IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

RHONDA WILLEFORD, as Next of Kin of JEWELL MARGARET COLSON, deceased,	)	
Plaintiff-Appellant,	)	
v.	)	No. M2016-01491-SC-R11-CV
TIMOTHY P. KLEPPER, M.D., OVERTON SURGICAL SERVICES assumed name of AMG – LIVINGSTON, LLC, and LIVINGSTON REGIONAL HOSPITAL, LLC d/b/a LIVINGSTON REGIONAL HOSPITAL,	)	
Defendants-Appellees,	)	
STATE OF TENNESSEE,	)	
Intervenor-Appellee.	)	

ON APPEAL BY PERMISSION FROM
THE ORDER OF THE DAVIDSON COUNTY CIRCUIT COURT

BRIEF OF INTERVENOR-APPELLEE, STATE OF TENNESSEE

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ISSUE PRESENTED FOR REVIEW

Whether Tenn. Code Ann. § 29-26-121(f) is constitutional under the separation-of-powers provisions of the Tennessee Constitution.

STATEMENT OF THE CASE AND RELEVANT FACTS

Tennessee Code Annotated § 29-26-121(f) makes provision for the defendants in a health care liability action to petition the court for a qualified protective order allowing them to obtain protected health information from the patient's treating health care providers in interviews conducted outside the presence of claimant or claimant's attorney. The Defendants in this health care liability action moved for a qualified protective order under this statute. (I, 54.) Plaintiff opposed the motion, asserting that the statute violates the separation-of-powers doctrine under the Tennessee Constitution. (I, 73.)

The State of Tennessee, having previously intervened in this case to defend the constitutionality of a different statute, filed a memorandum of law in support of Tenn. Code Ann. § 29-26-121(f). (II, 6.) The trial court declined to rule Tenn. Code Ann. § 29-26-121(f) unconstitutional but granted Plaintiff permission to seek interlocutory review under Tenn. R. App. P. 9 on the issue whether Tenn. Code Ann. § 29-26-121(f) violates the separation-of-powers provisions of the Tennessee Constitution. (IV, 47, 146.) The Court of Appeals denied permission to appeal. But this Court granted permission to appeal under Tenn. R. App. P. 11.

STANDARD OF REVIEW

This Court reviews constitutional questions *de novo* with no presumption of correctness afforded to the court below. *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009). This Court has stated: "Our charge is to uphold the constitutionality of a statute wherever possible." *Id.*

Evaluation "begin[s] with the presumption that an act of the General Assembly is constitutional." *Id.* (internal quotations omitted). A court must "indulge every presumption and resolve every doubt in favor of the statute's constitutionality." *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003). Further, "[t]he presumption of constitutionality applies with even greater force when a party brings a facial challenge to the validity of a statute." *Waters*, 291 S.W.3d at 882. For such a challenge, "the challenger must establish that no set of circumstances exists under which the statute, as written, would be valid." *Id.*

RELEVANT STATUTORY PROVISIONS

Tennessee Code Annotated § 29-26-121(f), the qualified protective order statute, provides as follows:

> (1) Upon the filing of any "healthcare liability action," as defined in § 29-26-101, the named defendant or defendants may petition the court for a qualified protective order allowing the defendant or defendants and their attorneys the right to obtain protected health information during interviews, outside the presence of claimant or claimant's counsel, with the relevant patient's treating "healthcare providers," as defined by § 29-26-101. Such petition shall be granted under the following conditions:
>
> > (A) The petition must identify the treating healthcare provider or providers for whom the defendant or defendants seek a qualified protective order to conduct an interview;
> >
> > (B) The claimant may file an objection seeking to limit or prohibit the defendant or defendants or the defendant's or defendants' counsel from conducting the interviews, which may be granted only upon good cause shown that a treating healthcare provider does not possess relevant information as defined by the Tennessee Rules of Civil Procedure; and
> >
> > (C)(i) The qualified protective order shall expressly limit the dissemination of any protected health information to the litigation pending before the court and require the defendant or defendants who conducted the interview to return to the healthcare provider or destroy any protected health information obtained in the course of any such interview, including all copies, at the end of the litigation;
> >
> > > (ii) The qualified protective order shall expressly provide that participation in any such interview by a treating healthcare provider is voluntary.

(2) Any healthcare provider's disclosure of relevant information in response to a court order under this section, including, but not limited to, protected health information, opinions as to the standard of care of any defendant, compliance with or breach of the standard, and causation of the alleged injury, shall be deemed a permissible disclosure under Tennessee law.

(3) Nothing in this part shall be construed as restricting in any way the right of a defendant or defendant's counsel from conducting interviews outside the presence of claimant or claimant's counsel with the defendant's own present or former employees, partners, or owners concerning a healthcare liability action.

ARGUMENT

THE QUALIFIED PROTECTIVE ORDER STATUTE DOES NOT VIOLATE THE SEPARATION-OF-POWERS PROVISIONS OF THE TENNESSEE CONSTITUTION.

The Tennessee Constitution provides for the separation of powers between the Legislative, Executive, and Judicial departments of state government. Tenn. Const. art. II, §§ 1 and 2. "While there are no precise lines of demarcation in the respective roles of our three branches of government, the traditional rule is that "'the legislative [branch] [ha]s the authority to make, order, and repeal [the laws], the executive . . . to administer and enforce, and the judicial . . . to interpret and apply.'" *Mansell v. Bridgestone Firestone N. Am. Tire, LLC,* 417 S.W.3d 393, 402 (Tenn. 2013) (quoting *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975)).

The three branches will have some overlap because "it is impossible to preserve perfectly the theoretical lines of demarcation between the executive, legislative and judicial branches of government." *Underwood,* 529 S.W.2d at 47. This Court has "long held the view that comity and cooperation among the branches of government are beneficial to all." *State v. Mallard,* 40 S.W.3d 473, 481 (Tenn. 2001). "It is only by remembering the limits of the power confided to the judicial department of government, and respecting the independence of the other departments, that the judiciary can maintain its own independence in the proper sense of the term." *Mansell,* 417 S.W.3d at 402.

This Court has also stated: "our commitment to cooperation among the three branches of government has prompted us to acquiesce in and apply statutes affecting the operation of the courts when they do not interfere with the court's adjudicative functions or otherwise impermissibly encroach on the Judicial Branch." *Bush v. State*, 428 S.W.3d 1, 16 (Tenn. 2014). Consent to "the application of procedural or evidentiary rules promulgated by the legislature . . . is sometimes necessary to foster a workable model of government." *Mallard,* 40 S.W.3d at 481.

There are numerous procedural rules in the Tennessee Code that supplement judicial rules. *See, e.g.,* Tenn. Code Ann., Title 16, "Courts" (containing rules setting forth subject-matter jurisdiction of the courts); Tenn. Code Ann., Title 20, "Civil Procedure" (containing rules pertaining to bringing and maintaining court actions); Tenn. Code Ann., Title 24, "Evidence and Witnesses" (containing numerous evidentiary rules); and Tenn. Code Ann., Title 28, "Limitations of Actions" (containing rules setting forth statutes of limitation and repose). The legislature also approves the rules promulgated by this Court. Tenn. Code Ann. § 16-3-404.

This Court has consented to the legislature's procedural or evidentiary rules when the statutes "(1) are reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court." *Mallard*, 40 S.W.3d at 481. In addition, "where a decision of the legislature chiefly driven by public policy concerns infringes on [the Court's inherent power to prescribe rules for practice and procedure in the state's courts] we will generally defer to the judgment of the legislature." *Biscan v. Brown*, 160 S.W.3d 462, 474 (Tenn. 2005).

A. Deference to the Legislature is Appropriate Because the Qualified Protective Order Statute is Predicated on Public-Policy Concerns.

It is well settled that "[q]uestions of public policy not determined by the [Tennessee] Constitution are within the exclusive power of the Legislature." *Cooper v. Nolan*, 19 S.W.2d 274, 276 (Tenn. 1929). The legislature's police power "embraces all matters reasonably deemed

necessary or expedient for the safety, health, morals, comfort, domestic peace, private happiness, and welfare of the people." *Wagner v. Elizabethton City Bd. of Educ.*, 496 S.W.2d 468, 471 (Tenn. 1973) (internal citations omitted).

This Court has recognized the legislature's public-policy concerns underlying The Medical Malpractice Review Board and Claims Act (now the Tennessee Health Care Liability Act),[1] since its enactment in 1975. In *Harrison v. Schrader*, 569 S.W.2d 822, 826 (Tenn. 1978),[2] this Court stated that "this state and the nation were in the throes of what was popularly described as a 'medical malpractice insurance crisis,'" in which medical malpractice policies were less available and "premiums had risen astronomically." The legislature could have been concerned that the cost of health care would increase, the availability of practicing physicians would decrease, and the practice of "defensive medicine" would lower the quality of health care. *Id.* "These considerations may or may not have been valid; however, it is apparent that they were accepted by the legislature and *formed the predicate for its action.*" *Id.* (emphasis added). *See also Newton v. Cox*, 878 S.W.2d 105, 107-108 (Tenn. 1994) ("As we noted in *Harrison*, the Legislature saw the Act as a means of controlling the cost of health care and benefitting the general welfare of the State's citizens.").

The same public-policy objectives, particularly a fear of rising liability costs that would be passed on to consumers, drove the adoption of Tenn. Code Ann. §§ 29-26-121 and 122, which were enacted and amended in the same legislative sessions in 2008 and 2009. *Jackson v. HCA Health Servs. of Tenn., Inc.*, 383 S.W.3d 497, 505 (Tenn. Ct. App. 2012). *See also Williams v. SMZ Specialists, P.C.*, No. W2012-00740-COA-R9-CV, 2013 WL 1701843, at *9 (Tenn. Ct. App.

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[1] The legislature deleted the words "medical malpractice" and substituted the words "health care liability" in 2012. 2012 Tenn. Pub. Acts, ch. 798, §§ 7-15.

[2] In *Harrison*, this Court held that Tenn. Code Ann. § 23-3415(a), the repose provision now codified at § 29-26-116, did not violate the equal-protection or "open courts" provisions of the Tennessee Constitution.

Apr. 19, 2013) ("The overall statutory scheme, including the pre-lawsuit notice requirement in Section 29-26-121, is driven by the Legislature's substantive public policy concerns"), *perm. app. denied* (Tenn. Dec. 10, 2013) (appendix, Exhibit 4).

This Court has recognized that the pre-suit notice provisions of Tenn. Code Ann. § 29-26-121 "afford[] defendants the opportunity to investigate the merits of a claim and to pursue settlement negotiations before suit is filed." *Foster v. Chiles,* 467 S.W.3d 911, 915 (Tenn. 2015). "Early resolution of claims is beneficial to the parties and is an efficient use of judicial resources." *Id.* The Tennessee Court of Appeals has stated that the objectives of "preventing protracted litigation through early investigation, and possibly, facilitating early resolution through settlement . . . are of particular importance in the context of medical malpractice claims where . . . increased malpractice insurance costs threaten both health care affordability and accessibility." *Webb v. Roberson*, No. W2012-01230-COA-R9CV, 2013 WL 1645713, at *19 (Tenn. Ct. App. Apr. 17, 2013), *perm. app. denied* (Tenn. Dec. 23, 2013) (appendix, Exhibit 3). *See also J.A.C. v. Methodist Healthcare Memphis Hosps.*, No. W2016-00024-COA-R3-CV, 2016 WL 6493229, at *15 (Tenn. Ct. App. Nov. 2, 2016) ("There is no reason to contradict our reasoning from *Webb* on this issue"), *perm. app. denied* (Tenn. Mar. 9, 2017).

Deference to the legislature is appropriate here because Tenn. Code Ann. § 29-26-121(f) addresses these same important public-policy goals—preventing protracted litigation through early investigation and possibly facilitating settlement. *See Faust v. Metropolitan Gov't of Nashville*, 206 S.W.3d 475, 490 (Tenn. Ct. App. 2006) ("The different parts of a statute reflect light upon each other, and statutory provisions are regarded as in pari materia where they are parts of the same act."). Subsection (f) allows the defendants in a health care liability action to obtain, through a qualified protective order, protected health care information directly from the patient's treating health care providers through ex parte interviews. The legislature could easily have

determined that preventing protracted litigation and facilitating settlement necessitate the disclosure of relevant health information by giving a defendant in a health care liability action equal access to such information, within the confines of Tenn. Code Ann. § 29-26-121(f).

Plaintiff is wrong to ask the Court to evaluate whether Tenn. Code Ann. § 29-16-121(f) "further[s] the rest of the statute's alleged policy goals." (Br. Plaintiff-Appellee, 12.) Doing so questions the wisdom or success of the legislature's enactment. "It is not the role of this Court to pass upon the wisdom or lack thereof of the legislation under review. In the absence of constitutional infirmity such matters are ones of policy solely for the legislature." *Harrison v. Schrader,* 569 S.W.2d 822, 827 (Tenn.1978). *See also Williams,* 2013 WL 1701843, *9 ("Whether the statute is wise or actually accomplishes the Legislature's stated purpose is not for us to say."). Plaintiff seeks to distinguish the *Webb* and *Williams* cases because they involved the Court of Appeals' upholding of the *pre-suit* notice provisions in Tenn. Code Ann. § 29-26-121. (Br. Plaintiff-Appellant, 12-13). But the goal of facilitating disclosure of information in a health care liability action, thereby expediting resolution of the case or encouraging settlement, is no less important once a suit has been filed.

B. The Qualified Protective Order Statute is Reasonable and Workable within the Framework Adopted by the Judiciary.

In *Givens v. Mullikin,* 75 S.W.3d 383, 407 (Tenn. 2002), this Court held that "an implied covenant of confidentiality can arise from the original contract of treatment for payment" between a doctor and a patient. The Court stated that "the General Assembly has enacted several statutes that expressly require a physician and others to keep a patient's medical records and identifying information confidential." *Id.* "Through the enactment of these statutes, patients and physicians now clearly expect that the physician will keep the patient's information confidential" absent the patient's permission to disclose. *Id.* But the physician "cannot withhold such [confidential]

information in the face of a subpoena or other request cloaked with the authority of the court." *Id.* at 408.

In 2006, this Court held that public policy did not require the voidance of the covenant of confidentiality for ex parte communications between defense counsel and non-party treating physicians in a medical-malpractice case. *Alsip v. Johnson City Med. Ctr.,* 197 S.W.3d 722, 724 (Tenn. 2006) (appendix, Exhibit 1). The Court stressed "the General Assembly's desire to keep confidential a patient's medical records and identifying information." *Id.* 726 (citing Tenn. Code Ann. §§ 63-2-101(b)(1) (1997), 68-11-1502 (2001), and 68-11-1503 (2001)). And there was no statute in effect at that time that required the voidance of the implied covenant of confidentiality in a medical malpractice lawsuit. *Id.* at 726.

But this Court clearly recognized in *Alsip* that "like all contract terms, . . . the implied covenant of confidentiality becomes unenforceable when it offends public policy." *Id.* For example, the Court observed that Tenn. Code Ann. § 38-1-101 requires disclosure of injuries inflicted by violence, and that Tenn. Code Ann. § 37-1-403 requires disclosure of suspected child abuse or sexual assault. *Id.* In addition, "public policy considerations reflected in the Tennessee Rules of Civil Procedure require that the covenant . . . be voided for the purpose of discovery." *Id.* "Thus, the covenant of confidentiality is not absolute and can be voided when its enforcement would compromise the needs of society." *Id.*

In 2012, however, the legislature added Subsection (f) to Tenn. Code Ann. § 29-26-121. 2012 Tenn. Pub. Acts, ch. 926, § 1. In doing so, the legislature altered the public-policy landscape against which *Alsip* had been decided. Public policy as reflected in state law now calls for voiding the covenant of confidentiality to allow voluntary ex parte interviews under a qualified protective order. *See Caldwell v. Baptist Mem. Hosp.*, No. W2015-01076-COA-R10-CV, 2016 WL 3226431, at *6 (Tenn. Ct. App. June 3, 2016) ("By enacting Tenn. Code Ann. § 29-26-121(f), the legislature

rejected the policy determination reflected in *Alsip* in favor of allowing ex parte interviews.), *perm. app. denied* (Tenn. Oct. 21, 2016) (appendix, Exhibit 2).[3]

Tennessee Code Annotated § 29-26-121(f) is reasonable and workable within the judiciary's framework. It is consistent with Tennessee law regarding the implied covenant of confidentiality because the covenant is voided for public-policy reasons and in response to a court order. *Cf. Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs., Inc.*, 418 S.W.3d 547, 558 (Tenn. 2013) (concluding that the medical release required by Tenn. Code Ann. § 29-26-121(a)(2)(E) is not inconsistent with the covenant of confidentiality). Moreover, Tenn. Code Ann. § 29-26-121(f) addresses many of the concerns that this Court expressed in *Alsip*.

First, the Court observed in *Alsip* that the plaintiff had not impliedly consented to ex parte disclosure of health information by filing the lawsuit. 197 S.W.3d at 728. The provisions of Tenn. Code Ann. § 29-26-121(f) took effect July 1, 2012, and applied to all health care liability actions commenced on or after that date. 2012 Tenn. Pub. Acts, ch. 926, § 2. Therefore, by filing a healthcare liability action after the effective date of Tenn. Code Ann. § 29-26-121(f), a plaintiff consents to voidance of the covenant of confidentiality according to the statute's terms. A plaintiff's decision to file a healthcare liability action is a voluntary one. *See Stevens*, 418 S.W.3d at 557-8.

Second, the Court expressed concern in *Alsip* about the disclosure of non-relevant information. 197 S.W.3d at 728. Tennessee Code Ann. § 29-26-121(f) contains the following safeguards: (1) a defendant may petition to interview *relevant* providers, and must identify the provider in the petition; (2) the claimant may seek to limit or prohibit an interview; (3) the court may limit or prohibit an interview upon good cause shown that the provider does not possess

[3] In *Caldwell*, 2016 WL 3226431, at *6, the Court of Appeals stated that "Tenn. Code Ann. § 29-26-121(f) is consistent with HIPAA and includes some additional requirements." The court held that subsection (f) is not preempted by HIPAA. *Id.*

relevant information; (4) disclosure of *relevant* information is deemed permissible; (5) any dissemination is limited to the litigation pending before the court; and (6) any information obtained shall be returned or destroyed at the end of the litigation. In addition, any qualified protective order "shall expressly provide that participation in any such interview by a treating healthcare provider is voluntary." Tenn. Code Ann. § (f)(1)(C)(ii).[4]

For these reasons, the qualified protective order statute does not violate the separation-of-powers doctrine because it conflicts with the holding in *Alsip*. (*See* Br. Plaintiff-Appellee, 14-16.) A statute is not unconstitutional simply because it abrogates a decision of this Court. *See Bush v. State*, 428 S.W.3d 1, 16 (Tenn. 2014) (holding that Tenn. Code Ann. § 40-30-122 does not violate the separation-of-powers doctrine because the statute "is an integral part of a purely statutory remedy by the General Assembly and because its reach does not extend beyond the Post-Conviction Procedure Act.") Akin to the statute analyzed in *Bush*, the qualified protective order statute is an integral part of the Tennessee Health Care Liability Act, and it applies only to health care liability actions.

C. The Qualified Protective Order Statute Supplements the Rules of the Judiciary.

Both this Court and the Court of Appeals have upheld many statutes against separation-of-powers challenges when the challenged provisions do not directly conflict with the rules promulgated by the judiciary. For instance, in *Mansell v. Bridgestone Firestone,* this Court analyzed challenges to the medical-impairment-rating (MIR) statutes in the workers' compensation scheme. 417 S.W.3d at 404-06. The plaintiff argued that the statutes conflicted with Tenn. R. Evid. 702 and 706, "which govern the appointment of experts and the admissibility of their testimony." *Id.* at 404. But, "because the MIR statutes are specifically tailored to certain,

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[4]This provision also helps alleviate this Court's concern that judicial resources will be burdened with an increase in tort or contract actions against physicians for disclosure of confidential information. *See Alsip*, 197 S.W.3d at 729. Likewise, § (f)(2) states that disclosure of relevant information is a "permissible disclosure under Tennessee law."

limited circumstances within the overall workers' compensation scheme," the Court could not conclude that the MIR process "'strikes at the heart of the court's exercise of judicial power.'" *Id.* (quoting *Martin v. Lear Corp.*, 90 S.W.3d 626, 631 (Tenn. 2002)). Thus, the Court rejected the separation-of-powers challenge: "In our view, these MIR statutes, while placing limitations on the ability of a trial court to determine the admissibility of expert testimony and to appoint its own expert witness to give an impairment rating, are not in conflict with the Rules of Evidence." *Id.* at 405

In *Newton v. Cox*, 878 S.W.2d 105 (Tenn. 1994), this Court upheld the constitutionality of another part of the Medical Malpractice Claims Act, Tenn. Code Ann. § 29-26-120, which limits contingency-based attorneys' fees in healthcare liability claims. *Id.* at 112. The defendant had argued that the statute encroached upon the judiciary's power to control the conduct of attorneys, specifically Disciplinary Rule 2-106(A), which provided that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." *Id.* at 111. But the Court stated that "areas exist in which both the legislative and judicial branch have interests, and . . . in such areas both branches may exercise appropriate authority." *Id.* The Court concluded that, "[s]ince the statute does not directly conflict with the Supreme Court's authority to regulate the practice of law, and because it is designed to declare the public policy with respect to attorney fee contracts, we hold that it does not unconstitutionally impinge upon the Supreme Court's authority to regulate the practice of law." *Id.*

In *Jackson v. HCA Health Servs.*, the Court of Appeals upheld the constitutionality of Tenn. Code Ann. § 29-26-122, which requires a health care liability plaintiff to file a certificate of good faith with the complaint. 383 S.W.3d at 505. The plaintiff had argued that the statute was procedural and conflicted with Tenn. R. Civ. P. 3 by dictating the form and content of a complaint.

Id. But the court concluded that there was no conflict with the rules or other violation of the separation-of-powers doctrine. *Id.*

The Court of Appeals has also held that the pre-suit notice provisions of Tenn. Code Ann. § 29-26-121 do not run afoul of the separation of powers. *See Webb v. Roberson*, 2013 WL 1645713, at *9; *Williams v. SMZ Specialists*, 2013 WL 1701843, at *10. The legislative purpose of the pre-suit notice provisions is "to give the defendant the opportunity to investigate and perhaps even settle the case before it is actually filed." *Webb*, 2013 WL 1645713, at *9. "The pre-lawsuit notice requirements potentially promote an early resolution and reduce the number of frivolous lawsuits filed in Tennessee each year . . . by requiring early evaluation and streamlined disclosure of medical records." *Williams,* 2013 WL 1701843, at *9 (citation omitted). There are "important policy reasons behind the Legislature's enactment of Section 29-26-121," so it is not entirely procedural. *Id. See also Webb,* 2013 WL 1645713, at *9. There is no conflict with the Court's procedural rules because the provisions require notice before the filing of a complaint. *Id.* at *8; *Webb,* 2013 WL 1645713, at *9. Even if deemed procedural, "deferment to the legislature is appropriate" because the purposes of the statute "supplement the Rules of Civil Procedure, which are to 'be construed to secure the just, speedy, and inexpensive determination of every action,' *Tenn. R. Civ. P. 1*." *Webb,* 2013 WL 1645713, at *9 (emphasis in original).

Tennessee Code Annotated § 29-26-121(f) likewise does not impermissibly infringe upon the judiciary's power to control the practice and procedure of the courts.[5] It does not directly conflict with the Tennessee Rules of Civil Procedure. The ex parte interviews permitted by § 29-26-121(f) fall outside the formal discovery methods governed by Tenn. R. Civ. P. 26. Thus, the rules providing formal methods of discovery and regulating its scope, limits, and protections

[5] Plaintiff does not assert that Tenn. Code Ann. § 29-26-121(f) infringes upon the inherent judicial powers to hear facts or to decide issues of law, and it clearly does not interfere with those powers.

remain available to the parties. *See, e.g.,* Tenn. R. Civ. P. 26. Further, the objectives of § 29-26-121(f) supplement those of the Rules, which are to "be construed to secure the just, speedy, and inexpensive determination of every action," Tenn. R. Civ. P. 1.

Subsection (f) is not entirely procedural because it is driven by the same important policy reasons of its section, and it allows for ex parte communication that was previously not allowed in the state. *See* Order Granting Defendants' Motions for Qualified Protective Order at 42-43, *Miller v. Uchendu*, No. 2:13-CV-02149-SHL-dkv (W.D. Tenn. Aug. 11, 2016), ECF No. 202 (finding that "Tenn. Code Ann. § 29-26-121(f) has a substantive component, and thus, it is not purely procedural") (appendix, Exhibit 5); *see also Williams*, 2013 WL 1701843, *9 ("The overall statutory scheme, including the pre-lawsuit notice requirement in Section 29-26-121, is driven by the Legislature's substantive public policy concerns, and therefore cannot be described as purely procedural.").

By its terms, Tenn. Code Ann. § 29-26-121(f) applies only to health care liability actions and is specifically tailored to certain limited circumstances within the overall health care liability scheme. Thus, Tennessee Code Ann. § 29-26-121(f) does not strike at the very heart of judicial power.

Plaintiff argues that Tenn. Code Ann. § 29-26-121(f) violates the separation-of-powers doctrine because a court should have more discretion in whether to grant a qualified protective order and because there is no mechanism to determine or enforce relevancy safeguards. (Br. Plaintiff-Appellant, 8, 10, 15.)[6] But the court has the opportunity to evaluate and determine the scope of an ex parte interview before granting a qualified protective order. *See* Tenn. Code Ann. § 29-26-121(f)(1)(A), (B). The statute requires a defendant to identify the relevant providers to be

[6] In support of this argument, Plaintiff cites a Court of Appeals opinion that has been designated "Not for Citation." (Br. Plaintiff-Appellee, 10.) But under Tenn. Sup Ct. R. 4(E), such opinions have no precedential value and shall not be cited by any litigant in any brief except when the opinion is the basis for a claim of res judicata, collateral estoppel, law of the case, or to establish a split of authority. None of these exceptions applies here.

interviewed, and it provides a plaintiff the opportunity to object. *Id.* The court has discretion to decide whether to limit or prohibit an interview based on good cause shown that the provider does not have relevant information as defined by the Tennessee Rules of Civil Procedure. Tenn. Code Ann. § 29-26-121(f)(1)(B). For instance, the court could limit the time frame or health conditions that are relevant to the litigation and thus available to be discussed in an interview, based upon a plaintiff's objections. The statute does not interfere with the court's determinations of relevancy. Further, any information disclosed in an ex parte interview is subject to the court's determination whether to admit or exclude it under the Tennessee Rules of Evidence.

CONCLUSION

For the reasons stated, this Court should affirm the order of the circuit court and hold that Tenn. Code Ann. § 29-26-121(f) does not violate the separation-of-powers provisions of the Tennessee Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served by regular mail, postage pre-paid, on the 24 day of May 2017 to:

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EXHIBIT 1

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Stevens ex rel. Stevens v. Hickman Community Health Care Services, Inc., Tenn., November 25, 2013

197 S.W.3d 722
Supreme Court of Tennessee,
at Knoxville.

Jennifer Lynn ALSIP et al.
v.
JOHNSON CITY MEDICAL CENTER et al.

No. E2004-00831-SC-S09-CV.
|
May 4, 2006 Session.
|
June 29, 2006.

Synopsis
Background: Patient's surviving spouse and children filed medical malpractice action against hospital and physician. The Circuit Court, Washington County, Thomas J. Seeley, Jr., J., granted in part defendant physician's motion for ex parte communications with patient's post-surgery, non-party physicians. Interlocutory appeal was granted to plaintiffs. The Court of Appeals reversed. Appeal was taken.

[Holding:] The Supreme Court, William M. Barker, C.J., held that public policy did not dictate that implied covenant of confidentiality contained in contracts between patient and his non-party physicians had to be voided to allow defendant physician to communicate ex parte with non-party physicians who treated patient for injuries allegedly arising from medical malpractice.

Court of Appeals affirmed.

Attorneys and Law Firms

***723** Gary E. Brewer and Leslie A. Muse, Morristown, Tennessee, for the appellants, Jennifer Lynn Alsip, Rebecca Dawn Alsip, and Geraldine Alsip.

Jeffrey M. Ward, Greeneville, Tennessee, for the appellees, Louis Modica, M.D., and Medical Education Assistance Corporation d/b/a ETSU Physicians and Associates.

Randall J. Phillips, Jackson, Tennessee, for Amicus Curiae, Tennessee Trial Lawyers Association.

Melanie M. Stewart, C. Michael Becker, Germantown, Tennessee, and James M. Beck, Philadelphia, Pennsylvania, for Amicus Curiae, Tennessee Defense Lawyers Association.

William B. Hubbard, Nashville, Tennessee, for Amicus Curiae, Tennessee Hospital Association.

David L. Steed and Jay N. Chamness, Nashville, Tennessee, for Amicus Curiae, Tennessee Medical Association.

WILLIAM M. BARKER, C.J., delivered the opinion of the court, in which E. RILEY ANDERSON, ADOLPHO A. BIRCH, JR., JANICE M. HOLDER, and CORNELIA A. CLARK, JJ. joined.

OPINION

WILLIAM M. BARKER, C.J.

Pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, we accepted this appeal to clarify the meaning of our holding in *Givens v. Mullikin,* 75 S.W.3d 383 (Tenn.2002), as it relates to a trial court's tailored discovery order in a medical malpractice lawsuit permitting ex parte communications between defense counsel and the decedent's non-party treating physicians. Carefully weighing public policy concerns and considering the case law on this issue from other jurisdictions, we hold that the trial court erred by issuing this order. Today we announce that such ex parte communications violate the implied ***724** covenant of confidentiality that exists between physicians and patients and that public policy does not require the voidance of this covenant. This being the case, ex parte communications between the plaintiff's non-party physicians and defense attorneys are not allowed in the State of Tennessee. Accordingly, we affirm the judgment of the Court of Appeals and remand the case to the trial court for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

On August 27, 2000, Walter Alsip presented himself to the emergency room of Johnson City Medical Center after a four-day history of sore throat, ear ache, fever, and chills. Upon examination by a staff physician, Dr. Mark Wilkinson, Alsip was treated and released.

Alsip returned to the emergency room the next day with worsening symptoms. Dr. Wilkinson ordered a CT scan, which revealed that Alsip had a peritonsillar abscess. Dr. Wilkinson then referred Alsip to a specialist, Dr. Louis Modica.

Dr. Modica performed an aspiration, whereby a needle was placed into the tissue of the abscess. Ten minutes after the aspiration, a nurse informed Dr. Modica that Alsip was bleeding heavily from the aspiration site. Upon examination, Dr. Modica determined that while performing the aspiration he had inadvertently punctured an artery. Dr. Modica immediately consulted an anesthesiologist and ordered an operating room, but one was not available. In the interim, Dr. Modica applied pressure in an attempt to control the bleeding. Although Dr. Modica characterized Alsip's condition as an emergency, the wait for an operating room lasted more than two hours. During this time, Alsip suffered significant blood lost and went into hypovolemic shock. Surgery eventually was performed to repair Alsip's lacerated artery.

The critical care team of Johnson City Medical Center was charged with caring for Alsip after his surgery. Despite the best efforts of these doctors—defendant Modica numbers them at nine—Alsip's condition deteriorated. It was learned that Alsip suffered from numerous pre-existing health problems, including sepsis and disseminated intravascular coagulation; after surgery, Alsip developed adult respiratory distress syndrome, renal failure, and pneumonia. He died at Johnson City Medical Center in November 2000.

Alsip's surviving children and mother filed this medical malpractice action in August 2001 against Dr. Modica and other defendants. One month later, Dr. Modica filed an answer denying allegations of medical malpractice, and in December 2001, an agreed order was issued to allow Dr. Modica access to "any and all medical records and radiographic films of [the decedent]." After the plaintiffs' deposition of Dr. Modica and the defendants' deposition of the plaintiffs' expert, Dr. Randall Dalton, the plaintiffs submitted written interrogatories to Dr. Modica, asking for, among other things, identification of the defendants' expert witnesses. After receiving these interrogatories, Dr. Modica filed the matter that concerns us here: a motion to allow ex parte interviews with the decedent's post-surgery, non-party physicians.

Although expressly holding that the decedent enjoyed a right to privacy and that a covenant of confidentiality existed between Alsip and his doctor (and that neither was waived by filing this lawsuit), the trial judge granted Dr. Modica's motion allowing ex parte communications with Alsip's other physicians, but only on the following terms:

> ***725** The defense motion will be granted to the extent that the requested doctors were in active communication with the defendant during Mr. Alsip's care and treatment, in accord with the criteria established and discussed in the *Kilian* case.

The sole legal authority for this order appears to have been *Kilian v. Med. Educ. Assistance Corp.*, No. 22477 (Washington County Law Court May 19, 2003), a decision of the same trial court less than five months before the issuance of the order allowing ex parte communications in this case. In *Kilian,* the trial court authorized but also established the following restrictions on such communications:

1. Defendant's counsel in a medical malpractice case may have ex parte conversations with plaintiff's treating physician without express authorization by the plaintiff ONLY under the following conditions:

   a) The court in which the action is pending must authorize the contact pursuant to a motion filed by defendant with notice to plaintiff;

   b) The information sought must relate only to A) the diagnosis and treatment of the condition for which the plaintiff originally sought treatment and B) any time-relevant treatment for any injury claimed to have arisen from the alleged malpractice where the defendant physician was still involved in treatment of the plaintiff;

c) No defendant physician shall be present during the contact; and

d) Counsel shall not engage in inappropriate discussion of matters such as malpractice cases in general, their impact on professional insurance, jury awards, professional reputations or the like. The discussion shall be limited as specified in paragraph no. 2 [1] above and the physician's opinion in connection therewith. [2]

The trial court granted the plaintiffs' motion for interlocutory appeal and stayed the order pending appellate review. The Tennessee Court of Appeals ruled in favor of the plaintiffs and struck down the trial court's order.

The sole issue in this case is whether the trial court erred by granting the defendant's motion and issuing an order authorizing ex parte communications between defense counsel and the decedent's non-party physicians. On this issue, we agree with the predominant trend among the states, and with our own appeals court, that it did.

STANDARD OF REVIEW

[1] Because this case concerns a question of law, "we review [it] under a pure *de novo* standard ..., according no deference to the conclusions of law made by the lower courts." *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn.2001).

LEGAL ANALYSIS

[2] Although no *testimonial privilege* protecting doctor-patient communications has ever been recognized by this Court or declared by Tennessee statute, in *Givens v. Mullikin*, 75 S.W.3d 383 (Tenn.2002), we recognized an implied *covenant of confidentiality* in medical-care contracts between treating physicians and their patients. ***726** This covenant forbids doctors from "releas[ing] without the patient's permission ... any confidential information gained through the [physician-patient] relationship." *Givens*, 75 S.W.3d at 407. We explained in *Givens* that the covenant of confidentiality arises not only from the implied understanding of the agreement between patient and doctor, but also from a policy concern that such private and potentially embarrassing information should be protected from public view. *Id.* (citing in support Tennessee Code Annotated sections 63–2–101(b)(1) (1997), 68–11–1502 (2001), and 68–11–1503 (2001), which are indicative of the General Assembly's desire to keep confidential a patient's medical records and identifying information). Indeed, "[t]he relationship of patient to physician is a particularly intimate one [because] [t]o the physician we bare our bodies ... in confidence that what is seen and heard will remain unknown to others." *Cua v. Morrison*, 626 N.E.2d 581, 586 (Ind.Ct.App.1993). For this reason "the public has a widespread belief that information given to a physician in confidence will not be disclosed to third parties absent legal compulsion, ... and [thus] the public has a right to have this expectation realized." *Duquette v. Superior Court in and for County of Maricopa*, 161 Ariz. 269, 778 P.2d 634, 640 (Ct.App.1989). Our recognition in *Givens* of an implied covenant of confidentiality reflects these concerns.

[3] Like all contract terms, however, the implied covenant of confidentiality becomes unenforceable when it offends public policy. *Planters Gin Co. v. Federal Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn.2002). For example, as we explained in *Givens*, the covenant is voided when a doctor determines that a patient's illness presents a foreseeable risk to third parties; in such circumstances, the doctor has a duty to break the patient's confidence and risks no civil liability when he does so. 75 S.W.3d at 409. State law also requires doctors to report "any wound or other injury inflicted by means of a knife, pistol, gun, or other deadly weapon, or by other means of violence" to police, in clear violation of the covenant of confidentiality, in order to promote vital societal interests in public safety, law enforcement, and crime deterrence. Tenn.Code Ann. § 38–1–101 (2005). Public policy as reflected in state law also vitiates the covenant of confidentiality by requiring doctors to report suspected child abuse, sexual assault, and instances of venereal disease in minors who are thirteen and under. Tenn.Code Ann. § 37–1–403 (2001). Thus, the covenant of confidentiality is not absolute and can be voided when its enforcement would compromise the needs of society.

[4] Most important to this case, public policy considerations reflected in the Tennessee Rules of Civil Procedure require that the covenant of physician-patient

confidentiality be voided for the purpose of discovery. *See* Tenn. R. Civ. P. 26; *Gall ex rel. Gall v. Jamison,* 44 P.3d 233, 239 (Colo.2002) ("Strong public policy considerations support a construction of Rule 26(a)(2) favoring broad disclosure."). Tennessee Rule of Civil Procedure 26.02, which defines the scope of discovery, clearly states that unprivileged information relevant to the lawsuit is discoverable. In *Givens* we stated "a physician cannot withhold [the plaintiff's relevant medical] information in the face of a subpoena or other request cloaked with the authority of the court." 75 S.W.3d at 408. This exception stems from "public policy [concerns] as expressed in the rules governing pre-trial discovery": in any medical malpractice action, the dictates of due process require voidance of the covenant of confidentiality so that the truth of the matter can be revealed and the defendant can defend himself against civil liability. *Id.* Thus, for ***727** example, if the parties dispute whether certain information is relevant, the trial court may order discovery upon a finding of relevance because, by filing the lawsuit, the plaintiff impliedly consents to disclosure of his *relevant* medical information. [3]

[5] The present case confronts us with the following question: does public policy dictate that the covenant of confidentiality contained in the contract between patient and physician be voided by the filing of a medical malpractice lawsuit with the consequence that a trial court may authorize defense counsel to communicate ex parte with non-party physicians who treated the plaintiff for injuries allegedly arising from the malpractice? The issue presented requires us to balance society's legitimate desire for medical confidentiality against medical malpractice defendants' need for full disclosure of plaintiffs' relevant health information.

We simply are not persuaded that the defendants here would be impeded from learning all the decedent's relevant medical information by being prohibited from communicating ex parte with non-party physicians. " '[A] prohibition against ... ex parte contacts regulates only how defense counsel may obtain information from a plaintiff's treating physician, i.e., it affects defense counsel's methods, not the substance of what is discoverable.' " *Crist v. Moffatt,* 326 N.C. 326, 389 S.E.2d 41, 45 (1990) (quoting *Manion v. N.P.W. Med. Ctr.,* 676 F.Supp. 585, 593 (M.D.Penn.1987)). On this point, all the parties to this case, and their amici, agree: not only did the defendant here have access to "any and all" of the decedent's medical records pursuant to an agreed order, the defendant also may obtain discovery of all relevant medical information via any of the formal procedures prescribed in Tennessee Rule of Civil Procedure 26.01, including deposition upon oral examination or written questions, written interrogatories, and requests for admissions. The plaintiff here fully concedes that the decedent's relevant medical information is discoverable—the question is simply *how* the defendant may discover it. "[I]t is undisputed that ex parte conferences yield no greater evidence, nor do they provide any additional information, than that which is already obtainable through the regular methods of discovery." *Petrillo v. Syntex Lab., Inc.,* 148 Ill.App.3d 581, 102 Ill.Dec. 172, 499 N.E.2d 952, 956 (1986). We agree with numerous "[o]ther courts [that have] concluded that formal discovery procedures enable defendants to reach all relevant information while simultaneously protecting the patient's privacy by ensuring supervision over the discovery process...." *Crist,* 389 S.E.2d at 46 (citing *Petrillo v. Syntex Lab., Inc.,* 102 Ill.Dec. 172, 499 N.E.2d at 963; *Roosevelt Hotel Ltd. P'ship v. Sweeney,* 394 N.W.2d 353, 356 (Iowa 1986); *Anker v. Brodnitz,* 98 Misc.2d 148, 413 N.Y.S.2d 582, 585–86 (N.Y.Sup.Ct.1979)). As a result, we cannot agree that public policy concerns on this score dictate that we allow ex parte communications between defense counsel and the decedent's non-party physicians.

It is important to note that "the confidential nature of the physician-patient relationship remains even though medical information is ... subject to discovery" ***728** because the plaintiff's contractual right to medical confidentiality remains in all his health information *not relevant* to the malpractice lawsuit. *Crist,* 389 S.E.2d at 46; *Petrillo,* 102 Ill.Dec. 172, 499 N.E.2d at 959. Having determinedthe sufficiency of the formal methods of discovery expressly authorized by Rule 26 to reveal all the decedent's relevant medical information to the defendants, we find it reasonable to conclude that those formal discovery methods exclusively define the *manner* of disclosure in medical malpractice cases. "The fact that a party may obtain the same information through formal discovery as can be obtained informally *supports* the [exclusive] use of [formal] discovery [procedures] ... [because their] utilization ... places the plaintiff in a position to object to irrelevant inquiries." *Karsten v. McCray,* 157 Ill.App.3d 1, 109 Ill.Dec. 364, 509 N.E.2d 1376, 1384 (1987); *accord Petrillo,* 102 Ill.Dec. 172, 499

N.E.2d at 959; *Duquette,* 778 P.2d at 637. Because consent here to disclose the decedent's confidential, relevant medical information was *implied at law* as a consequence of the plaintiffs' conduct (i.e., by the filing of the lawsuit), rather than done expressly (e.g., by written waiver), the scope of the plaintiffs' consent must be determined by the express terms of the Tennessee Rules of Civil Procedure, which do not prescribe ex parte communications. Nothing in the law indicates that the plaintiffs impliedly consented to the revelation of the decedent's health information by any methods other than those expressly outlined in the Tennessee Rules of Civil Procedure. Moreover, because the formal methods of discovery suffice to disclose all medical information relevant to the case, the needs of the trial court system, and hence the dictates of public policy, are fulfilled without ex parte communications. Were we to conclude that the plaintiffs' implied consent included permission to defense counsel to communicate ex parte with non-party physicians, we would force the plaintiffs to risk, unnecessarily, disclosure of irrelevant and confidential medical information.[4] *Neubeck v. Lundquist,* 186 F.R.D. 249, 250 (D.Maine 1999) ("Restricting a defendant's access to formal methods of discovery protects against [the] possibility ... [of] unintentionally disclosing privileged information not relevant to any issue in the case."). In short, we agree with the Supreme Court of Minnesota that by precluding informal interviews

> both the patient and his physician are protected from the danger that adverse counsel may abuse his opportunity to interrogate the physician by privately inquiring into facts or opinions about the patient's mental and physical health or history which may neither be relevant to the patient's lawsuit nor lead to discovery of admissible evidence. In a formal deposition ... the presence of a patient's counsel ... assure[s] that clearly irrelevant medical testimony will not be elicited.
>
> ***729** *Wenninger v. Muesing,* 307 Minn. 405, 240 N.W.2d 333, 336–37 (1976).

We are not impressed with the chief public policy concern that the defendants and their amici argue require defense counsel to be allowed to communicate ex parte with the plaintiffs' non-party physicians. Defense counsel points to Tennessee Rule of Civil Procedure 1, which states that "[t]hese rules shall be construed to secure the just, speedy, and inexpensive determination of every action," and argues that ex parte communications should be allowed because they promote efficient discovery. We think it clear that prohibition of informal interviews with non-party treating physicians will do little to increase the burden on defense attorneys because efficient alternative methods are available, including deposition by written questions. Tenn. R. Civ. P. 26.02; *Petrillo,* 102 Ill.Dec. 172, 499 N.E.2d at 963. Plaintiffs' counsel may also consent to informal interviews with both counsel present. *Pearce v. Ollie,* 121 Idaho 539, 826 P.2d 888, 901 (1992) (Bistline, J., concurring in part and dissenting in part). On this issue, we agree with the Supreme Court of New Hampshire: "while *ex parte* interviews may be less expensive and time-consuming than formal discovery ..., these interests are insignificant when compared with the patient-plaintiff's interest in maintaining the confidentiality of personal and possibly embarrassing information, irrelevant to the determination of the case being tried." *Nelson v. Lewis,* 130 N.H. 106, 534 A.2d 720, 723 (1987).

We also believe that prohibiting ex parte communications between defense counsel and plaintiffs' non-party doctors will conserve judicial resources for a reason not mentioned by the defendants here: the potential tort or contract liability of non-party doctors for disclosure of confidential information during informal interviews.[5] Although the order issued by the trial court here does much to properly focus the scope of any ex parte communication toward relevant medical information, the order does not require defense counsel to inform the non-party physician either that he has a right to refuse to be interviewed informally or that he may be held personally liable for disclosures outside the relevance of the present litigation. *Crist,* 389 S.E.2d at 47. These omissions, we think, are important because of "the difficulty of determining whether a particular piece of information is relevant to the claim being litigated.... Asking a physician, untrained in the law, to assume this burden is a great[ ] gamble and is unfair...." *Roosevelt Hotel Ltd. v. Sweeney,* 394 N.W.2d 353, 357 (Iowa 1986). As we explained above, the risk of breaching physician-patient confidentiality is heightened by ex parte communications, which could "expose the doctor to charges of professional misconduct or tort liability." *Crist,* 389 S.E.2d at 47. Thus, were we to allow ex parte communications between defense counsel and the plaintiffs' non-party treating physicians, increased litigation in the State's already overburdened trial court system would result.

CONCLUSION

Tennessee Rule of Civil Procedure 26 allows for discovery of any unprivileged ***730** information that is also *relevant* to the lawsuit. Because ex parte communications unnecessarily endanger the integrity of the covenant of confidentiality between patient and physician by risking disclosure of the decedent's medical information not relevant to the lawsuit, and because the formal methods of discovery provided for in Rule 26.01 suffice to provide the defendants with all the decedent's relevant medical information, we hold that the trial court erred by issuing the order in controversy here. *See also Kitzmiller v. Henning,* 190 W.Va. 142, 437 S.E.2d 452, 455 (1993) ("Ex parte interviews are prohibited because they pose the danger of disclosing irrelevant medical information that may compromise the confidential nature of the doctor-patient relationship without advancing any legitimate object of discovery."). Neither the law nor public policy requires the plaintiff to bear the risk of disclosure of irrelevant confidential medical information in informal, private interviews with opposing counsel and non-party doctors. Therefore, we affirm the judgment of the Court of Appeals and remand the case to the trial court for further proceedings consistent with this opinion.

The costs of this appeal are taxed to defendants, Johnson City Medical Center; Mountain State Health Alliance; Louis Modica, M.D.; ETSU Physicians and Associates; Dr. Mark Wilkinson; and Johnson City Emergency Physicians; and their sureties, for which execution may issue if necessary.

All Citations

197 S.W.3d 722

Footnotes

1 No such numbered paragraph appears in the order above the paragraph quoted here. Presumably this reference was intended to be to part (b) in this quotation.

2 We choose to quote here from the trial court's written and signed order rather than the trial court's oral opinion, which differed somewhat from its written order and appears to be a less precise rendition of the trial court's intended meaning.

3 Tennessee Rule of Civil Procedure 26.02 states

> [p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Thus, the Rule requires that all information elicited during discovery be relevant to the action but not necessarily admissible.

4 Such a requirement would also violate the *understanding of the patient and physician* when they formed a contract that included an implied covenant of confidentiality. As we stated in *Givens,* "[w]hile the understanding of the parties giving rise to the implied covenant of confidentiality permits a physician to disclose information pursuant to subpoena or court order, *this understanding does not include permission to divulge this information informally without the patient's consent.*" *Givens,* 75 S.W.3d at 408–09 (emphasis added); *see also Kitzmiller v. Henning,* 190 W.Va. 142, 437 S.E.2d 452, 454 (1993) ("Private ... interviews ... threaten to undermine the confidential nature of the physician-patient relationship.... [The plaintiff] does not consent, simply by filing suit, ... to his physician's discussing the patient's confidences in an ex parte conference with the patient's adversary.").

5 Furthermore, while we do not in any way impugn the integrity of defense counsel in this case, we recognize that defense lawyers could abuse the opportunity, which ex parte communications provide, to inquire into the plaintiff's confidential medical matters. Given the adversarial nature of our court system, this, we think, is no small concern. Moreover, disclosure of confidential health information is entirely possible even when defense counsel acts in good faith: "The questioning attorney simply cannot reasonably anticipate the physician's response and, therefore, cannot protect against the disclosure of confidential information." *Steinberg v. Jensen,* 194 Wis.2d 439, 534 N.W.2d 361, 371 (1995).

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EXHIBIT 2

2016 WL 3226431
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
AT JACKSON.

Angela Caldwell, as Power of
Attorney f/u/b of Leathy M. Johnson
v.
Baptist Memorial Hospital, et al.

No. W2015–01076–COA–R10–CV
|
April 19, 2016 Session
|
Filed June 3, 2016
|
Application for Permission to Appeal
Denied by Supreme Court October 21, 2016

Synopsis

Background: Healthcare liability action was brought on behalf of patient against multiple health care providers. The Circuit Court, Shelby County, D'Army Bailey, J., denied healthcare providers' petition for qualified protective orders (QPO). Healthcare providers appealed.

Holdings: The Court of Appeals, Andy D. Bennett, J., held that:

[1] State statutory provision that allowed for the disclosure of protected health care information in ex parte interviews conducted during judicial proceedings was not preempted by the Health Insurance Portability and Accountability Act (HIPPA), and

[2] health care providers were entitled to the issuance of qualified protective orders (QPO).

Reversed and remanded.

Appeal from the Circuit Court for Shelby County, No. CT–002843–13, D'Army Bailey, Judge

Attorneys and Law Firms

Marty R. Phillips and John O. Alexander, IV, Memphis, Tennessee, for appellant Ravi K. Madasu, M.D.

Christopher S. Campbell and Laura S. Martin, Memphis, Tennessee, for appellant Baptist Memorial Hospital.

Kevin O'Neal Baskette and Peter Benjamin Winterburn, Memphis, Tennessee, for appellants Frank Eggers, and Mid-South Imaging and Therapeutics, PA.

Albert C. Harvey and Justin Nicholas Joy, Memphis, Tennessee, for appellants Lance J. Wright and Semmes-Murphey Clinic, P.C.

Herbert H. Slatery, III; Attorney General and Reporter, Andrée S. Blumstein, Solicitor General; Mary M. Bers, Senior Counsel; and Stephanie A. Bergmeyer, Assistant Attorney General, Nashville, Tennessee, for the intervenor-appellee State of Tennessee.

William Bryan Smith, Memphis, Tennessee, for the appellee Angela Caldwell.

Opinion

ANDY D. BENNETT, J., delivered the opinion of the Court, in which BRANDON O. GIBSON, and KENNY W. ARMSTRONG, JJ., joined.

OPINION

ANDY D. BENNETT, J.

***1** In this health care liability action, this Court granted the defendants' application pursuant to Tenn. R.App. P. 10 to address two issues. We have determined that: (1) the Health Insurance Portability and Accountability Act ("HIPAA") does not preempt Tenn.Code Ann. § 29–26–121(f); and (2) the trial court erred in denying the defendants' petition for a qualified protective order pursuant to Tenn.Code Ann. § 29–26–121(f) because it is undisputed that the defendants complied with the procedural requirements of subsection (f), and the plaintiff did not file an objection as permitted under the statute. We, therefore, reverse the trial court's decision and remand for the entry of a qualified protective order.

FACTUAL AND PROCEDURAL BACKGROUND

Angela Caldwell filed this healthcare liability action on behalf of patient Leathy M. Johnson against multiple healthcare providers on July 3, 2013.[1] In January 2014, defendant Ravi K. Madasu, M.D., filed a petition for a qualified protective order ("QPO") pursuant to Tenn.Code Ann. § 29–26–121(f) to allow "the Defendant and his attorneys the right to obtain protected health information during interviews, outside the presence of claimant or claimant's counsel, with the patient's treating healthcare providers." Ms. Caldwell objected, asserting in part that the Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. § 1320d *et seq.*, preempted Tenn.Code Ann. § 29–26–121(f). The State of Tennessee intervened pursuant to Tenn. R. Civ. P. 24.01 to defend the validity of the statute under Tenn.Code Ann. § 8–6–109(b)(9). The remaining defendants[2] either filed their own petitions for QPOs or joined in the relief sought in the other defendants' petitions.

A hearing was held on November 7, 2014. Ms. Caldwell acknowledged that the defendants had complied with the procedural requirements of Tenn.Code Ann. § 29–26121(f). Moreover, she did not argue that the treating healthcare providers named in the defendants' proposed QPOs did "not possess relevant information as defined by the Tennessee Rules of Civil Procedure." Tenn.Code Ann. § 29–26–121(f)(1)(B). Rather, she argued that the statute was preempted by HIPAA and that the court had the inherent authority to craft a remedy that balanced the patient's privacy rights against the defendants' need to conduct discovery.

In an order entered on December 5, 2014, the trial court denied the petitions for QPOs. As an alternative, the court ordered that the defendants be allowed to take "the discovery-only depositions of Patient's treating physicians." The court reasoned:

> ***2** A discovery-only deposition is a less intrusive alternative than an *ex parte* interview and is, therefore, less in conflict with the protections and safeguards contemplated under HIPAA. Furthermore, a discovery-only deposition addresses the Court's due process concerns of ensuring fairness to Plaintiff by reducing the risk that the physician, as well as the Defendants' respective counsel, may not be able to find those lines of demarcation between relevant and appropriate inquiries during an *ex parte* interview. Finally, a discovery-only deposition addresses the Court's fairness concern arising from the fact that Plaintiff has no access to *ex parte* communications with Patient's treating physicians who are also party Defendants[ ] in this matter.

After the trial court denied the defendants' motion for permission to seek an interlocutory appeal, the defendants filed an application with this Court for an extraordinary appeal under Tenn. R.App. P. 10. By order entered on July 15, 2015, this Court granted the application for an extraordinary appeal to address the following issues:

1. Whether the Health Insurance Portability and Accountability Act preempts Tennessee Code Annotated Section 29–26–121(f).

2. Whether the trial court erred in denying the Defendants' Petition for a Qualified Protective Order pursuant to Tennessee Code Annotated § 29–26–121(f) when it is undisputed that (1) Defendants complied with the procedural requirements of subsection (f); and (2) Plaintiff did not file an objection seeking to limit or prohibit the Defendants from conducting the interviews based upon good cause shown that the treating healthcare providers named in Defendants' Petition did not possess relevant information as defined by the Tennessee Rules of Civil Procedure.

STANDARD OF REVIEW

The issues on appeal involve questions of law. Whether a federal law preempts a state law is a question of law and is, therefore, subject to de novo review with no presumption of correctness. *Lake v. Memphis Landsmen, LLC,* 405 S.W.3d 47, 55 (Tenn.2013). Issues of statutory construction also present questions of law. *Carter v. Bell,* 279 S.W.3d 560, 564 (Tenn.2009).

ANALYSIS

Tennessee law

Tennessee Code Annotated section 29–26–121 was enacted in 2008; subsection (f) was enacted in 2012. 2008 TENN. PUB. ACTS, c. 919, § 1; 2012 TENN. PUB. ACTS, c. 926, § 1. Before we consider the meaning and effect of subsection (f), it is important to consider some prior caselaw. In *Alsip v. Johnson City Medical Center,* 197 S.W.3d 722, 723–24 (Tenn.2006), the Tennessee Supreme Court held that ex parte communications between defense counsel and non-party treating physicians in medical malpractice lawsuits violated the implied covenant of confidentiality between physicians and patients. The federal district court, in *Wade v. Vabnick–Wener,* 922 F.Supp.2d 679, 690 (W.D.Tenn.2010), interpreted HIPAA to "allow defense counsel to conduct *ex parte* interviews with plaintiff's treating physicians after first securing, or attempting to secure, a qualified protective order consistent with the regulations." The court in *Wade* further held that the implied covenant of confidentiality did not apply to a non-party physician who did not render medical treatment to the patient. *Wade,* 922 F.Supp.2d at 694. Therefore, the defendants were permitted to communicate ex parte with such a physician. *Id.*

Tennessee Code Annotated § 29–26–121(f) allows for the disclosure of protected health care information in ex parte interviews conducted during judicial proceedings as follows:

> (1) Upon the filing of any "healthcare liability action," as defined in § 29–26–101, the named defendant or defendants may petition the court for a qualified protective order allowing the defendant or defendants and their attorneys the right to obtain protected health information during interviews, outside the presence of claimant or claimant's counsel, with the relevant patient's treating "healthcare providers," as defined by § 29–26–101. Such petition shall be granted under the following conditions:
>
> *3 (A) The petition must identify the treating healthcare provider or providers for whom the defendant or defendants seek a qualified protective order to conduct an interview;
>
> (B) The claimant may file an objection seeking to limit or prohibit the defendant or defendants or the defendant's or defendants' counsel from conducting the interviews, which may be granted only upon good cause shown that a treating healthcare provider does not possess relevant information as defined by the Tennessee Rules of Civil Procedure; and
>
> (C)(i) The qualified protective order shall expressly limit the dissemination of any protected health information to the litigation pending before the court and require the defendant or defendants who conducted the interview to return to the healthcare provider or destroy any protected health information obtained in the course of any such interview, including all copies, at the end of the litigation;
>
> (ii) The qualified protective order shall expressly provide that participation in any such interview by a treating healthcare provider is voluntary.
>
> (2) Any disclosure of protected health information by a healthcare provider in response to a court order under this section shall be deemed a permissible disclosure under Tennessee law, any Tennessee statute or rule of common law notwithstanding.

Tenn.Code Ann. § 29–26–121(f) (2015). (Subsection (f)(2) was amended effective April 24, 2015. We cite the previous version of the statute, which applies here).

Preemption

[1] Under the Supremacy Clause of the United States Constitution, the laws of the United States are the supreme law of the land and preempt state laws that interfere with or are contrary to federal law. *Pendleton v. Mills,* 73 S.W.3d 115, 126 (Tenn.Ct.App.2001); *Ill. Cent. Gulf R.R. Co. v. Tenn. Pub. Serv. Comm'n,* 736 S.W.2d 112, 114 (Tenn.Ct.App.1987). In preemption analysis, a court "should start with the presumption that Congress does not intent to supplant state law and that the historic police powers of the states are not superseded by the federal act unless preemption was the clear and manifest purpose of Congress." *Morgan Keegan & Co., Inc. v. Smythe,* 401 S.W.3d 595, 605 (Tenn.2013).

Congress passed HIPAA in 1996, and it took effect in 2003. *Wade,* 99 F.Supp.2d at 685. HIPAA "governs the dissemination of protected health information." *Id.* The regulations implementing HIPAA contain an express preemption clause: "A standard, requirement, or implementation specification adopted under this subchapter that is *contrary* to a provision of State law preempts the provision of State law." 45 C.F.R. § 160.203 (emphasis added). "Contrary" is defined as follows:

(1) A covered entity or business associate would find it *impossible* to comply with both the State and Federal requirements; or

(2) The provision of State law stands as an *obstacle* to the accomplishment and execution of the full purposes and objectives [of HIPAA].

45 C.F.R. § 160.202 (emphasis added). Pursuant to 45 C.F.R. § 160.203(b), even a state law provision that is contrary to HIPAA will not be preempted if it "relates to the privacy of individually identifiable health information and is more stringent" than HIPAA.

***4** Congress enacted HIPAA to improve "the efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information." Pub.L. No. 104–191, § 261, 110 Stat.1936 (1996). To protect the security and privacy of health information, Congress delegated to the Secretary of Health and Human Services ("the Department") the authority to promulgate rules and regulations. 42 U.S.C. § 1320d–2(d). These regulations, the Standards for the Privacy of Individually Identifiable Health Information, are known as "the Privacy Rule." *See* 45 C.F.R. §§ 160, 164. The Privacy Rule provides that a covered entity may not disclose protected health information except as permitted by the provisions of the rule. 45 C.F.R. § 164.502(a). "Health information" is defined to include oral information. 45 C.F.R. § 160.103.

The Privacy Rule includes exceptions to the general rule against disclosure of health information without a patient's consent. One of those exceptions is in the case of a judicial or administrative proceeding. Subsection (e) of 45 C.F.R. § 164.512 provides as follows:

(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(1) No objections were filed; or

(2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

*5 (B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

(vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(v) of this section.

In short, 45 C.F.R. § 164.512 allows disclosure of protected health information in the course of a judicial or administrative proceedings pursuant to a court order, or in response to lawful process not accompanied by a court order, as long as either (1) reasonable efforts have been made to provide notice to the patient, or (2) reasonable efforts have been made to secure a qualified protective order that prohibits disclosure for any purpose other than the litigation and requires the return or destruction of the health information at the end of the litigation. 45 C.F.R. § 164.512(e)(1)(ii)-(v).

What does HIPAA say about the use of ex parte interviews by defendants with a plaintiff's treating physicians? HIPAA's definition of health information includes oral information; thus, by its terms, the statute covers oral interviews. 45 C.F.R. § 160.103. We conclude that, under the language of the statute and regulations, as long as the procedural requirements of 45 C.F.R. § 164.512(e) are met, ex parte interviews allowed under state law during the course of a judicial proceeding would be permitted under HIPAA.

With regard to preemption, the plaintiffs acknowledge that the impossibility test is not an issue in this case. Thus, we must determine whether Tenn.Code Ann. § 29–26121(f) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of HIPAA. 45 C.F.R. § 160.202(2).

Tennessee Code Annotated section 29–26–121(f) mirrors the requirements of 45 C.F.R. § 164.512(e)(1) with respect to QPOs in that the Tennessee statute provides that the QPO "shall expressly limit the dissemination of any protected health information to the litigation pending before the court" and that it shall require the defendant(s) to "return to the healthcare provider or destroy any protected health information obtained in the course of any such interview ... at the end of the litigation." Tenn.Code Ann. § 29–26–121(f)(1)(C)(i). Tennessee law imposes additional requirements not required by the federal law. The claimant has the right to seek to "limit or prohibit the defendant ... from conducting the interviews ... upon good cause shown that a treating healthcare provider does not possess relevant information...." Tenn.Code Ann. § 29–26–121(f)(1)(B). Moreover, the QPO must expressly "provide that participation in any such interview by a

treating healthcare provider is voluntary." Tenn.Code Ann. § 29–26–121(f)(1)(C)(ii).

*6 Thus, Tenn.Code Ann. § 29–26–121(f) is consistent with HIPAA and includes some additional requirements. Under 45 C.F.R. § 160.203(b), even a state law that is contrary to HIPAA will not be preempted if it "relates to the privacy of individually identifiable health information and is more stringent" than HIPAA. Ms. Caldwell asserts that these additional requirements are not effective safeguards and discusses policy arguments as to why ex parte interviews should not be allowed. *See Alsip,* 197 S.W.3d at 727–29 (discussing policy reasons against ex parte interviews). However, it is not the role of this court to make policy decisions that contradict a statutory provision. *See generally Cary v. Cary,* 937 S.W.2d 777, 781 (Tenn.1996); *Cooper v. Nolan,* 19 S.W.2d 274, 276 (Tenn.1929). By enacting Tenn.Code Ann. § 29–26–121(f), the legislature rejected the policy determination reflected in *Alsip* in favor of allowing ex parte interviews.

We do not find that Tenn.Code Ann. § 29–26–121(f) is an obstacle to the accomplishment of the purposes of HIPAA. The Department stated that the Privacy Rule was intended to serve three major purposes:

> (1) To protect and enhance the rights of consumers by providing them access to their health information and controlling the inappropriate use of that information; (2) to improve the quality of health care in the U.S. by restoring trust in the health care system among consumers, health care professionals, and the multitude of organizations and individuals committed to the delivery of care; and (3) to improve the efficiency and effectiveness of health care delivery by creating a national framework for health privacy protection that builds on efforts by states, health systems, and individual organizations and individuals.

65 Fed.Reg. 82462, 82463 (Dec. 28, 2000). Two Tennessee cases occurring prior to the effective date of subsection (f) found that Tenn.Code Ann. § 29–26–121 did not violate the obstacle test and was not preempted by HIPAA. Some of the reasoning found in these cases is instructive here. The case of *Webb v. Roberson,* No. W2012–01230–COA–R9–CV, 2013 WL 1645713, at *1 (Tenn.Ct.App. Apr. 17, 2013), involved a challenge to the provision requiring medical malpractice claimants to provide certain notice sixty days before filing suit. The plaintiffs asserted, *inter alia,* that Tenn.Code Ann. § 29–26–121 allowed for the "disclosure of protected health information without either a court order or the patient's consent in contravention of HIPAA." *Webb,* 2013 WL 1645713, at *13. The court disagreed, stating: "By pursuing a malpractice claim, the plaintiff consents to the disclosure of relevant medical information." *Id.* at *14. Furthermore, the court noted, Tenn.Code Ann. § 29–26–121 limited "the discoverable medical records to those held by providers sent notice by the claimant, and it requires the records be treated as confidential and be used only by the parties, their counsel, and their consultants." *Id.* The court concluded that Tenn.Code Ann. § 29–26–121 did not impede the accomplishment or execution of HIPAA's goals. *Id.*

In *Stevens ex rel. Stevens v. Hickman Community Health Care Services, Inc.,* 418 S.W.3d 547, 557 (Tenn.2013), the plaintiff argued that the pre-suit authorization requirement of Tenn.Code Ann. § 29–26–121(a)(2)(E) "impliedly frustrates HIPAA's purposes and objectives." Our Supreme Court rejected this argument:

> Tenn.Code Ann. § 29–26–121(a)(2)(E) authorizes disclosures that are expressly contemplated by HIPAA. *See* 45 C.F.R. § 164.508. Additionally, although Tenn.Code Ann. § 29–16–121(a)(2)(E) requires that a plaintiff complete a HIPAA authorization as a pre-condition of filing suit, a plaintiff's decision whether to file suit is still a voluntary one. *See In re Collins,* 286 S.W.3d 911, 920 (Tex.2009).... Thus, complying with Tenn.Code Ann. § 29–26–121(a)(2)(E) neither conflicts with HIPAA nor stands as an obstacle to the accomplishment of HIPAA's full purposes and objectives. As such, Tenn.Code Ann. § 29–16–121(a)(2)(E) is not "contrary" to HIPAA within the

meaning of 45 C.F.R. § 160.202(1), and it is not preempted. *Id.*

*7 *Stevens*, 418 S.W.3d at 557–58.

Courts in other states have considered the issue of whether state laws allowing ex parte interviews are preempted by HIPAA. In *Arons v. Jutkowitz,* 880 N.E.2d 831, 832 (N.Y.Ct.App.2007), the court considered whether the defendants in a medical malpractice and wrongful death action were entitled to receive HIPAA authorizations to conduct ex parte interviews of the plaintiff's treating physicians. Pursuant to New York caselaw, ex parte interviews with treating physicians were generally allowed. *Arons,* 880 N.E.2d at 837–38. The *Arons* court concluded that HIPAA did not preempt New York state law, reasoning that "there can be no conflict between New York law and HIPAA on the subject of ex parte interviews of treating physicians because HIPAA does not address this subject." *Id.* at 842. The court further stated that "the Privacy Rule does not prevent this informal discovery from going forward, it merely superimposes procedural prerequisites." *Id.*

The court in *Holman v. Rasak,* 785 N.W.2d 98, 100 (Mich.2010), held that "ex parte interviews, which are permitted under Michigan law, are also consistent with HIPAA regulations, provided that 'reasonable efforts have been made ... to secure a qualified protective order that meets the requirements of [45 C.F.R. 164.512(e)(1)(v)].' " (quoting 45 C.F.R. § 164.512(e)(1)(ii)(B)). The *Holmes* court specifically addressed the obstacle test:

> Nor does Michigan law concerning ex parte interviews "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of" HIPAA—the second definition of "contrary" under 45 CFR 160.202. Plaintiff claims that allowing ex parte interviews frustrated HIPAA's purpose of protecting the privacy of an individual's health information. While HIPAA is obviously concerned with protecting the privacy of individuals' health information, it does not enforce that goal to the exclusion of other interests. Rather, it balances the protection of individual privacy with the need for disclosure in some situations.... Given HIPAA's interest in balancing the need for disclosure in certain contexts with the importance of individual privacy, we cannot conclude that ex parte interviews are "contrary" to the objectives of HIPAA, as long as the interviews are sought according to the specific requirements of 45 CFR 164.512(e).

Holman, 785 N.W.2d at 446–47. The court concluded that Michigan law did not violate the obstacle test "given the balance HIPAA strikes between the protection of individual privacy and the necessity of disclosure in some contexts." *Id.* at 449.

In *Murphy v. Dulay,* 768 F.3d 1360 (11th Cir.2014), the court concluded that the Florida law at issue did not violate the obstacle test:

> [The statute] does not stand "as an obstacle" to fulfilling "the purposes and objectives" of HIPAA. *See* 45 C.F.R. § 160.202(2). One of HIPAA's stated objectives is "reducing the administrative costs of providing and paying for health care." 42 U.S.C. § 1320d–1(b). Likewise, § 766.1065, by allowing health care providers to investigate and potentially settle claims before litigation commences, serves to reduce the overall cost that medical negligence litigation places on Florida's health care system. The Florida law, like HIPAA, attempts to strike a balance between privacy protection and the efficient resolution of medical negligence claims.

***8** *Murphy*, 768 F.3d at 1377. *See also McCloud v. Bd. of Dirs. of Geary Cmty. Hosp.*, No. 06–1002–MLB, 2006 WL 2375614, at *1–2 (D.Kan.2006) (denying plaintiff's request to allow plaintiff's counsel to be present at defense counsel's meeting with a treating physician); *Bayne v. Provost*, 359 F.Supp.2d 234, 241 (N.D.N.Y.2005) (finding that HIPAA controlled in the absence of any state law and would allow ex parte interviews where all requirements of regulations were met); *Caldwell v. Chauvin*, 464 S.W.3d 139, 148–55 (Ky.2015) (finding that Kentucky law did not prohibit ex parte interviews by defendants with a plaintiff's treating physicians, and that HIPAA also did not prohibit such interviews). There are cases that have reached the opposite conclusion—i.e., that HIPAA does not allow ex parte communications between counsel and healthcare providers. *See, e.g., State ex rel. Proctor v. Messina*, 320 S.W.3d 145, 156–57 (Mo.2010) (finding that an ex parte interview does not qualify as being in the course of "judicial proceedings" under HIPAA, therefore a trial court lacks authority to issue an order under HIPAA allowing an ex parte interview).

We find the reasoning of the Tennessee cases that have addressed the preemption issue, as well as the cases from other states that have reached the same conclusion, to be persuasive. We conclude that Tennessee Code Annotated section 29–26–121(f) is not preempted by HIPAA.

Denial of QPO

[2] We find that the trial court erred in denying the defendants' petition for a QPO when there is no dispute that the defendants complied with the statute's procedural requirements and Ms. Caldwell did not object based upon relevance.

Our Supreme Court has instructed:

> When dealing with statutory interpretation, well-defined precepts apply. Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn.2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn.2005). When a statute is clear, we apply the plain meaning without complicating the task. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn.2004). Our obligation is simply to enforce the written language. *Abels ex rel. Hunt v. Genie Indus., Inc.*, 202 S.W.3d 99, 102 (Tenn.2006). It is only when a statute is ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other sources. *Parks v. Tenn. Mun. League Risk Mgmt. Pool*, 974 S.W.2d 677, 679 (Tenn.1998). *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 895 (Tenn.2011).

The language of Tenn.Code Ann. § 29–26–121(f) is clear: When a defendant has filed a petition for a QPO allowing him or her to obtain an ex parte interview with a patient's treating healthcare provider as defined by § 29–26–101, "[s]uch petition *shall* be granted" if certain conditions are met. (Emphasis added). The statutory conditions are: (A) that the petition must identify the treating healthcare providers with whom an interview is sought; (B) that the claimant may seek to "limit or prohibit the defendant or defendants ... from conducting the interviews, which [request] may be granted *only* upon good cause shown that a treating healthcare provider does not possess relevant information as defined by the Tennessee Rules of Civil Procedure"; (C)(i) that the QPO "shall limit the dissemination of any protected health information to the litigation pending before the court" and require the defendant or defendants "to return to the healthcare provider or destroy any protected health information obtained in the course of any such interview ... at the end of the litigation"; and (C)(ii) that the QPO shall provide that participation in any ex parte "interview by a treating healthcare provider is voluntary." Tenn.Code Ann. § 29–26–121(f)(A)–(C) (emphasis added). In the present case, there is no dispute that all of the preceding conditions are satisfied. Ms. Caldwell made no objection to the form of the petition or any objection based upon good cause showing that a treating physician did not have relevant information. It is undisputed that the defendants satisfied all of the conditions of Tenn.Code Ann. § 29–26–121(f).

***9** By requiring that the defendants take the "discovery-only" depositions of the treating healthcare providers, the trial court ignored the mandates of Tenn.Code Ann. § 29–26–121(f), which does not contemplate the formality of a deposition. The plain language of subdivision (f) of Tenn.Code Ann. § 29–26–121 requires ex parte interviews —i.e., interviews held outside the presence of claimant and claimant's counsel. The intent of the General Assembly, as expressed in the language of the statute, was to authorize defendants to conduct ex parte interviews where certain conditions are met. We conclude that the trial court erred in denying the defendants' petition for a QPO.

CONCLUSION

For the foregoing reasons, the decision of the trial court is reversed, and the case is remanded for entry of a qualified protective order consistent with this opinion. Costs of this appeal are assessed against the appellee, Angela Caldwell, and execution may issue if necessary.

All Citations

Slip Copy, 2016 WL 3226431

Footnotes

1 The original defendants in this case were Baptist Memorial Hospital; Southeastern Emergency Physicians, Inc.; Southeastern Emergency Physicians of Memphis, Inc.; Team Health, Inc.; Ravi K. Madasu, M.D.; Semmes–Murphey Clinic, PC; Lance J. Wright, M.D.; Mid–South Imaging & Therapeutics, P.A.; and Frank M. Eggers, M.D.

2 The remaining defendants, in addition to Dr. Madasu, were Dr. Wright, the Semmes–Murphey Clinic, Dr. Eggers, Mid–South Imaging & Therapeutics, and Baptist Memorial Hospital.

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EXHIBIT 3

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Charles WEBB and Evangeline Webb, Individually and as Husband and Wife
v.
Charles ROBERSON, M.D., et al.

No. W2012–01230–COA–R9CV.
Feb. 19, 2013 Session.
April 17, 2013.

Interlocutory Appeal from the Circuit Court for Shelby County, No. CT–004737–10; Robert S. Weiss, Judge.
Louis P. Chiozza, Jr., Memphis, Tennessee; Steven R. Walker, Oakland, TN, for the appellants, Charles Webb and Evangeline Webb.

Marty R. Phillips, John O. Alexander, Memphis, Tennessee, for the appellees, Charles Roberson, M.D. and Charles Roberson, M.D., P.C.

Robert E. Cooper, Jr., Attorney General and Reporter, William E. Young, Solicitor General, Stephanie A. Bergmeyer, Assistant Attorney General, Nashville, TN, for the appellee, State of Tennessee.

Jennifer S. Harrison, Memphis, TN, for the appellees, Sabrina Greer, R.N., Brandy Madden, R.N., Jerry Ray, R.N., Tina Cox, R.N., Michael Maharrey, R.N. and AMISUB (SFH), Inc., d/b/a St. Francis Hospital.

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the Court, in which DAVID R. FARMER, J., and J. STEVEN STAFFORD, J., joined.

OPINION

ALAN E. HIGHERS, P.J., W.S.,

***1** In this interlocutory appeal, Plaintiffs challenge the constitutionality of Tennessee Code Annotated section 29–26–121, which requires a medical malpractice claimant to provide certain notice sixty days prior to filing suit. We conclude that Tennessee Code Annotated section 29–26–121 is not an unconstitutional infringement upon the courts' rule-making authority, that it is not preempted by HIPAA, and that it does not violate the equal protection and due process provisions of state and federal law. Affirmed and Remanded.

I. FACTS & PROCEDURAL HISTORY

On September 23, 2010, Charles Webb and his wife, Evangeline Webb, (collectively "Plaintiffs") filed a medical malpractice Complaint against numerous defendants, including emergency room physician Charles Roberson, M.D. and Charles Roberson, M.D., P.C.; [FN1] nurses Sabrina Greer, Brandy Madden, Jerry Ray, Tina Cox, and Michael Maharrey ("Nurses"); and AMISUB (SFH), Inc. and AMISUB (SFH), Inc. d/b/a Saint Francis Hospital ("Hospital"). [FN2] The Complaint alleged the negligent failure to timely diagnose and treat Mr. Webb's cancer on or about July 26, 2009. Also on September 23, 2010, Plaintiffs filed their Certificate of Good Faith in accordance with Tennessee Code Annotated section 29–26–122.

FN1. In his Answer to Plaintiffs' Complaint, Dr. Roberson states "Charles Roberson, M.D., P.C. is not a legal entity and, therefore, is not a properly named defendant in this action."

FN2. On appeal, the Nurses and the Hospital adopted the briefs filed by Dr. Roberson and the State of Tennessee.

Charles Roberson, M.D. and Charles Roberson, M.D., P.C. ("Dr.Roberson") filed an Answer on April 12, 2011, generally denying negligence and asserting that he was not provided with the sixty-

day pre-suit notice required by Tennessee Code Annotated section 29–26–121. Specifically, Dr. Roberson alleged that he received a notice letter on or about September 16, 2010—seven days prior to the filing of Plaintiffs' Complaint.

On April 21, 2011, the Hospital and the Nurses filed a joint Answer also generally denying any negligence.

On August 10, 2011, Dr. Roberson filed a Motion for Summary Judgment based upon Plaintiffs' alleged failure to comply with Tennessee Code Annotated section 29–26–121. Dr. Roberson claimed that Plaintiffs had failed to provide him with notice of the potential claim sixty days prior to the filing of the Complaint, that the statute of limitations, therefore, was not extended for a period of one hundred twenty days, and, thus, that the September 23, 2010 Complaint was filed outside of the one-year statute of limitations. Additionally, Dr. Roberson claimed that Plaintiffs' Complaint failed to comply with section 29–26–121 because it had no attached affidavit stating that timely notice had been delivered and to whom, and because it failed to include the information required within the sixty-day notice.

On September 2, 2011, the Nurses also filed a Motion to Dismiss based upon Plaintiffs' alleged failure to comply with the requirements of section 29–26–121. The Nurses claimed that the Hospital was served with a notice letter on July 21, 2010, but that the letter "was not served on the individually named nurses and the notice letter that was served ... did not list the individually named nurses as providers being sent notice." Additionally, the Nurses maintained that the July 21, 2010 notice letter failed to include the "HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice" as required by section 29–26–121(a)(2)(E). Instead, according to the nurses, Plaintiffs "provided HIPAA compliant medical authorizations allowing all defendants other than these individually named nurses to obtain the plaintiff's medical records."

*2 In response to Dr. Roberson's Motion for Summary Judgment, Plaintiffs conceded that they had unsuccessfully attempted to personally serve Dr. Roberson with a pre-suit notice letter dated July 22, 2010, and that a letter was not personally delivered to him until September 16, 2010–seven days prior to the filing of their Complaint. However, Plaintiffs argued that service of the July 22, 2010 letter was attempted upon Dr. Roberson "several times at St. Francis Hospital; however, hospital security would not provide a work schedule for Dr. Roberson, and was uncooperative in assisting with service." Additionally, Plaintiffs contended that "T.C.A. § 29–26–121 and the entire Tennessee Medical Malpractice Act are unconstitutional." Likewise, in response to the Nurses's Motion to Dismiss, Plaintiffs challenged the constitutionality of section 29–26–121 and the entire Medical Malpractice Act. Due to the constitutional claims, the State of Tennessee was allowed to intervene in the matter and it filed a memorandum of law to defend the constitutionality of section 29–26–121,[FN3] which Dr. Roberson and the Nurses adopted.

FN3. The State argued that Plaintiffs lack standing to challenge the constitutionality of the *entire* Medical Malpractice Act.

Following a hearing, the trial court granted Dr. Roberson's Motion for Summary Judgment. The court concluded that the Medical Malpractice Act is constitutional and that Plaintiffs failed to comply with the requirements of section 29–26–121. Specifically, the court found that Dr. Roberson was not served with notice until September 16, 2010, and therefore that Plaintiffs' Complaint was filed beyond the one-year statute of limitations for medical malpractice claims. Additionally, the trial court found that Plaintiffs had failed to file an affidavit along with their Complaint establishing delivery under section 29–26–121 and that their Complaint failed to include the information required within the sixty-day notice.

Following a second hearing, the trial court granted summary judgment [FN4] in favor of the Nurses. Again, the trial court concluded that the Medical Malpractice Act is constitutional, and it further found that the Nurses had not been served with pre-suit notice of a potential claim, that the notice which was provided did not give the Nurses a HIPAA compliant medical authorization to obtain medical records from other providers receiving notice of the potential claim, and that Plaintiffs' Complaint failed to include the information required within the sixty-day notice.

FN4. Apparently, the trial court concluded that the Nurse's motion to dismiss had been converted to a motion for summary judgment.

Plaintiffs filed a Motion to Alter or Amend claiming that the trial court had erred in considering "at least two aspects" of section 29–26–121's constitutionality under a rational basis test rather than under strict scrutiny. The trial court denied Plaintiffs' Motion to Alter or Amend. Plaintiffs then successfully moved the trial court for permission to pursue an interlocutory appeal, and on August 20, 2012, this Court entered an Order granting Plaintiffs' application for an interlocutory appeal.

II. ISSUES PRESENTED

Plaintiffs raised four issues [FN5] in their Application for Interlocutory Appeal:

FN5. In their appellate brief, Plaintiffs attempt to raise two additional issues: "whether the Trial Court Erred in Granting Summary Judgment to Dr. Roberson, and Whether the Trial Court Should Have Granted Plaintiffs' Motion to Dismiss without Prejudice pursuant to Tenn. R. Civ. P. 41.01(1)." However, because these additional issues were not raised in Plaintiffs' applications for interlocutory appeal, nor were they accepted for consideration by this Court, they will not be addressed. *See Montcastle v. Baird,* 723 S.W.2d 119, 122 (Tenn.Ct.App.1986); *see also Milligan v. George,* No. 01A01–9609–CH–00406, 1997 WL 39138, at *3 (Tenn.Ct.App. July 9, 1997) (scope of interlocutory appeal is restricted to issues certified by the trial court and accepted by appellate court).

*3 1. Whether Tennessee Code Annotated section 29–26–121 is an unconstitutional infringement upon the rule-making authority of the courts, and particularly upon Tennessee Rule of Civil Procedure 3;

2. Whether the Health Insurance Portability and Accountability Act ("HIPAA") preempts Tennessee Code Annotated section 29–26–121;

3. Whether Tennessee Code Annotated section 29–26–121 violates the equal protection and due process provisions of state and federal law; and

4. Whether the entire Tennessee Medical Malpractice Act is unconstitutional.

For the following reasons, we conclude that Tennessee Code Annotated section 29–26–121 is not an unconstitutional infringement upon the courts' rule-making authority, that it is not preempted by HIPAA, and that it does not violate the equal protection and due process provisions of state and federal law. The case is remanded for further proceedings consistent with this opinion.

III. STANDARD OF REVIEW

"Issues of constitutional interpretation are questions of law, which we review de novo without any presumption of correctness given to the legal conclusions of the courts below." *Waters v. Farr,* 291 S.W.3d 873, 882 (Tenn.2009) (citing *Colonial Pipeline v. Morgan,* 263 S.W.3d 827, 836 (Tenn.2008)). When evaluating the constitutionality of a statute, we must begin with the presumption that the statute is constitutional, and we must uphold the statute's constitutionality "wherever possible." *Id.* (citing *State v. Pickett,* 211 S.W.3d 696,

700 (Tenn.2007)).

The issues presented in this interlocutory appeal involve a facial challenge to a statute, "meaning they involve a claim 'that the statute fails a constitutional test and should be found invalid in all applications.' " *Jackson v. HCA Health Servs. of Tenn., Inc.,* 383 S.W.3d 497, 500 (Tenn.Ct.App.2012) (quoting *Waters,* 291 S.W.3d at 921). Our Supreme Court has explained:

> A facial challenge to a statute is the most difficult challenge to mount successfully. The presumption of a statute's constitutionality applies with even greater force when a facial challenge is made. Accordingly, the challenger must establish that no set of circumstances exists under which the statute would be valid. Stated another way, the challenger must demonstrate that the law cannot be constitutionally applied to anyone.
>
> Courts considering a facial challenge to a statute should proceed with caution and restraint because holding a statute facially unconstitutional may result in unnecessary interference with legitimate governmental functions. Accordingly, the courts view facial invalidity as "manifestly strong medicine" and invoke it sparingly and only as a last resort.
>
> There are at least three reasons for the courts' reticence to invalidate statutes on their face. First, claims of facial invalidity often rest on speculation and thus run the risk of the "premature interpretation of statutes on the basis of factually barebones records." Second, facial challenges "run contrary to the fundamental principle of judicial restraint" by inviting the courts to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Third, "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution."
>
> *4 Thus, a successful facial constitutional challenge results in the wholesale invalidation of the statute. While passing on the validity of a statute wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular. For this reason, many courts view "as applied" challenges as the "basic building blocks" of constitutional adjudication. "As applied" challenges are preferred because, if they are successful, they do not render the entire statute completely inoperative. In some circumstances, the courts can fulfill the legislature's intent by prohibiting only the unconstitutional applications of a statute, while allowing the State to enforce the statute in other circumstances.

Id. (quoting *Waters,* 291 S.W.3d at 921–23) (internal citations and footnotes omitted in quotation).

IV. DISCUSSION

A. Constitutionality of Tennessee Medical Malpractice Act

In this interlocutory appeal, Plaintiffs attempt to challenge the constitutionality of both a *specific section* of the Tennessee Medical Malpractice Act-section 29–26–121–and the *entire* Tennessee Medical Malpractice Act, Tennessee Code Annotated section 29–26–115, et seq. (the "Act").

"It is well-settled in Tennessee that 'courts do not decide constitutional questions unless resolution is absolutely necessary to determining the issues in the case and adjudicating the rights of the parties.' " *Waters,* 291 S.W.3d at 882 (quoting *State v. Taylor,* 70 S.W.3d 717, 720 (Tenn.2002)); *see also Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.,* 467 U.S. 138, 157, 104 S.Ct. 2267, 2279, 81 L.Ed.2d 113 (1984) ("It is a fundamental rule of judicial restraint ... that this Court will not reach constitutional questions in advance of the necessity of deciding them."). In this case, Plaintiffs face dismissal of their Complaint due to their alleged failure to comply with the requirements of section 29–26–121; the *entirety* of the Act is in no way implicated by the facts under

consideration here. As such, we find it unnecessary, and thus improper, for this Court to consider the constitutionality of the Act as a whole.

B. Constitutionality of Tennessee Code Annotated section 29–26–121

We begin by looking at the statute under attack-section 29–26–121–which provides in relevant part:

(a)(1) Any person, or that person's authorized agent, asserting a potential claim for medical malpractice [FN6] shall give written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon medical malpractice in any court of this state.

FN6. This Court is aware that, effective April 23, 2012, the TMMA was amended, and the words "health care liability" were substituted for the words "medical malpractice" throughout the statute. 2012 Tenn. Pub. Acts, ch. 798, § 1–59. In this opinion, however, we cite to the 2009 version in effect at the time Plaintiffs filed suit.

(2) The notice shall include:

(A) The full name and date of birth of the patient whose treatment is at issue;

(B) The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient;

*5 (C) The name and address of the attorney sending the notice, if applicable;

(D) A list of the name and address of all providers being sent a notice; and

(E) A HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.

(3) The requirement of service of written notice prior to suit is deemed satisfied if, within the statutes of limitations and statutes of repose applicable to the provider, one of the following occurs, as established by the specified proof of service, which shall be filed with the complaint:

(A) Personal delivery of the notice to the health care provider or an identified individual whose job function includes receptionist for deliveries to the provider or for arrival of the provider's patients at the provider's current practice location. Delivery must be established by an affidavit stating that the notice was personally delivered and the identity of the individual to whom the notice was delivered; or

(B) Mailing of the notice:

(i) To an individual health care provider at both the address listed for the provider on the Tennessee department of health web site and the provider's current business address, if different from the address maintained by the Tennessee department of health; provided, that, if the mailings are returned undelivered from both addresses, then, within five (5) business days after receipt of the second undelivered letter, the notice shall be mailed in the specified manner to the provider's office or business address at the location where the provider last provided a medical service to the patient; or

(ii) To a health care provider that is a corporation or other business entity at both the address for the agent for service of process, and the provider's current business address, if different from that of the agent for service of process; provided, that, if the mailings are returned undelivered from both addresses, then, within five (5) business days after receipt of the second undelivered letter, the notice shall be mailed in the specified manner to the provider's office or business address at the location where

the provider last provided a medical service to the patient.

(4) Compliance with subdivision (a)(3)(B) shall be demonstrated by filing a certificate of mailing from the United States postal service stamped with the date of mailing and an affidavit of the party mailing the notice establishing that the specified notice was timely mailed by certified mail, return receipt requested. A copy of the notice sent shall be attached to the affidavit. It is not necessary that the addressee of the notice sign or return the return receipt card that accompanies a letter sent by certified mail for service to be effective.

(b) If a complaint is filed in any court alleging a claim for health care liability, the pleadings shall state whether each party has complied with subsection (a) and shall provide the documentation specified in subdivision (a)(2). The court may require additional evidence of compliance to determine if the provisions of this section have been met. The court has discretion to excuse compliance with this section only for extraordinary cause shown.

***6** (c) When notice is given to a provider as provided in this section, the applicable statutes of limitations and repose shall be extended for a period of one hundred twenty (120) days from the date of expiration of the statute of limitations and statute of repose applicable to that provider....

(d)(1) All parties in an action covered by this section shall be entitled to obtain complete copies of the claimant's medical records from any other provider receiving notice. A party shall provide a copy of the specified portions of the claimant's medical records as of the date of the receipt of a legally authorized written request for the records within thirty (30) days thereafter. The claimant complies with this requirement by providing the providers with the authorized HIPAA compliant medical authorization required to accompany the notice. The provider may comply with this section by:

(A) Mailing a copy of the requested portions of the records with a statement for the cost of duplication of the records to the individual requesting the records;

(B) Informing the individual requesting the records that the records will be mailed only upon advance payment for the records for the stated cost of the records, calculated as provided in § 63–2–102. Any request for advance payment must be made in writing twenty (20) days after the receipt of the request for medical records. The provider must send the records within three (3) business days after receipt of payment for the records; or

(C) Fulfilling such other method that the provider and the individual requesting the records agree to in writing.

(2) The records received by the parties shall be treated as confidential, to be used only by the parties, their counsel, and their consultants.

Tennessee Code Annotated section 29–26–121.

1. Whether section 29–26–121 Infringes upon Rule–Making Authority of Courts

We first consider whether section 29–26–121 violates the separation of powers doctrine by infringing upon the courts' rule-making authority-particularly, in conflicting with, or attempting to supersede, Rule 3 of the Tennessee Rules of Civil Procedure.

Article II, sections 1 and 2 of the Tennessee Constitution provide for the separation of powers among the three branches of government. **Tenn. Const. Art. II, secs. 1 and 2.**

In general, the "legislative power" is the authority to make, order, and repeal law; the "executive power" is the authority to administer and enforce the law; and the "judicial power" is the authority to interpret and apply law. The Tennessee constitutional provision prevents an encroachment by any of the departments upon the powers, func-

tions and prerogatives of the others. The branches of government, however, are guided by the doctrine of checks and balances; the doctrine of separation of powers is not absolute.

State v. King, 973 S.W.2d 586, 588 (Tenn.1998) (quoting *State v. Brackett,* 869 S.W.2d 936, 939 (Tenn.Crim.App.1993)). "Thus, while the three branches of government are independent and co-equal, they are to a degree interdependent as well, with the functions of one branch often overlapping that of another." *Id.* (citing *Underwood v. State,* 529 S.W.2d 45, 47 (Tenn.1975)). "A legislative enactment which does not frustrate or interfere with the adjudicative function of the courts does not constitute an impermissible encroachment upon the judicial branch of government." *Underwood,* 529 S.W.2d at 47.

*7 The Tennessee Rules of Civil Procedure are "promulgated by the Supreme Court and approved by [the Supreme Court] and approved by the General Assembly, pursuant to [the Supreme Court's] 'inherent power to promulgate rules governing the practice and procedure of the courts of this state.' " *Hall v. Haynes,* 319 S.W.3d 564, 571 (Tenn.2010) (citing *State v. Mallard,* 40 S.W.3d 473, 481 (Tenn.2001)). The rules "have 'the force and effect of law [,]' " and "provisions of the Tennessee Code which cannot be harmoniously construed will be resolved in favor of the Tennessee Rules of Civil Procedure." *Mid–South Pavers, Inc. v. Arnco Const ., Inc.,* 771 S.W.2d 420 (Tenn.Ct.App.1989) (citing Tenn.Code Ann. § 16–3–406). "[B]ecause the power to control the practice and procedure of the courts is inherent in the judiciary and necessary 'to engage in the complete performance of the judicial function,' ... this power cannot be constitutionally exercised by any other branch of government[.]" *Mallard,* 40 S.W.3d at 481 (quoting *Anderson County Quarterly Court v. Judges of the 28th Judicial Cir .,* 579 S.W.2d 875, 877 (Tenn.Ct.App.1978)) (internal citation omitted).

Notwithstanding the constitutional limits of legislative power in this regard, the courts of this state have, from time to time, consented to the application of procedural or evidentiary rules promulgated by the legislature. Indeed, such occasional acquiescence can be expected in the natural course of events, as this practice is sometimes necessary to foster a workable model of government. When legislative enactments (1) are reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court, then considerations of comity amongst the coequal branches of government counsel that the courts not turn a blind eye.

Id. (citing *Newton v. Cox,* 878 S.W.2d 105, 112 (Tenn.1994)). Moreover, "[a]lthough it is the province of [the Supreme] Court to prescribe rules for practice and procedure in the state's courts, where a decision of the legislature chiefly driven by public policy concerns infringes on that power [the Court] will generally defer to the judgment of the legislature." *Biscan v. Biscan,* 160 S.W.3d 462, 474 (Tenn.2005) (citing *Martin v. Lear Corp.,* 90 S.W.3d 626, 631–32 (Tenn.2002)).

Tennessee Rule of Civil Procedure 3 provides:

All civil actions are commenced by filing a complaint with the clerk of the court.[FN7] An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not issued and whether process be returned served or unserved. If process remains unissued for 90 days or is not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint.

FN7. This Court has stated, "Standing alone, Tennessee Rule of Civil Procedure 3 could be construed to mean that filing a

complaint alone is sufficient to commence an action. However, this construction overlooks the application of Tennessee Rules of Civil Procedure 3 and 4, which also requires service of process. Tennessee law is clear that commencement of an action is accomplished only when a complaint is filed and process is served." *McNeary v. Baptist Mem'l Hosp.*, 360 S.W.3d 429, 439 (Tenn.Ct.App.2011).

***8 Tenn. R. Civ. P. 3.**

i. Pre–Suit Notice Requirement

Regarding compatibility with Rule 3, Plaintiffs first contend that the legislature "has attempted to control commencement of a suit in medical malpractice actions" by adding a written notice step in section 29–26–121. Plaintiffs claim that the pre-suit notice requirement attempts to supersede the lawsuit commencement procedures set forth in Rule 3 in violation of the Supreme Court's authority to promulgate rules governing practice and procedure.

Our Supreme Court has previously considered a pre-suit requisite in the context of workers' compensation. In *Lynch v. City of Jellico,* 205 S.W.3d 384, 390, 393 (Tenn.2006) the Court determined that requiring parties involved in a workers' compensation dispute to participate in a benefit review conference prior to filing suit did not violate the separation of powers doctrine. Specifically, the Court rejected the trial court's conclusion that the conference violated the separation of powers doctrine because it was conducted by a workers' compensation specialist rather than by a judge. *Id.* at 392–93. Relevant to the instant case, the Court noted the necessity of overlap between the governmental branches, and it pointed out that the judicial branch would ultimately adjudicate the claim if an agreement was not reached at the pre-suit conference. *Id.* at 293.

More akin to the instant case, in *Jackson v. HCA Health Services of Tennessee, Inc.,* 383 S.W.3d 497 (Tenn.Ct.App.2012), the middle section of this Court concluded that Tennessee Code Annotated section 29–26–122, which requires the contemporaneous filing of a certificate of good faith along with a medical malpractice complaint, did not conflict with Tennessee Rule of Civil Procedure 3, and therefore, that it did not violate the separation of powers doctrine. *Id.* at 505. This Court noted that the civil action continued to commence upon the filing of the complaint, and that the statute merely provided for dismissal of the action *if* the good faith certificate requirement was not satisfied. *Id.* The Court further acknowledged that dismissal was not mandated if a plaintiff failed to file a certificate of good faith; instead, failure to file the certificate could be excused upon "demonstrated extraordinary cause." *Id.* at 505–06 (citing Tenn.Code Ann. § 29–26–121(a)). Importantly, the Court stated that "requiring a plaintiff to conduct a due diligence inquiry prior to filing a complaint is not in conflict with the Tennessee Rules of Civil Procedure adopted by the Supreme Court of Tennessee. In fact, requiring a plaintiff to exercise due diligence prior to the filing of the complaint is entirely consistent with the rules." *Id.* at 505. Finally, the Court noted that the certificate of good faith requirement is easily complied with, as "[i]t merely requires proof of the plaintiff's due diligence, specifically that the plaintiff or his counsel consulted with at least one competent medical expert who provided a written statement confirming that the expert believes, based on the information available from medical records ..., that there is a good faith basis to maintain the action[.]" *Id.* at 506.

***9** With the above-cited principles and applications in mind, we find no conflict between section 29–26–121 and Civil Procedure Rule 3 to constitute an impermissible encroachment upon the court's rule-making authority. As pointed out by the defendants, section 29–26–121 requires that written notice of a potential health care liability claim be given "*before the filing of a complaint.*" Thus, the statute's pre-suit notice requirements are satisfied-or not-before suit is commenced pursuant to Rule 3 by the filing of the complaint. *See Rajvongs v.*

Wright, No. M2011–01889–COA–R9–CV, 2012 WL 2308563, at *5 (Tenn. Ct.App. June 18, 2012) (holding that a suit is "commenced" upon the filing of the complaint, *not* upon the filing of the sixty-day notice) *perm. app. granted* (Tenn. Sept. 19, 2012). Once suit is commenced, *if* the pre-suit notice requirements are demonstrably not met, the complaint is subject to dismissal *by the courts* absent "extraordinary cause" which is, likewise, determined *by the courts. See* Tenn.Code Ann. § 29–26–121(a)(4)(b); *see also Myers v. AMUSUB (SFH), Inc.,* 382 S.W.3d 300, 304 (Tenn.2012) ("We hold that the statutory requirement[ ] that a plaintiff give sixty days pre-suit notice ... [is a] mandatory requirement[ ] and not subject to substantial compliance.").

Moreover, the purpose of section 29–26–121 is " 'to give the defendant the opportunity to investigate and perhaps even settle the case before it is actually filed. At a minimum, it will give the defendant the opportunity to gather information before suit is filed and should eliminate the need for extensions of time to answer the complaint or slow-walk discovery.' " *DePue v. Schroeder,* No. E2010–00504–COA–R9–CV, 2011 WL 538865, at *5 (Tenn.Ct.App. Feb. 15, 2011) *perm. app. denied* (Tenn. Aug. 31, 2011) (quoting *Howell v. Claiborne and Hughes Health Ctr.,* No. M2009–01683–COA–R3–CV, 2010 WL 2539651, at *14 (Tenn. Ct.App. June 24, 2010)) *overruled on other grounds by Myers v. AMISUB (SFH), Inc.,* 382 S.W.3d 300 (Tenn.2012). Based upon legislature's substantive policy concerns, we find that the pre-suit notice requirement is not entirely procedural. In any event, as stated above, consent to a legislatively-promulgated procedural rule is appropriate where the statute works within the framework and rules adopted by the judiciary. *Mallard,* 40 S.W.3d at 481 (citing *Newton,* 878 S.W.2d at 112). Here, the statutory purposes supplement the Rules of Civil Procedure, which are to "be construed to secure the just, speedy, and inexpensive determination of every action [,]" **Tenn. R. Civ. P. 1,** and therefore, we find that deferment to the legislature is appropriate.

Finally, as with section 29–26–122–the constitutionality of which has been upheld-the requirements of section 29–26–121 are easily met. The written notice requires only minimal information which is easily accessible to the claimant, and several clearly-explained delivery methods are available. In sum, because the pre-suit notice requirements of section 29–26–121 merely supplement Rule 3 and can be harmoniously construed therewith, we find such requirements do not violate the separation of powers doctrine.

ii. Tolling

***10** Rule 3 of the Tennessee Rules of Civil Procedure allows a plaintiff to toll the statute of limitations by obtaining issuance of new process within one year of the original issuance or, if no process was originally issued, within one year of the filing of the complaint. Plaintiffs point out that the one-year tolling period is unavailable to a health care liability plaintiff who *fails* to provide pre-suit notice within the original statute of limitations pursuant to section 29–26–121, and therefore, they argue that the legislative statute, in attempting to supersede the Courts' Rule 3, violates the separation of powers doctrine.

Plaintiffs are correct that a plaintiff who *fails* to comply with the requirements of section 29–26–121 may not take advantage of Rule 3's one-year tolling period, as the suit becomes subject to dismissal. FN8 However, we disagree that this tolling inability "effectively kills the suit before it starts[,]" as Plaintiffs suggest. As explained above, the statutory pre-suit notice requirements are easily met and they work to promote both early evaluation and streamlined disclosure of medical records in order to facilitate the statutory goals of information gathering and litigation expediency.

FN8. On appeal, Plaintiffs argue that the proper sanction for failure to comply with the requirements of section 29–26–121 is dismissal *without* prejudice. As stated

above, however, this issue was not accepted for consideration by this Court and will not be addressed. *See Montcastle,* 723 S.W.2d at 122.

Moreover, we note that a health care liability plaintiff who *complies* with the meager pre-suit notice requirements of section 29–26–121 is afforded an *additional* 120 day period in which to commence his claim. Section 29–26–121 provides that if the requisite pre-suit notice is given, "the applicable statutes of limitations and repose shall be extended for a period of one hundred twenty (120) days from the date of expiration of the statute of limitations and statute of repose applicable to that provider." **Tenn.Code Ann. § 29–26–121(a)(3)(B)(4)(c).** When suit is commenced pursuant to Rule 3, its tolling provisions become operative. Thus, a plaintiff who provides the requisite 29–26–121 notice may take advantage of *both* section 29–26–121's 120–day extension in which to commence his claim, and Rule 3's one year tolling period. In sum, we simply decline to adopt Plaintiffs' premise that subjecting a plaintiff's claim to dismissal-for failure to follow reasonable pre-suit requirements-renders a statute unconstitutional.

2. Whether Tenn.Code Ann. § 29–26–121 is Pre–Empted by HIPAA

Congress passed the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") FN9 for the stated purpose of "improv[ing] ... the efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information." *South Carolina Med. Ass'n v. Thompson,* 327 F.3d 346, 348 (4th Cir.S.C.2003) (citation omitted). Specifically, HIPAA "creates privacy and security rules related to personal health information held by *covered entities.* " *North Cypress Med. Ctr. Operating Co. v. Fedex Corp.,* 892 F.Supp.2d 861, 2012 WL 4344611, at *7 n.1 (S.D.Tex. Sept. 14, 2012) (citing Pub.L. No. 104–191, 110 Stat.1936) (emphasis added). A "covered entity" is generally defined as either a health plan, a health care clearinghouse, or a health care provider engaged in electronic transactions. 45 C.F.R. § 160.103; *see also Graham v. Fleissner Law Firm,* No. 1:08–CV–00031, 2008 WL 2169512, at *3 (E.D.Tenn.2008). Under HIPAA, a covered entity generally "may not use or disclose protected health information without a[ ] [valid] authorization [.]" **45 C.F.R. § 164.508(a)(1).** However, in certain circumstances, "[a] covered entity may use or disclose protected health information without the written authorization of the individual[.]" **45 C.F.R. § 164.512.** For example, pursuant to HIPAA section 164.512(e)(1), "[a] covered entity may disclose protected health information in the course of any judicial administrative proceeding:"

FN9. HIPAA is codified in Title 45, Parts 160, 162, and 164 of the Code of Federal Regulations. *See Jackson v. CVS Corp.,* 2010 WL 3385184, at *5 n.5 (Tenn.Ct.App. Aug. 26, 2010).

***11** (i) In response to an order of a court or administrative tribunal, provided that the covered entity disclosed only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance ... from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance ... from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective or-

der[.]

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protect[ed] health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(1) No objections were filed; or

(2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

45 C.F.R. § 164.512(e)(1). A "qualified protective order" is one that:
(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information is requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

***12 45 C.F.R. § 164.512(e)(1)(v)(A), (B).**

On appeal, Plaintiffs argue that section 29–26–121 conflicts with HIPAA, and therefore, that the Tennessee statute is preempted.

"Our federal system of government recognizes the dual sovereignty of the federal government and the various state governments." *Pendleton v. Mills,* 73 S.W.3d 115, 126 (Tenn.Ct.App.2001) (citing *Printz v. United States,* 521 U.S. 898, 918, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997); *Gregory v. Ashcroft,* 501 U.S. 452, 45, 111 S.Ct. 2395, 2399, 115 L.Ed.2d 410 (1991)). A state is sovereign within its own sphere subject only to preemption pursuant the Supremacy Clause of the United States Constitution.[FN10] *Id.* (citing *Tafflin v. Levitt,* 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990); *Bellsouth Telecomm., Inc. v. Greer,* 972 S.W.2d 663, 670 (Tenn.Ct.App.1997)).

FN10. U.S. Const. art. VI, c.2 provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges of every State shall be bound thereby, anything in the Constitution or laws of any state to the Contrary notwithstanding."

"The courts, however, are reluctant to presume that preemption of state law has occurred." *Id.* (citations omitted). Instead, "courts work from the assumption that the historic powers of the states with regard to matters traditionally subject to state regulation are not displaced by a federal statute unless that is the clear and manifest intent of Congress." *Id.* (citations omitted). A preemption inquiry begins by focusing upon the federal statutory language, with consideration given to the "entire federal statutory scheme." *Id.* at 127 (citations omitted). The inquiry must attempt "to reconcile the federal and state laws, ... rather than to seek out conflict where none clearly exists." *Id.* (citations omitted).

HIPAA contains an express preemption clause: "A standard, requirement, or implementation specification adopted under this subchapter that is *contrary* to a provision of State law preempts the provision of State law." **45 C.F.R. § 160.203** (emphasis added). "Contrary" means:

> (1) A covered entity would find it impossible to comply with both the State and federal requirements; or
>
> (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives [of the Act.]

45 C.F.R. § 160.202. The preemption rule does not apply where "[t]he provision of State law relates to the privacy of individually identifiable health information and is *more stringent* than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter ." **45 C.F.R. § 160.203(b)** (emphasis added).

On appeal, Plaintiffs contend that the confidentiality requirements of section 29–26–121 are *less stringent* than HIPAA, and therefore, that section 29–26–121 is preempted. Specifically, Plaintiffs point out that HIPAA allows the disclosure of protected health information in response to a subpoena, discovery request, or other lawful process only if reasonable efforts were made to notify the individual who is the subject of the protected health information or if the party seeking the information made reasonable efforts to secure a qualified protective order either by the agreement of the parties or upon application to the court by the party seeking the protected health information. If a qualified protective order is sought, the order must limit the protected health information's use to the present litigation and it must require the return or destruction of such information upon the litigation's end. Without elaboration, Plaintiffs contend that section 29–26–121 contains "no such provisions" and that the Tennessee statute attempts to allow "[d]isclosure without a court order or the patient's consent[.]" FN11 They suggest that, to avoid preemption, a state provision must be "more stringent" than the HIPAA regulations.

> FN11. Tennessee Code Annotated section 29–26–121 was amended, effective July 1, 2013, to provide as follows regarding qualified protective orders:
>
> > (C)(i) The qualified protective order shall expressly limit the dissemination of any protected health information to the litigation pending before the court and require the defendant or defendants who conducted the interview to return to the healthcare provider or destroy any protected health information obtained in the course of any such interview, including all copies, at the end of the litigation.
> >
> > (ii) The qualified protective order shall expressly provide that participation in any such interview by a treating healthcare provider is voluntary.

***13** In response, Defendants argue that not only are "more stringent" state provisions not preempted by HIPAA, but state provisions which are "consistent" with HIPAA are also not preempted. Defendants contend that a health care liability

claimant can comply with both section 29–26–121 and HIPAA and they point out that section 29–26–121 specifically requires the mandatory pre-suit notice include "[a] HIPAA compliant medical authorization[.]" **Tenn.Code Ann. § 29–26–121(a)(2)(E).**

First, we must agree with Defendants' position regarding the preemption standard. Plaintiffs are correct that HIPAA expressly provides that "more stringent" state provisions are not subject to preemption. **45 C.F.R. § 160.203(b).** However, this does not necessarily indicate that a state provision *must* be "more stringent" in order to avoid preemption, as Plaintiffs suggest. HIPAA's preemption clause provides only for the preemption of "contrary" state provisions, which it defines as those provisions which make contemporaneous state and federal compliance impossible or which impede accomplishment and execution of federal objectives. A "non-contrary" state provision, which is *not* "less stringent" than the federal standard is not preempted simply because it is not *"more* stringent" than the federal HIPPA standard. *See Alsip v. Johnson City Med. Ctr.,* No. E2004–00831–COA–R9–CV, 2005 WL 1536192, at *9 (Tenn. Ct.App. June 30, 2005) *aff'd by Alsip v. Johnson City Med. Ctr.,* 197 S.W.3d 722 (Tenn.2006) ("Federal law clearly provides that the provisions of HIPAA and its related rules, where more stringent or, stated another way, more confidentiality-friendly, preempt the less stringent edicts of state law; while states can establish *greater* protections than those provided for under HIPAA, they cannot promulgate rules that provide for *less* stringent protections.") (citing 45 C.F.R. § 160.203 (2005)) (footnote omitted).

With this preemption standard in mind, we consider whether the requirements of section 29–26–121 are "contrary" to those set forth by HIPAA. Again, Plaintiffs assert that section 29–26–121 allows disclosure of protected health information without either a court order or the patient's consent in contravention of HIPAA.

In *Alsip v. Johnson City Medical Center,* 197 S.W.3d 722, 723–24 (Tenn.2006), our Supreme Court discussed the issue of plaintiff consent when it considered whether ex parte communications between a medical malpractice plaintiff's physicians and defense attorneys violated the implied covenant of confidentiality between physicians and patients. Ultimately, the Court determined that ex parte communications were unnecessary because formal discovery methods were sufficient to uncover the plaintiff's relevant medical information. *Id.* at 728. However, the Court noted that "public policy considerations reflected in the Tennessee Rules of Civil Procedure require that the covenant of physician-patient confidentiality be voided for the purpose of discovery[,]" *id.* at 726 (citing Tenn. R. Civ. P. 26; *Gall ex rel. Gall v. Jamison,* 44 P.3d 233, 239 (Colo.2002), and it stated that "by filing the lawsuit, the plaintiff impliedly consents to disclosure of his *relevant* medical information." *Id.* at 727 (citing Tenn. R. Civ. P. 26.02); *see also id.* at 728 ("[C]onsent here to disclose the decedent's confidential, relevant medical information was *implied at law* as a consequence of the plaintiffs' conduct (i.e., by the filing of the lawsuit)[.]").

***14** We simply cannot agree with Plaintiffs' position that section 29–26–121 allows for the release of protected health information without either a court order or the patient's consent, in violation of HIPAA. By pursuing a malpractice claim, the plaintiff consents to the disclosure of relevant medical information.[FN12] *See, e.g ., Holman v. Rasak,* 785 N.W.2d 98,106 (Mich.2010) ("The HIPAA regulations were 'not intended to disrupt the current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected health information.' ") (quoting 65 Fed.Reg. 82462–01, 82530 (December 28, 2000) discussing 45 C.F.R. § 164.512(e)) (footnote omitted). Moreover, HIPAA expressly provides that protected health information may be released, in the context of a judicial proceeding, in response to lawful process *where the*

subject of the protected information is notified of the information request. **45 C.F.R. § 164.512(e)(1)(ii)(A)** (emphasis added). Certainly, the plaintiff, who, in the pursuit of his claim has authorized the release of his medical records, is aware of the information request. Notwithstanding this consent, however, HIPAA protection is not waived by the pursuit of a malpractice claim. As pointed out by Defendants, section 29–26–121specifically demands that the claimant's authorization to release medical records be "HIPAA complaint[,]" it limits the discoverable medical records to those held by providers sent notice by the claimant, and it requires the records be treated as confidential and be used only by the parties, their counsel, and their consultants. **Tenn.Code Ann. § 29–26–121(a)(2)(E), (d)(2).**

FN12. In their appellate brief, Plaintiffs briefly argue that because section 29–26–121 requires the release of information *prior to suit commencement* that "there is no way that a potential plaintiff has waived anything." This argument, however, is without merit as public policy considerations related to the need to discovery are no less applicable sixty days prior to suit commencement.

In sum, we find that a "covered entity" can comply with the requirements of both section 29–26–121 and HIPAA, and that section 29–26–121 does not impede the accomplishment or execution of HIPAA's purposes. Accordingly, section 29–26–121 is not a "contrary" provision subject to preemption.

3. Whether section29–26–121 Violates Equal Protection and Due Process Provisions

Finally, we address Plaintiffs' arguments that section 29–26–121 violates the Equal Protection and Due Process provisions of both the Tennessee Constitution and the United States Constitution.

i. Standard of Review FN13

FN13. In his brief, Dr. Roberson contends that Plaintiffs first argued in their Rule 59.04 Motion to Alter or Amend that section 29–26–121 should have been reviewed under strict scrutiny, and therefore, that the issue should be considered waived. Dr. Roberson also points out that interlocutory appeal was not specifically granted with regard to the strict scrutiny versus rational basis issue. However, we find a determination of the appropriate scrutiny standard is necessary to our consideration of the statute's constitutionality under due process and equal protection challenges; thus, we will consider which test applies.

At the outset, we must consider Plaintiffs' argument that the pre-suit notice requirements of section 29–26–121 restrict the fundamental right of court access, and therefore, that the constitutionality of the statute must be analyzed under strict scrutiny.

A legislative classification which disadvantages a "suspect class" or which interferes with the exercise of a "fundamental right" must be analyzed under strict scrutiny. *In re Estate of Combs,* No. M2011–01696–COA–R3–CV, 2012 WL 3711748, at *5 (Tenn. Ct .App. Aug. 28, 2012) *perm. app. denied* (Tenn. Jan. 14, 2013) (citing *State v. Tester,* 879 S.W.2d 823, 828 (Tenn.1994)); *see also In re Adoption ofJ.K. W.,* No. E2006–00906–COA–R3–PT, 2007 WL 161048, at *4 (Tenn.Ct.App. Jan. 23, 2007) *perm. app. denied* (Tenn. Apr. 30, 2007) ("Tennessee courts have used the strict scrutiny approach in regard to fundamental rights 'without exception.' ") (citation omitted). "In order to survive a strict scrutiny analysis, the statute must serve a compelling state interest and be narrowly tailored to serve that interest." *In re Adoption ofJ.K.W.,* 2007 WL 161048, at *4 (citation omitted). If, however, no fundamental interest or suspect class is involved, the legislation is subject only to a rational basis test. *Harrison v. Schrader,* 569 S.W.2d 822, 825 (Tenn.1978) (footnote omit-

ted). "Under this standard, if some reasonable basis can be found for the classification, or if any state of facts may reasonably be conceived to justify it, the classification will be upheld." *Id.* (citations omitted).

***15** Our Tennessee Supreme Court has held that "medical malpractice litigants are not members of a suspect class." *Newton v. Cox,* 878 S.W.2d 105, 109 (Tenn.1994) (citing *Sutphin v. Platt,* 720 S .W.2d 455 (Tenn.1986)). Thus, in their attempt to invoke strict scrutiny, Plaintiffs contend that Tennessee Code Annotated section 29–26–121 impinges on the fundamental right of access to the courts under Article I, Section 17 of the Tennessee Constitution, which provides in relevant part:

> That all courts shall be open; and every man, for injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay.

Tenn. Const. art. I, § 17 ("Open Courts Clause"). Specifically, Plaintiffs claim that section 29–26–121 "in its attempt to super[s]ede the procedures set forth in Tenn. R. Civ. P. 3 and in its arbitrary restriction which requires that the notice letter be served during the original statute of limitations (and which does not permit any extension-equivalent to alias process-in which to complete service of the notice letter)" runs afoul of the Open Courts Clause.

Our Supreme Court, however, has explained that the Open Courts Clause "has been interpreted ... as a mandate to the judiciary and not as a limitation upon the legislature." *Harrison,* 569 S .W.2d at 827 (citing *Scott v. Nashville Bridge Co.,* 143 Tenn. 86, 223 S.W. 844 (1920)). The right to court access is not absolute. Instead,

> [t]he constitutional guaranty providing for open courts and insuring a remedy for injuries does not guaranty a remedy for every species of injury, but applies only to such injuries as constitute violations of established law of which the courts can properly take cognizance.

Id. (quoting *Barnes v. Kyle,* 202 Tenn. 529, 535–36, 306 S .W.2d 1, 4 (1957)).

> Thus, the courts are open only to those who suffer injuries as defined by the constitution, statute, or common law. Thus, if the legislature chooses to classify some damage outside the realm of "legal injury," it may do so, as long as no other constitutional provision is violated. That is what is meant by the statement that Article I, section 17 is a mandate to the judiciary and not the legislature. The legislature may limit access to the courts, but the judiciary may not.

Stutts v. Ford Motor Co., 574 F.Supp. 100, 103 (M.D.Tenn.1983) (citing *Barnes,* 306 S.W.2d 1).

In *Harrison,* our Supreme Court upheld the constitutionality of the three-year medical malpractice statute of limitations—employing a rational basis test-specifically finding that it did not violate the Open Courts Clause. Quoting with approval *Barnes,* the Court noted that statutes of limitation are " 'exclusively the creatures of the legislative branch of government [,]' " *id.* (citing *Carney v. Smith,* 222 Tenn. 472, 477, 437 S.W.2d 246, 248 (1969)), that "[t]hey are justified on the basis of policy[,]" and that the legislature, "in enacting such legislation, may weigh the conflicting interests between one person's right to enforce an otherwise valid claim and another person's right to be confronted with any claim against him (within a suitable time)." *Id.*

***16** The *Harrison* Court likewise cited with approval *Dunn v. Felt,* 379 A.2d 1140 (Del.Super.1977), which addressed whether Delaware's three-year medical malpractice statute of limitations violated a provision of the Delaware Constitution similar to Tennessee's Open Courts Clause. The *Dunn* Court found that the plaintiffs had misconceived the nature of the statute of limitations:

> It does not eliminate a remedy for a civil wrong; it simply provides that after 3 years no cause of action can arise. The General Assembly has the power to create new rights and abolish old ones so long as they are not vested.

Harrison, 569 S.W.2d at 827 (quoting *Dunn,* 379 A.2d 1140).

In the instant case, Plaintiffs take issue with section 29–26–121's requirement that written pre-suit notice of the potential health care liability claim be given within the original statute of limitations, without provision for extension. As was explained in the cases cited above, however, the legislature has the inherent authority to set the parameters under which a cause of action accrues and is abolished; in enacting section 29–26–121, it crafted an affirmative defense for failure to comply with the pre-suit notice requirements. Because the Open Courts Clause "applies only to such injuries as constitute violations of established law of which the courts can properly take cognizance[,]" *Harrison,* 569 S.W.2d at 827, we find that Plaintiffs may not successfully invoke the clause to challenge section 29–26–121, nor to insist that section 29–26–121 be analyzed under strict scrutiny.

ii. Equal Protection

"The concept of equal protection espoused by the federal and of our state constitutions FN14 guarantees that 'all persons similarly circumstanced shall be treated alike.' " *Newton v. Cox,* 878 S.W.2d 105, 109 (Tenn.1994) (quoting *Tenn. Small School Sys. v. McWherter,* 851 S.w.2d 139,153 (Tenn.1993)). Where, as here, the legislative classification does not interfere with the exercise of a fundamental right nor does it disadvantage a suspect class, the rational basis test provides the appropriate standard for determining whether the statute should be upheld on equal protection grounds. *See id.* at 109–10 (citations omitted). Under this standard, the classification must simply "rest upon a reasonable basis .... it is not unconstitutional merely because it results in some inequality." *Harrison,* 569 S.W.2d at 825. "[I]f any state of facts can reasonably be conceived to justify the classification or if the reasonableness of the class is fairly debatable, the statute must be upheld." *Id.* at 826 (citing *Swain v. State,* 527 S.W.2d 119 (Tenn.1975); *Estrin v. Moss,* 221 Tenn. 657, 430 S.W.2d 345 (1968); *Phillips v. State,* 202 Tenn. 402, 304 S.W.2d 614 (1957)); *see also Club Sys. of Tenn., Inc. v. YMCA of Middle Tenn.,* No. M2004–01966–COA–R3–CV, 2005 WL 3479628, at *10 (Tenn.Ct.W.S.App. Dec. 19, 2005) *perm. app. denied* (Tenn. June 26, 2006) ("Tennessee courts have consistently held not only that the rational basis standard is a very low level of scrutiny, but also that the party challenging the rational basis of a statute bears the burden of proving that the legislative classification in that statute is unreasonable and arbitrary.") (citing *Harrison,* 569 S.W.2d at 826). Specific evidence of the relationship between the classification and its purported purpose is unnecessary; "[t]he proper analysis is whether the legislature *could conceive* of a relationship between the statute and the purpose of the [legislation]." *Newton,* 878 S.W .2d at 110 (emphasis added).

> FN14. Although our Supreme Court has "recogniz[ed] ... [the] 'historic[ ] and linguistic[ ] distinct[ness],' " of the equal protection provisions of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution, it "has followed the framework developed by the United States Constitution for analyzing equal protection claims." *Newton v. Cox,* 878 S.W .2d 105 (Tenn.1994) (citing *Tenn. Small School Sys. v. McWherter,* 851 S.W.2d 139, 152–54 (Tenn.1993)).

***17** On appeal, Plaintiffs contend that there exists no rational basis for imposing pre-suit notice requirements upon a medical negligence claimant, while not imposing such requirements upon a *non*-medical negligence claimant. We disagree.

The courts of this state have rejected numerous equal protection challenges to specific provisions of the Tennessee Medical Malpractice Act. In *Harris-*

on v. Schrader, 569 S.W.2d 822, 825 (Tenn.1978), the plaintiffs challenged the Act's three-year statute of repose arguing, like Plaintiffs in the instant case, that no rational basis existed for treating medical malpractice plaintiffs differently from non-medical malpractice plaintiffs. In upholding the constitutionality of the statute of repose, the Court noted that

> At the time the legislature passed the statute of limitations ..., this state and the nation were in the throes of what was popularly described as a "medical malpractice insurance crisis." Because of alleged increasing numbers of claims, insurance companies had grown reluctant to write medical malpractice policies. Where policies were available, premiums had risen astronomically.

Id. at 826 (footnote omitted). The Court reasoned that the legislature could have perceived a threat, not only to the medical profession, but also to the general public. Specifically, the Court stated that the legislature may have considered the increased cost of health care due to skyrocketing liability costs, the decreased number of physicians due to the cessation of practice and early retirement, and the decreased quality of health care due to the practice of "defensive medicine." *Id.* Additionally, the Court found that "it could be argued" that placing a three-year limitation on actions could lead to decreased malpractice insurance costs. *Id.* Importantly, the Court found the *validity* of these concerns irrelevant; what mattered was that the considerations "were accepted by the legislature and formed the predicate for its action." *Id.* Ultimately, the Court could not "say that there [was] no reasonable basis" for the legislative classification or that it bore "no reasonable relation to the legislative objective of reducing and stabilizing insurance and health costs and protecting the public as a whole." *Id.* Instead, when the legislation was enacted, " 'there was indubitably a valid reason for the distinction made' by the statute." *Id.* at 827.

Similarly, in *Newton v. Cox,* 878 S.W.2d 105 (Tenn.1994), our Supreme Court rejected an equal protection challenge to Tennessee Code Annotated section 29–26–120, which establishes a contingency fee cap for attorneys representing medical malpractice claimants. Employing the rational basis test, the Court found "it conceivable that the General Assembly concluded that the contingency cap ... would further the purposes of the Medical Malpractice Act by reducing malpractice insurance costs and, therefore reduce the cost of health care to the public." *Id.* at 110. Thus, it found the statute did not violate the equal protection provisions of the Tennessee or United States constitutions. *Id.*

***18** More recently, in *Jackson v. HCA Health Services of Tennessee, Inc.,* 383 S.W.3d 497 (Tenn.Ct.App.2012), the middle section of this Court rejected an equal protection challenge to Tennessee Code Annotated section 29–26–122, which requires that a medical malpractice complaint be accompanied by a certificate of good faith. Relying upon *Harrison,* and its language regarding the purposes behind the Medical Malpractice Act, the *Jackson* Court stated,

> we cannot say that the current medical malpractice act, specifically, Tennessee Code Annotated § 29–26–122(a), has no reasonable basis for the distinction in filing good faith certificates in medical malpractice actions and not in civil actions for personal injuries caused by other means, which are not under the purview of medical malpractice, or that it has no natural relation to the legislative objective.
>
> As was the environment at the time of *Harrison,* the legislature perceived a threat in 2009, not only to the medical profession and its insurers, but to the general welfare of the citizens of this state because, believing that as liability costs increase, so does the cost of health care and the practice of "defensive medicine," spawned by the fear of costly legal actions, may lead to a lower quality of health care in general. Whether these considerations are or are not valid is not for this court to determine. What is relevant and con-

trolling is that they were accepted by the legislature and formed the predicate for its action.

Accordingly, we cannot say that there is no reasonable basis for the separate classification of health care providers or that this classification bears no reasonable relation to the legislative objective of reducing and stabilizing health costs and protecting the general public. Borrowing a phrase from *Harrison,* at the time Section 122(a) was enacted, "there was indubitably a valid reason for the distinction made" by the statute.

Id. at 505 (internal citations omitted).

Turning to the instant case, as stated above, the purpose of section 29–26–121 is " 'to give the defendant the opportunity to investigate and perhaps even settle the case before it is actually filed. At a minimum, it will give the defendant the opportunity to gather information before suit is filed and should eliminate the need for extensions of time to answer the complaint or slow-walk discovery.' " *DePue,* 2011 WL 538865, at *5 (quoting *Howell,* 2010 WL 2539651, at *14). The legislative purposes of section 29–26–121 have been further discussed as follows:

The State of Tennessee Senate Republican Caucus newsletter ... states that "[t]he legislation is designed to reduce the number of frivolous lawsuits filed in Tennessee each year ... by requiring early evaluation and streamlined disclosure of medical records.".... A news release from the Senate Republic Caucus ... contains the following relevant language:

The State Senate has approved and sent to the governor major tort reform legislation aimed at weeding out meritless medical malpractice lawsuits.

***19** ....

Key provisions in the bill include:

• Notice would be provided at least two months before a lawsuit is filed *to help resolve the case before it goes to court.*

It appears, therefore, that the Tennessee statute was intended ... to provide notice to potential parties and to facilitate early resolution of cases through settlement.

Jenkins v. Marvel, 683 F.Supp.2d 626, 639 (E.D.Tenn.2010) (footnotes and internal citations omitted).

Simply put, we find that the legislature could conceive of a relationship between section 29–26–121's pre-suit notice requirements and its legislative objectives of preventing protracted litigation through early investigation, and possibly, facilitating early resolution through settlement. *See DePue,* 2011 WL 538865, at *5 (citation omitted). These objectives are of particular importance in the context of medical malpractice claims where, as discussed above, increased malpractice insurance costs threaten both health care affordability and accessibility. In sum, because the classification rests upon a reasonable basis, we reject Plaintiffs' claim that section 29–26–121 violates the equal protection provisions of the Tennessee and United States constitutions.

iii. Due Process

Article I, section 8 of the Tennessee Constitution provides

That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

Tenn. Const. Art. I, sec. 8. This "law of the land" provision is synonymous with the due process clause of the Fourteenth Amendment to the United States Constitution. *Newton,* 878 S.W.2d at 110 (citing *State ex rel. Anglin v. Mitchell,* 596 S.W.2d 779, 786 (Tenn.1980)). "Due process under the state and federal constitutions encom-

passes both procedural and substantive protections." *Lynch v. City of Jellico,* 205 S.W.3d 384, 391 (Tenn.2006).

Substantive due process "limits oppressive government action[,]" and may be categorized into two types of claims: "(1) deprivations of a particular constitutional guarantee and (2) actions by the government which are 'arbitrary, or conscience shocking in a constitutional sense.' " *Id.* at 391–92 (citing *Collins v. City of Harker Heights,* 503 U.S. 115, 128, 112 S.Ct. 1061, 117 L.Ed.2d261 (1992); *Valot v. Southeast Local Sch. Dist. Bd. of Educ.,* 107 F.3d 1220, 1228 (6th Cir.1997)). "In short, substantive due process bars certain government action regardless of the fairness of the procedures used to implement them." *Id.* at 392 (citing *County of Sacramento v. Lewis,* 523 U.S. 833, 840, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). Where, as here, no fundamental right is involved, "the test for determining whether a statute comports with substantive due process is whether the legislation bears 'a reasonable relation to a proper legislative purpose' and is 'neither arbitrary nor discriminatory." ' *Newton,* 878 S.W.2d at 110 (quoting *Nebbia v. New York,* 291 U .S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940 (1934); *National Railroad Passenger Corp. v. Atchison, Topka & Santa Fe Ry. Co.,* 470 U.S. 451, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985)). In applying this test, courts do not "inquire into the motives of a legislative body or [ ] scrutinize the wisdom of a challenged statute or ordinance." *Martin v. Beer Bd. for City of Dickson,* 908 S.W.2d 941, 955 (Tenn.Ct.App.1995) (citations omitted).

***20** Procedural due process, however, does not prevent deprivations of "life, liberty, or property" but instead it simply "requires state and local governments to employ fair procedures when they deprive persons of a constitutionally protected interest in 'life liberty, or property.' " *Cheatham County v. Cheatham County Bd. of Zoning Appeals,* No. M2012–00930–COA–R3–CV, 2012 WL 5993757, at *3 (Tenn.Ct.App.Nov.30, 2012) (quoting *Parks Props. v. Maury County,* 70 S.W.3d 735, 743 (Tenn.Ct.App.2001)). Procedural due process requires "that individuals be given an opportunity to have their legal claims heard at a meaningful time and in a meaningful manner." *Lynch,* 205 S.W.3d at 391 (citing *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429–30, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); *Manning v. City of Lebanon,* 124 S.W.3d 562, 566 (Tenn.Ct.App.2003)). It is clear, however, "that a state may erect reasonable procedural requirements for triggering the right to an adjudication, such as statutes of limitations, and a state may terminate a claim for failure to comply with a reasonable procedural rule without violating due process rights." *Burford v. State,* 845 S.W.2d 204, 208 (Tenn.1992) (citing *Logan,* 455 U.S. at 437). When a state terminates a claim for failure to comply with procedural requirements, the procedural due process "question, then, is 'whether the state's policy reflected in the statute affords a fair and reasonable opportunity for ... bringing ... suit.' " *Id.* (quoting *Pickett v. Brown,* 638 S.W.2d 369, 376 (Tenn.1982) *rev'd on other grounds* 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983)).

In this interlocutory appeal, Plaintiffs assert that section 29–26–121 violates both the procedural and substantive due process provisions of the United States Constitution. Plaintiffs claim that the statute "is designed to take away the right of a plaintiff to bring suit, not based upon any consideration of the merits, and not based upon a reasonable statute of limitations, but by erecting artificial and punitive barriers to suit." They further contend that no rational basis exists for the statute because reduction of frivolous lawsuits can be accomplished by section 29–26–122's certificate of good faith requirement, and because after the allegedly HIPAA-violative provisions of section 29–26–121 are eliminated, section 29–26–121 will no longer work to facilitate early resolution of cases.

First, we reject Plaintiffs' contention that section 29–26–121 deprives them of their property without due process of law. As explained above, section 29–26–121 simply requires a medical mal-

practice plaintiff, within the standard statute of limitations, to provide minimal, easily-accessible information to health care providers who will be named as defendants, and several clearly-explained delivery methods for this information are available. For example, the notice may be personally delivered to the health care provider or to the provider's receptionist, or it may be sent via certified mail to the health care provider-without regard to actual receipt-which, if undelivered, may be resent within five business days. **Tenn.Code Ann. § 29–26–121(a)(3)(B), (a)(4)** . Once this pre-suit notice is given, the statute affords the plaintiff an additional 120 days in which to file suit, and statutory non-compliance may be excused for "extraordinary cause shown." Section 29–26–121 simply does not deprive Plaintiffs of a meaningful opportunity to pursue their medical malpractice claim so as to violate procedural due process.

***21** Moreover, as we explained in our equal protection analysis, section 29–26–121's pre-suit notice requirements bear a reasonable relation to the proper legislative objectives of preventing protracted litigation through early investigation, and possibly, facilitating early resolution through settlement. *See DePue,* 2011 WL 538865, at *5 (citation omitted). Despite Plaintiffs' argument that such objectives are applicable to *all* tort cases and therefore may not provide grounds for differential treatment within the medical malpractice context, we find that these objectives are of *particular* importance in the medical malpractice arena as, again, increased malpractice insurance costs threaten both health care affordability and accessibility. Moreover, based upon our above-finding that neither the statute-nor portions of it-are preempted by HIPAA, we reject Plaintiffs' argument that the statute is ineffective to facilitate early case resolution. Accordingly, we conclude that section 29–26–121 passes substantive due process muster as it is reasonably related to proper legislative purposes and it is neither arbitrary nor discriminatory. *See Newton,* 878 S.W.2d at 110 (citations omitted).

V. CONCLUSION

For the aforementioned reasons, we conclude that Tennessee Code Annotated section 29–26–121 is not an unconstitutional infringement upon the courts' rule-making authority, that it is not preempted by HIPAA, and that it does not violate the equal protection and due process provisions of state and federal law. The case is remanded for further proceedings consistent with this opinion. Costs of this appeal are taxed to Appellants, Charles Webb and Evangeline Webb, and their surety, for which execution may issue if necessary.

Tenn. Ct.App.,2013.
Webb v. Roberson
Slip Copy, 2013 WL 1645713 (Tenn.Ct.App.)

END OF DOCUMENT

EXHIBIT 4

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
James C. WILLIAMS, Individually and on behalf of the heirs at law of Gayle Ann Williams, Deceased, for the use and benefit of the heirs at law of Gayle Ann Williams, Deceased, and on behalf of Gayle Ann Williams, Deceased
v.
SMZ SPECIALISTS, P.C., Syed H. Shirazee, M.D., P.C., Syed H. Shirazee, M.D., Said Elias, M.D., P.C., Said Elias, M.D., Memphis Emergency Room Group, PLLC, Steven G. Bentley, M.D., P.C., Steven G. Bentley, M.D., Tenent Healthsystems Bartlett, Inc., St. Francis Hospital–Bartlett, and John and/or Jane Doe,
v.
State of Tennessee.

No. W2012–00740–COA–R9–CV.
Jan. 24, 2013 Session.
April 19, 2013.

Appeal from the Shelby County Circuit Court, No. CT–005482–10; Donna M. Fields, Judge.
Darrell E. Baker, Jr., Deborah Whitt, and M. Jason Martin, Memphis, Tennessee for Defendant/Appellant, Said Elias, M.D.

Michael L. Robb, Margaret F. Cooper, and Samantha E. Bennett, Memphis, Tennessee for Defendant/Appellant, Steven G. Bentley, M.D.

Robert E. Cooper, Jr., William E. Young, and Stephanie A. Bergmeyer, Nashville, Tennessee for Defendant/Intervenor/Appellant, the State of Tennessee.

Louis P. Chiozza Jr., Memphis Tennessee and Steven R. Walker, Oakland, Tennessee for Plaintiff/Appellee, James C. Williams, Individually and on behalf of the heirs at law of Gayle Ann Williams, Deceased.

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J. W.S., and J. STEVEN STAFFORD, J., joined.

OPINION

HOLLY M. KIRBY, J.

***1** This appeal involves a constitutional challenge to T.C.A. § 29–26–121, which requires notice to defendants prior to the commencement of a health care liability lawsuit. The plaintiff filed a lawsuit asserting health care liability against the defendant health care providers within the applicable statute of limitations, but without providing the defendants with prior notice as required under Section 29–26–121. In ruling on the defendants' motion for summary judgment, the trial court held that Section 29–26–121 conflicted with Rule 3 of the Tennessee Rules of Civil Procedure. On this basis, it held that the statute infringed upon the authority of the judicial branch to enact rules governing the procedures for commencing a lawsuit, and thus violated the separation of powers clause of the Tennessee Constitution. The defendant health care providers were granted permission for this interlocutory appeal under Rule 9 of the Tennessee Rules of Appellate Procedure. We reverse, holding that pre-lawsuit notice requirement in Section 29–26–121 does not contravene the separation of powers clause of the Tennessee Constitution.

FACTS AND PROCEEDINGS BELOW

The facts pertinent to this appeal are generally undisputed. On November 8, 2010, Plaintiff/Appellee James C. Williams filed a complaint in the Circuit Court for Shelby County, Tennessee against Defendant/Appellants Steven G. Bentley, M.D. ("Dr.Bentley") and Said Elias, M.D. ("Dr.Elias") (collectively "Defendants"). The lawsuit alleged that Drs. Bentley and Elias were negligent in the

care and treatment of Mr. Williams's deceased wife Gayle Ann Williams while she was hospitalized at St. Francis Hospital–Bartlett from November 8 through November 18, 2009. The complaint was filed within the limitations period under the applicable statute of limitations. However, Mr. Williams did not give Drs. Bentley and Elias "written notice of the potential claim" at least sixty days before he filed the complaint, as set forth in Tennessee Code Annotated § 29–26–121(a) and (b).

After the lawsuit was served, Drs. Bentley and Elias filed motions for summary judgment. The motions asserted that the complaint should be dismissed because Mr. Williams did not comply with the mandatory notice provisions in Section 29–26–121.

Mr. Williams's initial response to the Defendants' motions for summary judgment challenged the constitutionality of Tennessee Code Annotated § 29–26–121, on the ground that it violated the constitutional right to equal protection. After the constitutionality of the statute was called into question, Defendant/Appellant the State of Tennessee ("State") filed a motion to intervene in the lawsuit as a matter of right to defend the constitutionality of the statute, and was later added as a party by consent order.

Mr. Williams later amended his response to add challenges to the constitutionality of the statute based on the right to procedural and substantive due process. Mr. Williams also asserted the doctrine of federal preemption, arguing that Section 29–26–121 conflicted with the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") because Section 29–26–121 required a potential plaintiff to disclose protected health information, and thus, Section 29–26–121 was preempted by HIPAA.

***2** In November 2011, the trial court granted summary judgment in favor of the Defendants, based on Mr. Williams's failure to comply with the statutory pre-suit notice requirements set forth in Section 29–26–121. The trial court rejected the argument that Section 29–26–121 violated either the Equal Protection Clause or the Due Process Clause, and held that Section 29–26–121 was not preempted by HIPAA. The trial court also held that Mr. Williams had not shown "extraordinary cause" to excuse his failure to comply with Section 29–26–121.[FN1]

FN1. Pursuant to subsection (b) of Section 29–26–121, "The court has discretion to excuse compliance with this section only for extraordinary cause shown." Tenn.Code Ann. § 29–26–121(b).

After receiving the trial court's order granting summary judgment, Mr. Williams filed a motion to alter or amend the order. The motion to alter or amend argued, among other things, that Section 29–26–121 placed an unconstitutional pre-condition on the commencement of a lawsuit, and encroached upon the inherent rule-making authority of the Tennessee Supreme Court in violation of the doctrine of separation of powers. The Defendants filed responses opposing the motion to alter or amend.

In January 2012, the trial court granted Mr. Williams's motion to alter or amend. It denied the Defendants' motions for summary judgment on the basis that the pre-suit notice requirements in subsections (a) and (b) are unconstitutional. The trial court held that "only the Tennessee Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state" and "Rule 3 of the Tennessee Rules of Civil Procedure establishes how a law suit is to be commenced in this State." It characterized Section 29–26–121 as "procedural in nature" and held that "by enacting T.C.A. § 29–26–121, the Tennessee Legislature has added an additional, and preclusive, step to commencement of an action." The trial court found "no way to separate the notice requirement of [Section 29–26–121] from commencement of an action." It opined that "the Tennessee Legislature has attempted to control commencement of suit in medical malpractice actions, but the power to con-

trol procedures in the courts cannot be constitutionally exercised by any branch of government other than the courts." The trial court held that the pre-lawsuit notice requirements set forth in Section 29–26–121(a) and (b) were an "unconstitutional infringement upon the rule-making authority of the courts," and particularly infringed upon Rule 3 of the Tennessee Rules of Civil Procedure "since commencement of suit is governed by Tenn. R. Civ. P. 3." The trial court held that subsections (a) and (b) of Section 29–26–121 were unconstitutional for violating the separation of powers clause of the Tennessee Constitution, and on this basis denied the Defendants' motions for summary judgment.

The Defendants filed a motion for permission to file an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. The trial court granted permission for the interlocutory appeal, and certified a number of questions for the appeal. It first certified the question of whether Section 29–26–121 "is an unconstitutional infringement upon the rule-making authority of the court and particularly upon Tenn. R. Civ. P. 3," because Section 29–26–121 added "an additional, and preclusive, step to commencement of an action" and the Section 29–26–121 notice requirement could not be separated from the commencement of an action. It also certified the questions of whether Section 29–26–121 is preempted by HIPAA, whether it violates the equal protection and due process clauses in the state and federal constitutions, and whether the trial court erred in denying the Defendants' motions for summary judgment.

***3** Having secured the permission of the trial court for a Rule 9 interlocutory appeal, the Defendants filed applications for permission from the appellate court as well. This Court granted permission for the appeal, but limited the question on appeal to "[w]hether the trial court erred in failing to grant the motions for summary judgment of [the Defendants] by determining that Tenn.Code Ann. § 29–26–121(a) and (b) are unconstitutional because these sections violate the separation of powers doctrine."

ISSUE ON APPEAL AND STANDARD OF REVIEW

"Under Rule 9 of the Tennessee Rules of Appellate Procedure, the issues in a Rule 9 interlocutory appeal are limited to the questions that are certified by the trial court in its order granting permission for the appeal and also certified by the appellate court in its order granting permission for the appeal." *Shaffer v. Memphis Airport Auth.,* No. W2012–00237–COA–R9–CV, 2013 WL 209309, at *3; 2013 Tenn.App. LEXIS 32 at *9 (Tenn.Ct.App. Jan.18, 2013) (citing *In re Bridgestone/Firestone,* 286 S.W.3d 898, 902 (Tenn.Ct.App.2008)). Thus, the issue presented in this appeal is whether the trial court erred in denying the motions for summary judgment filed by Drs. Bentley and Elias on the basis that subsections (a) and (b) of Section 29–26–121 violate the separation of powers clause of our Constitution.

The issue presented on appeal is a question of law. Therefore, the standard of review is *de novo* without according any presumption of correctness to the trial court's holding. *Lynch v. City of Jellico,* 205 S.W.3d 384, 390 (Tenn.2006); *Taylor v. Fezell,* 158 S.W.3d 352, 357 (Tenn.2005).

ANALYSIS

In 2008, Tennessee's Legislature amended the Medical Malpractice Act by enacting two new statutes,[FN2] one of which was Tennessee Code Annotated § 29–26–121. The statute established a new requirement that a plaintiff in a health care liability action must give the contemplated health care provider defendants a pre-lawsuit notice 60 days prior to the filing of the complaint.[FN3] *Rajvongs v. Wright,* No. M2011–01889–COA–R9–CV, 2012 WL 2308563, at *4; 2012 Tenn.App. LEXIS 393, at *11 (Tenn.Ct.App. June 18, 2012) (perm. app. granted Sept. 19, 2012). Subsections (a) and (b) of Section 29–26–121 provide:

FN2. The Legislature also enacted Tennessee Code Annotated § 29–26–122,

which requires that the plaintiff in a health care liability action file a certificate of good faith with his complaint. In *Jackson v. HCA Health Services of Tenn., Inc.*, this Court held that Section 29–26–122 does not conflict with Rule 3 of the Tennessee Rules of Civil Procedure and does not violate the separation of powers clause of the Tennessee Constitution. *Jackson v. HCA Health Services of Tenn., Inc.*, 383 S.W.3d 497, 506–07 (Tenn.Ct.App.2012) (perm. app. denied Aug. 16, 2012).

FN3. In 2009, the Legislature amended Section 29–26–121(c) to increase the extension of the statutory limitations and repose periods, from 90 days to 120 days. *Rajvongs,* 2012 WL 2308563, at *4 n. 6, 2012 Tenn.App. LEXIS 393, at *13 n. 6. In 2012, the Legislature substituted the term "health care liability" for "medical malpractice" in the statutes. *Vaughn v. Mountain States Health Alliance,* No. E2012–01042–COA–R3–CV, 2013 WL 817032, at *4 n. 7; 2013 Tenn.App. LEXIS 159, at *10 n. 7 (Tenn.Ct.App. March 5, 2013) (citing Acts 2012, ch. 798 § 59 (effective April 23, 2012)).

(a) (1) Any person, or that person's authorized agent, asserting a potential claim for health care liability shall give written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon health care liability in any court of this state.

(2) The notice shall include:

(A) The full name and date of birth of the patient whose treatment is at issue;

(B) The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient;

(C) The name and address of the attorney sending the notice, if applicable;

*4 (D) A list of the name and address of all providers being sent a notice; and

(E) A HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.

(3) The requirement of service of written notice prior to suit is deemed satisfied if, within the statutes of limitations and statutes of repose applicable to the provider, one of the following occurs, as established by the specified proof of service, which shall be filed with the complaint:

(A) Personal delivery of the notice to the health care provider or an identified individual whose job function includes receptionist for deliveries to the provider or for arrival of the provider's patients at the provider's current practice location. Delivery must be established by an affidavit stating that the notice was personally delivered and the identity of the individual to whom the notice was delivered; or

(B) Mailing of the notice:

(i) To an individual health care provider at both the address listed for the provider on the Tennessee department of health web site and the provider's current business address, if different from the address maintained by the Tennessee department of health; provided, that, if the mailings are returned undelivered from both addresses, then, within five (5) business days after receipt of the second undelivered letter, the notice shall be mailed in the specified manner to the provider's office or business address at the location where the provider last provided a medical service to the patient; or

(ii) To a health care provider that is a corporation or other business entity at both the address

for the agent for service of process, and the provider's current business address, if different from that of the agent for service of process; provided, that, if the mailings are returned undelivered from both addresses, then, within five (5) business days after receipt of the second undelivered letter, the notice shall be mailed in the specified manner to the provider's office or business address at the location where the provider last provided a medical service to the patient.

(4) Compliance with shall be demonstrated by filing a certificate of mailing from the United States postal service stamped with the date of mailing and an affidavit of the party mailing the notice establishing that the specified notice was timely mailed by certified mail, return receipt requested. A copy of the notice sent shall be attached to the affidavit. It is not necessary that the addressee of the notice sign or return the return receipt card that accompanies a letter sent by certified mail for service to be effective.

(b) If a complaint is filed in any court alleging a claim for health care liability, the pleadings shall state whether each party has complied with subsection (a) and shall provide the documentation specified in subdivision (a)(2). The court may require additional evidence of compliance to determine if the provisions of this section have been met. The court has discretion to excuse compliance with this section only for extraordinary cause shown.

*5 Tenn.Code Ann. § 29–26–121(a) and (b) (2012).

On appeal, Mr. Williams argues vigorously that Section 29–26–121 conflicts with Rule 3 of the Tennessee Rules of Civil Procedure, which governs the commencement of civil actions. Rule 3 provides: "All civil actions are commenced by filing a complaint with the clerk of the court. An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not issued and whether process be returned served or unserved...." Tenn. R. Civ. P. 3 (2012). Mr. Williams contends that Section 29–26–121 "supercedes Rule 3 by adding a step," that is, the statute requires the plaintiff in a health care liability action to give written notice of the potential claim to health care providers who will be named defendants at least 60 days before the complaint is filed. This additional step, Mr. Williams notes, is not included in Tenn. R. Civ. P. 3, and consequently, it changes the process that was intended by the courts for the commencement of a lawsuit, resulting in a conflict with the judiciary's authority to set court procedures. Section 29–26–121(a), Mr. Williams argues, "effectively kills the suit before it starts," in that it conflicts with the provision in Rule 3 that if process is not served within 90 days of issuance, the plaintiff can toll the running of the statute of limitations by obtaining issuance of new process within one year from issuance of the previous process.

In the alternative, even if Section 29–26–121 does not directly conflict with Tenn. R. Civ. P. 3, Mr. Williams characterizes Section 29–26–121 as purely procedural rather than substantive, and contends that it is contrary to the inherent power of the judicial branch for the legislative branch to promulgate the procedural rules that govern the courts. Mr. Williams describes the statute as an attempt by the Legislature to control the commencement of a health care liability action; as such, Mr. Williams contends, it encroaches on the inherent rule-making authority of the Tennessee Supreme Court. The Tennessee Legislature's attempt to control the judicial process, Mr. Williams insists, violates the separation of powers clause of our Constitution, and must not be permitted.

In contrast, the State and the Defendants maintain that Section 29–26–121 does not conflict with Rule 3. They argue that Section 29–26–121 only adds a "brief temporal restriction before the suit may be commenced." Thus, the statute comple-

ments Rule 3 by adding a pre-suit notice requirement, and the two can be construed harmoniously. The Legislature's enactment of Section 29–26–121, they contend, was a legitimate exercise of the Legislature's police power and its authority to set policy for the State, and does not impact inherent judicial function. Therefore, they argue that the trial court erred in holding that Section 29–26–121 violates the separation of powers clause of the Tennessee Constitution.

***6** At the outset, we note the standard utilized in evaluating the constitutionality of Section 29–26–121 in this appeal.[FN4] "[I]t is well-established in Tennessee that when considering the constitutionality of a statute, we start with a strong presumption that acts passed by the legislature are constitutional." *Lynch,* 205 S.W.3d at 390 (citing *Osborn v. Marr,* 127 S.W.3d 737, 740–41 (Tenn.2004)). Our "charge is to uphold the constitutionality of a statute wherever possible." *Waters v. Farr,* 291 S.W.3d 873, 882 (Tenn.2009). Therefore, "we must indulge every presumption and resolve every doubt in favor of constitutionality." *Lynch,* 205 S.W.3d at 390 (quoting *Vogel v. Wells Fargo Guard Servs.,* 937 S.W.2d 856, 858 (Tenn.1996)). The presumption of constitutionality "applies with even greater force" where, as here, a party "brings a facial challenge to the validity of a statute." *Waters,* 291 S.W.3d at 882. When a facial challenge to the constitutionality of a statute is made, "the challenger must establish that no set of circumstances exists under which the statute would be valid." *Id.* at 921.

FN4. In this appeal, Mr. Williams urges this Court to apply the "strict scrutiny" test to evaluate the constitutionality of Section 29–26–121. However, the strict scrutiny test only applies when the legislative action at issue is said to impermissibly interfere with the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class. *See Harrison v. Schrader,* 569 S.W.2d 822, 825 (Tenn.1978). While the trial court below considered arguments based on equal protection and the Open Courts clause of the Tennessee Constitution, those issues are not within the parameters of the question certified for this Rule 9 appeal. Accordingly, we decline to apply the strict scrutiny standard to our analysis of whether Section 29–26–121 contravenes the separation of powers clause of the Constitution. We note as well that Mr. Williams's appellate brief includes arguments that Section 29–26–121 interferes with the exercise of a fundamental right of access to the courts, and that the complaint should have been dismissed without prejudice. We decline to consider those arguments for the same reason.

The question before us in this appeal is whether Section 29–26–121 violates the separation of powers clause of the Tennessee Constitution. Article II, Section 1 of our Constitution states: "The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial." Tenn. Const. art. II, § 1. This is followed by the separation of powers clause in Article II, Section 2: "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." Tenn. Const. art. II, § 2.

The separation of powers clause "prohibits one branch from encroaching on the powers or functions of the other two branches." *Colonial Pipeline Co. v. Morgan,* 263 S.W.3d 827, 843 (Tenn.2008) (citing Tenn. Const. art. II, § 2; *State v. Brackett,* 869 S.W.2d 936, 939 (Tenn.Crim.App.1993)). "In general, the 'legislative power' is the authority to make, order, and repeal law; the 'executive power' is the authority to administer and enforce law; and the 'judicial power' is the authority to interpret and apply law ." *Colonial Pipeline Co.,* 263 S.W.3d at 843, n. 8. However, "[t]he branches of government

... are guided by the doctrine of checks and balances; the doctrine of separation of powers is not absolute." *Id.* "%[I]t is impossible to preserve perfectly the 'theoretical lines of demarcation between the executive, legislative and judicial branches of government" and "[i]ndeed there is, by necessity, a certain amount of overlap because the three branches of government are interdependent." *State v. Mallard,* 40 S.W.3d 473, 481 (Tenn.2001); *see also Newton v. Cox,* 878 S.W.2d 105, 111 (Tenn.1994) ("[A]reas exist in which both the legislative and judicial branch have interests, and that in such areas both branches may exercise appropriate authority.").

***7** "Only the Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state." *Mallard,* 40 S.W.3d at 480–81; *see also Thomas v. Oldfield,* 279 S.W.3d 259, 261 (Tenn.2009). This power is vested with the Supreme Court "by virtue of the establishment of a Court and not by largess of the legislature." *Mallard,* 40 S.W.3d at 481 (quoting *Haynes v. McKenzie Mem'l Hosp.,* 667 S.W.2d 497, 498 (Tenn.Ct.App.1984)); Tenn.Code Ann. § 16–3–402 (2012). "Furthermore, because the power to control the practice and procedure of the courts is inherent in the judiciary and necessary to engage in the complete performance of the judicial function, this power cannot be constitutionally exercised by any other branch of government." *Corum v. Holston Health & Rehab. Ctr.,* 104 S.W.3d 451, 454 (Tenn.2003) (citing *Mallard,* 40 S.W.3d at 481; *Anderson County Quarterly Court v. Judges of the 28th Judicial Cir .,* 579 S.W.2d 875, 877 (Tenn.Ct.App.1978)); *see also* Tenn. Const. art. II, § 2. While the power of the legislature is broad, "[i]ts power ... is not unlimited," and any exercise of power "by the legislature must inevitably yield when it seeks to govern the practice and procedure of the courts." *Mallard,* 40 S.W.3d at 480.

In light of the Court's inherent power to promulgate the rules governing the practice and procedures of the courts, Tennessee Code Annotated § 16–3–406 was enacted to ensure that rules enacted pursuant to the prescribed procedure between the Supreme Court and the Legislature prevail over conflicting laws. *See* Robert Banks, Jr. & June F. Entman, *Tennessee Civil Procedure* § 1–2(b) (3d ed.2009). Therefore, once a rule governing the practice and procedure of the courts has become effective, "all laws in conflict therewith shall be of no further force or effect." *Corum,* 104 S.W.3d at 454–55; Tenn.Code Ann. § 16–3–406. However, even with regard to procedural and evidentiary rules, the Tennessee Supreme Court has held:

> [T]he courts of this state have, from time to time, consented to the application of procedural or evidentiary rules promulgated by the legislature. Indeed, such occasional acquiescence can be expected in the natural course of events, as this practice is sometimes necessary to foster a workable model of government. When legislative enactments (1) are reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court, then considerations of comity amongst the coequal branches of government counsel that the courts not turn a blind eye. This Court has long held the view that comity and cooperation among the branches of government are beneficial to all, and consistent with constitutional principles, such practices are desired and ought to be nurtured and maintained. While it is sometimes difficult to practically ascertain where Article II, section 2 draws the line, the distinction may be simply stated as that between cooperation and coercion.

***8** *Mallard,* 40 S.W.3d at 481–82 (citations omitted).

"The essence of Tennessee Code Annotated section 29–26–121 is that a defendant be given notice of a medical malpractice claim before suit is filed." *Myers v. Amisub (SFH) Inc.,* 382 S.W.3d 300, 309 (Tenn.2012). The pre-lawsuit notice requirements in Section 29–26–121 do not conflict with the Court's procedural rules, including Tenn.

R. Civ. P. 3., because Section 29–26–121 requires notice of a potential claim "before the filing of the complaint." Tenn.Code Ann. § 29–26–121(a)(1). The pre-suit notice requirements are satisfied before the lawsuit is "commenced" pursuant to Rule 3. Once the suit is "commenced" under Rule 3, it then falls to the courts to hear the facts and decide the issues, including the issue of whether the action should be dismissed for failure to comply with the pre-lawsuit requirements. *See Underwood v. State,* 529 S.W.2d 45, 47 (Tenn.1975). ("A legislative enactment which does not frustrate or interfere with the adjudicative function of the courts does not constitute an impermissible encroachment upon the judicial branch of government."). Indeed, this Court recently held that Section 29–26–121 does not "redefine the commencement of an action as occurring at any time other than when the complaint is filed." *Rajvongs,* 2012 WL 2308563, at *5, 2012 Tenn.App. LEXIS 393, at *15. Therefore, Section 29–26–121 and Rule 3 can be construed harmoniously.

In addition, the important policy reasons behind the Legislature's enactment of Section 29–26–121 belie Mr. Williams's contention that the statute is purely procedural. The Tennessee Supreme Court in *Myers* explained the policy reasons for the statute:

> By passing this statute, the legislature intended to give prospective defendants notice of a forthcoming lawsuit. In Senate committee discussion of the bill that introduced Tennessee Code Annotated sections 29–26–121 and 122, the bill's cosponsor, Senator Mark Norris, stated that the new law was "designed to give people notice that there's about to be a claim and to put everyone who might be involved on notice that a suit will shortly be filed."

Myers, 382 S.W.3d at 309–310 (footnote omitted). One court identified the problem the legislation was intended to address:

> The State of Tennessee Senate Republican Caucus newsletter for the week of April 2, 2007 states that "[t]he legislation is designed to reduce the number of frivolous lawsuits filed in Tennessee each year ... by requiring early evaluation and streamlined disclosure of medical records." TN Senate Republican Caucus Weekly Wrap, April 6, 2007 (*available at* http://www.tnsenate.com/weekly2007/04–06–07.htm). A news release from the Senate Republican Caucus on April 24, 2008 contains the following relevant language:
>
> > The State Senate has approved and sent to the governor major tort reform legislation aimed at weeding out meritless medical malpractice lawsuits.
> >
> > ***9** Key provisions in the bill include:
> >
> > Notice would be provided at least two months before a lawsuit is filed to help resolve the case before it goes to court.

Jenkins v. Marvel, 683 F.Supp.2d 626, 639 (E.D.Tenn.2010) (quoting TN News Rel., S. Rep. 4/24/2008) (footnote and emphasis omitted).

Thus, while Section 29–26–121 sets forth procedural steps to be taken by a plaintiff in a health care liability action, the procedural steps in the statute serve the legislative purpose of giving the potential health care provider defendants "the opportunity to investigate and perhaps even settle the case before it is actually filed." *Hinkle v. Kindred Hosp.,* No. M2010–02499–COA–R3–CV, 2012 WL 3799215, at *6; 2012 Tenn.App. LEXIS 611, at *15–16 (Tenn.Ct.App. Aug.31, 2012) (citing *Howell v. Claiborne and Hughes Health Center,* M2009–01683–COA–R3–CV, 2010 WL 2539651 at *14, 2010 Tenn.App. LEXIS 400, at *40–41 (Tenn.Ct.App. May 27, 2010) (perm. app. granted Dec. 7, 2010, app. dismissed Jan. 19, 2011)); *see also Rajvongs,* 2012 WL 2308563, at *8, 2012 Tenn.App. LEXIS 393, at *15; *DePue v. Schroeder,* No. E2010–00504–COA–R9–CV, 2011 WL 538865, at *6; 2011 Tenn.App. LEXIS 62, at *15–20 (Tenn.Ct.App. Feb.15, 2011) (perm. app.

denied Aug. 31, 2011) (quoting *Jenkins,* 683 F.Supp.2d at 638–39). The pre-lawsuit notice requirements potentially promote an early resolution and "reduce the number of frivolous lawsuits filed in Tennessee each year ... by requiring early evaluation and streamlined disclosure of medical records." *DePue,* 2011 WL 538865, at *6, 2011 Tenn.App. LEXIS 62, at *16 (relying on *Jenkins,* 683 F.Supp.2d at 638). To help balance the burden of the pre-suit notice requirement of subsections (a) and (b) of Section 29–26–121, the Legislature extended the statute of limitations in subsection (c) and created an "extraordinary cause" exception to the notice requirement "so that it would not be an absolute bar to all claims whatsoever for failure to comply with the notice requirements." Tenn.Code Ann. § 29–26–121(b); *DePue,* 2011 WL 538865, at *7, 2011 Tenn.App. LEXIS 62, at *18. The overall statutory scheme, including the pre-lawsuit notice requirement in Section 29–26–121, is driven by the Legislature's substantive public policy concerns, and therefore cannot be described as purely procedural. *See Biscan v. Brown,* 160 S.W.3d 462, 474 (Tenn.2005) ("Although it is the province of this Court to prescribe rules for practice and procedure in the state's courts, where a decision of the legislature chiefly driven by public policy concerns infringes on that power we will generally defer to the judgment of the legislature.").

Whether the statute is wise or actually accomplishes the Legislature's stated purpose is not for us to say. "[I]t is not the role of this Court to pass upon the wisdom or lack thereof of the legislation under review. In the absence of constitutional infirmity such matters are ones of policy solely for the legislature ." *Harrison v. Schrader,* 569 S.W.2d 822, 827 (Tenn.1978).

***10** For all of these reasons, we must conclude that Mr. Williams has not overcome the strong presumption that Section 29–26–121 is constitutional. Accordingly, we must reverse the decision of the trial court insofar as it denied the Defendants' motions for summary judgment on the basis that Section 29–26–121 is unconstitutional as violative of the separation of powers clause of the Tennessee Constitution.

CONCLUSION

The decision of the trial court is reversed and the cause is remanded for further proceedings consistent with this Opinion. Costs on appeal are taxed to Plaintiff/Appellee James C. Williams, individually and on behalf of the heirs at law of Gayle Ann Williams, for which execution may issue if necessary.

Tenn.Ct.App.,2013.
Williams v. SMZ Specialists, P.C.
Slip Copy, 2013 WL 1701843 (Tenn.Ct.App.)

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EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

KENNEDY WILLIAM MILLER,

Plaintiffs,

VS. No. 2:13-cv-02149-SHL-dkv

CHINENYE UCHENDU, M.D. and
METHODIST HEALTHCARE MEMPHIS
HOSPITALS d/b/a METHODIST
LEBONHEUR HEALTHCARE,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR QUALIFIED PROTECTIVE ORDER TO ALLOW *EX PARTE* INTERVIEWS WITH PLAINTIFF'S TREATING HEALTHCARE PROVIDERS

Before the court is the March 8, 2016 joint motion of the defendants, Methodist Healthcare – Memphis Hospitals ("Methodist") and Chinenye Uchendu, M.D. ("Dr. Uchendu") (collectively "the Defendants"), for a qualified protective order to allow *ex parte* interviews with fourteen treating healthcare providers of the plaintiff, Kennedy William Miller ("Miller"). (ECF No. 135.) Miller filed a response in opposition on March 22, 2016, (ECF No. 141), and the Defendants filed a reply on April 14, 2016, (ECF No. 146). The motion was referred to the United States Magistrate Judge for determination. (ECF No. 143.)

Also before the court is the April 21, 2016 joint motion of the Defendants for a qualified protective order to allow *ex parte* interviews with four more treating healthcare providers of Miller. (ECF No. 157.) Miller filed a response in opposition on May 3, 2016. (ECF No. 167.) The motion was referred to the United States Magistrate Judge for determination. (ECF No. 161.) For the reasons that follow, the Defendants' motions are granted.

I. PROCEDURAL AND FACTUAL BACKGROUND

In this healthcare liability action filed on February 15, 2013 in the Circuit Court of Shelby County, Tennessee, Miller alleges that Dr. Uchendu and the staff at Methodist fell below the standard of care in their treatment of him on October 21, 2011, at the emergency room in failing to diagnose and treat Miller for an acute myocardial infarction, and that, as a result, he sustained injuries and damages. (ECF No. 1-1.) In his complaint, Miller sets forth five causes of actions: (1) medical malpractice against both defendants; (2) *res ipsa loquitor* negligence against both defendants; (3) a claim under the Emergency Management Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, against Methodist only; (4) negligence per se on the part of Methodist; and (5) ordinary and gross negligence by both defendants. (*Id.*) On March 8, 2013, Methodist removed the action to the U.S. District Court for the

Western District of Tennessee pursuant to federal-question jurisdiction, 28 U.S.C. § 1331. (ECF No. 1.) [1]

In the March 8, 2016 motion, the Defendants seek a qualified protective order to allow *ex parte* interviews of fourteen of Miller's treating healthcare providers:

1. Michael McCabe, M.D.
2. Monica Lewis, Ph.D.
3. William Eugene Burch, M.D.
4. Joseph Seth Weinstein, M.D.
5. C. Ward-Washington, M.D.
6. James B. Lewis, M.D.
7. Michael Washington, M.D.
8. Paul F. Burgess, R.N.
9. Mohamad Moughrabieh, M.D.
10. Ajay Dalal, M.D.
11. David Stewart, M.D.
12. Marshall Elam, M.D.
13. Crystal Ann Jacvino, D.O.
14. Adedayo Adeboy, M.D.

(ECF No. 135.) In the April 21, 2016 motion, the Defendants seek a qualified protective order to allow *ex parte* interviews of four of Miller's treating healthcare providers:

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[1]The only federal claim is the EMTALA claim against Methodist. All the remaining claims, including the Healthcare Liability claim, are state law claims.

1. Jennifer Turnage

2. Kalanda Rankin

3. Gary Davis

4. Andrew Mills

(ECF No. 157.) The Defendants request that they be allowed during these interviews to obtain Miller's protected health information pursuant to Tenn. Code Ann. § 29-26-121(f)(1) and to question the treating healthcare providers regarding their opinions about the standard of care and causation pursuant to Tenn. Code Ann. § 29-26-121(f)(2). (ECF Nos. 135, 157.) In response, Miller argues that Tenn. Code Ann. § 29-26-121(f) is preempted by the Rules Enabling Act, 28 U.S.C. § 2072, and the Health Insurance Portability and Accountability Act ("HIPAA"), 45 C.F.R. § 164.501 *et seq.*, and it violates the Tennessee Constitution's separation of powers doctrine. (ECF Nos. 141-1, 167.)

On March 23, 2016, Miller served a notice on the Attorney General of the State of Tennessee, in accordance with Fed. R. Civ. P. 5.1, that he had challenged the constitutionality of the state statute. (ECF No. 142.) In addition, on April 19, 2016, the court certified to the Attorney General of the State of Tennessee under 28 U.S.C. § 2403 that the constitutionality of a state statue had been questioned. The State of Tennessee moved to intervene in this action on June 20, 2016, (ECF No. 192), and

filed a brief in support of the constitutionality of Tenn. Code Ann. § 29-26-121(f) on July 19, 2016, (ECF No. 200).

II. ANALYSIS

A. Applicable Version of Tenn. Code Ann. § 29-26-121(f)

At the outset, the court must decide which version of Tenn. Code Ann. § 29-26-121(f) applies to this lawsuit. To determine what version applies, it is necessary for the court to construe the statute to determine its intent and meaning. When construing a statute, the duty of the court is "to ascertain and effectuate the intent of the legislature without broadening a statute beyond its intended scope." *Thurmond v. Mid-Cumberland Infectious Disease Consultants, PLC*, 433 S.W.3d 512, 516 (Tenn. 2014). Statutes should be construed according to the natural and ordinary meaning of the language chosen by the legislature and in a reasonable manner which avoids statutory conflicts. *Baker v. State*, 417 S.W.3d 428, 433 (Tenn. 2013). "When statutory language is clear and unambiguous, [the court] must apply its plain meaning in its normal and accepted use." (*Id.*) If it is ambiguous, the court can take other matters into consideration, including relevant historical facts, the entire statutory scheme, the legislative history, earlier versions of the statute, and public policy. *Lee Medical Inc. v. Beecher*, 312 S.W.3d 515, 527-28 (Tenn. 2010). The court begins its

construction by examining the background and evolution of Tenn. Code Ann. § 29-26-121(f).

1. *Tennessee Law Prior to Tenn. Code Ann. § 29-26-121(f)*

In *Givens v. Mullikin*, 75 S.W.3d 383 (Tenn. 2002), the Tennessee Supreme Court acknowledged an implied covenant of confidentiality between a doctor and a patient. *Id.* at 407-08. The implied covenant of confidentiality ensures that "any confidential information gained through the [physician-patient] relationship [would] not be released without the patient's permission." *Id.* at 407 (quotation and internal citations omitted). The *Givens* court's holding was grounded in several Tennessee statutes that require a physician to keep a patient's medical records and identifying information confidential. *Id.* (citing Tenn. Code Ann. §§ 63-2-101(b)(1), 68-11-1502, 68-11-1503). The *Givens* court established an exception for disclosures made pursuant to a formal court process due to the need to conduct discovery of the plaintiff's relevant health information. *Id.* at 408.

Four years later, in *Alsip v. Johnson City Med. Ctr.*, 197 S.W.3d 722 (Tenn. 2006), the Tennessee Supreme Court specifically addressed *ex parte* interviews between the defendant and the plaintiff's treating physicians. *Id.* at 727-730. The *Alsip* court reiterated the premise that the implied covenant of confidentiality is not absolute and that "by filing the lawsuit,

the plaintiff impliedly consents to disclosure of his relevant medical information." *Id.* at 726-27. A plaintiff's non-relevant health information continued to be protected by the covenant of confidentiality despite the fact that he has filed a healthcare liability action. *Id.* at 727-28. As to *ex parte* interviews, the *Alsip* court held that such interviews were an unnecessary discovery tool in light of formal methods of discovery and could lead to the "disclosure of irrelevant and confidential medical information." *Id.* at 727-28 (citation omitted).

2. *Enactment of Tenn. Code Ann. 29-26-121(f), Amendments, and Legislative Purpose*

In 2008 and 2009, the Tennessee Medical Malpractice Act, Tenn. Code Ann. § 29-26-101, *et seq.*,[2] was amended to establish new procedural requirements for plaintiffs seeking to file medical malpractice actions, specifically to require pre-suit notice to persons or entities named as defendants and require the filing of a "certificate of good faith" confirming that one or more experts had been consulted that there was a good faith basis for filing the complaint. *Ellithorpe v. Weismark*, 479 S.W.3d 818, 824-25 (Tenn. 2015). "The purpose behind Tenn. Code. Ann. § 29-26-121 and other [] amendments to the Medical

[2]In 2011, Tennessee Code Annotated sections 29-26-115 through 122 and 202 of the Medical Malpractice Act were amended to replace the term "medical malpractice" with the term "health care liability." *Ellithorpe v. Weismark,* 479 S.W.3d 818, 825 n.6 (Tenn. 2015).

Malpractice Act was to provide notice to health care providers of potential claims against them so that they might investigate the matter and perhaps settle the claim, and also to reduce the number of meritless claims which were filed." *Howell v. Claiborne & Hughes Health Ctr.*, No. M200901683-COAR-3CV, 2010 WL 2539651, at *16 (Tenn. Ct. App. June 24, 2010), *overruled on other grounds by Myers v. AMISUB (SFH), Inc.*, 382 S.W.3d 300 (Tenn. 2012)(citations omitted); *see also Webb v. Roberson*, No. W2012-01230-COA-R9CV, 2013 WL 1645713, at *19 (Tenn. Ct. App. Apr. 17, 2013)(stating that section 121's legislative objectives were to "prevent[] protracted litigation through early investigation, and possibly, facilitat[e] early resolution through settlement" (citation omitted)).

a. The 2012 Amendment

On July 1, 2012, the Tennessee legislature amended Tenn. Code Ann. § 29-26-121 to add section (f), which allows the defendant to petition the trial court for permission to conduct *ex parte* interviews with a plaintiff's relevant treating healthcare providers ("the 2012 Amendment"). Tenn. Code Ann. § 29-26-121(f), as amended in 2012, read in full as follows:

> (1) Upon the filing of any "healthcare liability action," as defined in § 29-26-101, the named defendant(s) may petition the court for a qualified protective order allowing the defendant(s) and their attorneys the right to obtain protected health information during interviews, outside the presence of claimant or claimant's counsel, with the relevant patient's treating "healthcare providers," as defined

by § 29-26-101. Such petition shall be granted under the following conditions:

(A) The petition must identify the treating healthcare provider(s) for whom the defendant(s) seek a qualified protective order to conduct an interview;

(B) The claimant may file an objection seeking to limit or prohibit the defendant(s) or the defendant(s)' counsel from conducting the interviews, which may be granted only upon good cause shown that a treating healthcare provider does not possess relevant information as defined by the Tennessee Rules of Civil Procedure; and

(C) The qualified protective order shall expressly limit the dissemination of any protected health information to the litigation pending before the court.

(2) Any disclosure of protected health information by a healthcare provider in response to a court order under this section shall be deemed a permissible disclosure under Tennessee law, any Tennessee statute or rule of common law notwithstanding.

(3) Nothing in this part shall be construed as restricting in any way, the right of a defendant or defendant's counsel from conducting interviews outside the presence of claimant or claimant's counsel with the defendant's own present or former employees, partners, or owners concerning a healthcare liability action.

S.B. 2789, 2012 Tenn. Pub. Acts 926. The 2012 bill amending Section (f) provided: "This act shall take effect July 1, 2012, and shall apply to all healthcare liability actions commenced on or after July 1, 2012, the public welfare requiring it." *Id.* § 2. Because Miller filed this complaint on February 15, 2013, (ECF No. 1-1), section (f) applies to the instant action.

The 2012 Amendment is "[s]ometimes called 'the *Givens* Fix' because it arose against the backdrop of *Givens* and a 'reported . . . backlash of debate among defense lawyers.'" *Dean-Hayslett v. Methodist Healthcare*, No. W2014-00625-COA-R10-CV, 2015 WL 277114, at *9 (Tenn. Ct. App. Jan. 20, 2015) (quotations omitted). The 2012 Amendment "effectively legislatively abrogated *Givens* and *Alsip* to the extent they barred *ex parte* interviews of a plaintiff's treating healthcare providers by defendants and defense counsel outside the discovery process." *Id.* (citing *Hall v. Crenshaw*, No. W2014-0062-COA-R9-CV, 2014 WL 3555987, at *4 n.2 (Tenn. Ct. App. July 18, 2014)).

The legislative history indicates that by enacting 121(f), the Tennessee General Assembly intended to give the defendant and its counsel the same access to speak with the plaintiff's healthcare providers as the plaintiff. Proponents of the bill stated that the amendment would promote more cost-effective and efficient litigation by allowing defense counsel to quickly assess the merits of the case and begin settlement discussions. *See* Tenn. S. Judiciary Comm. Hearing, S.B. 2789, 107th Gen. Assemb., 2d Reg. Sess. (Mar. 13, 2012) (statement of State Sen. Brian Kelsey & Howard Hayden);[3] Tenn. H. Judiciary Subcomm.

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[3]The Tennessee Senate Judiciary Committee hearing is available at http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=5125.

Hearing, H.B. 2979, 107th Gen. Assemb., 2d Reg. Sess. (Mar. 21, 2012)(statement of State Rep. Vance Dennis).[4]

Further, legislative hearings also demonstrate that the Tennessee legislature was equally concerned about the patient's privacy and confidentiality of their medical records because proponents of the bill often stated that they intended for section 121(f) to be "compliant with HIPAA" and "no less restrictive than HIPAA." *See, e.g.*, Tenn. S. Judiciary Comm. Hearing, S.B. 2789, 107th Gen. Assemb., 2d Reg. Sess. (Mar. 13, 2012)(statement of Howard Hayden).[5]

b. The 2013 Amendment

On July 1, 2013, Tenn. Code Ann. § 29-26-121(f)(1)(C) was amended by deleting the subdivision (C) in its entirety and substituting it with subdivisions (C)(i) and (ii) ("the 2013 Amendment"). The amendment stated as following:

> (C)(i) The qualified protective order shall expressly limit the dissemination of any protected health information to the litigation pending before the court and require the defendant or defendants who conducted the interview to return to the healthcare provider or destroy any protected health information obtained in the course of any such interview, including all copies, at the end of the litigation.

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[4] The Tennessee House Judiciary Subcommittee hearing is available at http://tnga.granicus.com/MediaPlayer.php?view_id=143&clip_id=5202.

[5] The Tennessee Senate Judiciary Committee hearing is available at http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=5125.

> (ii) The qualified protective order shall expressly provide that participation in any such interview by a treating healthcare provider is voluntary.

See S.B. 273, 2013 Tenn. Pub. Acts 23. The 2013 bill amending Section (f) provided: "This act shall take effect July 1, 2013, and shall apply to all healthcare liability actions commenced on or after July 1, 2013, the public welfare requiring it." *See id.* Because Miller's complaint was filed before July 1, 2013, the 2013 Amendment to Tenn. Code Ann. § 29-26-121(f) does not apply to this lawsuit.

c. The 2015 Amendment

In January of 2014, the Tennessee Court of Appeals considered whether the defendant could seek to elicit opinions regarding the defendant's standard of care and whether the defendant's acts or omissions caused the plaintiff's injury during the *ex parte* interviews authorized by section 121(f). *Dean-Hayslett*, 2014 WL 277114, at *13-14. The *Dean-Hayslett* court ultimately held that section 121(f) does not authorize the defendant to elicit the opinions of the plaintiff's healthcare providers as to the standard of care and causation. *Id.* at *14.

Thereafter, on April 24, 2015, Tenn. Code Ann. § 29-26-121(f)(2) was rewritten to allow disclosure of opinions as to the standard of care and causation. Specifically, the amendment to section 121(f)(2) ("the 2015 Amendment") states:

> (2) Any healthcare provider's disclosure of relevant information in response to a court order under this section, including, but not limited to, protected health information, opinions as to the standard of care of any defendant, compliance with or breach of the standard, and causation of the alleged injury, shall be deemed a permissible disclosure under Tennessee law.

H.B. 1003, 2015 Tenn. Pub. Acts 268. The 2015 bill amending Section (f) provided: "This act shall take effect upon becoming a law, the public welfare requiring it." *Id.* § 2. Notably, when the legislation to amend § 121(f) was first introduced on February 12, 2015, the text of House Bill No. 1003 contained different language regarding the effective date. The early version of the bill stated: "This act shall take effect July 1, 2015, and shall apply to all healthcare liability actions commenced on or after July 1, 2015, the public welfare requiring it." 2015 Tenn. H.B. 1003, 109th Gen. Assemb., 1st Reg. Sess. Thereafter, House Bill No. 1003 was amended to state that it "shall take effect upon becoming law." H.B. 1003, 2015 Tenn. Pub. Acts 268.

The Defendants argue, without citation to any case authority, that the 2015 amendment to section 121(f)(2) and the timing of the bill as a direct response to *Dean-Hayslett* indicate the legislature's intent for the bill to apply to pending healthcare liability actions. (Joint Mot. for Prot. Order 6-7, ECF No. 135-1.) Miller, also without citation to any case authority, argues that the 2015 Amendment did not become

effective until its enactment on April 24, 2015, and therefore is not applicable to this lawsuit which was filed on February 15, 2013. (Pl.'s Resp. 5, ECF No. 141-1.) Miller insists that the 2012 version, which does not allow for disclosure of opinions as to the standard of care of any defendant, compliance with or breach of the standard, and causation of the alleged injury, applies to this lawsuit instead. The court has found no Tennessee case on whether the 2015 amendment applies only to cases filed after the effective date or also to pending healthcare liability cases.

Unlike the other amendments to section 121 which specifically applied to cases commenced after the effective date of the amendment, the 2015 amendment to section 121(f) clearly states that is was to "take effect upon becoming law," i.e., on April 24, 2015. Because the legislature did not limit the application of the 2015 amendment to cases commenced after the effective date, the plain meaning of the phrase "take effect upon becoming law" indicates the legislature's intent that healthcare providers could disclose their opinions as to the standard of care of any defendant, compliance with or breach of the standard, and causation of the alleged injury, subject to a qualified protective order after April 24, 2015, in pending healthcare liability actions. Thus, the 2015 Amendment to Tenn. Code Ann. § 29-26-121(f) applies to this lawsuit.

Nevertheless, even if the 2012 version of section 121(f) were applied, this court finds that the 2012 Legislature intended the 2012 version of 121(f) to encompass disclosure of opinions regarding standard of care and causation during informal *ex parte* interviews. Given the litigation that has ensued over the meaning of "relevant protected health information," the court finds the wording to be ambiguous and therefore takes into consideration other sources to determine the legislature's intent.

Hearings at the General Assembly in 2012 pertaining to the legislative purpose of 121(f) indicate that the Tennessee legislature specifically intended for the term "protected health information" to encompass information regarding the standard of care and causation and contemplated discovery of opinions regarding standard of care and causation during *ex parte* interviews. As to the standard of care, a proponent of the bill stated:

> This is strictly applicable to healthcare liability actions, as that term is defined in the medical malpractice code. . . . *[I]t is solely designed to give both parties to the lawsuit equal standing as it relates to what the claimant's healthcare providers think about the healthcare provided to the claimant.*

See Tenn. S. Judiciary Comm. Hearing, S.B. 2789, 107th Gen. Assemb., 2d Reg. Sess. (Mar. 13, 2012)(statement of Jeff Parish).[6] As to causation, another proponent stated:

> If in the pre-suit investigation, information came to light, for instance, that a patient had AIDS and unfortunately passed away, and there is an allegation of medical malpractice and the defense would be *"No, this person didn't die as the result of medical malpractice. This person dies of a pre-existing medical condition."* This statute would allow you to go to court to seek permission to interview the people to find that out without any repercussions with the answer that you are receiving . . . only being able to obtain that through a deposition that would be admissible for all purposes at trial. So, yes, you could find that information out under the control of the court.
>
> . . . .
>
> There is no mechanism under existing discovery to get the same information. With this bill, with [] a court order in hand, we can pick up the phone at that point and call the treating physician and say *"Did what this doctor that got sued cause the problems?"* And if the answer is yes, we can then try to resolve the case. We can't do that now.

See Tenn. S. Judiciary Comm. Hearing, S.B. 2789, 107th Gen. Assemb., 2d Reg. Sess. (Mar. 13, 2012)(statement of Howard Hayden).[7]

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[6]The Tennessee Senate Judiciary Committee hearing is available at http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=5125.

[7]The Tennessee Senate Judiciary Committee hearing is available at http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=5125.

In light of the legislative history of the 2012 amendment, the entire statutory scheme, and the subsequent amendments, the court is of the opinion that the court of appeals erred in *Dean-Hayslett* in holding that the relevant protected health information as used in the 2012 Amendment did not "extend to opinions regarding whether a defendant healthcare provider's acts or failure to act . . . caused the injury complained of by plaintiff in the lawsuit, or to the standard of care . . . employed by the defendants." *Dean-Hayslett*, 2014 WL 3555987, at *14. The 2012 legislative history, as discussed above, makes clear that the General Assembly intended for the defendants to elicit opinions regarding standard of care and causation.

Accordingly, even if the version of section 121(f) that applies to this lawsuit is the 2012 Amendment to Tenn. Code Ann. § 29-26-121(f), it permits the discovery of the healthcare provider's opinion as to standard of care and causation.

B. Whether Tenn. Code Ann. § 29-26-121(f) is Preempted by HIPAA

Regardless of what version applies, Miller argues that Tenn. Code Ann. § 29-26-121(f) is preempted by HIPAA.

1. *Preemption Standard*

The United States Constitution "establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "A state is sovereign within its own sphere subject only to preemption

pursuant [to] the Supremacy Clause of the United States Constitution." *Webb*, 2013 WL 1645713, at *12 (citations omitted). A court addressing preemption "begin[s] with the presumption that an act of the General Assembly is constitutional," *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003)(quotation and internal quotation marks omitted), and that it is not superseded by a federal statute unless that is the clear and manifest purpose of Congress. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008); *Webb*, 2013 WL 1645713, at *12 (citation omitted). "A preemption inquiry begins by focusing upon the federal statutory language, with consideration given to the entire federal statutory scheme," and must attempt to "reconcile the federal and state laws, . . . rather than to seek out conflict where none clearly exists." *Webb*, 2013 WL 1645713, at *12 (citations and internal quotation marks omitted). Where the federal and state laws cannot be reconciled, the Supremacy Clause mandates that the incompatible state law be found invalid. *See* U.S. Const. art. VI, cl. 2.

2. *HIPAA's Regulatory Scheme and Preemption Provision*

By enacting HIPAA in 1996, Congress sought to improve "the efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information." *Webb*,

2013 WL 1645713, at *10 (quotation omitted). Congress imposed a duty on the Secretary of the Department of Health and Human Services ("DHHS") to promulgate rules and regulations pertaining to the privacy of protected health information. 42 U.S.C. §§ 1320a, 1320d through 1320d-9. DHHS responded by enacting the "Privacy Rule," which regulates the disclosure of protected health information by covered entities. 45 C.F.R. § 164.502.[8] The DHHS has stated that the Privacy Rule was intended to serve three major purposes:

> (1) To protect and enhance the rights of consumers by providing them access to their health information and controlling the inappropriate use of that information;
>
> (2) to improve the quality of health care in the U.S. by restoring trust in the health care system among consumers, health care professionals, and the multitude of organizations and individuals committed to the delivery of care; and
>
> (3) to improve the efficiency and effectiveness of health care delivery by creating a national framework for health privacy protection that builds on efforts by states, health systems, and individual organizations and individuals.

Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,463 (Dec. 28, 2000)).

Pursuant to the Privacy Rule, a covered entity must make reasonable efforts to use or disclose the minimum necessary to accomplish the intended purpose of the use, disclosure, or

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[8]Covered entities are defined as a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form. 45 C.F.R. § 160.103.

request, 45 C.F.R § 164.502(b)(1), and generally "may not use or disclose protected health information without a[] [valid] authorization," *Id.* § 164.508(a)(1). However, in certain circumstances, "[a] covered entity may use or disclose protected health information without the written authorization of the individual." *Id.* § 164.512. One such exception is disclosure "in the course of any judicial or administrative proceeding." *Id.* § 164.512(e)(1). Section 164.512(e)(1) states:

> (e) Standard: Disclosures for judicial and administrative proceedings.
>
> > (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
> >
> > > (i) In response to an order of a court or administrative tribunal, provided that the covered entity disclose only the protected health information expressly authorized by such order; or
> > >
> > > (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
> > >
> > > > (A) The covered entity receives satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
> > > >
> > > > (B) The covered entity receives satisfactory assurance . . . from the party seeking the information that

reasonable efforts have been made by such party to secure a qualified protective order[.]

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protect[ed] health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(1) No objections were filed; or

(2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and

> accompanying documentation demonstrating that:
>
> > (A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or
> >
> > (B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

Stated more plainly, the Privacy Rule permits disclosure of protected health information in response to a court order, but only to the extent allowed by the language of the order, *id.* § 164.512 (e)(1)(i); or in response to a subpoena or a formal discovery request that lacks a court order where the requesting party assures the provider that either the patient was given notice of the request and any objections have been resolved, *Id.* § 164.512 (e)(1)(ii)(A) & (e)(1)(iii); or in response to a subpoena or a formal discovery request that lacks a court order where the provider receives assurance that a qualified protective order has been sought or secured, *id.* § 164.512 (e)(ii)(B) & (e)(1) (iv). The treating physician is not required to make the requested disclosures as § 164.512(e)(1) states that disclosures for judicial proceedings are "permitted," rather than required. Where the parties move the court to enter a qualified protective order, such order must:

> (A) Prohibit[] the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information is requested; and
>
> (B) Require[] the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

Id. § 164.512(e)(1)(v)(A).

HIPAA contains an express preemption clause which provides: "A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law." *Id.* § 160.203. HIPAA defines contrary as:

> (1) A covered entity would find it impossible to comply with both the State and federal requirements; or
>
> (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives [of the Act.]

Id. § 160.202. The first prong of HIPAA's preemption is known as the impossibility test while the second prong is known as the obstacle test. *See Caldwell v. Baptist Mem'l Hosp.*, No. W201501076COAR10CV, 2016 WL 3226431, at *5 (Tenn. Ct. App. June 3, 2016). The preemption rule does not apply where "[t]he provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted

under subpart E of part 164 of this subchapter." 45 C.F.R. § 160.203(b).

3. *Tenn. Code Ann. § 29-26-121(f) is not Preempted by HIPAA*

HIPAA's Privacy Rule does not preempt Tenn. Code Ann. § 29-26-121(f). As discussed more fully below, HIPAA does not expressly address *ex parte* interviews. During the notice and comment period for the proposed Privacy Rule, DHHS addressed the situation where "there is a State provision and no comparable or analogous federal provision," and explained that: "The short answer would seem to be that, since there is nothing to compare, there cannot be an issue of a "contrary" requirement, and so the preemption issue is not presented." *See* Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59,918, 59,995 (proposed Nov. 3, 1999)(to be codified at 45 C.F.R. pts. 160-64).

In one case prior to the enactment of 121(f), this court previously has found that *ex parte* interviews were not barred by HIPAA. In *Wade v. Vabnick-Wener*, 922 F. Supp. 2d 679 (W.D. Tenn. July 2, 2010), a case decided prior to the enactment of section 121(f), this court considered whether the Privacy Rule preempted the law of Tennessee regarding informal *ex-parte* communications with the plaintiff's treating physician absent a plaintiff's express consent. At the time *Wade* was decided, Tennessee law barred *ex-parte* interviews altogether pursuant to

Alsip. *Wade*, 922 F. Supp. 2d at 691 (citing *Alsip*). The *Wade* court ultimately held that because the laws of Tennessee barring *ex parte* interviews were more stringent than HIPAA, which allowed *ex parte* interviews so long as defense counsel sought a qualified protective order, "HIPAA [did] not preempt Tennessee's ban on *ex parte* communications with a plaintiff's non-party treating physician." *Id.* at 692.

Although Tennessee law with respect to *ex parte* communications has changed since *Wade* with the enactment of section 121(f), *Wade* is still relevant for its finding that *ex parte* communications are not barred under the Privacy Rule. The *Wade* court specifically held that "the exceptions to HIPAA's privacy rules allow defense counsel to conduct *ex parte* interviews with plaintiff's treating physicians after first securing, or attempting to secure, a qualified protective order consistent with the regulations." *Id.* at 690 (citations omitted).

Following the enactment of section 121(f), in another case, *Lovelace v. Pediatric Anesthesiologists, P.A.*, No. 2:13-cv-02289-JPM-dkv, (W.D. Tenn. Feb. 5, 2014), this court affirmed its prior holding that the Privacy Rule does not preempt *ex parte* interviews between the defense counsel and plaintiff's treating health care providers. The version of section 121(f) applicable in *Lovelace* was the 2012 version. *See* Order 4, 6-7,

Lovelace v. Pediatric Anesthesiologists, P.A., No. 2:13-cv-02289-JPM-dkv (W.D. Tenn. Feb. 5, 2014), ECF No. 95 ("The Lovelaces filed the present healthcare liability action on May 8, 2013, and therefore Tenn. Code Ann. § 29-26-121(f), as it existed before the 2013 amendment, applies to this lawsuit.").

In *Lovelace,* this court concluded that Tenn. Code. Ann. § 29-26-121(f) is not contrary to HIPAA and does not stand as an obstacle to the accomplishments of HIPAA. *Id.* at 15-17. The court stated:

> Both HIPAA and Tenn. Code Ann. § 29-26-121(f) seek to protect the privacy of individual health information. Both permit the disclosure of protected health information in a judicial proceeding pursuant to a qualified protective order entered by the court. Both require the same safeguards and limitations on dissemination and use of the information and destruction of the information at the end of the proceeding in the qualified protective order for the protection of the privacy of an individual's health care information. Both are limited to the discovery of relevant information. Both permit *ex parte* communications between defense counsel and a Plaintiffs' treating physician. The "good cause" and relevancy standards in Tenn. Code Ann. § 29-26-121(f) are consistent with the standards of discovery and issuance of protective orders under the Federal Rules of Civil Procedure, which would apply to HIPAA.

Id. at 15-16.

In two state cases filed prior to the effective date of section 121(f), the Tennessee Court of Appeals and the Tennessee Supreme Court found that Tenn. Code Ann. § 29-26-121 was not preempted by HIPAA. Although these cases did not specifically deal with section 121(f), their reasoning is instructive. By

way of background, Tenn. Code Ann. § 29-26-121(a) requires a person asserting a potential claim for health care liability to provide pre-suit notice to the named defendants which must include a "HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice." Tenn. Code Ann. § 29-26-121(a)(2)(E) & (d)(1). The statute further states that the "records received by the parties shall be treated as confidential, to be used only by the parties, their counsel, and their consultants." *Id.* § 121(d)(2).

In *Webb v. Roberson*, No. W2012-01230-COA-R9CV, 2013 WL 1645713 (Tenn. Ct. App. Apr. 17, 2013), the plaintiff argued that Tenn. Code Ann. § 29-26-121 was preempted by HIPAA because it allowed for "disclosure of protected health information without either a court order or the patient's consent in contravention of HIPAA." *Id.* at *13. Disagreeing with the plaintiff, the *Webb* court concluded that Tenn. Code Ann. § 29-26-121 is not contrary to HIPAA. *Id.* at *14. The *Webb* court stated that "[b]y pursuing a malpractice claim the plaintiff consented to the disclosure of relevant medical information." *Id.* (citation omitted). The court also noted that Tenn. Code Ann. § 29-26-121(d)(1) is consistent with HIPAA because it limits "the discoverable medical records to those held by providers sent notice by the claimant, and it requires the

records be treated as confidential and be used only by the parties, their counsel, and their consultants." *Id.*

In *Stevens v. Hickman Comm. Health Care Servs., Inc.*, 418 S.W.3d 547 (Tenn. 2013), the Tennessee Supreme Court similarly held that Tenn. Code Ann. § 29-26-121(a)(2)(E)'s requirement that a plaintiff authorize disclosure of his or her medical records "neither conflicts with HIPAA nor stands as an obstacle to the accomplishment of HIPAA's full purposes and objectives." *Id.* at 557-58.

The Tennessee Court of Appeals has just recently addressed the preemption issue with respect to the 2013 version of section 121(f) and found that HIPAA does not preempt the use of *ex parte* interviews under Tenn. Code Ann. § 29-26-121(f). In *Caldwell v. Baptist Mem. Hosp.*, No. W2015-01076-COA-R10-CV, 2016 WL 3226431 (Tenn. Ct. App. June 3, 2016), the Tennessee Court of Appeals considered whether section 121(f), with the 2013 Amendment, is preempted by HIPAA's Privacy Rule. *Id.* at *3, 5. The *Caldwell* court discussed in detail *Webb*, *Stevens*, and a number of cases from other circuits, *id.* at *6-8, and reached the conclusion that section 121(f), as amended by the 2013 Amendment, is consistent with HIPAA because it "mirrors the requirements of 45 C.F.R. § 164.512(e)(1) with respect to [qualified protective orders]," and that, in fact, it includes additional requirements not required by the federal law, *id.* at *5-6. The *Caldwell*

court also found that section 121(f) survives the preemption's obstacle test, *i.e.*, that section 121(f) is not an obstacle to the accomplishment of the purposes of HIPAA as stated in Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,463. *Id.* at *6.

The court holds that Tenn. Code Ann. § 29-26-121(f) is consistent with HIPAA and not preempted under either the impossibility or the obstacle test. As this court noted in *Wade*, under the Privacy Rule the defense counsel needs to only "attempt[] to secure," rather than secure, a qualified protective order before engaging in *ex-parte* interviews. *Wade*, 922 F. Supp. 2d at 690 (citations omitted). Therefore, because section 121(f) mandates that defense counsel actually secure a qualified protective order before conducting *ex parte* interviews, it is arguably more stringent, and thus not contrary to the Privacy Rule. *See* 45 C.F.R. § 160.202 (explaining that a state law is considered more stringent when it restricts disclosure in circumstances under which it would be permitted under the HIPAA).

As to the impossibility test, a treating health care provider could comply with both the procedural requirements of the Privacy Rule and Tenn. Code Ann. § 29-26-121(f). In order to do so, a treating healthcare provider need simply ensure that (1) defense counsel has secured a qualified protective order

that authorizes the provider to divulge the patient's health information; and (2) the qualified protective order limits the dissemination of the protected medical information to the pending litigation and mandates that defense counsel return or destroy all information obtained at the conclusion of the lawsuit. *Compare* Tenn. Code Ann. § 29-26-12(f), *with* 45 C.F.R. § 164.512(e)(1)(v).[9]

As to the obstacle test, Tenn. Code Ann. § 29-26-121(f) does not stand as an obstacle to the accomplishment of the purposes of the Privacy Rule. Discussions during the 2012 legislative hearings on section 121(f) and the subsequent 2013

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[9] Although the 2015 version of section 121(f) requires defense counsel to return or destroy all information obtained during *ex parte* interviews at the end of litigation, which requirement was added later to the statute by the 2013 Amendment, the 2012 version does not. The Defendants, however, do not object to the application of the terms of the 2013 Amendment to the qualified protective order they are seeking. (Joint Mot. for Prot. Order 2, ECF No. 135.) The trial court in *Dean-Hayslett* included these requirements without objection from the parties, and the requirements were not at issue in the appeals court decision. The court of appeals in *Dean-Hayslett* specifically "declined to address Defendants' assertion that the statute denies the trial court the authority in any circumstance to impose any condition or limitation on a qualified protective order other than as expressly provided by section 29-26-121(f)(1)." *Dean-Hayslett*, 2014 WL 277114, at *14.

Accordingly, the qualified protective order in this case will include the requirement that defense counsel must return or destroy all information obtained during *ex parte* interviews at the end of litigation and also specify that any *ex parte* communications are voluntary as required by the 2013 version of Tenn. Code Ann. § 29-26-121(f). Therefore, it is not impossible for the treating health care provider to comply with both the procedural requirements of the Privacy Rule and Tenn. Code Ann. § 29-26-121(f).

Amendment to section 121(f) are evidence that it was the General Assembly's intent for section 121(f) to comply with HIPAA and be "no less restrictive than HIPAA." *See supra* Section II.A.2.a.

As to the Privacy Rule's first purpose, Section 121(f) does not lead to "inappropriate use of [health] information." Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,463. As one court has stated:

> While HIPAA is obviously concerned with protecting the privacy of individuals' health information, it does not enforce that goal to the exclusion of other interests. Rather, it balances the protection of individual privacy with the need for disclosure in some situations. . . . Given HIPAA's interest in balancing the need for disclosure in certain contexts with the importance of individual privacy, we cannot conclude that ex parte interviews are "contrary" to the objectives of HIPAA, as long as the interviews are sought according to the specific requirements of 45 CFR 164.512(e).

Holman v. Rasak, 486 Mich. 429, 446-47 (2010). Section 121(f) similarly balances the protection of individual privacy with the need for disclosure in the context of a healthcare liability action. As the *Dean-Hayslett* court noted, section 121(f) "is not without express limitations [and] does not effectuate a blanket waiver of confidentiality in healthcare information by the plaintiff." *Dean-Hayslett*, 2015 WL 277114, at *10. As discussed in *Givens* and *Alsip*, by filing a healthcare liability lawsuit in Tennessee, a plaintiff impliedly consents to the discovery of relevant medical information. *Alsip*, 197 S.W.3d at 727. With the enactment of section 121(f), this implied consent

is not limited to formal discovery but extends to informal *ex parte* communications. A patient still has a privacy interest in non-relevant medical information and section 121(f)(2) is limited to disclosures of relevant information in conformance with the court's order. *See* Tenn. Code Ann. § 29-26-121(f)(2). Further section 121(f)(1)(B) allows for the plaintiff to object or limit the *ex parte* interviews based on relevancy. *See id.* § 29-26-121(f)(1)(B); *see also Dean-Hayslett*, 2015 WL 277114, at *10 (stating that section 121(f) does not constitute a complete wavier of confidentiality because "defendants may not seek to obtain protected healthcare information from healthcare providers who are not expressly identified on the protective order, and disclosure of protected health information by providers other than those identified on the protective order is not permissible").[10]

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[10]Mere possibility of inadvertent disclosure of non-relevant, and thus confidential, information does not cause the court major concern. As one court aptly stated:

> These cases assert that merely permitting *ex parte* interviews violates the physician-patient privilege, infringes upon the patient's right to privacy, constitutes a breach of the fiduciary and confidential physician-patient relationship, and creates conflicts of interest. These arguments prove too much. There is no breach of those various obligations unless and until the physician discloses some confidential information. Any medical information relevant to the condition put in issue by the plaintiff is simply not privileged and can be freely disclosed.

The Privacy Rule's second and third objectives are to improve the quality, efficiency, and effectiveness of the health care system. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,463. Likewise, Tenn. Code Ann. § 29-26-121(f) seeks to reduce the overall cost that healthcare liability litigation places on Tennessee's healthcare system by allowing defendants to investigate and settle claims early. *Webb*, 2013 WL 1645713, at *19 (stating that Tenn. Code Ann. § 29-26-121's objectives "are of particular importance in the context of medical malpractice claims where . . . increased malpractice insurance costs threaten both health care affordability and accessibility). By demanding a qualified protective order that contains strict requirements as to the use and dissemination of health care

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> The possibility of intentional or inadvertent disclosure of confidential information does not cause us major concern. If a physician is worried about a breach of confidentiality, he can always refuse to involve himself in informal *ex parte* interviews or condition his compliance on the presence of plaintiff's and/or his own attorney. As to the possibility of intentional misconduct or overreaching, it suffices to say that we refuse to speculate about or impute such sinister motives to defense counsel or treating physicians. Moreover, adequate remedies exist if any such abuses do in fact occur. Indeed, we believe that to disallow a viable, efficient, cost effective method of ascertaining the truth because of the mere possibility of abuse, smacks too much of throwing out the baby with the bath water.

Langdon v. Champion, 745 P.2d 1371, 1375 n.8 (Alaska 1987) (citations omitted)

information, Section 121(f) attempts to strike a balance between a patient's privacy rights and the efficient resolution of healthcare liability claims. *See Caldwell*, 2016 WL 3226431, at *7-8 (citing cases addressing the obstacle test).

4. *Whether the Healthcare Providers Can Disclose Opinions on the Standard of Care and Causation*

As discussed *supra*, although the language regarding disclosure of causation and standard of care was not added to section 121(f) until the 2015 Amendment, the 2012 version of the 121(f) does not prohibit discovery of such information. The Tennessee legislature intended such information to be discoverable during *ex parte* interviews, and, the subsequent 2015 Amendment specifically provides that opinions as to standard of care can be disclosed. *See* discussion *supra* Section II.A.2.c.

Opinions regarding the standard of care and causation are also not prohibited by HIPAA. HIPAA defines "health information" as "any information whether oral or recorded in any form or medium" that "relates to past, present, or future physical or mental health or condition of an individual, the provision of healthcare to an individual, or the past, present, or future payment of the protection of healthcare to the individual." 42 U.S.C. § 1320d(4); 45 C.F.R. § 160.103. This definition does not distinguish between factual information concerning a patient's protected health information and a

physician's opinion concerning a patient's health information. The qualified protective orders allowed by HIPAA provide safeguards for the disclosure of protected health information, that is "any information" that "relates" to the health, condition or treatment of the patient. 45 C.F.R. § 164.512(e). HIPAA's broad definition of protected health information thus encompasses standard of care and causation opinions because such opinions certainly constitute information that "relates" to the health, condition, or treatment of the patient.

C. Whether Tenn. Code Ann. § 29-26-121(f) Violates the Tennessee Constitution's Separation of Powers Doctrine

Sections 1 and 2 of Article II of the Tennessee Constitution provide for the separation of powers among the three branches of government. Tenn. Const. Art. II, secs. 1 and 2. The "legislative power" is the authority to make, order, and repeal law; the "executive power" is the authority to administer and enforce the law; and the "judicial power" is the authority to interpret and apply law. *Mansell v. Bridgestone Firestone N. Am. Tire, LLC,* 417 S.W.3d 393, 402 (Tenn. 2013)(quotation omitted). "[W]hile the three branches of government are independent and co-equal, they are to a degree interdependent as well, with the functions of one branch often overlapping that of another." *State v. King,* 973 S.W.2d 586, 588 (Tenn. 1998) (citing *Underwood v. State,* 529 S.W.2d 45, 47 (Tenn. 1975)).

In Tennessee, the Tennessee Rules of Civil Procedure are "promulgated by the [Tennessee Supreme] Court and approved by the [Tennessee] General Assembly. The Tennessee Supreme Court has 'inherent power to promulgate rules governing the practice and procedure of the courts of this state.'" *Hall v. Haynes,* 319 S.W.3d 564, 571 (Tenn. 2010)(citing *State v. Mallard,* 40 S.W.3d 473, 481 (Tenn. 2001)). "These rules have the full force and effect of law." *Id.* (quotation and internal quotation marks omitted). "[B]ecause the power to control the practice and procedure of the courts is inherent in the judiciary and necessary 'to engage in the complete performance of the judicial function,' . . . this power cannot be constitutionally exercised by any other branch of government." *Mallard,* 40 S.W.3d at 481 (quoting *Anderson County Quarterly Court v. Judges of the 28th Judicial Cir .,* 579 S.W.2d 875, 877 (Tenn. Ct. App. 1978))(internal citation omitted). "Conflicts between provisions of the Tennessee Rules of Civil Procedure and provisions of the Tennessee Code which cannot be harmoniously construed will be resolved in favor of the Tennessee Rules of Civil Procedure." *Mid-South Pavers, Inc. v. Arnco Const. ., Inc.,* 771 S.W.2d 420 (Tenn. Ct. App. 1989)(citing Tenn. Code Ann. § 16-3-406). However, "[a] legislative enactment which does not frustrate or interfere with the adjudicative function of the courts does not constitute an impermissible encroachment

upon the judicial branch of government." *Underwood,* 529 S.W.2d at 47.

"Notwithstanding the constitutional limits of legislative power in this regard, the courts of this state have, from time to time, consented to the application of procedural or evidentiary rules promulgated by the legislature." *Mallard,* 40 S.W.3d at 481. As the State points out in its brief, the Tennessee Code contains a number of procedural rules that supplement judicial rules such as Title 16 which contains rules setting forth subject-matter jurisdiction of the courts, Title 20 which contains rules of civil procedure, Title 24 which contains rules of evidence, and Title 28 which contains rules setting forth statutes of limitations and repose.

In determining whether a statute that prescribes rules of procedure in state courts violates the separation of powers doctrine, Tennessee courts must determine whether the legislative enactment is: (1) "reasonable and workable within the framework already adopted by the judiciary, and (2) work[s] to supplement the rules already promulgated by the Supreme Court." *Mallard,* 40 S.W.3d at 481 (citing *Newton v. Cox,* 878 S.W.2d 105, 112 (Tenn. 1994)). Further, "[a]lthough it is the province of [the Tennessee Supreme] Court to prescribe rules for practice and procedure in the state's courts, where a decision of the legislature chiefly driven by public policy concerns

infringes on that power [the court] will generally defer to the judgment of the legislature." *Biscan v. Biscan,* 160 S.W.3d 462, 474 (Tenn. 2005)(citing *Martin v. Lear Corp.,* 90 S.W.3d 626, 631-32 (Tenn. 2002)).

In the healthcare liability scheme, the Tennessee legislature has enacted many laws regarding the privacy of a patient's health information. *See* Tenn. Code Ann. § 63-2-101 (setting forth rules for releasing confidential medical records to a patient or an authorized representative for the patient); Tenn. Code Ann. § 68-11-1501 to 1505 (stating that every patient receiving care at a licensed healthcare facility has the right to privacy and setting forth violations for invasion of privacy). As the State's brief points out, the legislature has also focused on healthcare liability actions due to concerns that rising malpractice insurance costs may affect the cost and quality of healthcare. *Harrison v. Schrader,* 569 S.W.2d 822, 826 (Tenn. 1978); *Jackson v. HCA Health Servs. of Tennessee, Inc.*, 383 S.W.3d 497, 505 (Tenn. Ct. App. 2012).

Similar challenges to healthcare liability laws have failed. In *Newton v. Cox,* 878 S.W.2d 105 (Tenn. 1994), the Tennessee Supreme Court upheld the constitutionality of Tenn. Code. Ann. § 29-26-120, which limits contingency-based attorneys' fees in healthcare liability claims. The defendant in *Newton* maintained that Tenn. Code Ann. § 29-26-120

"encroached upon the power of the judiciary to control the conduct of attorneys." *Newton*, 878 S.W.2d at 111. The Tennessee Supreme Court stated that "areas exist in which both the legislative and judicial branch have interests, and that in such areas both branches may exercise appropriate authority." *Id.* The Court held that Tenn. Code. Ann. § 29-26-120 did not "directly conflict with the Supreme Court's authority to regulate the practice of law," but it supplemented and aided the rules set forth by the judiciary and it was a proper "exercise of the legislature's police powers, intended to protect the public." *Id.* at 112.

In *Jackson v. HCA Health Servs. of Tenn., Inc.*, 383 S.W.3d 497 (Tenn. Ct. App. 2012), the Tennessee Court of Appeals upheld the constitutionality of Tenn. Code Ann. § 29-26-122, which requires a plaintiff in a healthcare liability action to file a certificate of good faith concurrently with the filing of the complaint confirming that one or more experts had been consulted that there was a good faith basis for filing the complaint. The plaintiff in *Jackson* contended that Tenn. Code Ann. § 29-26-122 conflicted with Rule 3 of the Tennessee Rules of Civil Procedure which sets forth the rule for commencement of an action because it "requires plaintiffs to, in practical effect, conduct discovery and make a *prima facie* case prior to suit being filed." *Jackson*, 383 S.W.3d at 505. The Tennessee Court of

Appeals concluded that Section 122 was not in conflict with Rule 3 because it merely requires proof of the plaintiff's due diligence prior to filing of the complaint which is consistent with the Tennessee Rules of Civil Procedure. *Id.* at 506.

In *Webb v. Roberson*, No. W2012-01230-COA-R9CV, 2013 WL 1645713 (Tenn. Ct. App. Apr. 17, 2013) and *Williams v. SMZ Specialists, P.C.*, No. W2012-00740-COA-R9CV, 2013 WL 1701843 (Tenn. Ct. App. Apr. 19, 2013), the Tennessee Court of Appeals similarly concluded that the pre-suit notice provisions of Tenn. Code Ann. § 29-26-121, which require the plaintiff to give notice to the defendant of a medical malpractice claim before suit is filed, do not violate the separation of powers doctrine. In *Williams*, the Court of Appeals stated that "[t]he overall statutory scheme, including the pre-lawsuit notice requirement in Section 29-26-121, is driven by the Legislature's substantive public policy concerns, and therefore cannot be described as purely procedural." *Williams*, 2013 WL 1701843, at *9; *see also Webb*, 2013 WL 1645713, at *9 ("Based upon legislature's substantive policy concerns, we find that the pre-suit notice requirement is not entirely procedural."). Even if deemed procedural, the *Webb* and *Williams* courts found no conflict between the pre-lawsuit notice requirements of Section 29-26-121 and "the Court's procedural rules, including Tenn. R. Civ. P. 3, because Section 29-26-121 requires notice of a potential claim

"'before the filing of the complaint,'" and, "[t]herefore, Section 29-26-121 and Rule 3 can be construed harmoniously." *Williams*, 2013 WL 1701843, at *8 (quoting Tenn. Code Ann. § 29-26-121(a)(1)); *Webb*, 2013 WL 1645713, at *9 (stating that deferment to the legislature was appropriate because the pre-suit notice requirements of Section 29-26-121 supplement the Tennessee Rules of Civil Procedure).

Most recently, in *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393 (Tenn. 2013), the Tennessee Supreme Court upheld the constitutionality of the medical impairment rating ("MIR") process in Tenn. Code Ann. § 50-6-204(d). Tenn. Code Ann. § 50-6-204(d)(5) permits either the employee or the employer to request the appointment of an independent medical examiner from the MIR registry when there is a dispute as to the degree of the medical impairment for injuries to which the Workers' Compensation Law is applicable. *See also Mansell*, 417 S.W.3d at 400. The MRI process requires the Commissioner of the Department of Labor and Workforce Development, rather than the trial court, to establish the qualifications for MIR physicians, and, further, when a dispute as to injury exists, the trial court is prohibited by the MIR statutes from appointing its own neutral physician to state an opinion as to the degree of medical impairment. *Mansell*, 417 S.W.3d at 404 (citing Tenn. Code Ann. § 50-6-204(d)(6) & (9)).

The plaintiff in *Mansell* argued that the statute creating the MIR process was unconstitutional because it conflicted with Tennessee Rules of Evidence 702 and 706, which govern the appointment of experts by the trial court and the admissibility of their testimony. *Id.* The Tennessee Supreme Court stated that while the "MIR statutes[] plac[e] limitations on the ability of a trial court to determine the admissibility of expert testimony and to appoint its own expert witness to give an impairment rating, [they] are not in conflict with the Rules of Evidence." *Id.* at 404-05. The Court further concluded:

> In summary, because the MIR statutes are specifically tailored to certain, limited circumstances within the overall workers' compensation scheme, we cannot conclude that the MIR process "strike[s] at the heart of the court's exercise of judicial power." . . . "[T]he statute at issue . . . does not impermissibly conflict with [Tennessee Rules of Evidence 702 or 706] because it merely limits the application of [the Rules] in certain circumstances."

Id. at 406 (quoting *Martin v. Lear Corp.*, 90 S.W.3d 626, 631 (Tenn. 2002)).

Similar to the statutes at issue in *Williams* and *Webb*, Tenn. Code Ann. § 29-26-121(f) has a substantive component, and thus, it is not purely procedural. It is substantive because it codifies the premise that, in a healthcare liability action, the patient waives the covenant of confidentiality not just during formal discovery but also during *ex parte* interviews between defense counsel and the patient's treating healthcare providers,

thus abrogating *Givens* and *Alsip*. The statute was intended to address a legitimate policy decision by the Tennessee legislature to avoid protracted litigation through early resolution of a case. *See also Williams*, 2013 WL 1701843, at *9 ("The overall statutory scheme, including the pre-lawsuit notice requirement in Section 29-26-121, is driven by the Legislature's substantive public policy concerns, and therefore cannot be described as purely procedural."); *Webb*, 2013 WL 1645713, at *9 ("Based upon legislature's substantive policy concerns, we find that the pre-suit notice requirement is not entirely procedural.").

Even if deemed procedural, Tenn. Code Ann. § 29-26-121(f) does not conflict with the Tennessee Rules of Civil Procedure. Here, Miller argues that Tenn. Code Ann. § 29-26-121(f) violates the separation of powers doctrine because it conflicts with Tennessee's policy prohibiting *ex parte* interviews and the formal rules of discovery set forth in Tenn. R. Civ. P. 26.01 and. (Pl.'s Resp. 12-13, ECF No. 141-1.) With respect to Tennessee's policy prohibiting *ex parte* interviews, as Miller concedes and as discussed herein, the Tennessee Supreme Court's decision in *Alsip* and *Givens* disallowing *ex parte* interviews was abrogated by Tenn. Code Ann. § 29-26-121(f). The *Alsip* court was concerned that *ex parte* interviews would lead to disclosure of non-relevant protected health information, *see Alsip*, 197

S.W.3d at 727-28, and Tenn. Code Ann. § 29-26-121(f)(1)(B) addresses the *Alsip* court's concerns by limiting disclosure to relevant health information. Therefore, following the enactment of section 121(f), there no longer exists a policy in Tennessee prohibiting *ex parte* interviews.

Also, Tenn. Code Ann. § 29-26-121(f) does not contradict Fed. R. Civ. P. 26.01, which states that:

> Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and, requests for admission.

The defendant in a healthcare liability suit may still utilize all the formal discovery methods of Rule 26.01; Tenn. Code Ann. § 29-26-121(f) simply provides another tool for investigating a healthcare liability case. As such, Tenn. Code Ann. § 29-26-121(f) is both "reasonable and workable" within the framework of the Tennessee Rules of Civil Procedure and "work[s] to supplement" the Tennessee Rules of Civil Procedure. *Mallard*, 40 S.W.3d at 481. Subsection (f) furthers section 29-26-121's legislative objectives to prevent protracted litigation by promoting early investigation of the claim and to facilitate early resolution through settlement. Tenn. S. Judiciary Comm. Hearing, S.B. 2789, 107th Gen. Assemb., 2d Reg. Sess. (Mar. 13,

2012);[11] *Howell*, 2010 WL 2539651, at *16; *Webb*, 2013 WL 1645713, at *191 *Dean-Hayslett*, 2015 WL 277114, at *9 ("[S]ubsection 121(f) is one subsection in a statutory section that serves to promote the expeditious resolution of allegations of professional negligence in the healthcare setting [and] it is properly construed within the context of the statute's overall purpose and intent."). These objectives supplement the Tennessee Rules of Civil Procedure which seek "to secure the just, speedy, and inexpensive determination of every action." Tenn. R. Civ. P. 1.

Further, Tenn. Code Ann. § 29-26-121(f) does not "strike at the heart of the court's exercise of judicial power" because it only applies to healthcare liability actions and it only applies in the circumstance when the parties have secured a qualified protective order naming particular healthcare providers to be interviewed. Thus, subsection (f) is "specifically tailored to certain, limited circumstances within" the healthcare liability scheme. *See Mansell*, 417 S.W.3d at 406. The statute does not grant unlimited power to the defendant to conduct *ex parte* interviews because the trial court may limit or prohibit the defendant from conducting the interviews upon good cause shown that a provider does not possess relevant information. Tenn.

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[11]The Tennessee Senate Judiciary Committee hearing is available at http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=5125.

Code Ann. § 29-26-121(f)(1)(B). Thus, subsection (f) does not encroach on the court's broad control over its proceedings.

D. Whether Tenn. Code Ann. § 29-26-121(f) is Preempted by the Rules Enabling Act

Miller also contends that Tenn. Code Ann. § 29-26-121(f) is preempted by the Rules Enabling Act because the issue of *ex parte* interviews is a procedural issue governed by the Federal Rules of Civil Procedure and the Federal Rules of Civil Procedure do not permit *ex parte* interviews. (Pl.'s Resp. 9-10, ECF No. 141-1.)

The Rules Enabling Act provides that:

> a. The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . .
>
> b. Such rules shall not abridge, enlarge, or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

28 U.S.C. § 2072.

As stated above, Tenn. Code Ann. § 29-26-121(f) has a substantive component, and thus, it is not purely procedural. Plus, Section 121(f)'s legislative objective to prevent protracted litigation and facilitate settlement supplements the Federal Rules of Civil Procedure which "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. As the court noted

in *Lovelace*, "[t]he good cause and relevancy standards in Tenn. Code Ann. § 29-26-121(f) are consistent with the standards of discovery and the issuance of protective orders under the Federal Rules of Civil Procedure." Order 16, Lovelace v. Pediatric Anesthesiologists, P.A., No. 2:13-cv-02289-JPM-dkv (W.D. Tenn. Feb. 5, 2014), ECF No. 95. Thus, Tenn. Code Ann. § 29-26-121(f) is not in conflict with the Federal Rules of Civil Procedure.

Miller argues that the Federal Rules of Civil Procedure do not permit the use of *ex parte* interviews. (Pl.'s Resp. 10, ECF No. 141-1.) There is no rule in the Federal Rules of Civil Procedure governing *ex parte* interviews with a plaintiff's treating physician. *See Horner v. Rowan Companies, Inc.*, 153 F.R.D. 597, 599 (S.D. Tex. 1994)("[I]t is clear that no federal procedural rule explicitly permits or prohibits *ex parte* interviews between defendants and plaintiff's treating physicians." (citing *Filz v. Mayo Found.*, 136 F.R.D. 165, 173 (D. Minn. 1991)). The *Horner* court noted that "federal courts that have dealt directly with this issue seem to be split," and ultimately held that "the appropriate rule should prohibit private ex parte interviews between defense counsel and plaintiff's treating physicians." *Id.* at 599, 601.

Notably, the *Horner* court's decision was not specifically based on a finding that *ex parte* interviews were prohibited by

the Federal Rules of Civil Procedure; rather, it was based on the court's concern that defense counsel would be able to discover plaintiff's non-relevant medical information, the same concern that the *Alsip* court had. *Id.* at 601; *Alsip*, 197 S.W.3d 727-28. The *Horner* court stated that "in order to preserve the integrity of the physician/patient privilege, a defendant must be limited to the formal methods of discovery enumerated by the Rules of Civil Procedure." *Horner*, 153 F.R.D. at 601. Two other cases cited as support by Miller, *Weaver v. Mann*, 90 F.R.D. 443, 445 (D.N.D. 1981) and *Garner v. Ford Motor Co.*, 61 F.R.D. 22, 24 (D. Alaska 1973), only briefly analyzed the issue and ultimately did not allow private conversations between defense counsel and a plaintiff's physician stating that they are not contemplated by the Federal Rules of Civil Procedure.

The last case cited by Miller as support, *King v. Ahrens*, 798 F. Supp. 1371 (W.D. Ark. 1992), does not support the conclusion that the Federal Rules of Civil Procedure do not permit *ex parte* interviews. In *King*, the court discussed cases and factors supporting each view, i.e., the prohibition of *ex parte* communication and refusing to prohibit *ex parte* communications. *Id.* at 1373-74. The district court in *King* ultimately concluded that it had no authority to prohibit *ex parte* communications between defense counsel and plaintiff's treating physicians. *Id.* at 1378-80. None of these cases

relied on by Miller, however, are persuasive, and, in addition, all are from other circuits and predated the adoption of HIPAA in 1996.

Other district courts from the Sixth Circuit have refused to categorically prohibit *ex parte* interviews between defense counsel and plaintiff's treating physicians. For instance, in *Weiss v. Astellas Pharma, US, Inc.*, No. CIVA 05-527 JMH, 2007 WL 2137782 (E.D. Ky. July 23, 2007), the court stated that "the Federal Rules of Civil Procedure do not restrict contact with witnesses to formal mechanisms such as sworn depositions." *Id.* at *4 (citations omitted)). The *Weiss* court first noted that neither Kentucky nor the Sixth Circuit recognizes a physician-patient privilege. *Id.* at *2-4. The *Weiss* court cited numerous cases that have held that a defendant is entitled to conduct *ex parte* interviews with a plaintiff's treating physicians and concluded that:

> [T]reating physicians are important fact witnesses, and "[a]bsent a privilege, no party is entitled to restrict an opponent's access to a witness, however partial or important to him. . . ."
>
> [D]efendants' counsel should be permitted to have *ex parte* contact with plaintiff's treating physicians and to conduct *ex parte* interviews with these treating physicians, *but only if these treating physicians are willing to be interviewed by defendants' counsel.* Private interviews permit investigation and preparation of possible defense theories without revealing potential work product. The presence of plaintiff's counsel during these witness interviews could cause "interference and disruption." Further, interviews are less burdensome and more cost-effective

> than depositions in obtaining information from treating physicians.
>
> The Magistrate Judge is unpersuaded by plaintiff's argument that the fiduciary relationship he has with his treating physicians prohibits the *ex parte* interviews defendants seek to conduct with his treating physicians. While it is true that plaintiff has a fiduciary relationship with his treating physicians and that plaintiff's medical records are confidential, with the filing of this lawsuit, plaintiff has placed his medical condition at issue.

Id. at *4-5 (citations omitted); *see also Schwarz v. United States*, No. 94-CV-71147-DT, 1995 WL 871136, at *2 (E.D. Mich. Jan. 30, 1995)(stating that the Federal Rules of Civil Procedure did not prohibit the defendants from making *ex parte* contact with witnesses).

In *In re Aredia & Zometa Products Liab. Litig.*, No. 3:06-MD-1760, 2008 WL 8576167 (M.D. Tenn. Jan. 17, 2008), the court similarly held that the Federal Rules of Civil Procedure do not prohibit *ex parte* communications with the plaintiff's treating physicians and that such interviews would "allow for more expeditious trial preparation as it would enable [the defendant] to efficiently determine which physicians need to be formally deposed [and] assist all parties in determining which physicians' testimony would be relevant at trial." *Id.* at *1. Consistent with *Weiss*, the *Aredia* court limited the ruling "only to those Plaintiffs' physicians who are located in states where physician-patient privilege does not exist by common law or statutory enactment and/or where state law has not expressly

prohibited *ex parte* communications between defense counsel and plaintiffs' treating physicians even after waiver of privilege." *Id.*

This court holds that *ex parte* interviews between the Defendants and Miller's treating healthcare providers are permissible under the Federal Rules of Civil Procedure. As discussed throughout this order, after the enactment of Tenn. Code Ann. § 29-26-121(f), the physician-patient confidentiality no longer prohibits *ex parte* communications between defense counsel and the plaintiff's treating healthcare providers in healthcare liability actions under the circumstances prescribed in the statute. Absent such a privilege, "no party is entitled to restrict an opponent's access to a witness, however partial or important to him." *Weiss*, 2007 WL 2137782, at *4-5; *Schwarz*, 1995 WL 871136, at *2; *In re Aredia*, 2008 WL 8576167, at *1. Because section 121(f) specifically allows for the plaintiff to object on the basis of relevance, non-relevant information continues to be protected by the covenant of confidentiality. *See* Tenn. Code Ann. § 29-26-121(f)(1)(B). Thus, section 121(f) addresses the concern in *Alsip* and *Horner* that allowing *ex-parte* interviews would lead to discovery of non-relevant medical information. Further, these interviews are informal and do not encroach upon the parties' abilities to seek formal discovery under the Federal Rules of Civil Procedure.

Miller also argues that if the court were to permit disclosure of the healthcare providers' opinions, the disclosure of such opinions is preempted by Federal Rules of Civil Procedure 26(a)(2) and 26(b)(4) governing expert disclosures. (Pl.'s Resp. 11, ECF No. 141-1.) Federal Rule of Civil Procedure 26(a)(2) states that a party must disclose to others parties the identity of expert witnesses it may use at trial. Rule 26(b)(4) states that a party may depose any person who has been identified as an expert whose opinions may be presented at trial.

Allowing disclosure of the healthcare providers' opinions in *ex parte* informal interviews does not displace Rules 26(a)(2) and 26(b)(4). The Defendants are still required to comply with Rules 26(a)(2) and 26(b)(4) if they intend to present expert opinions from any of Miller's healthcare providers at trial. The 2015 Amendment merely allows the Defendants to interview Miller's healthcare providers regarding their opinions on the standard of care and causation. In short, compliance with both Tenn. Code Ann. § 29-26-121(f) and the Federal Rules of Civil Procedure is attainable, and Miller has not shown otherwise.

III. CONCLUSION

For the foregoing reasons, the Defendants' motions for a qualified protective order, (ECF Nos. 135 & 157), to allow *ex parte* interviews with Miller's treating healthcare providers are

granted. A qualified protective order consistent with this opinion will be entered.

IT IS SO ORDERED this 11th day of August, 2016.

s/ Diane K. Vescovo
DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE