

CASE NO. M2016-01491-SC-R11-CV

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

RHONDA WILLEFORD,
as next of kin of JEWELL MARGARET COLSON, deceased,
Appellant.

v.

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,
Appellees,

and

STATE OF TENNESSEE,

Intervenor

On Appeal from the Circuit Court for Overton County
Case No. 2015-CV-7

REPLY BRIEF OF APPELLANT RHONDA WILLEFORD

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Dated: July 19, 2017

ORAL ARGUMENT REQUESTED

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AT NASHVILLE

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ARGUMENT

I. DEFERENCE TO THE LEGISLATURE IS NEITHER REQUIRED NOR APPROPRIATE FOR TENN. CODE ANN. § 29-26-121(f).

A. Tenn. Code Ann. § 29-26-121(f) is Purely a Procedural Mechanism.

Appellees’ attempts to reframe Tenn. Code Ann. § 29-26-121(f) as predicated upon the legislature’s substantive policy concerns, and therefore entitled to deference from this Court, misconstrues both the plain text of the statute and this Court’s holding in *Alsip*.

As an initial matter, the implied covenant of confidentiality between physicians and patients is *not* a statutory creation of the legislature. Rather, it was recognized by this Court, based upon public policy considerations,¹ in *Givens v. Mullikin*, 75 S.W.3d 383 (Tenn. 2002). See *Alsip v. Johnson City Medical Center*, 197 S.W.3d 722, 725 (Tenn. 2006) (noting that “[a]lthough no testimonial privilege protecting doctor-patient communications has ever been recognized by this Court or declared by Tennessee statute,” the Court, in *Givens*, has “recognized an implied covenant of confidentiality” between treating physicians and their patients).²

¹ Contrary to Appellees’ assertion, not all public policy determinations are reserved for the legislature. Indeed, policy considerations are often considered by the judiciary when promulgating rules governing the practice and procedure of the courts. See *Alsip*, 197 S.W.3d at 726 (“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.”) (emphasis added). And, so too is it a permissible policy determination by the judiciary to exclude *ex parte* communications from the methods of discovery permissible under Tenn. R. Civ. P. 26.

² In this regard, Appellees’ reliance on *Bush v. State*, 428 S.W.3d 1 (Tenn. 2014) is misplaced. At issue in *Bush*, a petition for post-conviction relief, was whether a previous Tennessee Supreme Court opinion, *Ward v. State*, 315 S.W.3d 461 (Tenn. 2010) (holding that trial courts have an affirmative duty to inform a defendant desiring to enter a guilty plea of the consequence of lifetime supervision), should be given retroactive application under the standard set forth in *Meadows v. State*, 849 S.W.2d 748 (Tenn. 1993) or the standard set forth in Tenn. Code Ann. § 40-30-122, which provides retroactivity principles applicable to post-conviction petitions. The *Bush* Court ultimately held that “because Tenn. Code Ann. § 40-30-122 is an integral part of a purely statutory remedy created by the General Assembly and because it does not extend beyond the Post-Conviction Procedure Act, we hold that the retroactivity of new constitutional rules in post-conviction proceedings should henceforth be determined using Tenn.

Regardless, Appellant does not dispute that a plaintiff's relevant, protected health information is discoverable. Thus, the issue is not *whether* defendants are entitled to this information, but rather *how* they are entitled to obtain it.³ The answer to that question rests within the sound discretion of the judiciary and, in *Alsip v. Johnson City Medical Center*, this Court concluded that:

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.

197 S.W.3d at 728 (emphasis in original).

Against this backdrop, the legislature enacted Tenn. Code Ann. § 29-26-121(f), which Appellees attempt to characterize as a determination by the legislature that the public policy of Tennessee requires voiding the implied covenant of confidentiality in health care liability actions

Code Ann. § 40-30-122." *Bush*, 428 S.W.3d at 16 (emphasis added). Unlike *Bush*, the implied covenant of confidentiality at issue here is entirely a creation of the judiciary. And, although health care liability actions are, now, brought pursuant to the Health Care Liability Act, the original concept of a healthcare liability action, or a claim for medical malpractice, is not, like petitions for post-conviction relief, a statutory remedy created by the General Assembly. Rather, it is an action sounding in tort. And, the limitation of subsection (f) to healthcare liability actions only is of no import. Indeed, this Court has greatly expanded the scope of what constitutes a health care liability action. See *Ellithorpe v. Weismark*, 479 S.W.3d 818, 827 (Tenn. 2015) (holding that all civil actions alleging that a healthcare provider caused an injury related to the provision of healthcare are subject to the pre-suit notice requirements of the Health Care Liability Act "regardless of any other claims, causes of action, or theories of liability alleged in the complaint."). Regardless, "a violation of the judiciary's inherent power to exercise its discretion in limited circumstances is still a violation of the judiciary's inherent authority. Limiting an unconstitutional act to certain lawsuits does not change the fact that it is unconstitutional." *Hammonds v. HCA Health Services of Tennessee, Inc., et al.*, Davidson County Circuit Court, No. 15C3058, Nov. 18, 2016 Memorandum Order, at 19.

³ For this reason, alone, Appellees' attempt to characterize Tenn. Code Ann. § 29-26-121(f) as a valid exercise of the legislature's police powers must fail.

to allow for *ex parte* interviews upon the granting of a qualified protective order. See *Joint Brief of Defendants-Appellees*, at 10; *Brief of Intervenor-Appellee*, at 8.

Each of the three briefs, submitted by the State of Tennessee, the Defendants-Appellees, and the Tennessee Defense Lawyers Association, in support of Tenn. Code Ann. § 29-26-121(f) argues from the false premise that subsection (f) abrogates the implied covenant of confidentiality. Yet, subsection (f) does not purport to abrogate the implied covenant of confidentiality articulated in *Givens* and *Alsip*; nor could it, in light of state and federal privacy laws such as HIPAA. Instead, the statute merely addresses the procedure by which the implied covenant is avoided by mandating that, upon the filing of a petition, courts shall grant qualified protective orders allowing *ex parte* communications between defendants and a plaintiff's non-party treating physicians. Thus, the statute's effect is only to overrule the *Alsip* Court's holding that the "formal discovery methods [of Rule 26] exclusively define the *manner* of disclosure in medical malpractice cases." *Alsip*, 197 S.W.3d at 728 (emphasis in original). And, the legislative history confirms that subsection (f) was proposed as a *procedural* "leveling of the playing field," not as a substantive policy determination regarding the implied covenant of confidentiality between patients and physicians:

- "This Bill, quite frankly, is not about patient privacy. It's about procedure in a malpractice case, pure and simple."⁴
- "In short, this Bill is about procedure."⁵
- "I want to stress in my last thirty seconds, this current Bill has nothing to do with patient privacy at all."⁶

⁴ *Hearing on H.B. 2979 Before the H. Subcomm. on the Judiciary*, 2012 Leg., 107th Sess. (Tenn. Mar. 21, 2012) (statement of Jeff Parrish, Tennessee Health Management at 1:16:25), available at http://tnga.granicus.com/MediaPlayer.php?view_id=143&clip_id=5202.

⁵ *Hearing on S.B. 2789 Before the S. Comm. on the Judiciary*, 2012 Leg., 107th Sess. (Tenn. Apr. 11, 2012) (statement of Jeff Parrish, Tennessee Health Management at 6:08:22), available at http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=5342.

As this Court concluded in *Alsip*, “[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.” *Alsip*, 197 S.W.3d 722, 727 (Tenn. 2006) (emphasis added). If a prohibition *against* ex parte communications regulates only how defense counsel may obtain information, then a mandate *requiring* courts to allow ex parte communications equally regulates only how defense counsel may obtain information and is, thus, purely procedural. See *In re: New England Compounding Pharmacy, Inc. Products Liability Litigation*, 185 F. Supp.3d 250, 253 (D. Mass. 2016) (“Section 121(f) is procedural, not substantive.”).

By the time a defendant in a health care liability action files a petition for qualified protective order under Tenn. Code Ann. § 29-26-121(f), that defendant already has access to all of the protected health information that might legitimately be sought under subsection (f) via the traditional discovery methods provided under the Rules of Civil Procedure. *Alsip*, 197 S.W.3d at 727 (“all parties to this case, and their amici, agree . . . 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 . . .”). Thus, subsection (f) does not provide defendants access to any information they might legitimately need that they do not already have access to, and any conceivable policy considerations that the proponents of Tenn. Code Ann. § 29-26-121, generally, might argue the court should read into subsection (f), are mooted by the availability of formal discovery procedures.⁷

⁶ *Hearing on S.B. 0892 Before the S. Comm. on the Judiciary*, 2015 Leg. 109th Sess. (Tenn. Apr. 1, 2015) (statement of Howard Hayden, Wiseman Ashworth Law Group at 06:22), available at http://tnga.granicus.com/MediaPlayer.php?view_id=278&clip_id=10594.

⁷ In response, Appellees contend that subsection (f) is intended to place defendants on “equal footing” with plaintiffs by permitting defendants to obtain the opinions of a plaintiff’s treating physician without “risking an

Accordingly, Tenn. Code Ann. § 29-26-121(f) is purely procedural and does not advance any of the substantive policy goals reflected in the rest of the statute.

B. Tenn. Code Ann. § 29-26-121(f) is not Entitled to Judicial Comity.

The existing judicial framework for the type of discovery that subsection (f) seeks to govern is this Court’s holding in *Alsip*, limiting the disclosure of relevant protected health information to the methods expressly provided under the Rules of Civil Procedure. Tenn. Code Ann. § 29-26-121(f) runs afoul of the separation of powers doctrine because, rather than supplementing this procedural framework, the statute directly conflicts with it by mandating a method of discovery that is both prohibited under *Alsip* and excluded from Tenn. R. Civ. P. 26. *See In re: New England Compounding Pharmacy, Inc. Products Liability Litigation*, 185 F. Supp.3d at 253 (“Section 121(f) conflicts with Rule 26(c) of the Federal Rules of Civil Procedure in that it mandates the entry of a qualified protective order if certain conditions are met, abrogating a federal court’s discretion to grant protective orders and manage the procedure and content of discovery.”). As such, subsection (f) is not “reasonable and workable” within the framework already adopted by the judiciary and does not “work to supplement” the rules already promulgated by this Court. *State v. Mallard*, 40 S.W.3d 473, 481 (Tenn. 2001). Rather, subsection (f) is directly contrary to the procedural framework already established by this Court governing the discovery of relevant protected health information.

In arguing that Tenn. Code Ann. § 29-26-121(f) does not impermissibly conflict with the Tennessee Rules of Civil Procedure, Appellees contend that the *ex parte* interviews permitted by

expensive, blind deposition that almost invariably will be admissible in evidence due to the statutory exemption from trial subpoena afforded to Tennessee physicians.” *See Joint Brief of Defendants-Appellees*, at 12, 14. Yet, there is nothing in the Rules of Civil Procedure prohibiting defendants from seeking, and courts from granting, the right to take a discovery deposition of a plaintiff’s non-party treating physician prior to taking a deposition for proof. In addition, because the statutory provision exempting physicians from trial subpoena is a creation of the legislature, based upon a substantive policy determination, the legislature is free to repeal that exemption at any time.

Tenn. Code Ann. § 29-26-121(f) “fall outside the formal discovery methods governed by Tenn. R. Civ. P. 26.” *Brief of Intervenor-Appellee*, at 12; *Joint Brief of the Defendants-Appellees*, at 17.

Yet, this argument overlooks the statute’s provision that:

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.*

Tenn. Code Ann. § 29-26-121(f)(2).

Thus, by its express terms, subsection (f) purports to allow unregulated and unreviewable *ex parte* communications to substitute for judicially supervised communication of confidential healthcare information and to become permissible disclosures under the rules of discovery, including expert opinion testimony regarding the standard of care.

In addition, Appellees’ argument completely fails to acknowledge the policy considerations reflected in the Rules of Civil Procedure. The exclusion of *ex parte* communications as a permissible method of discovery under Tenn. R. Civ. P. 26 is not mere happenstance; it is a purposeful decision by the judiciary, and one that reflects the judiciary’s own policy determinations, appropriately confined to its sphere of power (that is, the practice and procedure of courts). That decision must be respected by the legislature. *See Mid-South Pavers, Inc. v. Arnco Const., Inc.*, 771 S.W.2d 420, 422 (Tenn. Ct. App. 1989) (holding that “[c]onflicts between provisions of the Tennessee Rules of Civil procedure and provision of the Tennessee Code which cannot be harmoniously construed will be resolved in favor of the Tennessee Rules of Civil Procedure.”).

Oversight of the process of litigation is a core function of the judiciary. Yet, subsection (f) impermissibly intrudes upon that function by removing any ability for the court to ensure that

information gathered during the *ex parte* communications is, in fact, relevant to the underlying claim. “[A]ny determination of what evidence is *relevant*, either logically or legally, to a fact at issue in litigation is a power that is entrusted solely to the care and exercise of the judiciary Consequently, any legislative enactment that purports to remove the discretion of a trial judge in making determinations of logical or legal relevancy impairs the independent operation of the judicial branch of government, and no such measure can be permitted to stand.” *Mallard*, 40 S.W.3d at 483 (emphasis in original).

In response, Appellees argue that the statute does not interfere with the court’s determinations of relevancy because the court has the discretion to limit or prohibit the *ex parte* interview based on good cause shown that the healthcare provider does not possess relevant information. *Brief of Intervenor-Appellee*, at 13-14; *Joint Brief of the Defendants-Appellees*, at 18. First, as pointed out by the trial court in *Hammonds*, this standard places the virtually insurmountable burden on the plaintiff of proving a negative. Second, and perhaps more significantly, Appellees’ argument ignores the crucial role that courts play in determining relevancy *throughout* discovery. Although the statute allows courts to limit or prohibit *ex parte* communications if it can be shown, at the outset, that a healthcare provider lacks relevant information, this threshold inquiry does nothing to provide courts with a mechanism to continue to ensure that questions *actually asked* during these *ex parte* communications are, in fact, limited to relevant information (the scope of which is often a subject of dispute that trial courts are routinely called upon to resolve). The absence of oversight in this regard is particularly significant in light of subsection (f)’s express provision permitting defendant healthcare providers, unencumbered by the Rules of Professional Responsibility, to personally communicate *ex parte* with a plaintiff’s other treating providers.

As a result, subsection (f) has the practical effect of replacing the court's core judicial function – the authority to independently assess the merits of a petition for qualified protective order and compliance therewith – with a rubber stamp.

CONCLUSION

In defending the principle of separated powers, Madison wrote that separation of powers “‘d[oes] not mean that these [three] departments ought to have no *partial agency* in, or no *control* over the acts of each other,’ but rather ‘that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted.’” *Mistretta v. U.S.*, 488 U.S. 361, 380-81 (1989) (quoting THE FEDERALIST NO. 47, pp. 325-26 (J. Cooke ed. 1961) (emphasis in original)). Here, by mandating a purely procedural mechanism for the discovery of protected health information in direct contravention of the pre-existing framework established by the judiciary, Tenn. Code Ann. § 29-26-121(f) impermissibly divests the judiciary of its broad inherent authority over the practice and procedure of lawsuits and allows defendants to circumvent the court's discovery rules and accompanying judicial oversight, all in violation of the separation of powers doctrine.

For all these reasons, the Court should reverse the ruling of the trial court and find that Tenn. Code Ann. § 29-26-121(f) violates the separation of powers doctrine and is unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2017, a true and correct copy of the foregoing was served by first class mail, postage prepaid, in accordance with the Tennessee Rules of Appellate Procedure, and was also transmitted by electronic mail to the following:

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