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,	)	**Overton County No. 2015-CV-7**
Defendants-Appellees, and	)	
STATE OF TENNESSEE,	)	
Intervenor-Appellee	)	

JOINT BRIEF OF THE DEFENDANTS-APPELLEES TIMOTHY KLEPPER, M.D., OVERTON SURGICAL SERVICES assumed name of AMG-LIVINGSTON, LLC, and LIVINGSTON REGIONAL HOSPITAL, LLC d/b/a LIVINGSTON REGIONAL HOSPITAL

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June 14, 2017

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I. ISSUE PRESENTED AND STANDARD OF REVIEW

A. ISSUE PRESENTED

1. Does Tenn. Code Ann. §29-26-121(f) violate the separation of powers doctrine of Article II, sections 1 and 2 of the Tennessee Constitution?

Answer: No, it does not. Section -121(f) is a constitutional exercise of the General Assembly's public policy-making authority.

B. STANDARD OF REVIEW

Issues of constitutional interpretation are questions of law, which are reviewed *de novo* without any presumption of correctness given to the legal conclusions of lower courts, *see* Waters v. Farr, 291 S.W.3d 873, 882 (Tenn. 2009) (*citing* Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827, 836 (Tenn. 2008)). That being said, this Court is charged with upholding the constitutionality of a statute wherever possible, Waters, 291 S.W.3d at 882 (*citing* State v. Pickett, 211 S.W.3d 696, 700 (Tenn. 2007)). A constitutional challenge "begin[s] with the presumption that an act of the General Assembly is constitutional," Waters, 291 S.W.3d at 882 (*citing* Pickett, 211 S.W.3d at 700 (*quoting* Gallaher v. Elam, 104 S.W.3d 455, 459 (Tenn. 2003)).

The presumption of constitutionality applies with even greater force when a facial challenge is made, Waters, 291 S.W.3d at 921 (*citing* Gallaher, 104 S.W.3d at 459, and In re Petition of Burson, 909 S.W.2d 768, 775 (Tenn. 1995)):

> [T]he 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."

Waters, 291 S.W.3d at 921-923 (internal citations and footnotes omitted).

II. STATEMENT OF THE CASE

In this health care liability action, the Defendants Dr. Klepper, Overton Surgical Services, and Livingston Regional Hospital moved for and were granted a qualified protective order, pursuant to Tenn. Code Ann. §29-26-121(f) (alternatively, "the QPO statute"), permitting them and their attorneys to obtain the Plaintiff's decedent's protected health information during *ex parte* meetings with certain of the decedent's specifically named treating health care providers. This appeal involves Plaintiff's challenge—on separation of powers grounds—to the facial validity of Tenn. Code Ann. §29-26-121(f), which (as amended in 2015) provides, in its entirety:

> (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.

Tenn. Code Ann. §29-26-121(f). As is demonstrated below, section -121(f) is a constitutional exercise of the Tennessee General Assembly's authority to determine the public policy of this state.

III. STATEMENT OF THE FACTS

Plaintiff filed this health care liability action, alleging personal injury and wrongful death related to Jewell Colson's October 2013 hospitalization at Livingston Regional Hospital, on February 11, 2015 (TR Vol. I, pp. 1-17). Defendants filed their respective answers to the Complaint (TR Vol. I, pp. 24-36 and 37-49), and subsequently moved jointly for entry of a qualified protective order, pursuant to Tenn. Code Ann. §29-26-121(f), to permit them to seek *ex parte* meetings with certain of Ms. Colson's treating health care providers (TR Vol. I, pp. 54-69). Plaintiff opposed the motion, arguing—*inter alia*—that the QPO statute violated the separation of powers doctrine of the Tennessee Constitution (TR Vol. I, pp. 73-82).

At the time Plaintiff challenged the constitutionality of Tenn. Code Ann. §29-26-121(f), the State of Tennessee had already intervened in the case as a result of Plaintiff having challenged the constitutionality of another statute, Tenn. Code Ann. §29-39-102, in her Complaint (TR. Vol. I, pp. 16-17, 21-23, and 50-53). The State filed a responsive brief in support of Tenn. Code Ann. §29-26-121(f) (TR. Vol. II, p. 6 – TR Vol. III, p. 33), and Defendants likewise filed a joint reply brief in support of the statute (TR Vol. III, p. 40 – TR Vol. IV, p. 46).

At hearing, the Trial Court declined to hold Tenn. Code Ann. §29-26-121(f) unconstitutional and granted the Defendants' motion, though it did require the Defendants to re-submit their proposed Order as the Trial Court felt that certain employees of institutional health care providers had not been identified with sufficient particularity (TR Vol. 4, pp. 67-70). The "Qualified Protective Order Permitting Ex Parte Contact with Treating Providers" entered on May 10, 2016 and filed on May 13, 2016 identified the

precise providers with whom Defendants sought *ex parte* contacts, and otherwise tracked the statutory language of Tenn. Code Ann. §29-26-121(f) (TR Vol. IV, pp. 47-50).

The Trial Court subsequently granted Plaintiff's Motion for Rule 9 Interlocutory Appeal on the issue of whether the QPO statute violates the separation of powers doctrine of the Tennessee Constitution (TR Vol. IV, pp. 51-130 and 146-148). By *per curiam* Order filed August 5, 2016, the Court of Appeals denied Plaintiff's application for permission to appeal pursuant to Tenn. R. App. P. 9. (*see* Order dated August 5, 2016, No. M2016-01491-COA-R9-CV). Plaintiff subsequently filed an application for permission to appeal the Court of Appeals' ruling pursuant to Tenn. R. App. P. 11 and, while the application was pending, the 6th Circuit Court for Davidson County issued a Memorandum Order finding Tenn. Code Ann. §29-26-121(f)(1)-(2) unconstitutional on separation of powers grounds (*see* Notice of Supplemental Authority filed November 23, 2016, No. M2016-01491-SC-R11-CV). The Davidson County Court's opinion thus created a split of authority with other Trial Courts in the state of Tennessee which had consistently upheld the constitutionality of the QPO statute. This Court subsequently granted Plaintiff's Tenn. R. App. P. 11 application by Order filed January 18, 2017.

IV. SUMMARY OF ARGUMENT

As reflected above at §I-A of this brief, Tenn. Code Ann. §29-26-121(f) is entitled to a strong presumption of constitutionality in this challenge to its facial validity. Defendants would further show this Court:

A. The separation of powers doctrine is not absolute, and there are areas in which both the legislative and judicial branch may exercise appropriate authority;

B. Legislative enactments concerning practice and procedure in the state's Courts that are driven chiefly by public policy concerns are entitled to judicial deference;

C. Tenn. Code Ann. §29-26-121(f) is a public policy determination of the General Assembly, and is therefore not "purely procedural"; and

D. Principles of inter-branch comity and cooperation counsel upholding the constitutionality of Tenn. Code Ann. §29-26-121(f).

V. ARGUMENT

A. THE SEPARATION OF POWERS DOCTRINE IS NOT ABSOLUTE, AND THERE ARE AREAS IN WHICH BOTH THE LEGISLATIVE AND JUDICIAL BRANCH MAY EXERCISE APPROPRIATE AUTHORITY

Article II of the Tennessee Constitution provides:

> Section 1. The powers of the government shall be divided into three distinct departments: legislative, executive, and judicial.
>
> 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.

The separation of powers clause at art. II, §2 "prohibits one branch from encroaching on the powers or functions of the other two branches," Colonial Pipeline Co., 263 S.W.3d at 843 (*citing* Richardson v. Tennessee Bd. Of Dentistry, 913 S.W.2d 446, 453 (Tenn. 1995)). "The branches of government, however, are guided by the doctrine of checks and balances; the doctrine of separation of powers is not absolute," Colonial

Pipeline Co., 263 S.W.3d at 843, *n.* 8 (*citing* Anderson County Quarterly Court v. Judges of 28th Judicial Circuit, 579 S.W.2d 875, 878 (Tenn. App. 1978)). Thus, the three branches of government, while independent and co-equal, 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)). As this Court has recognized:

> [I]t is impossible to preserve perfectly the 'theoretical lines of demarcation between the executive, legislative and judicial branches of government.' Indeed, 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) (*quoting* In re Petition of Burson, 909 S.W.2d at 774). Significantly as it pertains to this case, "areas exist in which both the legislative and judicial branch have interests, and that in such areas both branches may exercise appropriate authority," Newton v. Cox, 878 S.W.2d 105, 111 (Tenn. 1994).

B. LEGISLATIVE ENACTMENTS CONCERNING PRACTICE AND PROCEDURE IN THE STATE'S COURTS THAT ARE DRIVEN CHIEFLY BY PUBLIC POLICY CONCERNS ARE ENTITLED TO JUDICIAL DEFERENCE

This Court has previously recognized that:

> 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.

Biscan v. Brown, 160 S.W.3d 462, 474 (Tenn. 2005) (*citing* Martin v. Lear Corp., 90 S.W.3d 626, 631-32 (Tenn. 2002) and Tenn. Code Ann. §55-9-604 (2004) (excluding from most civil actions evidence of a party's failure to wear a seatbelt)). Accordingly, courts in Tennessee have repeatedly upheld various provisions of Tennessee's Health Care

Liability (formerly Medical Malpractice) Act in the face of separation of powers challenges, when those provisions reflected public policy determinations of the legislature. *See, e.g.,* Newton v. Cox, 878 S.W.2d 105 (1994) (claimant attorney fee provision at Tenn. Code Ann. §29-26-120, limiting fee to no more than 33 1/3%, found to be a legislative declaration of public policy and an appropriate exercise of legislature's police powers); Jackson v. HCA Health Services of Tennessee, Inc., 383 S.W.3d 497 (Tenn. App. 2012) (perm. app. denied) (certificate of good faith provision at Tenn. Code Ann. §29-26-122 addressed perceived malpractice insurance crisis, and requiring a plaintiff to conduct due diligence prior to filing a complaint was entirely consistent with the Tennessee Rules of Civil Procedure); Webb v. Roberson, No. W2012-01230-COA-R9CV, 2013 WL 1645713 (Tenn. App. 2013) (perm. app. denied) (pre-suit notice provision at Tenn. Code Ann. §29-26-121 was driven by legislature's substantive policy concerns); and Williams v. SMZ Specialists, P.C., No. W2012-00740-COA-R9-CV, 2013 WL 1701843 (Tenn. App. 2013) (perm. app. denied) (pre-suit notice provision at Tenn. Code Ann. §29-26-121 was supported by "important policy reasons"—namely, legislature's intent to give prospective defendants notice of a forthcoming lawsuit). Likewise, Tenn. Code Ann. §29-26-121(f) is a legislative expression of Tennessee public policy, and should be upheld by this Court.

C. TENN. CODE ANN. §29-26-121(F) IS A PUBLIC POLICY DETERMINATION OF THE GENERAL ASSEMBLY, AND IS THEREFORE NOT "PURELY PROCEDURAL"

There can be no dispute that Tenn. Code Ann. §29-26-121(f) represents a substantive public policy determination of the General Assembly, enacted in direct response to two Tennessee Supreme Court cases, Givens v. Mullikin ex rel. Estate of

McElwaney, 75 S.W.3d 383 (Tenn. 2002) and *Alsip v. Johnson City Medical Center*, 197 S.W.3d 722 (Tenn. 2006).

In *Givens*, this Court recognized an implied covenant of confidentiality between physician and patient, based in large part on multiple *legislative* enactments evincing the General Assembly's desire to keep medical information confidential, 75 S.W.3d at 407.

Four years later in *Alsip*, this Court declared that *public policy* did not require voidance of the implied covenant of confidentiality upon filing of a medical malpractice lawsuit to allow *ex parte* communications between defense counsel and non-party treating physicians, 197 S.W.3d at 727-730. As it pertains to the eventual enactment of Tenn. Code Ann. §29-26-121(f), the *Alsip* decision was important in two specific regards:

- The *Alsip* Court was only able to declare the public policy of Tennessee vis-à-vis whether the implied covenant of confidentiality should be voided to permit *ex parte* meetings in the absence of legislative action on the same subject, *see Griffin v. Shelter Mutual Insurance Co.*, 18 S.W.3d 195, 200 (Tenn. 2000) (*quoting Alcazar v. Hayes*, 982 S.W.2d 845, 851 (Tenn. 1998)) ("'[T]he determination of public policy is primarily a function of the legislature' and the judiciary determines 'public policy *in the absence of any constitutional or statutory declaration*'") (emphasis added in *Griffin*); and
- The *Alsip* Court openly acknowledged that the covenant of confidentiality can be vitiated by statute, 197 S.W.3d at 726 (*e.g.,* Tenn. Code Ann. §38-1-101, requiring reporting of wounds caused by deadly weapons, and §37-1-403, requiring reporting suspected child abuse, sexual assault, and venereal disease in certain minors).

By enacting Tenn. Code Ann. §29-26-121(f), the General Assembly rejected the policy determination reflected in *Alsip*, *see* *Caldwell v. Baptist Memorial Hospital*, No. W2015-01076-COA-R10-CV, 2016 WL 3226431, *6 (Tenn. App. 2016) (perm. app. denied). Instead, the General Assembly determined the public policy of Tennessee required voiding the implied covenant of confidentiality in health care liability actions to "level the playing field" by giving defendants and their attorneys access to an investigatory tool that plaintiffs and their attorneys have had since time immemorial: namely, the ability to meet *ex parte* with the patient's treating physicians. The legislative history of the QPO statute is replete with evidence that its enactment represented a public policy decision of the General Assembly:

> What's happened is that there has become a very uneven playing field between plaintiffs and defendants where plaintiffs have the right to unfettered access to health care providers in order to investigate their claims whereas defense lawyers don't have the same access to speak with health care providers absent permission from the patient or the claimant. (H. Hayden)
>
> ....
>
> This is strictly applicable to health care liability actions as that term is defined in the medical malpractice code. And its [sic], if I may, it is solely designed to give both parties to the lawsuit equal standing as it relates to what the claimant[']s health care providers think about the health care provided to the claimant. (J. Parrish)

Tenn. S. Judiciary Comm. Hearing, S.B. 2789, 107th Gen. Assemb., 2nd Reg. Sess. (Mar. 13, 2012).[1]

> What we're seeking in this bill is the same opportunity to decide, to make an informed decision on what deposition to take. Just like the plaintiff's counsel has now and each and every med mal case the plaintiff's counsel because of the ability to make the informal interviews is in a, has decision[-

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[1] Transcript attached as **Exhibit 1**.

]making opportunities and information that the defense counsel now under current law does not have and that is the issue this bill is trying to rectify. (J. Parrish).

Tenn. S. Judiciary Comm. Hearing, S.B. 2789, 107th Gen. Assemb., 2nd Reg. Sess. (April 11, 2012).[2]

> There was a Supreme Court case in 2002 that created an implied covenant of confidentiality and what that resulted in was inequities in the way that certain health care liability actions are prosecuted. So that now, if you are the plaintiff in a case, then your attorney can speak directly with the health care provider, who is your health care provider, freely and off the record. However, if you're a defendant in that same type of action, you do not have that same type of access. So what this does is, this puts us back on a level playing field.... (Senator B. Kelsey)

Tenn. S. Floor Session, S.B. 2789, 107th Gen. Assemb., 2nd Reg. Sess. (April 19, 2012).[3] Thus, Tenn. Code Ann. §29-26-121(f) is clearly a constitutional exercise of the General Assembly's public policy-making authority.

Plaintiff's argument that the QPO statute does not advance the substantive policy goals in the remainder of Tenn. Code Ann. §29-26-121 is inappropriate and wrong. Tennessee Code Annotated §29-26-121(f) is one subsection of a statute which serves to promote the expeditious resolution of health care liability claims, *see* Eastman Chemical Co. v. Johnson, 151 S.W.3d 503, 507 (Tenn. 2004) (a "statute must be construed in its entirety" and "its background, purpose, and general circumstances under which words are used in a statute must be considered"). Tenn. Code Ann. §29-26-121 was intended to facilitate early resolution of claims as well as to equip defendants with the actual means to evaluate the substantive merits of a plaintiffs' claims, *see* Stevens ex rel. Stevens v. Hickman Community Health Care Services, Inc., 418 S.W.3d 547, 554 (Tenn. 2013); *see*

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2 Transcript attached as **Exhibit 2**.

3 Transcript attached as **Exhibit 3**.

also Webb, 2013 WL 1645713 at *19 (The legislative objectives of Tenn. Code Ann. §29-26-121 include "preventing protracted litigation through early investigation, and possibly, facilitating early investigation through settlement."). The QPO statute advances those goals (which become no less important once a lawsuit has been filed than they are pre-suit) by permitting defendants and their attorneys to obtain the opinions of a plaintiff's treating physicians without risking an expensive, "blind" deposition that almost invariably will be admissible in evidence due to the statutory exemption from trial subpoena afforded to Tennessee physicians, *see* Tenn. R. Civ. P. 32.01(3), Tenn. R. Evid. 804(a), and Tenn. Code Ann. §24-9-101(a)(6).[4] This purpose is evident in the legislative hearings regarding Tenn. Code Ann. §29-26-121(f):

> [T]he plaintiff knows in advance and therefore makes the decision yes, I'd like to depose this doctor or no I don't want to depose that one because I know what he's going to say. Whereas defendants are scared to, have a real problem making the decision which treating physician to depose because we don't know what they're going to say. (H. Hayden)
>
> ....
>
> Without the ability to evaluate the case fully, not knowing what all providers think. It is a deterrent. It inhibits early resolutions. And we believe and submit that this process will flush out more facts, inform both sides of facts so that both sides can evaluate the case and reach an early resolution which will be less expensive and less taxing on all the parties emotionally and otherwise. (J. Parrish)
>
> ....
>
> 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 who got sued cause the problems["][?]. And if the answer is yes, then we can try to resolve the case. (H. Hayden)

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[4] Notably, Tenn. Code Ann. §24-9-101, regarding deponents exempt from trial subpoena but subject to deposition subpoena, represents another area in which the judiciary has acquiesced to legislative action regarding practice and procedure in Tennessee Courts.

Tenn. S. Judiciary Comm. Hearing, S.B. 2789, 107th Gen. Assemb., 2nd Reg. Sess. (Mar. 13, 2012).[5]

Ultimately, however, the question of whether the QPO statute advances the legislative goals of Tenn. Code Ann. §29-26-121 is not for this Court's consideration, *see* Griffin, 18 S.W.3d at 200-201 (*citing* BellSouth Telecommunications, Inc. v. Greer, 972 S.W.2d 663, 673 (Tenn. App. 1997) (perm. app. denied 1998) (It is not the duty of courts to question a statute's reasonableness or substitute its own policy judgments for those of the legislature.); Harrison v. Schrader, 569 S.W.2d 822 (Tenn. 1978) ("[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."); and Williams, 2013 WL 1701843 at *9 ("Whether the statute is wise or actually accomplishes the Legislature's stated purpose is not for us to say."). For the same reason, Plaintiff's argument concerning the claimed "lack of procedural safeguards" during *ex parte* interviews has no bearing on the constitutional question before this Court, as the General Assembly is presumed to have been aware of any such concerns when it enacted the QPO statute, *see* Lee Medical, Inc. v. Beecher, 312 S.W.3d 515, 527 (Tenn. 2010) (*citing* Murfreesboro Medical Clinic, P.A. v. Udom, 166 S.W.3d 674, 683 (Tenn. 2005)) (Legislators are presumed to know the "state of the law" affecting the subject matter of legislation).

Finally, Plaintiff's attempt to cast the QPO statute as "purely procedural" ignores the General Assembly's substantive policy goals underlying the statute. Section -121(f) does far more than regulate the "method" of what is discoverable insofar as the legislature

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5 *See* attached **Exhibit 1**.

intended to place defendants / their attorneys on equal footing with plaintiffs / their attorneys in terms of the ability to meet informally with treating health care providers. Where a legislative enactment concerning practice and procedure in Tennessee Courts is driven by public policy concerns, it will not be deemed "purely procedural" and is entitled to judicial deference, *see* Williams, 2013 WL 1701843 at *8 ("[T]he important policy reasons behind the Legislature's enactment of Section 29-26-121 belie Mr. Williams's contention that the statute is purely procedural."); Webb, 2013 WL 1645713 at *9 ("Based upon the legislature's substantive policy concerns, we find that the pre-suit notice requirement is not entirely procedural."); Biscan, 160 S.W.3d at 474 ("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."); and Mallard, 40 S.W.3d at 481 (*citing* Daugherty v. State, 393 S.W.2d 739, 743 (Tenn. 1965)) ("[W]e have frequently acknowledged the broad power of the General Assembly to establish rules of evidence in furtherance of its ability to enact substantive law.").

As demonstrated by its legislative history, Tenn. Code Ann. §29-26-121(f) is a legislative expression of the public policy of the State of Tennessee, representing the General Assembly's "re-balancing of a plaintiff's privacy interests and expectations in his healthcare information against the defendants' ability to obtain relevant protected information outside of the formal discovery procedures set forth in Rule 26 of the Tennessee Rules of Civil Procedure," Dean-Hayslett v. Methodist Healthcare, No. W2014-00625-COA-R-10-CV, 2015 WL 277114, *9 (Tenn. App. 2015) (perm. app.

denied).[6] "The legislature created the statutory right of privacy and then subsequently limited its application in health care liability actions," *see* "Order" entered May 19, 2017, *Beason v. Tennessee Orthopaedic Clinic, P.C.*, Knox County Circuit Court, No. 3-464-15.[7] As an appropriate public policy determination of the General Assembly, the QPO statute does not violate the separation of powers doctrine in Article II of the Tennessee Constitution.

D. PRINCIPLES OF INTER-BRANCH COMITY AND COOPERATION COUNSEL UPHOLDING THE CONSTITUTIONALITY OF TENN. CODE ANN. §29-26-121(F)

In addition to the legislature's constitutional authority to declare the public policy of Tennessee, principles of inter-branch comity and cooperation favor of the QPO statute's constitutionality. As this Court has previously recognized:

> [C]ourts 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....
>
> 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.

Mallard, 40 S.W.3d at 481. In particular, when legislative enactments are: (1) reasonable and workable within the existing framework adopted by the judiciary, and (2) supplement rules already promulgated by the Supreme Court, "then considerations of comity amongst

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[6] Though *Dean-Hayslett* has been designated "Not for Citation," the quoted language is offered here to demonstrate a split of authority in light of the 6th Circuit Court for Davidson County's determination that Tenn. Code Ann. §29-26-121(f) is "purely procedural," *see* Rule 4(E)(2) of the Tennessee Supreme Court Rules.

[7] Attached as **Exhibit 4**.

the coequal branches of government counsel that the courts not turn a blind eye," Id. (*citing* Newton, 878 S.W.2d at 112).

Plaintiff assumes, incorrectly, that the "framework" within which Tenn. Code Ann. §29-26-121(f) must be reasonable and workable is this Court's decision in Alsip, and essentially argues that because the QPO statute legislatively abrogated Alsip, it is unconstitutional. This argument is misguided for two important reasons. First, with the General Assembly having now expressed the public policy of Tennessee as it pertains to *ex parte* meetings with treating health care providers, it is not for the judiciary to substitute its own policy judgments for those of the legislature, *see* Griffin, 18 S.W.3d at 200-201 ("We are not at liberty to simply declare that the statute violates public policy and refuse to apply its plain language."). Second, using the Plaintiff's rationale, the legislature could never exercise its police powers to overturn judicially created law. A statute is not unconstitutional simply because it abrogates the common law, *see* Mills v. Wong, 972 S.W.2d 663, 922 (Tenn. 2005) (for example, the General Assembly has the power to abrogate common law rights of action in tort provided its legislation bears a rational relationship to some legitimate governmental purpose.)

Here, Tenn. Code Ann. §29-26-121(f) is both reasonable / workable within the existing judicial framework and works to supplement rules already promulgated by the Supreme Court. The goals of the QPO statute—to promote expeditious investigation and resolution of health care liability claims—are entirely consistent with Tenn. R. Civ. P. 1, which provides the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." The QPO statue itself provides a means, in specific circumstances (i.e., upon the filing of a health care liability action), by which defendants

can apply to Trial Courts for a particular order, Tenn. R. Civ. P. 7.02. Far from divesting Trial Courts of their authority to conduct proceedings before them, the QPO statute provides the petition shall be granted "under the following conditions," Tenn. Code Ann. §29-26-121(f)(1), compliance with which is left to the determination of the Trial Court, namely:

- That the petition identifies the health care providers with whom Defendants or their counsel seek *ex parte* contacts, *see* ¶(f)(1)(A);[8]
- That the health care providers so identified possess information relevant to the case at bar, *see* ¶(f)(1)(B);[9] and
- That any order arising from the petition limit dissemination of information to the case at bar (with return or destruction at the conclusion of the case) and expressly state that participation by health care providers in interviews is voluntary, *see* ¶¶(f)(1)(C)(i) and (ii).

Finally, the QPO statute supplements the Tennessee Rules of Civil Procedure by giving defendants and their attorneys equal access to an informal investigatory tool outside of the procedures set forth in Tenn. R. Civ. P. 26. Simply, Tenn. Code Ann. §29-26-121(f) is entirely complementary of the existing judicial framework for investigating health care liability claims.

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[8] Indeed, the instant case, in which the Trial Court required re-submission of the proposed Qualified Protective Order because it felt that certain employees of institutional health care providers had not been identified with sufficient particularity (TR Vol. 4, pp. 67-70), belies Plaintiff's argument that the QPO statute divests Trial Courts of all authority.

[9] Plaintiff devotes a substantial footnote to a scenario in which a defendant allegedly objected in discovery that certain treating health care providers did not possess relevant information and then sought ex parte meetings with some of those same providers. The scenario presented is ***not*** at issue in the present case, and is in any event immaterial to this facial challenge to the constitutionality of Tenn. Code Ann. §29-26-121(f) under all circumstances.

The QPO statute does not interfere with Trial Courts' inherent powers to hear facts, decide the issues of fact made by the pleadings, or to decide the questions of law involved, *Mallard*, 40, S.W.3 at 483. It appropriately leaves to the determination of Trial Courts whether health care providers identified in a petition for qualified protective order possess *relevant* information, *see Id.* Consequently, the QPO statute does not "strike at the very heart" of Trial Courts' exercise of judicial power, *Id.* Because, as demonstrated above, Tenn. Code Ann. §29-26-121(f) is reasonable and workable within, and supplementary to, the Tennessee Rules of Civil Procedure principles of inter-branch comity and cooperation direct that it should be upheld on constitutional grounds, regardless of any finding that it is a public policy determination of the General Assembly.

VI. ADOPTION OF ARGUMENTS

In addition to the arguments set forth herein, the Defendants, pursuant to Tenn. R. App. P. 27(j), adopt by reference the arguments raised in previously filed briefs of the intervenor the State of Tennessee and of the *Amicus Curiae* the Tennessee Defense Lawyers Association.

VII. CONCLUSION

For the foregoing reasons, Defendants respectfully request this Court to hold that Tenn. Code Ann. §29-26-121(f) is constitutional and does not violate the separation of powers doctrine of the Tennessee Constitution, and to affirm the Trial Court's entry of the "Qualified Protective Order Permitting Ex Parte Contact with Treating Providers."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 14, 2017, a true and correct copy of this document was provided by e-mail attachment and by U.S. Mail, postage prepaid, to the following:

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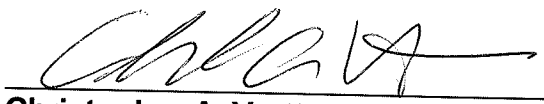


Christopher A. Vrettos

Senate Bill No. 2789
March 13, 2012

Beavers: Senator Kelsey, you're recognized.

Kelsey: Thank you, Madam Chairman. This is...sorry, I had the other folder out. This is a bill that addresses a problem that has recently arisen in Tennessee and it's regarding making sure that we get the right information out there in lawsuits so that we don't spend time on litigating issues that don't need to be litigated. And um...So that's really the purpose of it. And there is an amendment that's on the bill and I do have some folks who are here and prepared to testify on it today so I would move passage of Senate Bill 2789 so we can pull up the amendment.

Beavers: Okay. We have a motion on Senate Bill 2789, do I hear a second? Chair will second. Um, Senator Kelsey, on the amendment.

Kelsey: Yes, Madam Chairman. The amendment is drafting code 01416771 and I've got copies here if people do not have it.

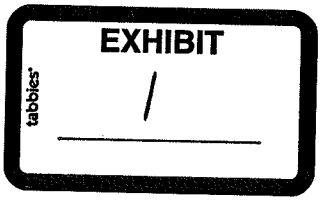
Beavers: Okay. Motion on the amendment by Senator Kelsey. Seconded by Senator Bell.

Kelsey: Apparently, I'm told it's on the system. I'm told that but, it's, uhh. Madam Chairman, we have with us today Mr. Howard Hayden from the Wiseman Ashworth Law Group to speak on this and potentially Mr. Jeff Parrish as well from Tennessee Health Management.

Beavers: Okay. We'll go into recess.

Beavers: Gentleman, if you'll have a seat and make sure your microphone is on and state your name please.

Hayden: Madam Chairman and members of the committee, my name is Howard Hayden from the Wiseman Ashworth Law Group and it's my privilege to be here before you today. I'm sorry; I thought we were going to hear from Mr. Parrish. I have spent more than the last ten years in defense of medical malpractice cases and have been practicing law for 28 years. I have offices in Memphis and Nashville. This has been a pet issue of mine for approximately the last 6 or 7 years ever since a decision named Alsip was handed down by the Tennessee Supreme Court. What's happened is that there has become a very uneven playing field between plaintiffs and defendants where plaintiffs have the right of unfettered access to health care providers in order to investigate their claims whereas defense lawyers don't have the same access to speak with health care providers absent permission from the patient or the claimant. Now what we did is we worked very hard to come up with amendments to the prior bill to ensure that there are safeguards in



place that are no less restrictive than HIPAA in order to ensure compliance with HIPAA and what we've done is we've created a procedure whereby a defendant who seeks to investigate a claim by speaking with health care providers who are not parties to the lawsuit have to first file a notice with the court after the suit has already been filed thereby giving the plaintiff or claimant the right to seek a qualified protective order if they feel as though any health care provider who is to be interviewed is irrelevant to the case at hand or is not being done for a proper purpose. We've put in the proposed statute a mechanism whereby restrictions can be put into place. The right is only available after the suit is filed and only after the court has entered an order permitting it. Thereby we believe making the bill compliant with HIPAA because it is no less restrictive than HIPAA. I can attest to daily, the difficulties that defense lawyers have trying to investigate a claim. Sometimes a simple phone call to a doctor to answer one question could give us the information to resolve the case, but we can't do that right now under the current status of Tennessee law. That's the reason for this bill.

Beavers: Senator Campfield.

Campfield: Maybe I'm misreading or misunderstanding what this bill could do. You're saying a defense attorney could get access to someone's medical records? Is that correct?

Hayden: Correct, but only after the court grants an order permitting it. In other words, you would have to first give notice, file a notice with the court setting forth whom you wish to communicate with outside the presence of the claimant or the claimant's lawyer. The court would have to grant an order permitting it.

Campfield: And this goes to, I guess, two scenarios I can think of off the top of my head. Actually there was a very famous person. I'll leave his name out of it but who is very well known and someone said that person had a certain disease that later ended up killing the guy but he said 'you can't prove it, I'm suing you.' He sued the person who said it they did not have access to his medical records and therefore, they lost the case. He collected all the money but, I'm just going to say he had AIDS, and later on he died of AIDS which they said he had. If this legislation passes, would the people who said he had AIDS be able to get records to show that he did have AIDS?

Hayden: If, in the pre-suit investigation, information came to light, for instance that a patient had AIDS and unfortunately passed away, and there's an allegation of medical malpractice and the defense would be 'No, this person didn't die as the result of medical malpractice. This person died of a preexisting medical condition." This statute would allow you to go to court to seek permission to interview the people to find that out without repercussions with the answer you're 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. In other words, you just can't run off on your own and start searching for that information.

Campfield: I guess the same thing would hold true, say something like the National Enquirer said so and so is pregnant or something like that. Or something else; so and so had an abortion or something like that and that person sued the National Enquirer. Would the National Enquirer more or less be able to call a doctor into could and say 'did this person receive this procedure?' Would they be able to do that?

Parrish: Madam Chairman, if I may. Jeff Parrish from Tennessee Health Management. I'm delighted to be here today and with all the members of the committee. If I may, briefly address Senator Campfield. This statute bill, as amended, only applies to medical malpractice cases where a claimant has claimed that a medical provider has been negligent in the care being provided. Strictly medical malpractice. I believe Senator Campfield, you may be talking about slander cases or...

Campfield: That would not apply to those?

Parrish: That would not apply. This is strictly applicable to health care liability actions as that term is defined in the medical malpractice code. And its, if I may, it is solely designed to give both parties to the lawsuit equal standing as it relates to what the claimants health care providers think about the health care provided to the claimant. And if that helps clarify it...

Campfield: Thank you.

Beavers: Senator Bell.

Bell: Thank you, Madam Chair. This question I could probably ask the sponsor but I'll ask to ya'll while you're here. Do other states, are there any other states that have a law similar to this bill being proposed?

Parrish: If I may, Jeff Parrish. Tennessee Health Management. The answer is yes but I'll be happy through Senator Kelsey to get you a detailed study of that. I know I was just having a discussion about that three weeks ago with a friend, defense counsel in Alabama in a case of my company's involved in and it's almost identical to this procedure that they go through in Alabama. There are many states which have a program like this, a statutory or a rule program like this. Post-filing in a malpractice claim that requires an order of the court before any of this information can be shared in an avenue for the claimant to contest or take issue with whether the discovery is overly broad. So as the parties are on equal footing in that regard. And there are many, many states, probably the preponderance of states have an express statute on the books in this regard.

Bell: Okay. Do you know if any of them have been, it may not have ever been challenged and it may not be a violation of, I'm not an attorney, I'm trying to feel my way through this but do you know if any of these statutes, other state's

statutes or even this bill, if it was enacted, would be subject to a HIPAA violation?

Parrish: I suspect, Jeff Parrish, Tennessee Health Management. I suspect that the bill would face challenges and that's why in the courthouse, is that most things going on in the courthouse is about a challenge to something. We have worked painstakingly with many, many interested parties, associations and groups that led to this amendment, frankly. And the amendment is dramatically different than the initial bill in that it is post-filing expressly requires a court order which is an express allowance and safe haven under HIPAA. HIPAA acknowledges that health information must be shared in the context of medical malpractice cases in state courts but makes a reference to that is appropriate in the case of and defers to state court judges for the order. So that's the reason you see the word order in our procedure leading to an order in this bill because we want it to be fair but certainly withstand any judicial scrutiny.

Bell: Okay. And forgive me for not knowing the legal terminology but if this bill is enacted and a defendant goes to the judge, the judge grants the order to look at the health care information, are there any privacy restrictions or concerns that would prevent the defendant from disclosing that information to any other party?

Parrish: Absolutely.

Hayden: It's expressly in the bill. It says that the information may not be disseminated outside the scope of the lawsuit. So, we were cognizant of that. We made sure it was in there.

Bell: Okay. Thank you.

Beavers: Senator Yager.

Yager: I don't practice, it's been years since I've tried any type of medical lawsuit so my questions might make that readily apparent but I'm interpreting this as an additional discovery tool?

Hayden: Yes sir.

Yager: How would this be different from a deposition? Why can't you get this through a deposition?

Hayden: The rules of civil procedure right now do not provide that a defendant has the right to take a discovery only deposition of a treating physician. They only provide that you can take a discovery only deposition of a Rule 26 designated expert witness, in other words, someone who is being paid by the parties to provide opinions. So if you take the deposition of the treating medical provider who is not a party to the lawsuit whatever you find out on the record is admissible for all purposes at trial. And that's what has tied the defendants hands from taking

those depositions because we don't know what the doctor will say in advance whereas plaintiffs have the right to know in advance what those treating physicians will say because they can communicate with the doctors, the lawyers can. That in essence is, that's one of the main reasons that the playing field has become so uneven.

Yager: So, you're telling me, if I understand your answer that the treating physician, you cannot depose the treating physician?

Hayden: No sir. You can depose the treating physician. Treating physicians are exempt under Tennessee law from being subpoenaed to court. So if you take the deposition of the treating physician who is, by law, called unavailable for purposes of trial, then what you find out is admissible for all purposes into evidence. So you can't just, to answer your question, yes you can take the deposition but whatever you find out for the first time during that deposition, you're stuck, it becomes admissible for all purposes and you don't have the right to find out in advance of asking the question. Whereas the plaintiffs' lawyers have that right. Does that make sense?

Yager: I believe so.

Beavers: Senator Barnes.

Barnes: The concern I have is, it sounds good when you talk about putting people on equal footing but the reason they're not on equal footing is because one of them is the patient. And one of them, traditionally, has under our law has the right to privacy to what he or she tells the treating physician. And I want to be clear that this is not some great inequity that's been discovered in the law. This is something that has existed for a long time because of the need of the patient to be open with their doctor and not worry about years down the road they're going to enquire into my ear infection to use that as the cause of my dizziness and not the malpractice of someone else. So, I want to be clear that there is an inequity but there are reasons for that. That's, and if you want to comment on it, that's fine but I've got another question.

Hayden: Yes sir. Would you rather ask your other question first?

Barnes: Go ahead, if you want.

Hayden: Well, there was a case Givens that it came down, maybe now it could have been fifteen years ago but before that time...Pardon? Givens was 2002 so ten years ago. So the Givens case came down. That's the case where the Supreme Court said there was an implied covenant of confidentiality between patient and doctor. Before 2002, the defendants had the right to communicate ex parte with anyone they wanted. What this bill is designed to do is let's say someone comes into court and files a lawsuit and says your car wreck caused me to be permanently dizzy, to

use your example, I should have the right to file a motion with the court seeking permission to talk to the ear, nose and throat doctor who treated that same patient seven years earlier for dizziness problems. Because that's relevant to the lawsuit and so this bill is designed with court control to allow us the right to get that information.

Beavers: Senator Barnes.

Barnes: The, but it's not as easy as what you suggested at the outset. The right to pick up the phone and call, I mean, this bill does provide you first of all have to petition the court...

Hayden: Correct.

Barnes: If there's an objection to the petition, then there is a hearing to determine whether or not there's, I believe, good cause shown and there has to be relevance.

Hayden: Yes sir.

Barnes: And you have to show all that. Well, and back to I believe Senator Yager's point that he made, you can take the deposition of that treating physician, it's just that, you might hear something you don't want to hear.

Hayden: Correct. That's correct but the plaintiff knows that in advance and therefore makes the decision yes, I'd like to depose this doctor or no I don't want to depose that one because I know what he's going to say. Whereas defendants are scared to, have a real problem making the decision which treating physician to depose because we don't know what they're going to say. So, that we consider to be an inequity.

Barnes: Well, I understand that but it is understandable why the plaintiffs' attorney would know since they're the ones who can ask their client who did you see, what did you see them for and they know all that information.

Hayden: But they also have the right to call the doctor and ask those questions. And your point is well taken about after all, it is the patient's right to confidentiality but my rebuttal to that would be that once that patient has put their health care and remember, this is just for malpractice actions; once they've made the decision to file this lawsuit, at least a certain amount of information, defendants should have the right to the same as the plaintiff, in my opinion.

Barnes: Madam Chair, if I could ask one other question. With regard to the, in section B of the amendment and I do like the good cause shown. The relevance, I usually think of relevant information in the determination of relevant information and it says as defined in the Tennessee Rules of Civil Procedure. I usually think that is an evidentiary question that is defined by the rules of evidence and maybe I'm not

thinking of what section the rules of civil procedure to find that. So, could you point me to that?

Parrish: If I may, Senator Barnes. Madam Chairman, Jeff Parrish Tennessee Health Management. 26.02 the rules of civil procedure defines relevance under the rules of civil procedure; its an age old proposition of information that's reasonably calculated to lead to the discovery of admissible evidence. And since this is in effect in the discovery, the very earliest discovery phases of the case, the rules of civil procedure which govern discovery, should be applicable and its definition of relevance. Rather than evidence which is, the rules of evidence, which are designed to address issues along time later at trial.

Barnes: Madam Chair that is a very important distinction that we're drawing here. Because when I read relevance, I don't read it as what I believe you're using it here which I think would be discoverable. I think 26.02, it's been a long time since I've looked at it and I'm, I don't have it here before me, but I think that that 26.02 defines discoverable and not relevance. Relevance is a different issue that's defined in the rules of evidence whereas, what you're talking about is the broader discoverable. That is, is it likely to lead to relevant information which is a lot broader. And I think if it were just limited to just relevant information, I think it would be a better amendment because I think when you give the explanation you just did, that really means discoverable and that's a lot broader.

Parrish: If I may, with all due respect, I don't want to argue whether it's the definition of relevance or discoverable. I understand it's basically synonymous. And you're correct that the definition in the rules of civil procedure are more broad, but I want to also note that this reference to relevant, the use of the word relevant and as defined in the Tennessee Rules of Civil Procedure are in this amendment as a result of all of our discussions with all the various parties wanting to make this bill more narrow than its original version and to be cognizant of parameters and confines on this information. Again, we are addressing the discovery phase of a medical malpractice case and the gathering of information. So, it is, in my opinion, and the proponents of the bill's opinion, elementary the definition and also very protective of claimants that we do have a very specific definition as referenced and incorporated from the rules of civil procedure.

Beavers: Senator Barnes.

Barnes: Well, I just want to be clear here that what power that you're giving to the defendants' attorney is to go and, got to petition the court, but the standard is if it, if the information I could get from this treating physician that treated somebody for an embarrassing condition ten years ago, the standard is going to be if that's likely to lead to something else that is relevant, then under the definition that you give, that's going to come in, that is going to be allowed. Is that, that's the way I'm understanding.

Parrish: Yes, yes sir. That is absolutely true. That is also the standard to written discovery requests and to depositions as Senator Yager referenced. However, back to the uneven playing field, it's the standard applicable to claimants and defendants however the unevenness and the unfairness is the claimants counsel, the lawyer, is made by the current state of the law and put in a different decision making capacity. They have more knowledge about whether to take the deposition governed by the rules of civil procedure. Whereas the defendants counsel does not know beforehand any information about what treating providers may say and is put in an unfair disadvantage by not knowing whether to take the risk of taking that deposition. The plaintiff's lawyer is educated and has full decision making knowledge about whether to take the deposition or not. And it's that disparity, the parties to the litigation, the medical malpractice case are in a disparity and that's simply what we're trying to address and have worked with all concerned, health care providers across the board and have much, much support to get this bill which is very narrow and has a number of protections for claimants.

Beavers: Senator Overbey.

Overbey: Thank you Madam Chairman. Just a couple of questions, comments. First of all, I would declare rule 13. Members of my firm handle these types of cases and probably while I was a member of the house, I filed similar legislation in regard to this Givens matter. One thing I thing we need to point out is we're talking about really interviewing the treating, the plaintiff's treating physicians, is that correct?

Parrish: Yes sir.

Overbey: Because when it comes together in information at the time a claim for malpractice, under the medical malpractice reform bill, you have to give notice of the claim and submit a HIPAA compliant medical authorization, is that correct?

Parrish: Yes sir.

Overbey: So, in terms of the claimant's medical records, those are already being available and can be provided by those who have been identified in the notice.

Parrish: Yes sir. If they receive notice. But there could be a world of other providers who haven't received notice.

Overbey: That is, if they're further named in the, mised in the answer and then they're made parties to the suit. Is that what you're referring to?

Parrish: The, our ability to obtain information from health care providers currently under the pre-suit notice statute is applicable to all providers receiving a pre-suit notice. If the claimant has a health care provider, a treating physician, for example, that they don't intend to sue or they're not thinking about suing, they will send us a notice that they're thinking about suing us but they won't name, they may not

name their treating provider in that notice. They may not tell their primary care physician, we're thinking about suing you. And therefore, we aren't able to obtain through the pre-suit notice procedure, any information from that primary care physician.

Overbey: Okay. I hear you. I see what you're saying. Why have, I guess one question has occurred to me, why are you limiting this to medical malpractice cases and not all personal injury cases?

Parrish: I'm going to give you a frank answer. I have asked, I'm in the health care business and I'm charged with overseeing, defending our health care providers in our company and I've managed this process for eleven years and I've asked and I've heard from, what's the most troubling aspect of these cases as it related to procedure, discovery, unfair advantages, etc. This is the single issue that I've heard for eleven years that outside defense counsel who defend cases daily, I don't. But they tell me from the trenches, from the courts in dealing with all the rules of procedure as the case comes along that the current state of the law without this type of mechanism is the most pertinent issue that creates an unfair advantage for a defendant trying to defend itself.

Hayden: And to evaluate the case.

Parrish: And to evaluate the case is something very important. Without the ability to evaluate the case fully, not knowing what all providers think. It is a deterrent. It inhibits early resolutions. And we believe and submit that this process will flush out more facts, inform both sides of facts so that both sides can evaluate the case and reach an early resolution which will be less expensive and less taxing on all the parties emotionally and otherwise.

Overbey: One last question. How do you view this legislation as overcoming whatever objections the court had in the Givens, articulated in the Givens case?

Hayden: Well, I sought the Alsip case being more of a guide than actually Givens because the way Alsip came up was a question of whether or not the trial court had the authority to even issue the order that it did permitting these ex parte interviews. And the Supreme Court determined that under existing Tennessee law, the trial court lacked any authority to grant the order so they reversed the trial court for doing so. So, we believe this statute directly addresses Alsip follow Givens. We think it directly responds to Alsip and Givens by creating a mechanism where there is in fact it does give the court authority that the Supreme Court deemed that it did not have at the time of those decisions. And we've used them as guidelines to try to make sure that the, what's been drafted is not less restrictive than HIPAA because we realize if it is less restrictive than HIPAA, HIPAA would preempt it meaning that it would be invalid, the law. So.

Parrish: If I may, Senator Overbey. We believe that if this statute were on the books at the time of Givens and the Alsip cases, the outcomes of those cases would have been different. There's a lot about privacy and nobody who is a proponent of this bill is objecting to there being a right of privacy. Certainly, I have a physician. Everybody has physicians and doctors and health care providers. This is not about the right of privacy. This is about giving both parties to a medical malpractice case equal footing in a process that is protecting the claimant that was not in place at the time of the Givens and the Alsip cases. If the process, for example, similer to this now in Alabama, I believe the Alsip and Givens cases would have been different. This provides the court's authority, the parties, a process for the parties to use and the state court's authority to do what Alsip said. The state court didn't have the power to do.

Beavers: Okay. Any other questions? If not, that you gentlemen.

Parrish: Thank you very much.

Beavers: We have one other person who has asked to testify. Mr. Matt Hardin. Okay, just a moment. Senator Yager, did you have a question? We'll go back into recess.

Yager: The, I'm, I'm, thank you Madam Chair. Is this necessary? Don't we have existing tools, just, you know, I'm, as I said, I readily admit I don't practice. Yes ma'am. I, tell me why this is necessary. I mean in a word or two when we have existing discovery. I, I'm...

Hayden: There is no mechanism under existing discovery to get this 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 who got sued cause the problems. And if the answer is yes, then we can try to resolve the case. We can't do that now. So...

Beavers: Okay. Thank you gentlemen. Uh, Mr. Matt Hardin? Senator Ford? For these gentlemen? Okay.

Ford: Um, hi there.

Hayden: Hello.

Ford: You know, there's a lot of things about this that sound too good. Umm I'm familiar with how a court case works and usually the plaintiff will go first. I guess depending on what it is. But either way, you're saying you'll be the defendants but when its presented, I mean one side presents altogether before the other side gets up to defend. You'll have the information when it's presented. Why can't you get it then? And then just ask the judge, well we need a little time to go over this. That's usually what makes a lawsuit interesting. And then you've got a fair ground depending on the judge. I suppose...

Parrish: I agree with your last comment, Senator.

Ford: You're, a lot of times you certainly have no choice over what judge you get but that's just the way it works. And, this doesn't sound good and the last two statements that you made about those two cases probably wouldn't have had the same outcome. Anyway, I just had to, I couldn't sit here and not say something about that. It just doesn't sound good. And I think the laws we have in place now will take care of everything that you all are looking for. You just have to work harder. That's all.

Parrish: I understand and I appreciate your position, Senator.

Ford: Thank you.

Hardin: Good afternoon committee members. My name is Matt Hardin. I'm an attorney that practices in Nashville, Tennessee. The first five years of my practice, I was a defense insurance attorney in Memphis, Tennessee and did a lot of work for State Volunteer Mutual Insurance Company as a defense lawyer. For the past six years, I've worked as a plaintiff's lawyer. I've had a number of medical malpractice suits here in the Nashville area. I would ask about this bill as we're going forward. There's an old expression: is there nothing sacred? Now what does that mean in relation to this bill? Now, in our constitution in what we call the bill of rights, we have the fourth amendment which is our right to privacy that it involves. That is our right to privacy in our person. It is through the fourth amendment that we ultimately went in 1996 and had our Congress pass the HIPAA law. The so called Health Care Privacy Law. I believe that the law, as this has been presented in front of the committee today would lessen significantly the privacy that is afforded to patients under HIPAA. Now the proposed bill, as I understand it does two things. One, it allows ex parte communication with a patient's physicians. This is not limited to the physicians who are involved in the lawsuit. This is all of a patient's physicians for their entire life. If you have a deal where someone is 18 years old and has sought alcohol treatment at that time and then fifty years later that same person goes into a hospital for a surgery and the wrong leg is removed, it's going to open up this alcohol treatment from fifty years before. And not only that, it will allow the defendants to track down and attempt to find counselors from all these years ago to ask about something that has nothing to do with the case. Now I heard several questions from the committee about what is allowed right now. As far as getting those records, which I understand a portion of this bill allows, mental health records as well as drug and alcohol treatment records of all potential plaintiffs whether or not it has anything to do with the case. Well, if it does have something to do with the case, it's already allowed. As far as ex parte communications, ex parte's just a legal word meaning without representation or without letting the patient being there. If the real interest in this is to allow a level playing field, why not allow the patient or plaintiff lawyer to attend these meetings with the doctors as well. I think that

would only be fair if we're looking for a level playing field. I think the other side is not looking for a level playing field, they're looking for a competitive advantage and frankly as the malpractice laws in our state are already, they have every advantage in the world. Whether it be the amount of money to be able to hire experts. Whether it be the laws that have been passed in the recent years. In Tennessee in 2004 there was over 4,000 medical malpractice cases filed. Through the efforts of the legislators to reduce the cases that did not have merit, last year that number was cut in half. The secondary issue is related to whether or not the patient has the right to refuse the other side to get these records. As HIPAA is currently, a patient can actually object to whether the other side gets the records at one point or another. This bill would actually take away rights under HIPAA and allow the defendants to get these records whether they wanted to or not or whether it had anything to do with the case. Another example here would be if you had a woman who had the wrong kidney taken out during a surgery. Well, what if that woman had been a victim of rape during her college years. Suddenly, whether or not there is any claim brought related to her mental status at all, the defendants are allowed to get all of her counseling records and potentially try to keep her from bringing this suit at all because she knows this could be made part of the case at the minimum at the deposition. Now, let's look at this from the doctor's standpoint. State Volunteer Mutual Insurance Company provides coverage for 81.4% of the doctors in our state as of 2011. That is an overwhelming amount. State Volunteer is what we call a mutual insurance company. And what does that mean? That means the doctors own the company. This puts the doctor or the treating doctor in the position of having a conversation with a defense lawyer about a lawsuit that could potentially could affect their own premiums. It's putting a doctor who should be looking for the patient's health in an adversarial position against their own patient which we do not think is reasonable. Now, another thing about the physicians, let's put the shoe on the other foot and this has happened occasionally on cases I've had where you have a physician that has had some type of alcohol or drug treatment. They are very quick to object to producing these records and say that it has nothing to do with the case. Senator Barnes brought up earlier that currently, he brought up the word relevance. Relevance means is it related to the case. Under current law as it is, if something is related to the case, the defendants are already allowed to get it. So this is completely unnecessary. Finally, I would say that at this time you were asked whether or not what other states did on this particular issue. Currently there are thirty eight states prohibit ex, this type of communication with physicians. Thirty eight; this is a large majority. The state of Georgia, two or three years ago had some legislation like this that went through and recently the Supreme Court overturned the law. Why did they do that? Because of the supremacy clause of the constitution. Because they found that this violated HIPAA. Five more states in our country, bringing it up to almost forty have no laws on this one way or another. So, I would ask that the committee not pass this bill or in the interim, if the goal is to make it equal among all parties, to make it where, if there is communication with a patient's doctor that the patient and the plaintiff's lawyer be able to attend

those meetings if the goal is only to find out what information that these physicians have. Thank you.

Beavers: Questions? Senator Barnes.

Barnes: Thank you, Madam Chair. The question I've got is when it talks about the protective order the plaintiff's counsel may seek and there's language that says that you can seek to limit or prohibit. And prohibit I understand, but limit, I read that as maybe you can only inquire into this particular subject matter. But how does that work practically when its ex parte? Who is the referee? The judge isn't there. Who is to say no, you've gone beyond the scope that you're allowed to inquire into.

Hardin: I think that is a big problem and I think when you're in a trial, the goal is to get the truth of what happened. In keeping our eye on that goal, having both attorneys there being able to ask. If you're just going to ask about the medical care, I think would be a fair solution to this.

Beavers: Any other questions? Senator Yager?

Yager: Why shouldn't we expect that when the plaintiff brings the case that they are waiving this right of privacy that you say they still have?

Hardin: Well, I think this bill goes...

Yager: And I understand there's a lot of means to the word waive but that's, you understand the point I'm trying to bring.

Hardin: I think, Senator, it's the case of where if someone's brought a, like the example I used earlier, if the wrong kidney is taken out, why should the records related to mental treatment that they had related to child abuse and their use be available and why should the defense get to talk to those doctors about that?

Yager: And I think I may be starting to repeat Mr. Barnes, Senator Barnes questions but isn't that a question of relevance? Couldn't the lawyer object to that? I mean, under this?

Hardin: You would hope so but the problem that we have with it, or I have with it is that it has taken the ability away from the patient to object and placed it in a court to decide whether their privacy is going to be recognized or not.

Yager: But they're the ones, you're representing the plaintiff. They're the ones who brought the case. They're the reason why you're in court.

Hardin: Right and I wanted to give one clarification about something I was talking earlier about as well that may help with that. The defendants are already allowed to take

the depositions of these physician doctors and there was an intimation that somehow the plaintiffs were allowed to speak to all these doctors. I have found in my experience over the, you know, past six years with these kinds of cases from the plaintiff's side, these doctors, once they find out there is a, that I'm representing a plaintiff in a medical malpractice suit, they won't speak to me at all. And so that is a real problem. There's not this open allowance for plaintiff lawyers to be able to talk to doctors because of this fact that most of them have this same insurance company. They won't talk to me.

Beavers: Senator Kelsey.

Kelsey: Thank you, Madam Chairman. Have you viewed the amendment that has been proposed and is under discussion today?

Hardin: It was not provided to us prior to the hearing. When we're given, we've been given in days past and we're not aware. I'll be glad to look at it right now if you have a copy and I can comment on it.

Kelsey: Well, Madam Chairman, I think this amendment actually addresses it a number of the concerns that were expressed and so if we could just hold off until next week on this and we'll give everybody time to take a look at the amendment and I think it would, it covers most of these issues.

Hardin: I'm happy to look at it and come back.

Beavers: Okay. We'll go back into session now and we'll roll that bill one week.

Kelsey: Thank you, Madam Chair.

Transcription of SB 2789

April 11, 2012

Kelsey: Thank you, Madam Chairman. Uh, this bill has an amendment as well and what this does is simply provides equality among the two different sides in a lawsuit in a health care liability action in terms of having access to informal discussions with folks who are in the medical field. So, I move for passage of the bill.

Beavers: Okay. We have a motion on the bill by Senator Kelsey. Do I hear a second? Seconded by Senator Bell. Ah, does the amendment make the bill?

Kelsey: The amendment does. It has been revised substantially since we last read it. And that amendment number is 01563571.

Beavers: Okay. Motion on the amendment by Senator Kelsey. Seconded by Senator Bell.

Kelsey: And I know we don't have... yeah, I'm sorry Madam Chairman.

Beavers: Questions on the amendment? Senator Yager.

Yager: ...another sentence or two other than it provides equality.

Kelsey: Madam Chairman, Mr. Parrish has been waiting patiently here for several hours and can explain to us the differences between the new version of the...

Yager: I just said a sentence or two.

Kelsey: and the previous version that we had heard.

Yager: Just a sentence or two.

Beavers: Very, very briefly, if you can.

Parrish: Thank you, Madam Chairman. Very briefly and succinctly. In summary, as far as the policy that this bill promotes, I would ask each of you to consider the following: if any of you were sued, when someone is claiming that you have been negligent for whatever reason. Would you want your lawyer who's defending you to have access to the same information as the lawyer representing the person suing you? In a nutshell, that's what this bill, uh, does. It levels the playing field and it does exactly what I ask you to consider if you were sued.

Beavers: Questions? Okay, that you very much. We'll go back into session. Senator Overbey.

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Overbey: Thank you, Madam Chairman. I want to declare a rule 13 because this bill would apply to cases that my law firm represents folks, so I would declare rule 13 on this bill. Also, I want to briefly explain my vote. Prior to the medical malpractice reform bill which became effective October 1, 2008 and in which a lot of parties cooperated and had input in and I, I, I see Julie sitting there and harkening back to 2005, 2006, 2007, 2008 there were lots and lots of negotiations that went into the medical malpractice reform bill that passed in this chamber in 2007 and in the House in 2008 and became effective October 1, 2008. And there was a lot of give and take in that bill and I think Ms. Griffin would agree with that. A lot of give and take on both sides and one of the initial issues was to do what we called the Givens fix. The other side of the bar probably didn't call it a Givens fix. But we talked a lot. We had bills that had a Givens fix. I sponsored some of those bills prior to 2008. But in the give and take of putting together the medical malpractice reform bill, one of the tradeoffs, as I recall, it is we, the tradeoff was we went with a HIPAA compliant release that would be filed with the notice given health care providers. And that's what we did then. That bill went into effect less than four years ago and to my colleagues here in this room I would tell you that bill has been effective. Medical Malpractice filings have been down almost fifty per cent. The latest statistics is almost forty per cent. But having been a part of those negotiations that led to that while I describe this bill as part of a fight between your head and your heart. Your heart may be in one place but your head reminds you of the various discussions that took place in 2007, 2008 and for that reason I, I'm, while I appreciate all the work Mr. Parrish and the sponsor have done on this bill and the amendments that you have placed on it I think to make it a much better bill and to be a clearer bill in its application. I'm going to pass on the bill and thank you for allowing me to give you that explanation.

Beavers: Any further statements? Senator Marrero.

Marrero: Well, uh, I've had some communication from people in my community who are very much opposed to this bill and the statements they've said to me that this ex parte communication creates a one way discovery mechanism to allow defendants to gain a substantial advantage to discover information about a plaintiff's claim while imposing no similar requirements on defendants. Prohibiting the use of ex parte communication protects the rights of both the treating physician and the plaintiff. It insures that when a patient confides in their physician and reveals confidential information, health information. Information that it ordinarily protected by doctor patient privilege. That information remains confidential. And I think most of us when we go to our physicians expect that when we talk to our physicians, that that is a privileged communication and that communication I think would be breached under this legislation. Uh, I don't think it's a, I don't think that this levels the playing field. I think this actually makes the playing field much more unlevel and so I'll, I'll have to say that I don't intend to vote for this legislation.

Beavers: Any other questions? We're voting on Senate Bill...Senator Yager.

Yager: I'm sorry, does the bill interfere with doctor patient privilege?

Kelsey: Madam Chairman, this um, this bill does not. Because let's remember, for one thing, this is someone who has...(computer beeping) that's not a good sign...this is someone who has entered into a lawsuit and so has voluntarily put herself or himself in a situation in which information like the treatment in healthcare is at issue. And that needs to be discovered and people need to know what are the answers to some of these questions. The bill as amended is limited to the information that is relevant information that is defined by the Tennessee Rules of Civil Procedure. So, it's not like you can just go in there and ask about anything under the sun. It's got to be relevant information. And then finally, I would just there was mention of the Givens case made earlier that was a state supreme court case, um, which really created this problem um, in the not too distant past and prior to that we didn't have this inequity in the system.

Beavers: Okay, we need to adopt the, adopt amendment number one. All in favor say I. Opposed? On the bill as amended. Senator Marrero.

Marrero: Uh, yeah.I would like to say that 34 states prohibit ex parte communications with treating physicians and the balance of authority suggests that HIPAA does not permit attorneys to engage in ex parte communication with non-party treating physicians.

Beavers: Senator Barnes?

Barnes: Thank you, Madam Chair. I'm just trying to figure out who the umpire is here in this process. Uh, the way I perceive this interview taking place is you've got a, you've got an insurance defense lawyer who shows up at the injured person's doctor and in tow with the insurance lawyer is the insurance company's expert witness. Another doctor that they're using and they're going to sit down and interview my, if I'm the injured person, they're going to sit down with my doctor and ask the doctor questions about my whole history and everything that may play into what might possibly be relevant about my, my injuries. But the question I've got for the sponsor is, in that kind of interview, who is there, who, who says what's relevant? The patient's attorney can't be there so who's the, who says what's relevant? Uh, how does that work? How do you make your objections? I don't understand. In a courtroom, I understand but, in a deposition, I understand. You've got a transcript but who is there to make that call? I mean, what if they decide to go way beyond what is relevant? What if they decide to go into things that could be used purely as leverage because it's embarrassing? How do you stop that?

Beavers: Senator Kelsey.

Kelsey: Well, that, that is covered by the qualified protective order under the subsection c. Uh, that shall expressly limit the dissemination of the information and so, and its also the claimant, it says that the claimant can file an objection seeing to limit that information.

Barnes: Respectfully, I mean, that's, the protective order, you don't know until they've already started this process and how do you know what they've ever asked? You would have to anticipate what it is they're going to ask and ask for the protective order. You wouldn't know if they're asking things that are irrelevant.

Kelsey: Madam Chairman, I'm glad to have Mr. Parrish explain the actual procedure of the health care liability action one more time to go through the timing of it and how it works.

Beavers: We can go into recess. Brief is the operative word here.

Parrish: Got it. Thank you Madam Chairman. And I was pretty good last time. I'll try to be good again. In short, this bill is about procedure. It's not about the defense counsel telling anyone information they're going to obtain. It creates a procedure that results in a protective order uh, which is the first element in the procedure. The defendant, if there is a treating physician or another provider that the defense counsel would like to interview or get information from, they have to petition or file a motion asking the court permission to do so. Explaining what the information is, who they want to interview. In response to that the plaintiff's counsel can object. Quoting the language of the bill, the plaintiff's counsel can seek to limit information that's going to be discussed prospectively not retroactively; prohibit any subject matter, topics from being discussed. So we have a protective order, a motion for protective order is the first line in this procedure and the other side has the opportunity to limit and prohibit; fishing expeditions, digging too deeply, etc. The judge hears that in the case, enters the protective order under the guidelines of 26.02, uh, using the word relevant as defined in the rules of discovery 26.02. There's an order that either allows some interview and, if so, has parameters around it. So, all of that process and all of those protections and due process to the plaintiff occur prior to the interview.

Beavers: Senator Barnes.

Barnes: But the question I've got, I understand the pre-interview, I understand uh, judge, here's what we want to inquire into. I understand all that, but you get into the privacy of that office and there that insurance defense lawyer is with the primary care provider, my doctor, my injured person's doctor and that insurance defense lawyer along with their doctor is asking questions. Who is there to say you've gone too far? Because the injured person's counsel can't be there. I mean, this is a this is a, the doctor is sitting beside the insurance defense lawyer, "hey Dr. John, hey Dr. Bill, saw you at the country club the other day, what about this patient?" I mean, who is there to protect the injured person to make sure that they're not

going beyond that order? There's no one there. There's no one that can say that's too far.

Parrish: With all due respect, Senator Barnes, uh, you're correct. There's no one there, but with all due respect to you and the plaintiff's bar, I don't believe that an insurance defense lawyer operating under the guise and confines of a protective order is more likely to go beyond an order. And the plaintiff's counsel might, now under the current law, when the plaintiff's counsel talks to that same provider and there's no one there representing the defendant to prohibit the plaintiff's counsel from steering the physician into, uh, or suggesting, uh, opinions or believes or facts, uh, that might corrupt the provider's opinions. There's no one protecting the defendant, no one representing the defendant in the interviews that are going on today and tomorrow for the plaintiff's counsel.

Beavers: Senator Barnes.

Barnes: The, the difference there though is that doctor is not there because of this process. That doctor is there because that doctor is my client's doctor. That, that doctor's primary role is to provide care and there's a relationship between those two. The primary reason for that health care, for that insurance defense lawyer and the other doctor to be there is to find out information, I understand that. But the answer that you give me, yes, there's no one there but trust us because we always abode by the rules. And I think 99.99% do. I agree with you. I think that most lawyers, defense and plaintiff, they play by the rules. They abode by orders but I'm suggesting to you that that process doesn't allow someone to be there to say you've gone beyond. Plus we may have a difference of opinion as to what's relevant and what's not. We've got a protective order that may be subject to interpretation but there's no one there to interpret it at that time and I think that's the flaw in this process.

Parrish: I appreciate your position.

Beavers: Okay. Thank you very much. We'll go back into session. Senator Campfield.

Campfield: I just had a question for the gentleman.

Beavers: Okay, we'll go back into recess. One more question.

Parrish: Thank you, Madam Chairman.

Campfield: Is there any provision in case someone does go too far? That that stuff would not be, um, more or less, put a, could not be put out to the public until someone would have the chance to come back and say hey, wait a second. He overstepped the bounds. He asked these way out questions and this doesn't need to go public. Is there anything that allows the other side to come in and say this is just a bad fishing expedition where the person's looking to do harm or to embarrass the

person? Is there any way that they could stop that once that interview has been done? Is there any time frame where they have to hold back that information and let the other side see it previous to making that stuff public?

Parrish: If I may, in reverse order. None of this, there's no design here whatsoever to make any of this information public. I mean, that's in this bill that any information gained shall not be disseminated beyond the walls of this particular med mal case. There's that. So there's no issue of public. To answer your other question is the procedure that exists, there's no procedure in this bill, particularly, but there's always existing procedure in a lawsuit between adverse parties for either side, including the plaintiff's counsel in this fact pattern to go in, to seek remedies from the judge against defense counsel if they violate the order, I mean, that's no different that if any party or any counsel is in violation of any court order. The protective order is a court order and if it's violated, there will be remedies for its breach, uh, by anybody who's found to be in contempt of it.

Campfield: So, they could stop them before, they went, say they went in and talked to someone's shrink or something like that and they went on a big fishing expedition and they came back with all this stuff that was maybe outside of what was originally thought to be, going to be questioned on but maybe they decide to take a different track. That stuff would not be admissible until at least the other side had an opportunity to see that information?

Parrish: And the judge rules on it…

Campfield: And the judge rules on it…

Parrish: That it is relevant…

Campfield: That it is relevant but they couldn't submit it until the judge said that it is relevant to the case, is that correct?

Parrish: Correct.

Campfield: Thank you.

Beavers: Senator Barnes has one more question.

Barnes: Brief. The, I don't want anybody to forget you still have the right to ask all the questions you want of this doctor in a deposition where plaintiff's counsel can be there, where we have a transcript, where we can go to the judge with this transcript and say this was too far. This violated protective order. You always have that right but as I understand from the last time you were here, you don't want to do that because you're bound by it. You've got a record of it. That doctor may say something that you don't like and whereas in this closed office with plaintiff's counsel not there, you're just, you don't, you're not bound by anything

but you still have the right to find out everything you want to find out in a deposition. That's still available to you.

Parrish: We have the, yes sir. We have the right to take a deposition. What we're seeking in this bill is the same opportunity to decide, to make an informed decision on what deposition to take. Just like the plaintiff's counsel has now and each and every med mal case the plaintiff's counsel because of the ability to make the informal interviews is in a, has decision making opportunities and information that the defense counsel now under current law does not have and that is the issue this bill is trying to rectify.

Beavers: Okay, thank you very much. We'll go back into session. Senator Kelsey.

Kelsey: Very briefly, I'll just say again that, just remind everybody that this, you know, prior to this decision in 2002, this was not the case but when the court, the state supreme court started interpreting our statute that we passed, this 68111501, then all of a sudden they created this implied covenant of confidentiality and its implied and I think we just need to be clear. That it was not meant to be implied.

Beavers: Okay, we're voting on Senate Bill 2789. Mr. Clerk would you call the roll?

Clerk: Senator Barnes? Senator Barnes votes no. Senator Bell? Senator Bell votes aye. Senator Campfield? Senator Campfield votes aye. Senator Ford? Senator Kelsey? Senator Kelsey votes aye. Senator Marrero? Senator Marrero votes no. Senator Overbey? Senator Overbey passes. Senator Yager? Senator Yager votes aye. Chairman Beavers? Chairman Beavers votes aye. Five ayes, two no's, one pass, one absent.

Beavers: Senate Bill 2789 goes to calendar committee. Uh, let me point out number 81 and 83 on that page are ____ subbed. Uh, number 85, Senator Kelsey, Senate Bill 3275.

Transcription of SB 2789

April 19, 2012

Senate Floor Session

Speaker: Senator Kelsey, you're recognized.

Kelsey: Thank you, Mr. Speaker. I move passage on the third and final consideration of Senate Bill 2789.

Speaker: Senator Kelsey moves passage of Senate Bill 2789 on third and final consideration. That's seconded. Amendments Mr. Clerk.

Clerk: Amendment number 1 by the Senate Judiciary Committee.

Speaker: Chairman Beavers.

Beavers: Amendment number 1 re-writes the bill and I would move the amendment and yield to the sponsor.

Speaker: Senator Beavers moves _____ with Judiciary Committee amendment number 1. Senator Kelsey, you're recognized for explanation.

Kelsey: Thank you, Mr. Speaker. Amendment number 1 makes the bill and let me explain where this problem comes from as well. There was a Supreme Court case in 2002 that created an implied covenant of confidentiality and what that resulted in was inequities in the way that certain health care liability actions are prosecuted. So that now, if you are the plaintiff in a case, then your attorney can speak directly with the health care provider, who is your health care provider, freely and off the record. However, if you're a defendant in that same type of action, you do not have that same type of access. So what this does is, this puts the, puts us back on a level playing field and I second the motion to adopt.

Speaker: On amendment number 1. We'll do a voice vote. Those in favor of adopting _____ signify by saying aye. Those opposed no. Adopt. Mr. Clerk.

Clerk: Mr. Speaker we have amendment number 2 by Senator Overbey.

Speaker: Senator Overbey, you're recognized on amendment number 2.

Overbey: Thank you, Mr. Speaker and members of the Senate. I filed amendment number 2 for a couple of reasons. First of all, um, I did not vote for this bill in Judiciary committee. I passed on it and I want to explain that vote. After the court decision

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in 2002 that Senator Kelsey referred to, I, in fact, carried very similar legislation to what he has before you while I was a member of the House and that, uh, those bills never found favor in the House civil practice subcommittee and never made it to the floor. But in 2005, 2006, Senator Norris and I co-sponsored legislation for medical malpractice reform. And that bill passed this body in 2007; passed the House in 2008 and became effective on October 1, 2008. As I recall, many of the negotiations Senator Norris and I had with various interested parties. One of the issues involved in that discussion was whether to insert language like this in the medical malpractice reform bill. And as I recall, the other interested parties rejected or argued against this language and we eventually arrived on what I would call a compromise, Senator Norris. Where we said if a, where we require claimants to give notice to possible treating physicians who're possible potential defendants. And we provided that those potential defendants would be provided with a HIPAA compliant release for medical information and my recollection is, is more and more fuzzy further and further we go back in time but that is roughly how I remember those negotiations taking place and what we agreed to in that legislation that eventually became law in 2008 was for the HIPAA compliant medical release to be provided to potential claimants so that they could get all of the treating physicians information with regard to the care and treatment of the plaintiff. And so its because of my role in those negotiations and in the passage of that legislation that has resulted in somewhere between a 40 and 50% reduction in medical malpractice cases being filed that I was unable, even now its some years later, even though I'm a member of another chamber to vote for this legislation as it came out of the Judiciary Committee. I did propose an alternative which was discussed in the Senate Judiciary Committee in which, I think gets us to where the sponsor wants us to go faster. Uh, but out of respect, Mr. Speaker, I apologize. Out of respect, Mr. Speaker, for the committee system which I think is very important in this body and because of the lateness of, of bringing this forward and I think the proponent of the legislation merits a vote on his bill as it came out of the Judiciary Committee, I move to withdraw amendment 2.

Speaker: Objection? Withdrawn. Mr. Clerk, further amendments.

Clerk: Mr. Speaker, there are no further amendments.

Speaker: Further discussion of Senate Bill 2789? Senator Marerro and Senator Barnes. Senator Marrero?

Marrero: Thank you, Mr. Speaker and as I did speak against this bill in committee, in the Judiciary Committee, uh, it is my firm belief that this bill would certainly do a lot to destroy the relationship between a patient and their physician if the physician could be deposed without anyone present and testify about any illnesses that the patient might have. I think it's a tremendous invasion of a patient's privacy and therefore that's the reason I can't support this legislation.

Speaker: Senator Barnes.

Barnes: Thank you, Mr. Speaker. If the sponsor would yield.

Speaker: Yields.

Barnes: Senator Kelsey, as I understood the presentation about this bill the way that the interview process takes place is defense counsel goes in and can take an expert in there, another doctor in the room with the, the uh, primary care provider to, for example, for the plaintiff and interview the doctor about certain things that may be specified in a protective order previously entered into, is that correct?

Speaker: Senator Kelsey.

Kelsey: Thank you, Mr. Speaker. That, that's correct. You have to receive a qualified protective order first.

Speaker: Senator Barnes.

Barnes: But when you're in that room, plaintiff's counsel is not allowed in there and the plaintiff is not allowed in there, is that correct?

Speaker: Senator Kelsey.

Kelsey: That is correct.

Speaker: Senator Barnes.

Barnes: And there's no record that's created; there's no transcript; there's no recording that's required. We have no record that we can refer back to at a later time, as I understand it.

Speaker: Senator Kelsey.

Kelsey: That is correct.

Speaker: Senator Barnes.

Barnes: My concern in committee, in Judiciary Committee is still my concern and that is if the issue comes up to whether or not the person conducting the interview is going outside the scope of the protective order, there's no referee, there's no judge, there's no one there that can make a ruling on that and because its all in private and that concerns me and that's one of my major concerns with this and that's why I respectfully, I cannot support the bill.

Speaker: We're on the bill. Further discussion of Senate Bill 2789? Objection or Question? See number on the board support passage of 2789 on third and final consideration

vote now when the bell rings. Those opposed vote no. Has every member voted? Mr. Watson votes aye. Senator Bell votes aye. Mr. Clerk, take the vote.

Clerk: Ayes 21, 9 nays

Speaker: Senate Bill 2789 having received constitutional majority hereby declare it passed. No objection. Motion to reconsider goes to table. Next order Mr. Clerk.

IN THE CIRCUIT COURT FOR KNOX COUNTY, TENNESSEE

MITCHELL STEVEN BEASON and PEGGY JEAN BEASON,

Plaintiff

v.

No. 3-464-15

TENNESSEE ORTHOPAEDIC CLINIC, P.C., DR. TRACY PESUT, M.D., and JENNIFER OLIVER, P.A.,

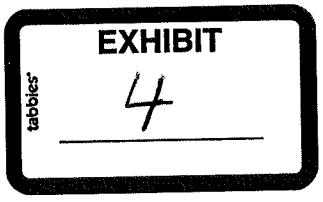
Defendant

ORDER

This matter is before this Court on the Defendants' Motion for a Qualified Protective Order seeking interviews of Plaintiff's treating physicians, outside the presence of Plaintiff or Plaintiff's counsel pursuant to Tenn. Code Ann. §29-26-121(f). The Defendant's seek to interview approximately twenty health care providers who are affiliated with approximately ten separate medical facilities. The Plaintiff opposes the Defendant's Motion for Qualified Protective Order on the basis that Tenn. Code Ann. §29-26-121(f) is unconstitutional. Specifically, Plaintiff challenges the statute authorizing qualified protective orders for interviews of treating physicians as an unconstitutional infringement on the inherent powers of the judiciary and the right to control post-filing discovery and relevance pursuant to the Tennessee Rules of Civil Procedure. The State of Tennessee was properly provided notice of the constitutional challenge, was granted permission to intervene for the sole purpose of defending the constitutionality of the statute and filed a Memorandum of Law in support of the statute.

ANALYSIS

Plaintiff argues that Tenn. Code Ann. §29-26-121(f) violates the separation of power between the legislative branch and judicial branch of government. A few states recognize a right



of privacy for their citizens within their state constitutions. The majority, including the State of Tennessee, do not include a right of privacy for its citizens. In 1965, our state supreme court recognized the possibility of an implied contract of confidentiality between a patient and his doctor, in part, because of the ethics of their profession. *Quarles v Sutherland*, 389 S.W. 2d 249, 251-252 (Tenn. 1965). However, the court in *Quarles* specifically declined to recognize a physician-patient privilege where the "Legislature ha[d] not seen fit to act on the matter[.]" *Id.* at 251. Between 1997 and 2001, the state legislature enacted several pieces of legislation indicative of a public policy concern regarding the confidentiality of medical information. Tenn. Code Ann. §63-2-101, 68-11-1502, 68-11-1503.

The right of the defendant to interview treating physicians is not new. Despite concerns regarding ethical obligations of privacy, ex parte interviews became common. However, as the statutory protection of health care information evolved, accompanied by the judicial recognition of a cause of action for a breach of implied covenant of confidentiality, the practice of ex parte interviews were questioned in courts across the country.

Thirty-five years after suggesting the possibility of an action for a breach of an implied contract of confidentiality between patient and physician and after the adoption of the statutes regarding medical privacy, the Tennessee Supreme Court specifically recognized a cause of action for a breach of the covenant of confidentiality between the physician and patient. *Givens v. Mullikin*, 75 S.W. 383 (Tenn. 2002). The *Givens* court recognized that there were statutory exceptions to the duty of confidentiality, but there was no exception that would permit the disclosure of private health care information shared between physician and patient during the course of treatment. Four years later in *Alsip v. Johnson City Medical Center*, 197 S.W. 3d 722 (Tenn. 2006), the Tennessee Supreme Court clarified the issue of confidentiality of medical records and health care liability actions, specifically with regard to the issue of ex parte interviews by defendants of non-party treating physicians. In *Alsip*, the Court ruled that "formal discovery" methods set forth in Rule 26 of the Tennessee Rules of Civil Procedure exclusively define the manner of disclosure in health care liability cases. The *Alsip* Court found that ex parte interviews offer none of the safeguards traditional methods of discovery offer and found that there was no law or public policy that required the plaintiff to bear the risk of disclosure of irrelevant confidential medical information. *Alsip* at 727, 730. At that point, defendants or their counsel in health care liability actions could no longer conduct ex parte interviews.

From this history, it is clear that the protection of health care information is primarily statutory. "Questions of public policy not determined by the [Tennessee] Constitution are within the exclusive power of the [l]egislature." *Cooper v Nolan*, 19 S.W.2d 274,276 (Tenn. 1929). In addition to public policy concerns regarding confidentiality, the legislature of this state has also created a new statutory scheme for health care liability actions arising from an apparent concern regarding rising malpractice insurance rates. *Jackson v. HCA Health Servs. of Tenn., Inc.*, 383 S.W.3d 497, 505 (Tenn. Ct. App. 2012).

While Article II, Sections 1 and 2 of the Tennessee Constitution provide for the separation of powers between the Executive, Legislative, and Judicial branches of government, these lines of demarcation are theoretical and often difficult to properly identify. *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975).

The Plaintiff argues that Tenn. Code Ann. §29-26-121(f) also improperly attempts to impact procedural and evidentiary rules created by the Court. However, the Supreme Court of Tennessee has recognized that there are areas in which both the legislative and judicial branch have an interest and both may exercise appropriate authority. *Newton v Cox*, 878 S.W.3d 105, 111 (Tenn. 1994) (legislation limiting attorneys' fees in health care actions did not encroach on judicial power to control conduct of attorneys). See also, *Mansell v Bridgestone Firestone N. Am. Tire, LLC,* 417 S.W. 3d 393, 404-406 (Tenn. 2013) (medical-impairment-rating in workers' compensation statute did not conflict with Tennessee Rules of Evidence) and *Jackson v. HCA,* 383 S.W.3d at 505. (Legislation requiring the filing of a certificate of good faith did not conflict with Tenn. R. Civ. P. 3).

CONCLUSION

There is a presumption that every act of the Legislature is constitutional. *Waters v Farr*, 291 S.W.3d 873, 872 (Tenn. 2009). "[T]he challenger must establish that no set of circumstances exists under which the statute, as written, would be valid." *Id.* The legislature created the statutory right of privacy and then subsequently limited its application in health care liability actions. Based upon the arguments set forth above, this Court finds Tenn. Code Ann. 29-26-121(f) to be constitutional and all challenges to the constitutionality of the requested Qualified Protective Order are denied.

Tenn. Code Ann. 29-26-121(f) does, however, provide a mechanism for the Plaintiff "to 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 that a treating healthcare provider does not possess relevant information as defined by the Tennessee Rules of Civil Procedure." Tenn. Code Ann. §29-26-121(f)(1)(B). As such, the Plaintiff shall have fifteen (15) days from the date of entry of this order to file any such objection. Additionally, all other provisions with regard to Tenn. Code Ann. §29-26-121(f)(1)(C), (2) and (3) shall apply.

ENTER this 19 day of May, 2017.

JUDGE DEBORAH C. STEVENS
CIRCUIT COURT DIV. III

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify pursuant to Rule 58.02 TRCP that a copy of this ORDER has been served upon the following counsel of record and case parties by First Class U.S. Mail:

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This 19 day of May, 2017.

Catherine F. Shanks, Clerk

By Debbie Byrd
Deputy Clerk