*The following is a summary regarding the oral arguments in the Willeford v. Klepper et al. case by attorney **Chris Vrettos** with Gideon, Cooper and Essary PLC.*

January 10, 2018, the Supreme Court heard oral arguments on the constitutional challenge to TCA 29-26-121(f) in Knoxville in the *Willeford o/b/o Colson v. Klepper and Livingston Regional Hospital* case.

Phil Elbert argued on behalf of the Plaintiff. Assistant AG Stephanie Bergmeyer argued on behalf of the state, and I argued on behalf of all Defendants. AAG Bergmeyer and I split time 15 minutes each. We had spent some time beforehand trying to figure out who should lead off, depending on whether the Court was more likely to want to address the finer points of Constitutional law versus the mechanics of the statute. Ultimately, the AAG went first, though the Court did end up focusing almost exclusively on the operation of the statute. This may have been helpful, as it did give me some time to prepare counterpoints for the questions I knew would be coming.

The thrust of Mr. Elbert's argument was that the statute is entirely procedural with no public policy concerns at issue. Justice Page made quick work of that issue, pointing to the legislative history and in particular the "equality of access" provided by the statute. Chief Justice Bivins also pointed out that the Certificate of Good Faith and pre-suit notice requirements, though largely procedural, have been upheld by the Court. When Mr. Elbert tried to counter that pre-suit notice and the Certificate of Good Faith relate to pre-suit procedural issues, Chief Justice Bivins was quick to reply: "Are you saying that if this statute allowed the exact same conduct pre-suit, it would be constitutional?"

Mr. Elbert also repeatedly fell back on the claim physicians will meet with Defendants but not with Plaintiff's counsel. Justice Lee seemed to give some consideration to this issue ("What if the doctor refuses to meet with the Plaintiff, but is buddies with the Defendant and plays golf with him at the country club?"). Chief Justice Bivins, again, was having none of it, and pointed out during Mr. Elbert's rebuttal time: "You don't have anything to support that in the record before us."

On the Defense side of the argument, I began with the proposition that if 29-26-121(f) represents an exercise of the legislature's public policymaking authority, then precedent counsels deference to the legislature. Here, the policies underlying the statute include equality of access to treating health care providers, and permitting Defense counsel to gauge the mental impressions of treating providers (which cannot always be gleaned from the records alone) without risking a deposition which is ultimately admissible in evidence—because there is no such thing as a discovery deposition of a treating doctor under the Rules of Civil Procedure.

Almost all questions came from Justices Kirby and Lee, with Justice Kirby leading the charge. The questioning did not differ much between the AAG and me. The points we wound up addressing (sometimes repeatedly) were as follows:

1. The statute strips the Court of its ability to act as the arbiter of what is and what is not relevant (Kirby).

2. The statute only allows the Trial Court to grant or prohibit the ex *parte* meetings, and only upon a showing that a provider does not possess any relevant information. What happens when a provider possesses both relevant and irrelevant information?

3. Concern regarding the spontaneous disclosure of irrelevant information duringex *parte* meetings (i.e., a woman's sexual history or 25 years in the past abortion during a meeting with an OB – Justices Kirby and Lee kept coming back to this example)

4. There is no way for the Trial Court to police what is said during the ex *parte* meetings.

Point #2 above was an interesting issue which the AAG and I had discussed beforehand and on which we did have to make some concessions. However, these concessions may have provided a "middle path" which gave the Supreme Court additional assurances that the Trial Court retains control over the proceedings, and which may avoid a finding that the statute constitutes legislative overreach. Our argument was as follows:

The statute permits a Trial Court not only to ***prohibit*** an interview based on the lack of relevant information, but to ***limit*** it as well. See the following language from paragraph (f)(1)(B):

(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

Justice Kirby seemed intent on taking the position that the statute ties the Trial Court's hands by only permitting a grant or denial of the *ex parte* meetings, and suggested we were inviting the Court to read nonexistent language into the statute, in contravention of the clear and unambiguous language "only upon good cause shown that a treating healthcare provider does not possess relevant

information." I argued that this language is clear and unambiguous only when taken in isolation, and that when the sentence is read in context, the use of the word "limit" creates an ambiguity. The Court should therefore interpret the statute to make logical and sense. If the Trial Court's only option is to grant or prohibit an interview, and it may only prohibit the interview only on a showing that the provider has no relevant information whatsoever, then the word "limit" in the statute is meaningless (Chief Justice Bivins seemed to embrace this argument, as he repeated right back to Elbert during his rebuttal time). The Court should therefore construe the statute to mean that when a provider has both relevant and irrelevant information, the Trial Court can limit the interview to relevant information alone. The Plaintiff knows which providers the Defendants intend to interview and is in the best position to know if a particular provider has information she believes should be off limits. This can then be addressed at the hearing on the -121(f) petition, and if necessary, the Court can include in its order what categories of irrelevant information are not to be discussed at any *ex parte* meetings, so that it is not left to the provider being interviewed to determine what "relevant" information may or may not be discussed.

Intertwined in this argument was Justice Kirby's repeated concern that the statute strips the Court of its ability to determine what is / is not relevant. The AAG and I pointed out that on the contrary, this is precisely why there is a hearing on the QPO petition—for the Court to make a determination as to whether a particular provider has relevant information.

In regards to point #3 above, I noted that by the time an *ex parte* interview occurs, the disclosure of potentially irrelevant information has already occurred, because as a practical matter, I have already obtained records before meeting *ex parte* with the provider.

Point #4 above was the only issue on which I was concerned about our position. I noted that the individuals involved in the meeting are both still bound by the ethics and rules governing their respective professions. This drew an *extremely* sarcastic response from Justice Kirby. "Oh, we should just trust doctors, then, because they're good people and would never say anything?" I responded that it is not only the doctor involved in the meeting, but the attorney as well, who is likewise bound by professional rules/ethics.

I was able to circle back to where I started, which is that the policy reasons underpinning the statute counsel deference to the legislature. Justice Kirby engaged in a bit of argument to the extreme, asking if ***any*** procedural statute touching on the admissibility of evidence, etc. should be upheld if it has policy reasons supporting it. No, I said, but that is not the case in front of us. This statute doesn't affect the Court's ability to determine what evidence is admissible, hear evidence, instruct the jury, etc.

Toward the end of my argument, Justice Kirby indicated her belief that the statute "destroys" confidentiality. This allowed me to close on the point that pursuant to the 1999 case of *Doe v. Sundquist*, the Court has recognized that confidentiality of personal information is an area which is left to the legislature.

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Following oral argument, I could not hazard a guess as to how the Court will ultimately rule. However, I would not be surprised to see a split decision.

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