IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

KIMBERLY MICHELLE HAMMONDS, **Plaintiff,** **vs.** **HCA HEALTH SERVICES OF TENNESSEE INC., d/b/a TRISTAR SOUTHERN HILLS MEDICAL CENTER, TRISTAR HEALTH SYSTEM, INC., DORSHA NICOLE JAMES, M.D., GREGORY R. WEAVER, M.D., RADIOLOGY ALLIANCE, P.C., STEVEN L. SILAS, M.D., STEVEN L. SILAS, M.D., P.C., JEFF FREDERICK SEEBACH, M.D., SOUTHERN HILLS SURGICAL CONSULTANTS, assumed name d/b/a CENTENNIAL SURGICAL ASSOCIATES, LLC, TRACY JEAN OSBORNE, M.D. and MIDDLE TENNESSEE INTERNAL MEDICINE ASSOCIATES,** **Defendants.**	**No. 15c3058**

MEMORANDUM ORDER

Before the Court is Defendants' petition for a Qualified Protective Order ("QPO"). Plaintiff's response argues that the petition should be denied because TENN. CODE ANN. § 29-26-121(f) violates the separation of powers doctrine, violates the open courts clause or is preempted by HIPAA. In the event that TENN. CODE ANN. § 29-26-121(f) is found to be constitutional, the Court must also decide whether Defendants' proposed QPO complies with TENN. CODE ANN. § 29-26-121(f) and the Davidson County Circuit Courts' Joint Order dated May 18, 2016 ("PJ 16").

For the following reasons, the Court finds that TENN. CODE ANN. § 29-26-121(f)(1) and (2) violate the separation of powers doctrine and are unconstitutional. The Court also finds that Defendants' QPO violates both TENN. CODE ANN. § 29-26-121(f) and PJ 16.

I. BACKGROUND

This healthcare liability action was transferred to the Sixth Circuit Court from the Second Circuit Court pursuant to an Order entered August 1, 2016. Defendants' original Motion for QPO was filed December 1, 2015. It sought an order allowing *ex parte* communications with one healthcare provider. The State intervened after Plaintiff's Response to Defendants' Motion for QPO alleged that TENN. CODE ANN. § 29-26-121(f) was unconstitutional. On February 12, 2016, Defendants filed a supplemental brief to their initial motion requesting that eight healthcare providers be added to their original motion. On May 27, 2016 Defendants filed a Joint Petition for QPO that consolidated their first motion and the supplemental motion. On September 9, 2016 Defendants filed a Second Joint Petition for QPO that sought an order allowing them to interview an additional three healthcare providers. For purposes of this Memorandum Opinion Defendants' four pleadings will be treated as one petition for QPO ("Petition") for all twelve healthcare providers.

Plaintiff argues that Defendants' Petition should be denied for four reasons:

A. TENN. CODE ANN. § 29-26-121(f) violates the separation of powers doctrine;

B. TENN. CODE ANN. § 29-26-121(f) violates the open courts clause;

C. HIPAA preempts TENN. CODE ANN. § 29-26-121(f); and

D. Defendants' Petition does not comply with the requirements of TENN. CODE ANN. § 29-26-121(f) and PJ 16.

II. DISCUSSION AND ANALYSIS

A. The Implied Covenant of Confidentiality

In order to interpret TENN. CODE ANN. § 29-26-121(f) it is important to understand its context in the recent history of *ex parte* interviews with healthcare providers. While Tennessee has no testimonial privilege protecting doctor-patient communications, an implied covenant of confidentiality in medical contracts between treating physicians and their patients has been recognized. This covenant of confidentiality was first adopted by the Tennessee Supreme Court in *Givens v. Mullikin,* 75 S.W.3d 383 (Tenn. 2002). In *Givens,* the Court found that a covenant of confidentiality arises from both an implied understanding between patient and doctor and also from a public policy concern that private medical information should be protected.[1] The Court held that physicians breach the implied covenant of confidentiality if they divulge confidential information, without permission, during "informal conversations with others".[2]

In *Alsip v. Johnson City Medical Center,* 197 S.W.3d 722 (Tenn. 2006), the Tennessee Supreme Court clarified its holding in *Givens* by further defining the proper methods for defendants to obtain a plaintiff's private medical information from a non-party treating physician. In *Alsip,* the Tennessee Supreme Court addressed the issue of whether *ex parte* interviews with a plaintiff's non-party physician, conducted after a lawsuit is filed, are an appropriate method of discovery in the context of healthcare liability cases.[3] The Court joined the majority of states[4] in holding that "[h]aving determined the sufficiency of the formal methods

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[1] *Givens,* 75 S.W.3d at 407. *See also Alsip, v. Johnson City Medical Center,* 197 S.W.3d 722, 726 (Tenn. 2006).
[2] *Givens,* 75 S.W.3d at 409.
[3] *Alsip,* 197 S.W.3d at 725 (stating the issue was "whether the trial court erred by granting the defendant's motion and issuing an order authorizing ex parte communications between defense counsel and the decedent's non-party physicians.").
[4] *See Crist v. Moffatt,* 389 S.E.2d 41 (N.C. 1990); *Neubeck v. Lundquist,* 186 F.R.D. 249 (D. ME. 1999); *Nelson v. Lewis,* 534 A.2d 720 (N.H. 1987); *Roosevelt Hotel Ltd. Partnership v. Sweeney,* 394 N.W.2d 353 (Iowa 1986); *Petrillo v. Syntex Labratories Inc.,* 499 N.E.2d 952 (Ill.App.Ct. 1986); and *Anker v. Brodnitz,* 413 N.Y.S.2d 582 (N.Y.Supp.Ct. 1979).

of discovery expressly authorized by Rule 26 to reveal all the decedent's relevant medical information to the defendants, we find it reasonable to conclude that those formal discovery methods **exclusively** define the *manner* of disclosure in healthcare liability cases."[5]

The Court in *Alsip* found the covenant of confidentiality should only be breached in limited circumstances such as pursuant to a subpoena or when a patient's illness presents a foreseeable risk to third parties.[6] The Court explicitly held that *ex parte* interviews, between a plaintiff's non-party treating physician and counsel for the defendant in a healthcare liability action, do not fit within the limited circumstances when the covenant can be breached and are thus inappropriate.[7] The Court held that the "exclusive" methods for a defendant to obtain a plaintiff's private healthcare information from a non-party physician are contained in TENN. R. CIV. P. 26 which governs acceptable methods of discovery.[8]

In *Alsip,* the judiciary was exercising its broad power to promulgate rules governing discovery procedures in a lawsuit and control the methods by which information may be disclosed during litigation. The methods by which parties obtain information falls under the judiciary's broad authority to control the practice and procedures of lawsuits once filed with the court.[9]

Traditionally, parties involved in litigation gather or discover information both formally and informally. Formal discovery is compulsory and governed by limits found in TENN. R. CIV. P. 26. There is no legal duty upon any citizen to engage in any discussion with the representative of any litigant in a civil matter. In fact, "[t]he only compulsory disclosure of facts in civil

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[5] *Alsip*, 197 S.W.3d at 728 (emphasis added, this Court's emphasis is underlined and in bold.).
[6] *Id.* at 726. The Court found the covenant of confidentiality was needed to protect private information from public view and enforce the public's widespread expectation that their medical information was held in confidence. *Id.*
[7] *Id.* at 728.
[8] *Id.*
[9] *See State v. Mallard,* 40 S.W.3d 473, 480-481 (Tenn. 2001)(Stating the Tennessee Supreme Court has the "inherent power to promulgate rules governing the practice and procedure of the courts of this state").

litigation is by subpoena from a court which has the power to determine the *limits and conditions of disclosure*."[10]

Normally, courts do not restrict the informal investigation by a party concerning a lawsuit, either before or after filing. Generally, one may conduct interviews and even obtain documents and sworn affidavits from a willing provider. There are limits, however, upon obtaining such information when there is a recognized privilege or protection. The implied covenant of confidentiality is one such barrier.

The Court in *Alsip* emphasized that the existence of the covenant of confidentiality proscribed the limited methods by which such information may be disclosed. The Court held that public policy considerations reflected in the Tennessee Rules of Civil Procedure require that the covenant of physician-patient confidentiality be voided for the purpose of discovery.[11] Therefore, the covenant of confidentiality bars disclosure of confidential healthcare information without the patient's consent and the barrier falls only in the face of legal compulsion stemming from "public policy [concerns] as expressed in the rules governing pre-trial discovery."[12]

In *Alsip,* the Court extensively explains why *ex parte* interviews of a plaintiff's non-party treating healthcare provider are inappropriate. Formal methods of discovery expressly authorized under TENN. R. CIV. P. 26 are sufficient to allow defendants to obtain all relevant confidential healthcare information.[13] *Ex parte* interviews offer none of the safeguards traditional methods of discovery offer, in turn, increasing the chance that healthcare providers inadvertently reveal non-relevant confidential healthcare information violating a patent's privacy and exposing the

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[10] *Wright v. Wasudev*, No. 01-A-01-9404-CV00176, 1994 WL 642785, at *6 (Tenn. Ct. App. 1994) (emphasis added).
[11] *Alsip*, 197 S.W.3d at 726.
[12] *Id.*
[13] *Id.* at 728.

healthcare provider to charges of professional misconduct and tort liability.[14] Essentially, the Tennessee Supreme Court found that *ex parte* interviews offer almost no benefits while creating the distinct possibility of violating a plaintiff's significant interest in maintaining the confidentiality of their healthcare information.[15]

The Court in *Alsip* expressly found the prohibition against *ex parte* interviews regulates "only *how* defense counsel may obtain" the confidential information; not whether the information is protected.[16] The method of how such information is gathered is part of the practice and procedure of litigation and is under the supervisory power of the judiciary. The Supreme Court has declared that the exclusive method to obtain such information is by formal discovery pursuant to TENN. R. CIV. P. 26.

B. TENN. CODE ANN. § 29-26-121(f)

TENN. CODE ANN. § 29-26-121(f) appears to be the General Assembly's response to the Tennessee Supreme Court's decisions in *Givens* and *Alsip*. It seeks to abrogate those decisions and allow defendants in health care liability actions to obtain confidential healthcare information through informal *ex parte* interviews with a plaintiff's non-party healthcare provider. Curiously, the Legislature recognized the need for legal process to even allow such informal discussions and the statute requires a formal court order authorizing them.

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[14] *See Id.* at 729. *See also Crist v. Moffatt*, 389 S.E.2d 41, 47 (N.C. 1990)(finding "[a] physician may lack an understanding of the legal distinction between an informal method of discovery such an *ex parte* interview...and may therefore feel compelled to participate in the *ex parte* interview...[which] may expose the doctor to charges of professional misconduct or tort liability."). The Court in *Alsip* wisely pointed out that a plaintiff does not consent to the revelation of all of his or her confidential healthcare information, just that information that is relevant to the lawsuit. *Alsip*, 197 S.W.3d at 727-728.

[15] *Alsip*, 197 S.W.3d at 727-729. *See also Crist*, 389 S.E.2d at 47 ("We conclude that considerations of patient privacy, the confidential relationship between doctor and patient, the adequacy of formal discovery devices, and the untenable position in which *ex parte* contacts place the nonparty treating physician supersede defendant's interest in a less expensive and more convenient method of discovery.").

[16] *Alsip*, 197 S.W.3d at 727 (quoting *Crist*, 389 S.E.2d at 43) (emphasis added).

Under TENN. CODE ANN. § 29-26-121(f), a defendant in a healthcare liability action may petition the court for a QPO granting the right to obtain relevant protected health information during *ex parte* interviews with a plaintiff's healthcare providers if certain conditions are met. Such petitions "shall" be granted if they follow three limitations:

1. *The petition must identify the treating healthcare provider or providers for whom the defendants seek a qualified protective order to conduct an interview.*[17]
2. *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.*[18]
3. *The qualified protective order shall expressly provide that participation in any interview by a treating healthcare provider is voluntary.*[19]

A plaintiff may file an objection to either limit or prohibit the defendant's ability to conduct the interviews.[20] The Legislature has directed that the plaintiff bears the burden to prove that a healthcare provider does not possess relevant information.[21] Under the statute, relevance is defined by the Tennessee Rules of Civil Procedure.[22]

TENN. CODE ANN. § 29-26-121(f)(1) requires courts to grant a QPO if a defendant's petition includes the noted restrictions and the plaintiff cannot show the healthcare providers do not have relevant information. Courts have repeatedly held that "shall" removes the court's discretion and instead indicates that the action governed by the statute is mandatory.[23]

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[17] TENN. CODE ANN. § 29-26-121(f)(1)(A).
[18] TENN. CODE ANN. § 29-26-121(f)(1)(C)(i).
[19] TENN. CODE ANN. § 29-26-121(f)(1)(C)(ii).
[20] TENN. CODE ANN. § 29-26-121(f)(1)(B).
[21] *Id.*
[22] *Id.*
[23] *Bellamy v. Cracker Barrel Old Country Store, Inc.*, 302 S.W.3d 278, 281 (Tenn. 2009)(finding "[w]hen shall is used in a statute or rule, the requirement is mandatory."); *Bolin v. Tenn. Farmer's Mut. Ins. Co.*, 614 S.W.2d 566, 569 (Tenn. 1981)(stating "The general rule is that the word 'shall' ordinarily is construed to be mandatory rather than merely directory.").

TENN. CODE ANN. § 29-26-121(f)(2) mandates that healthcare providers' disclosures obtained through a QPO are deemed a permissible disclosure under Tennessee law.

TENN. CODE ANN. § 29-26-121(f)(3) ensures the statute will not prevent defendants from conducting interviews, outside the presence of a plaintiff, with defendants' own present or former employees, partners or owners concerning the healthcare liability action.

TENN. CODE ANN. § 29-26-121(f)(1) and (2) dictate that a court must grant a QPO, and deem any disclosures from it permissible disclosures, if the defendant identifies the healthcare providers, limits the dissemination of the protected health information, and advises the provider that the interviews are voluntary. Under the statute, the only way a QPO is denied is if the plaintiff can carry the substantial, if not insurmountable, burden of proving a negative – that the healthcare provider has no relevant evidence.[24] Therefore, a court's only ability to exercise its discretion to grant or deny the motion completely hinges upon a plaintiff's ability to show the healthcare providers listed in the petition have no relevant information.

This squarely presents the issue of whether the Legislature's mandate improperly encroaches upon the powers of the judiciary.

C. Separation of Powers

The first issue before this Court is whether the Legislature violated the separation of powers doctrine of Article II, Sections 1 and 2 of the Tennessee Constitution by seeking to overrule the Tennessee Supreme Court's determination that *ex parte* interviews between a plaintiff's non-party treating physician and counsel for the defendant in a healthcare liability action are inappropriate and requiring defendants to comply with the formal discovery requirements of the Tennessee Rules of Civil Procedure.

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[24] *See* TENN. CODE ANN. § 29-26-121(f)(1)(B). *See also Dean-Hayslett v. Methodist Healthcare,* No. W2014-00625-COA-R10-CV, 2015 WL 277114, *14-15 (Tenn.Ct.App. Jan. 20, 2015)(Stafford, J., concurring).

When considering the constitutionality of a statute a court starts with the presumption it is constitutional.[25] When there is a facial challenge to the constitutionality of a statute, "the challenger must establish that no set of circumstances exists under which the statute, as written, would be valid".[26] Furthermore, The Tennessee Supreme Court has made clear that the judiciary should "interpret statutes so as to provide for harmonious operation of the laws."[27]

The separation of powers clause "prohibits one branch from encroaching on the powers or functions of the other two branches."[28] The power to control the practice and procedure of the courts sits solely with the judiciary and cannot be constitutionally exercised by any other branch of government.[29] However, from time to time courts recognize that overlap will occur and can consent to the adoption of procedural rules promulgated by the legislature.[30] Specifically, the Tennessee Supreme Court held adoption of procedural rules created by the legislature is appropriate when such rules are: "(1)...reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court..."[31] A court should give greater deference to a procedural rule proposed by the legislature, even if it infringes on the judiciary's power, if it is chiefly driven by public policy concerns.[32]

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[25] *Waters v. Farr,* 291 S.W.3d 873, 882 (Tenn. 2009).
[26] *Id.*
[27] *Mallard,* 40 S.W.3d at 484.
[28] *Colonial Pipeline Co. v. Morgan,* 263 S.W.3d 827, 843 (Tenn. 2008).
[29] *Mallard,* 40 S.W.3d at 480-481 (Stating the Tennessee Supreme Court has the "inherent power to promulgate rules governing the practice and procedure of the courts of this state"). *See also Corum v. Holston Health & Rehab Ctr.,*104 S.W.3d 451, 454 (Tenn. 2003); and *Dean-Hayslett,* 2015 WL 277114, at *11 (citing *Hodges v. Attorney Gen.,* 43 S.W.3d 918, 921 (Tenn.Ct.App. 2000)).
[30] *Mallard,* 40 S.W.3d at 481(holding "it is impossible to preserve perfectly the 'theoretical lines of demarcation between the executive, legislative and judicial branches of government'" and "[i]ndeed there is, by necessity, a certain amount of overlap because the three branches of government are interdependent.").
[31] *Id.* at 481.
[32] *Biscan v. Brown,* 160 S.W.3d 462, 474 (Tenn. 2005)(holding "[a]lthough 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.").

The deference courts must give to a procedural rule proposed by the legislature, however, has its limits. It must be emphasized "that the consent of the courts to legislative regulation of inherent judicial authority is purely out of considerations of inter-branch comity and is not required by any principle of free government."[33] The legislature has no constitutional authority to "strike at the very heart of a court's exercise of judicial power".[34] If a legislative regulation goes too far, courts have not only the option, but the obligation "to protect their independent status, and to fend off legislative or executive attempts to encroach upon judicial [prerogatives]."[35]

TENN. CODE ANN. § 29-26-121(f) is on its face procedural. It governs the manner in which a defendant may obtain certain protected healthcare information. As previously noted, while procedural rules are generally reserved for the courts, the Tennessee Supreme Court has acknowledged that courts should try to accept such statutes if they are chiefly driven by public policy, are reasonable and workable within the framework already adopted by the judiciary, and work to supplement the rules already promulgated by the Supreme Court.

Having found that TENN. CODE ANN. § 29-26-121(f) is procedural, the Court must now address whether the provisions of TENN. CODE ANN. § 29-26-121(f) advance the public policy considerations reflected in the rest of TENN. CODE ANN. § 29-26-121 and whether those provisions conflict with the framework adopted by the Supreme Court.

While the parties did not distinguish the different parts of TENN. CODE ANN. § 29-26-121(f), the Court finds that there is a clear distinction between subsection (f)(3) and subsections (f)(1) and (2) and will address them separately.

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[33] *Mallard*, 40 S.W.3d 482.
[34] *Id.* at 483.
[35] *Id.* at 482. An example of when a legislative enactment goes too far is when it "purports to remove the discretion of a trial judge in making determinations of logical or legal relevancy." *Id.* at 483. *See also Mid-South Pavers, Inc. v. Arnco Const., Inc.*, 771 S.W.2d 420, 422 (Tenn.Ct.App. 1989)(finding "[c]onflicts between provisions of the Tennessee Rules of Civil Procedure and provision of the Tennessee Code which cannot be harmoniously construed will be resolved in favor of the Tennessee Rules of Civil Procedure".).

1. Do the provisions of TENN. CODE ANN. § 29-26-121(f) advance the public policy considerations reflected in the rest of TENN. CODE ANN. § 29-26-121?

The Court of Appeals, examining the pre-suit notice requirements of the statute, stated that the legislature's chief purpose behind TENN. CODE ANN. § 29-26-121 is to reduce the number of frivolous healthcare liability lawsuits in Tennessee and facilitate early settlement by requiring early evaluation and investigation while streamlining the disclosure of medical records.[36] Plaintiff argues that the *ex parte* communications allowed under subsection (f) are purely procedural and do not further the policy goals reflected in the rest of TENN. CODE ANN. § 29-26-121. In support of this argument, Plaintiff claims the legislature's policy goal can only be achieved through actions before a lawsuit arises.[37] While Plaintiff is correct that most of TENN. CODE ANN. § 29-26-121, except section (f), provides for actions to be taken before a lawsuit is filed, this does not automatically preclude post-filing action, such as QPOs, from furthering the legislature's policy goals.

Defendants and the State argue that TENN. CODE ANN. § 29-26-121(f) represents a public policy determination of the legislature to which the judiciary must defer. This misunderstanding seems to rest upon the false notion that all public policy determinations are reserved for the legislature. Both Defendants and the State point to case law that states "the determination of public policy is primarily a function of the legislature" and the judiciary only determines "public policy in the absence of any constitutional or statutory declaration".[38] Relying on the unreported

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[36] *Williams v. SMZ Specialists, P.C.*, No. W2012-00740-COA-R9-CV, 2013 WL 1701843, *8-10 (Tenn.Ct.App. Jan. 24, 2013). *See also Dean-Hayslett*, 2015 WL 277114, *9 (describing the overarching policy of TENN. CODE ANN. § 29-26-121 to "promote the expeditious resolution of allegations of professional negligence in the healthcare setting."); and *Webb v. Roberson*, No. W2012-01230-COA-R9CV, 2013 WL 1645713 *9 (Tenn.Ct.App. Apr. 17, 2013) (similarly finding the policy of TENN. CODE ANN. § 29-26-121 is "to give the defendant the opportunity to investigate and perhaps even settle the case before it is actually filed.").

[37] Plaintiff's Response to Defendants' Motion for QPO pg. 5-6.

[38] *See Mallard*, 40 S.W.3d at 480(finding a court does not have the power to "substitute its own policy judgments for those of the General Assembly."); *See also Alcazar v. Hayes*, 982 S.W.2d 845, 851-852(Tenn. 1998).

case of *Dean-Hayslett v. Methodist Healthcare,* No. W2014-00625-COA-R10-CV, 2015 WL 277114, (Tenn.Ct.App. Jan. 20, 2015), Defendants argue that TENN. CODE ANN. § 29-26-121(f) is a public policy determination reflecting the legislature's "re-balancing" of a plaintiff's privacy interests in his healthcare information against the defendants' ability to obtain relevant protected information "outside the formal discovery procedures". [39]

This argument is not well taken. First, it must be recognized that the Tennessee Supreme Court adopted the implied covenant of confidentiality out of public policy considerations. This protection is not removed by the statute, instead, this statute only addresses the *method* by which it is avoided. The separation of powers doctrine means that the judiciary and legislature must defer to the other's determinations regarding matters that fall within each branch's respective sphere of power.[40] While the legislature enacts the laws, and thus makes most of the public policy determinations, the judiciary has the exclusive authority to determine what the best rules are for its sphere of power. One aspect of the judiciary's power is the ability to regulate the practice and procedure of lawsuits. To be sure, the judiciary will make public policy determinations when promulgating these rules.[41] That is what the Tennessee Supreme Court did in *Alsip* by finding *ex parte* interviews were not a proper discovery method based upon public policy considerations that disclosure of information protected by the covenant of confidentiality should only be discovered through TENN. R. CIV. P. 26 which allows full and open discovery.

Subsections (1) and (2) of TENN. CODE ANN. § 29-26-121(f) do not further the rest of the statute's alleged policy goals. Subsections (f)(1) and (2) do not assist in reducing the number of

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[39] Defendants' Joint Reply to Plaintiff's Response to Motion for QPO, pg. 6 citing to *Dean-Hayslett,* 2015 WL 277114 at *9.

[40] It is important to note that almost all determinations that either branch makes regarding the laws or rules they promulgate within their respective spheres of power are determined by public policy considerations.

[41] The legislature is similarly free to pursue its policy goals through methods that do not interfere with the judiciary's power. That is exactly what the legislature did with all of TENN. CODE ANN. § 29-26-121 except section (f) and the courts found it to be a valid exercise of legislature's power. *See Williams,* 2013 WL 1701843 at *8; and *Webb,* 2013 WL 1645713 at *9.

healthcare liability suits because they only apply after a suit has been filed. Furthermore, an *ex parte* interview that complies with subsections (f)(1) and (2) do not facilitate earlier settlement. Defendants already receive sixty days notice before the filing of a complaint.[42] Within that notice, a plaintiff must provide a HIPAA compliant medical authorization permitting the healthcare provider receiving the notice to obtain a plaintiff's complete medical records from each provider who receives notice.[43] Accordingly, defendants already receive a plaintiff's otherwise protected relevant healthcare information through the pre-suit notice requirement.[44] The only goal subsections (f)(1) and (2) seem to advance is to give defendants an advantage in the litigation process by broadening the scope of informal pretrial discovery of otherwise protected, confidential health information from non-party treating healthcare providers. The court finds that TENN. CODE ANN. § 29-26-121(f)(1) and (2) are not driven chiefly by the goals supporting the rest of the statute. Therefore, the Court does not need to give greater deference to the legislature regarding this procedural rule.

Subsection (f)(3) on the other hand, clearly reflects the public policy goals reflected in the rest of the statute. Subsection (f)(3) simply blocks the statute from improperly infringing on a defendant's right to interview its own employees, partners, or owners. The covenant of confidentiality as described in *Alsip* is to prevent *ex parte* interviews with non-party healthcare providers. Preventing defendant's counsel from speaking to extensions of the defendant would clearly push the covenant of confidentiality too far. This Court finds that TENN. CODE ANN. § 29-26-121(f)(3) is constitutional.

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[42] TENN. CODE ANN. § 29-26-121(a)(1).
[43] TENN. CODE ANN. § 29-26-121(a)(2)(E).
[44] This provision gives defendants ample information to evaluate the case in furtherance of a prompt settlement. Defendants will certainly be able to ascertain whether the suit is frivolous through the ample disclosure the statute already provides.

Having found no need to give greater deference to the procedural rules contained within TENN. CODE ANN. § 29-26-121(f)(1) and (2), the Court now turns to whether they are reasonable and workable within the framework already adopted by the judiciary.

Do these provisions conflict with the framework adopted by the Supreme Court?

This Court must determine whether TENN. CODE ANN. § 29-26-121(f)(1) and (2) violate the separation of powers doctrine by attempting to directly overrule the Tennessee Supreme Court's ability to create rules that govern the practice and procedure of lawsuits before the courts. Once a lawsuit is filed, the judiciary has broad authority to determine the practice and procedures before it. This power includes rules regarding the methods by which the parties obtain information. TENN. CODE ANN. § 29-26-121(f) applies to the gathering of private healthcare information protected by the covenant of confidentiality, after a lawsuit is filed, through *ex parte* interviews. Therefore, the statute will violate the separation of powers doctrine if it directly conflicts with the established judicial framework that addresses the proper methods parties may use to collect such information.

Courts have expressed a great deal of unease surrounding TENN. CODE ANN. § 29-26-121(f) and whether it violates the separation of powers doctrine. Several circuit courts have granted motions for interlocutory appeal to examine whether TENN. CODE ANN. § 29-26-121(f) violates the separation of powers doctrine.[45] Other concerned courts have attached additional procedural requirements to QPOs in an attempt to provide safeguards against the potential for abuse inherent in *ex parte* interviews.[46] Judge Stafford has expressed his concern that the statute

[45] *See Willeford v. Klepper, et al.*, Overton County Circuit Court No. 2015 5CV7, Order granting Plaintiff's motion for Rule 9 interlocutory appeal; and *Williams v. Shelbyville Hospital Corp. d/b/a Heritage Medical Center*, Bedford County Circuit Court No. 13012, Proposed Order granting Plaintiffs' motion for Rule 9 interlocutory appeal.
[46] *See Caldwell v. Baptist Memorial Hospital et al.*, No. W2015-01076-COA-R10-CV, 2016 WL 3226431, *1-3 (Tenn.Ct.App. June 3, 2016); and *Dean-Hayslett*, 2015 WL 277114, *12-14.

comes "perilously close" to infringing on the inherent power of the courts.[47] Courts have also been concerned with the lack of discretion the statute affords to a trial court.[48] The Circuit courts of the 20th Judicial District were similarly concerned, and on May 18, 2016 jointly entered PJ 16 that attempts to balance the seemingly contradictory instructions of TENN. CODE ANN. § 29-26-121(f) and the Tennessee Supreme Court's decision in *Alsip*.

The unreported Tennessee Court of Appeals decision in *Dean-Hayslett* found TENN. CODE ANN. § 29-26-121(f) abrogated *Givens* and *Alsip* "to the extent to which they barred *ex parte* interviews of a plaintiff's treating healthcare providers by defendants and defense counsel outside the discovery process".[49] The Court of Appeals did not address the issue of whether TENN. CODE ANN. § 29-26-121(f) was constitutional or violated the separation of powers doctrine.[50] Rather the limited issue before that court was whether a trial judge has the authority to add certain conditions to a QPO granted pursuant to TENN. CODE ANN. § 29-26-121(f).[51]

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[47] *See Dean-Hayslett*, 2015 WL 277114, at *15 (Stafford, J., concurring)(stating "The practical effect of the majority's interpretation of Tennessee Code Annotated Section 29-26-121(f)(1) also comes perilously close to infringing on the inherent power of the courts."); The separation of powers doctrine was not at issue in *Dean-Hayslett*. Judge Stafford expressed similar concerns in *S.W. by Warren v. Baptist Memorial Hospital*, No. W2014-00621-COA-R10-CV, 2015 WL 891758 (Tenn.Ct.App. Feb. 27, 2015) which has been designated "not for citation" under Tennessee Supreme Court Rule 4.

[48] *Dean-Hayslett*, 2015 WL 277114, at *14 (Stafford, J., concurring)("I write separately, however, to express my concern with the apparent lack of discretion afforded a trial court..."). A Federal District Court in Massachusetts found that TENN. CODE ANN. § 29-26-121(f) was in direct conflict with Federal Rule of Civil Procedure 26 because it "mandates the entry of a qualified protective order if certain conditions are met, abrogating a federal court's discretion to grant protective orders and to manage the procedure and content of discovery". *In re: New England Compounding Pharmacy, Inc. Products Liability Litigation*, MDL No. 13-2419-RWZ (D. Mass. Mar. 11, 2016). This opinion is persuasive as TENN. R. CIV. P. 26 and F.R.C.P. 26 are nearly identical. *Austin v. City of Memphis*, 684 S.W.2d 624, 632 (Tenn.Ct.App. 1984)(finding "...Tenn.R.Civ.P. 26 is, in general, identical to Rule 26 of the Federal Rules of Civil Procedure..."). Also, neither rule explicitly allows nor prohibits *ex parte* interviews.

[49] *Dean-Hayslett*, 2015 WL 277114, at * 9-11.

[50] *Id.* at *3. *See also Dean-Hayslett*, 2015 WL 277114, at *15 n. 2 (Stafford, concurring)(stating "Any question regarding whether Tennessee Code Annotated Section 29-26-121(f)(1) violates any constitutional doctrines is not before this Court.").

[51] *Id.* While the trial court addressed whether the statute violates the separation of powers doctrine "by improperly infringing upon the discretion of the judiciary or by exceeding the boundaries of the legislature's authority" the Court of Appeals did not address that issue. *Id.* at *2-3. Even though a separation of power issue was not before the Court of Appeals, Judge Stafford expressed his concern that the statute seemed to infringe on the inherent power of the courts. *Id.* at *15.

Dean-Hayslett, therefore, provides limited persuasive value or guidance on the separation of powers issue now before this Court.

The two Tennessee Court of Appeals cases that addressed whether TENN. CODE ANN. § 29-26-121(a) and (b) violate the separation of powers doctrine are distinguishable from this case.[52] Those cases did not address subsection (f) and were limited to the finding that pre-suit notice requirements in TENN. CODE ANN. § 29-26-121(a) and (b) did not conflict with TENN. R. CIV. P. 3 because they occur before the filing of a complaint and TENN. R. CIV. P. 3 does not apply until after a suit is filed.[53] In both cases, the court made it readily apparent that their decision was based largely on the pre-suit nature of the requirements.[54] Therefore, those cases are distinguishable from the separation of powers issue because they involved pre-suit action while here the actions occur after a lawsuit is filed.[55]

This Court finds the Tennessee Supreme Court has created a framework for the discovery of protected health information in *Alsip* for the type of action TENN. CODE ANN. § 29-26-121(f) seeks to govern. TENN. CODE ANN. § 29-26-121(f) does not supplement this framework but instead directly conflicts with it and therefore violates the separation of powers doctrine.

In *Alsip,* the Court defined an order permitting *ex parte* communications between defense counsel and the plaintiff's non-party treating physician as a "discovery order".[56] It is abundantly clear, that a QPO granting *ex parte* interviews described in TENN. CODE ANN. § 29-26-121(f) fits squarely within the type of order the Tennessee Supreme Court described as a "discovery

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[52] *See Williams,* 2013 WL 1701843 and *Webb,* 2013 WL 1645713.
[53] *Williams,* 2013 WL 1701843 at *8; and *Webb,* 2013 WL 1645713 at *9.
[54] *Id.*
[55] *Compare Williams,* 2013 WL 1701843 at *8 (finding "[t]he essence of Tennessee Code Annotated section 29-26-121 is that a defendant be given notice of a medical malpractice claim *before suit is filed*".)(emphasis added); and *Webb,* 2013 WL 1645713 at *9 (holding "29-26-121 requires that written notice of a potential health care liability claim be given '*before the filing of a complaint*'".) *with* TENN. CODE ANN. § 29-26-121(f)(1) (applies "[u]pon the filing of any 'healthcare liability action'...").
[56] *Alsip,* 197 S.W.3d at 723.

order". TENN. CODE ANN. § 29-26-121(f) is attempting to allow a manner of discovery the Tennessee Supreme Court explicitly found to be inappropriate. Subsection (f) of the statute is therefore an improper attempt by the legislature to infringe upon the judiciary's power and is unconstitutional.

The legislature has expressed its public policy determination that healthcare liability suits should be expedited in TENN. CODE ANN. § 29-26-121. It is free to make such a determination and courts should respect it. The legislature is free to use whatever mechanism it wishes to achieve this goal so long as it does not infringe upon the judiciary's inherent powers. Most of TENN. CODE ANN. § 29-26-121 uses mechanisms that are squarely within the legislature's power and the court has respected those parts of the statue.[57] However, subsections (f)(1) and (2) use a procedural mechanism that is controlled solely by the judiciary: post-filing discovery. Furthermore, those subsections directly conflict with the framework for the discovery of protected health information created by the Tennessee Supreme Court in *Alsip*. That is an evident infringement on the judiciary's power.

To be clear, the legislature is free to repeal the covenant of confidentiality. However, it is not free to tell the judiciary what methods must be used for parties to acquire information protected under the covenant of confidentiality during the litigation process. Until the legislature decides to either abolish the covenant of confidentiality or *Alsip* is overruled, this Court is required to follow *Alsip* and its instructions on what methods may be used to breach the covenant of confidentiality.

This case provides an excellent example of why the judiciary has the power to control the practice and procedure of lawsuits before the courts, and shows how the statute conflicts with the judiciary's inherent authority to control judicial proceedings by removing its ability to exercise

[57] *See Williams*, 2013 WL 1701843; and *Webb*, 2013 WL 1645713.

discretion when determining whether to grant or deny a QPO. As previously explained, the only time a court may exercise its discretion to deny a defendant's petition for QPO under TENN. CODE ANN. § 29-26-121(f) is if the plaintiff can prove the healthcare provider does not possess relevant information. Absent such proof, the statute forces the court to grant the QPO. In this case, however, Defendants prevented Plaintiff from ever having the chance to prove the information was not relevant and thus removed any chance the court had at denying the QPO. In effect, there was only an illusion of discretion.

Plaintiff's first set of interrogatories to Defendant HCA Health Services of Tennessee, Inc. d/b/a Southern Hills Medical Center ("Southern Hills") asked Southern Hills to identify all the healthcare providers and other staff that were involved in Plaintiff's care.[58] In response Southern Hills objected, claiming this called for "information not relevant or material to Plaintiff's claim" as most of those individuals were not involved in the care relating to the lawsuit, and gave Plaintiff a few names without providing the specifically asked for contact information.[59] Southern Hills then turned around and filed a QPO for twelve healthcare providers claiming they all had relevant information. In effect, Southern Hills own conduct prevented Plaintiff from ever having the chance to meet its burden. In doing so, it took away the Court's ability to do anything but grant the QPO. Essentially, TENN. CODE ANN. § 29-26-121(f) allowed Defendants to ensure the Court was nothing more than a rubber stamp. If the QPO is considered discovery, the court could use TENN. R. CIV. P. 37 to rectify this issue. However, if it isn't discovery, as the Court of Appeals held in *Dean-Hayslett*, a court has no recourse. The statute mandates that it grant the QPO even if a plaintiff has no chance or hope in responding. Thus, the

[58] Plaintiff's First Set of Interrogatories and Requests for Production to Defendant Southern Hills, Interrogatory No. 2.

[59] Defendant Southern Hills Response to Plaintiff's First Set of Interrogatories and Requests for Production, answer to Interrogatory No. 2. Southern Hills only listed three of the twelve healthcare providers in now seeks to interview in its response to Plaintiff's interrogatories.

legislature violated the separation of powers doctrine by creating an illusion that a court's discretion was preserved but in reality created circumstances in which the court's discretion has been completely taken away.

Defendants and the State argue that TENN. CODE ANN. § 29-26-121(f) does not impermissibly infringe upon the judiciary's authority to control their court proceedings because the statute, and its limit on the court's ability to exercise discretion, only applies to healthcare liability actions. This argument is not well taken. The argument seems to be that since the statutory exception is narrowly tailored to apply only to health care liability actions, it doesn't remove the court's discretion in other instances and therefore is constitutional. It is important to note, that the Tennessee Supreme Court's recent decision in *Ellithorpe v. Weismark* 479 S.W.3d 818 (Tenn. 2015) has greatly expanded what constitutes a healthcare liability action. This alone undermines the argument that this statute only applies in narrow circumstances or has a limited effect. Furthermore, a violation of the judiciary's inherent power to exercise its discretion in limited circumstances is still a violation of the judiciary's inherent power. Limiting an unconstitutional act to certain lawsuits does not change the fact that it is unconstitutional.

This Court finds, that TENN. CODE ANN. § 29-26-121(f)(1) and (2) create a procedure that directly conflicts with the judiciary's framework laid out in *Alsip* and by extension TENN. R. CIV. P. 26. The statute neither fits into that framework nor supplements it. Rather, it seeks to abolish that framework. It is a clear violation of the separation of powers doctrine and is therefore unconstitutional. As Justice Scalia has opined, quoting Thomas Cooley, "the legislature cannot ... control the action of the courts, by requiring of them a construction of the

law according to its own views, ... directing what particular steps shall be taken in the progress of a judicial inquiry."[60]

Therefore, TENN. CODE ANN. § 29-26-121(f)(1) and (2) violate the separation of powers doctrine and are unconstitutional.

D. Open Courts Clause

TENN. CODE ANN. § 29-26-121(f) does not violate the open courts clause of Article I, Section 17 of the Tennessee Constitution. Plaintiff argues that there is no judicial oversight afforded under TENN. CODE ANN. § 29-26-121(f) which in effect restricts Plaintiff's access to the process and protections afforded in a judicial proceeding. This argument is not persuasive. The open courts clause ensures an injured person has a remedy for an injury.[61] TENN. CODE ANN. § 29-26-121(f) does not eliminate or limit any remedies available to Plaintiff. If Plaintiff believes she has been injured by Defendants, nothing in TENN. CODE ANN. § 29-26-121(f) prevents her from seeking out the available remedies.[62]

E. Preemption

This Court finds the Court of Appeals' decision in *Caldwell v. Baptist Memorial Hospital et al.*, No. W2015-01076-COA-R10-CV, 2016 WL 3226431 (Tenn.Ct.App. June 3, 2016) to be persuasive. The Court of Appeals found that TENN. CODE ANN. § 29-26-121(f) is not preempted by HIPAA as it is not an obstacle to carrying out the policies of HIPPA and does not otherwise interfere with the federal law.[63]

F. Compliance with TENN. CODE ANN. § 29-26-121(f) and PJ 16

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[60] *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995).
[61] *See Harrison v. Schrader*, 569 S.W.2d 822, 827-828 (Tenn. 1978); and *Barnes v. Kyle*, 306 S.W.2d 1, 4 (Tenn. 1957).
[62] Plaintiff's claim that the judiciary's power is infringed upon by a court being forced to grant a defendant's QPO is best addressed under the separation of powers doctrine not the open courts clause.
[63] *Caldwell*, 2016 WL 3226431, at *3-8.

While the Court has found TENN. CODE ANN. § 29-26-121(f)(1) and (2) are unconstitutional, it will still address the issue of whether Defendants' Petition complies with the statute and PJ 16.

1. Compliance with TENN. CODE ANN. § 29-26-121(f)

Defendants' Petition does not comply with TENN. CODE ANN. § 29-26-121(f). Plaintiff has two objections to Defendants' Petition relating specifically to TENN. CODE ANN. § 29-26-121(f):

1. the twelve healthcare providers do not have relevant information; and
2. the order improperly allows Defendants to conduct *ex parte* interviews without petitioning the Court.

Plaintiff has failed to show the healthcare providers do not have relevant information, but the Petition does improperly allow Defendants to conduct *ex parte* interviews without petitioning the Court.

Plaintiff has been unable to show that the twelve healthcare providers do not possess relevant information.[64] However, as previously discussed, Plaintiff was prevented by Defendant Southern Hills from having a chance to determine if certain healthcare providers had relevant information. To be sure, relevance is a low hurdle to cross and it is very unlikely that Plaintiff

[64] Plaintiff seems to argue the relevance standard is whether a "non-party provided health care contemporaneously with the events that form the basis of the underlying complaint." This argument relies upon this Court's previous ruling in *Igou v. Vanderbilt University,* No. 13C1647, Sixth Circuit Court for Davidson County, Tennessee (Sep. 27, 2013). In that case, the Court relied upon a previous version of the PJ 16 order filed on February 25, 2016 that has since been amended. In the original PJ 16 the Court found that a defendant could only get a QPO allowing *ex parte* communication with plaintiff's healthcare providers in one of two situations. One of those was if the "non-party provided health care contemporaneously with the events that form the basis of the underlying complaint." The Plaintiff repeatedly argues that none of the healthcare providers sought by Defendants rendered care "contemporaneously" with the negligent care at issue. However, the amended PJ 16 filed on May 18, 2016 clearly replaced this standard with "if defendant obtains a QPO." Thus, *Igou,* and Plaintiff's reliance upon it, is not persuasive.

will be able to carry her burden.[65] While the Court finds that Plaintiff has not carried her burden to show the healthcare providers do not possess relevant information[66] it is deeply concerned with the implication that a defendant could take action to prevent a plaintiff from ever having the opportunity to carry this burden.

Defendants' Petition improperly seeks to allow Defendants to conduct *ex parte* interviews without first petitioning the Court. Defendants' Petition includes a paragraph that states:

> Regarding any medical providers who are not specifically named in this Order but who were involved in the care or treatment of Plaintiff, at any time, if the Defendants or their attorneys intend to seek interviews with such unnamed providers, then the Defendants shall provide the Plaintiff's counsel with the providers' names at least 15 days before these Defendants or their attorneys meet with such unnamed providers.[67]

TENN. CODE ANN. § 29-26-121(f)(1) clearly asserts that the proper mechanism to seek *ex parte* interviews is to petition a court for a QPO. The paragraph above could allow Defendants to conduct *ex parte* interviews if Plaintiff does not object in 15 days. Defendants' concern with judicial economy is not sufficient to allow them to create a self-serving mechanism that goes against the procedures laid out in TENN. CODE ANN. § 29-26-121(f)(1). Therefore, this paragraph should be stricken from Defendants' proposed order.

Otherwise, Defendants' Petition complies with TENN. CODE ANN. § 29-26-121(f).

2. Compliance with PJ 16

Defendants' Petition does not comply with the Circuit Courts of Davidson County's guidelines regarding QPOs. On May 18, 2016, the Circuit Courts of Davidson County jointly

[65] Defendants have stated that all twelve healthcare providers either treated Plaintiff at the time of the accident or for a condition that Plaintiff claims Defendants caused. If true, it is likely those healthcare providers have relevant information to this lawsuit.

[66] The only specific support Plaintiff has offered to the claim no healthcare providers have relevant information is that Dr. Callahan's (listed in Defendants' second petition for QPO) only contact with Plaintiff was more than 15 years prior to the incident. This is not enough to prove he does not have relevant information.

[67] Defendants' proposed order for their second petition for QPO pg. 3.

entered PJ 16 that applies to all QPOs of TENN. CODE ANN. § 19-16-121. The goal of the Circuit Courts was to create a uniform template that would balance the seemingly contradictory instructions of TENN. CODE ANN. § 29-26-121(f) and the Tennessee Supreme Court's decision in *Alsip*, as well as ensure some measure of fairness to plaintiffs. Circuit Courts across Tennessee have attempted to include additional requirements to QPOs for similar reasons. The Court of Appeals has accepted some of these additional requirements and struck down others.[68] This Court along with the rest of the 20th Judicial District believes the additional requirements and clarifying language in PJ 16 are appropriate and help ensure compliance with TENN. CODE ANN. § 29-26-121(f) and *Alsip*. Nonetheless, out of an abundance of caution, this Court believes PJ 16 should be reviewed via interlocutory appeal.[69] However, unless and until PJ 16 is invalidated, this Court will operate under the assumption that it is valid and require Defendants to comply with it.

Defendants' proposed order does not comply with PJ 16 by failing to include procedures that ensure healthcare providers are aware that the *ex parte* interviews are voluntary. Specifically, PJ 16 states:

> In all cases, the petitioner must notify the treating health care provider by letter, including a copy of the QPO, that participation in the interview is voluntary and that the provider has the right to refuse to the interview without recourse. Petitioner shall prepare an acknowledgment, bearing the style of the case which must be provided and signed before any disclosure of PHI. The acknowledgment shall contain the following language in bold face font:

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[68] *See Caldwell*, 2016 WL 3226431 at *9 (holding trial court's requirement that defendant use a discovery-only deposition instead of an *ex parte* interview was improper); and *Dean-Hayslett*, 2015 WL 277114, at *10-14 (holding trial court's requirements that defendants should not attempt to elicit or discuss non-relevant protected health information was proper but requirements that a court reporter be present at *ex parte* interviews, all interviews be recorded, the interviews be conducted under oath, and transcripts of the interviews be filed under seal were improper).

[69] Under Rule 9 of the Tennessee Rules of Appellate Procedure, interlocutory appeal is appropriate if there is a need to prevent irreparable injury or develop a uniform body of law. Interlocutory appeal is appropriate in this case in order to develop a uniform body of law on whether PJ 16 is proper, for which there is an absence of appellate court authority, and to prevent irreparable injury to Plaintiff created by the risk of disclosure of irrelevant confidential medical information during *ex parte* interviews with Defendants' counsel.

I HEREBY ACKKNOWLEDGE THAT I AM NOT OBLIGATED TO PARTICIPATE IN ANY INTERVIEW OR DISCUSSION INVOLVING MY PATIENT. PARTICIPATION IN ANY INTERVIERW CONCERNING A PATIENT IS STRICTLY VOLUNTARY. BY SIGNING THIS ACKNOWLEDGEMENT, I AGREE TO VOLUNTARILY DISCUSS OTHERWISE PROTECTED HEALTH INFORMATION CONCERNING MY PATIENT, __(name of patient)__ WITH __(name of lawyer(s))__.

_____

Signature Date_____

This acknowledgment shall be filed with the court and served on all parties within seven (7) days following its execution.

Defendants' order must include this language pursuant to PJ 16.

Furthermore, Defendants' order fails to include three other paragraphs that are included in PJ 16. They are as follows:

1. *In order to prevent unfair surprise a party plaintiff or defendant intending to rely upon the opinion of a non-party treating physician concerning standard of care or causation shall disclose said opinion in accord with the provisions of Rule 26 T.R.C.P. Said disclosure shall be made at the same time that Rule 26 disclosures of retained experts are made pursuant to the applicable scheduling order.*
2. *Nothing in this Order shall be construed to prohibit the parties from entering into an Agreed Qualified Protective Order that is complaint with TENN. CODE ANN. § 29-26-121.*
3. *Nothing in this Order shall be construed to prohibit a party from questioning non-party individuals by use of formal discovery methods.*

Defendants' order must include this language pursuant to PJ 16.

The Court finds that these additions are not in conflict with TENN. CODE ANN. § 29-26-121(f). TENN. CODE ANN. § 29-26-121(f)(1)(C)(ii) requires that "[t]he qualified protective order shall expressly provide that participation in any such interview by a treating healthcare provider is voluntary." The Court finds that requiring a treating healthcare provider to sign the acknowledgment above furthers the purpose of this provision by ensuring that treating healthcare

providers are aware that such interviews are voluntary. The paragraph addressing opinions concerning standard of care and causation is a way to ensure that TENN. R. CIV. P. 26 is followed and to prevent unfair surprise by either party. The final two paragraphs are included to ensure an order does not prevent the parties from obtaining protected healthcare information through traditional discovery methods. Furthermore, the Court finds that these additional paragraphs are a valid exercise of a trial court's wide discretion in controlling proceedings in its court.[70]

Defendants argue that the addition of the voluntary acknowledgment should not be included because it will have a chilling effect on healthcare providers who contemplate participating in the *ex parte* interview. This argument is without merit. The purpose of PJ 16, and similar orders by other trial courts, is to ensure a practical application of TENN. CODE ANN. § 29-26-121(f). The alleged purpose of TENN. CODE ANN. § 29-26-121(f) is to "enable defendants to ascertain identifying information and relevant healthcare information more expeditiously than otherwise allowed by the formal discovery process in order to evaluate the substantive merits of a plaintiff's claim" through ex parte interviews.[71] The statute's parameters on when an interview is proper and what information can be sought ensure an *ex parte* interview is a limited opportunity.[72] However, ex parte communications create the opportunity for mischief and abuse of process by defendants.[73] A plaintiff only waives the covenant of confidentiality to healthcare

[70] *See Hodges v. Attorney Gen.*, 43 S.W.3d 918, 921 (Tenn.Ct.App. 2000))(finding "[t]rial courts possess inherent, common-law authority to control their dockets and the proceedings in their courts.").
[71] *Dean-Hayslett*, 2015 WL 277114, at *14.
[72] *Id.* (finding "[t]he opportunity granted by the subsection is a limited one; it is limited to interviewing a plaintiff's treating healthcare providers to obtain information – specifically, the plaintiff's relevant protected health information that is in the direct knowledge and control of the plaintiff's treating healthcare providers.").
[73] *Id.* at *17 (Stafford concurring)(stating "this situation presents an opportunity for mischief" and the statute "compounds the threat and leaves little hope of a remedy when its own provisions are violated.").

information relevant to the claim.[74] Non-relevant healthcare information is still protected. The importance of a patient's expectation of privacy and policy of not revealing potentially embarrassing information still applies to the non-relevant information. The voluntary statement ensures healthcare providers are aware that there is a substantial risk that they could breach the covenant of confidentiality by participating in *ex parte* interviews that lack the protections of traditional discovery.[75] PJ 16 attempts to limit the opportunity for abuse by defendants and ensure healthcare providers are aware of the parameters of TENN. CODE ANN. § 29-26-121(f). TENN. CODE ANN. § 29-26-121(f)(1)(C)(ii) explicitly states that the interview must be voluntary and PJ 16 guarantees healthcare providers are well aware of the voluntary nature of the *ex parte* interview. The other provisions of PJ 16 act as similar safeguards.

Therefore, in order to comply with TENN. CODE ANN. § 29-26-121(f) and PJ 16 Defendants' proposed order must strike the language that improperly seeks to allow Defendants to conduct *ex parte* interviews without first petitioning the Court and include the language of PJ 16 that ensures healthcare providers are aware that *ex parte* interviews are voluntary, that TENN. R. CIV. P. 26 is followed, and the order does not prevent the parties from obtaining protected healthcare information through traditional discovery methods.

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[74] *Alsip,* 197 S.W.3d at 728. *See also Crist,* 389 S.E.2d at 46 (finding a plaintiff does not totally waive their right to confidentiality, but rather only waives the right to confidentiality to healthcare information relevant to the case. "...once the statutory privilege has been waived, the confidential nature of the physician-patient relationship remains, even though medical information is then subject to discovery.").

[75] *See Crist,* 389 S.E.2d at 47 (finding "[b]reaches of patient confidentiality, whether the result of inadvertence or pressure by the interviewer, may expose the doctor to charges of professional misconduct or tort liability.") *and Duquette v. Superior Court of Arizona,* 778 P.2d 634, 641 (Ariz.Ct.App. 1989)(finding "[a] physician may lack an understanding of the legal distinction between an informal method of discovery such as an *ex parte* interview, and formal methods of discovery such as deposition and interrogatories, and may therefore feel compelled to participate in the *ex parte* interview.").

III. CONCLUSION

It is therefore, ORDERED, ADJUDGED and DECREED that Defendants' Petition for Qualified Protective Order is respectfully DENIED because TENN. CODE ANN. § 29-26-121(f)(1) and (2) are found to be unconstitutional.

It is further, ORDERED, ADJUDGED and DECREED that in the event TENN. CODE ANN. § 29-26-121(f)(1) and (2) are found to be constitutional, the QPO entered in the above styled case shall be altered and amended to reflect the changes detailed in this Order.

This Court *sua sponte* respectfully suggests that, due to the effect this finding may have on this and numerous other health care liability actions across the State, an expedited interlocutory appeal under Rule 9 of the Tennessee Rules of Appellate Procedure is appropriate in this case in order to develop a uniform body of law and to prevent needless, expensive, and protracted litigation.

IT IS SO ORDERED.

Entered this _____ day of November 2016.

THOMAS W. BROTHERS, JUDGE

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing by postage prepaid, U.S. Mail upon the following:

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This, the 18th day of November, 2016.

Deputy Clerk