**IN THE SUPREME COURT OF TENNESSEE**
**AT NASHVILLE**

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| **RHONDA WILLEFORD, as next of kin of JEWELL MARGARET COLSON, deceased,** | ) | |
| **Plaintiff/Appellant** | ) | **No. M2016-01491-SC-R9-CV** |
| **v.** | ) | |
| | ) | **Circuit Court for Overton County** |
| **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,** | ) | **Docket No. 2015-CV-7** |
| | ) | **Judge Jonathan Young** |
| **Defendant/Appellees,** | ) | |
| **and** | ) | |
| **STATE OF TENNESSEE,** | ) | |
| **Defendant-Intervenor/Appellee** | ) | |

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# BRIEF OF AMICUS CURIAE TENNESSEE DEFENSE LAWYERS ASSOCIATION

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Dated: May 24, 2017

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## INTEREST OF THE TENNESSEE DEFENSE LAWYERS ASSOCIATION

The Tennessee Defense Lawyers Association is a professional organization made up of attorneys throughout the State of Tennessee who are primarily engaged in civil defense litigation. The organization strives to improve trial practice by supporting high standards for litigation practice and courtroom manners within the adversarial system of jurisprudence. A significant portion of the TDLA's members serve as defense counsel for individual physicians and other health care providers in Health Care Liability Actions. Members of the TDLA have been involved in Health Care Liability Actions, formerly referred to as medical malpractice actions, for decades.

As a result, the TDLA has observed and helped to shape the evolution of Health Care Liability law within the State of Tennessee. Many of the TDLA's members practiced in that field before, during, and after Givens v. Mullikin ex rel. Estate of McElwaney, 75 S.W.3d 383 (Tenn. 2002) and Alsip v. Johnson City Medical Entry, 197 S.W.3d 722 (Tenn. 2006) were decided. Further, the TDLA was active when the General Assembly created Tenn. Code Ann. 29-26-121(f). The availability of the *ex parte* communications authorized by Tenn. Code Ann. 29-26-121(f) directly impacts the practice of many of the TDLA's members and impacts each and every attorney who defends health care professionals across the state.

Based on the foregoing, the TDLA is uniquely situated to provide insight into the history of Tenn. Code Ann. 29-26-121(f) and the policy considerations which formed the provision.

## ISSUES PRESENTED, STANDARD OF REVIEW, STATEMENT OF FACTS, AND STATEMENT OF CASE

TDLA adopts and incorporates the Issues Presented, Standard of Review, Statement of Facts, and Statement of Case set forth in brief of the Respondent.

## ARGUMENT

I. Tenn. Code Ann. 29-26-121(f) Does Not Violate the Separation of Powers Clause

a. This Court Typically Defers to the Legislature When a Matter of Public Policy is at Issue

At issue in this case is Plaintiff's challenge to the constitutionality of Tenn. Code Ann. 29-26-121(f) in light of the separation of powers clause of the Tennessee Constitution. Tenn. Const. art. II, §2. Although the Tennessee Constitution "prohibits one branch from encroaching on the powers or functions of the other two branches," Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827, 843 (Tenn. 2008) (citing Tenn. Const. art. II, §2), the lines between these powers are not always clear, and the Supreme Court of Tennessee has recognized that "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). In discussing how to resolve questions regarding separation of powers, this Court has said:

> [I]t is well-established in Tennessee that when considering the constitutionality of a statute, we start with a strong presumption that acts passed by the legislature are constitutional. Indeed, we must indulge every presumption and resolve every doubt in favor of constitutionality. Therefore, notwithstanding the trial judge's findings in the present case, we must begin our inquiry with the presumption that the statutes in question pass constitutional muster.
>
> Likewise, it is well recognized that a facial challenge to a statute, such as that involved here, is the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exist under which the Act would be valid. Thus, the plaintiffs in this appeal have a heavy legal burden in challenging the constitutionality of the statutes in question.

Lynch v. City of Jellico, 205 S.W.3d 384, 390 (Tenn. 2006) (internal citations and quotations omitted).

The general rule is that "[o]nly the Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state." Williams v. Smz Specialists, P.C., No. W2012-00740-COA-R9-CV, 2013 Tenn. App. LEXIS 267, at *19 (Tenn.

Ct. App. Apr. 19, 2013) (quoting State v. Mallard, 40 S.W.3d 473, 480-18). However, "where a decision of the legislature chiefly driven by public policy concerns infringes upon that power [this Court] will generally defer to the judgment of the legislature." Biscan v. Brown, 160 S.W.3d 462, 474 (Tenn. 2005) (internal citations omitted). Notably, this principle has been invoked to uphold other elements of Tenn. Code Ann. § 29-26-121 against similar challenges in the past. See Williams, 2013 Tenn. App. LEXIS 267 (upholding the pre-suit notice requirement of 29-26-121).

This is primarily because, as this Court has noted many times before, matters of public policy are primarily for the legislature to decide. See Taylor v. Beard, 104 S.W.3d 507, 511 (Tenn. 2003) (internal citation omitted) ("This Court has long recognized that it has a limited role in declaring public policy and has consistently stated that 'the determination of public policy is primarily a function of the legislature...'"); See also Martin v. Lear Corp. 90 S.W.3d 626, 632 (Tenn. 2002) (noting the public policy is generally set by the legislature). Because Section 29-26-121(f) is chiefly driven by public policy concerns identified by the General Assembly, this Court should defer to the General Assembly's judgment.

b. Tenn. Code Ann. § 29-26-121(f) is Clearly a Public Policy Pronouncement of the Legislature

Plaintiff, and others, have incorrectly asserted that Tenn. Code Ann. § 29-26-121(f) is "purely procedural," without any ties to the public policy concerns of the legislature. Br. of App. Rhonda Willeford ("Plaintiff's Br."), p. 11. A cursory glance at the legislative history surrounding the statute, however, belies that conclusion. The members of the Tennessee General Assembly made clear that there were strong public policy purposes behind Section 29-26-121(f). One of those clear purposes was to return the state of Health Care Liability Actions back to where it was before this Court issued its opinions in Givens v. Mullikin ex rel. Estate of

McElwaney, 75 S.W.3d 383 (Tenn. 2002) and Alsip v. Johnson City Medical Entry, 197 S.W.3d 722 (Tenn. 2006). This has been expressly noted by both the Court of Appeals and the Tennessee legal community. See Caldwell v. Baptist Mem. Hosp., No. W2015-01076-COA-R10-CV, 2016 Tenn. App. LEXIS 389, at *15 (Tenn. Ct. App. June 3, 2016) ("By enacting Tenn. Code Ann. § 29-26-121(f), the legislature rejected the policy determination reflected in Alsip in favor of allowing *ex parte* interviews); Whitney Boshers Hayes, Physician-Patient Confidentiality in Health Care Liability Actions: HIPAA's Preemption of Ex Parte Interviews with Treating Physicians Through the Obstacle Test, 44 U. Mem. L. Rev. 97, 108 (2013) ("By enacting section 121(f), the General Assembly clearly intended to equalize the defendant and its counsel's access to the plaintiff's treating physicians"). To properly understand the legislature's purpose, it is instructive to provide a brief history of *ex parte* interviews within this state.

Just prior to the enactment of Section 29-26-121(f), Health Care Liability Action plaintiffs and their attorneys were the only parties in a lawsuit who had unfettered access to conduct informal interviews with the patient's treating health care providers both before and after depositions. Under Givens, 75 S.W.3d 383 and Alsip, 197 S.W.3d 722, Defendants and their counsel were unable to meet *ex parte* with those same treating health care providers. Defendants and defense counsel had to either forego the discovery of information from those providers or accept the costs and high risks of deposing those providers for proof, on the record, without first knowing what they might say about critical issues in dispute (such as standard of care and causation). More often than not, the defense decided to forego a formal deposition altogether because the risks of taking a treating provider's deposition without first knowing what the provider might say are simply too high.[1] Section 29-26-121(f) corrected this inequality and

1. Commandment Number 4 of Irvin Younger's 10 Commandments of Cross-Examination is: "Don't ask a

placed defendants and defense counsel back on equal footing with plaintiffs and plaintiffs' counsel. The addition of sub-section 121(f) was meant to do just that—even the playing field between plaintiffs and defendants in health care liability suits--returning things to the status quo as it was prior to Givens and Alsip.

This intent to even the playing field is further evidenced by the statements given by witnesses and members of the General Assembly in the Judiciary Committees of the Tennessee House and Senate. Discussing the addition of sub-section (f) to the statute, attorney Howard Hayden testified before the Senate Judiciary Committee and stated as follows:

> ...[S]o 10 years ago the Givens case came down. That's the case where the Supreme Court said that there was an implied covenant of confidentiality between patient and doctor. Before 2002, defendant had the right to communicate *ex parte* with anyone that they wanted.

Tenn. S. Judiciary Comm. Hearing, S.B. 2789, 107th Gen. Assemb., 2d Reg. Sess. (Tenn. Mar. 13, 2012), http://tnga.granicus.com/MediaPlayer.php?view_id=189&clip_id=5125 (hereinafter "Tenn. S. Judiciary Hearing (March 13, 2012)").

Furthermore, Representative Vance Dennis, sponsor of the House bill, described the addition of sub-section (f) as follows:

> This is the bill dealing with the ability of defense counsel to interview the treating physician in a case of a med mal lawsuit. It would put the law back to what it was prior to... I think it was the Alsip case, where the Court... The Supreme Court basically created an implied right of privacy that said you couldn't talk to a witness.

Tenn. H. Judiciary Comm. Hearing, H.B. 2979, 107th Gen. Assemb., 2d Reg. Sess. (Tenn. Apr. 11, 2012), http://tnga.granicus.com/MediaPlayer.php?view_id=142&clip_id=5341.

As further evidence of this clear public policy rationale, the committee meeting transcripts reveal the following explanations of the statute's purpose:

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question to which you do not know the answer." See Irving Younger, The Irving Younger Collection: Wisdom & Wit from the Master of Trial Advocacy (2010); see also Irving Younger, The Art of Cross-Examination: The Section of Litigation Monograph Series, No. 1 (1975).

> ...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....
>
> ... [the statute] 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
>
> ... 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 lawyer can. That in essence is, that's one of the main reasons that the playing field has become so uneven. This is about giving both parties to a medical malpractice case equal footing.

Tenn. S. Judiciary Hearing (March 13, 2012) (testimony of Howard Hayden and Jeff Parish).

> ... 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.

Tenn. S. Judiciary Comm. Hearing, S.B. 2789, 107th Gen. Assemb., 2d Reg. Sess. (Tenn. Apr. 11, 2012), http://tnga.granicus.com/MediaPlayer.php?view_id=189&clip_id=5125 (testimony of Jeff Parish).

Section 29-26-12(f)'s ties to public policy are further made clear by examining Alsip to identify the reasoning behind the Court's policy determination barring on *ex parte* communications in that case. 197 S.W.3d 722. In Alsip, the Court stated that the question presented was as follows: "does ***public policy*** dictate that the covenant of confidentiality contained in the contract between patient and physician be voided by the filing of a medical malpractice lawsuit with the consequence that a trial court may authorize defense counsel to communicate ex parte with non-party physicians who treated the plaintiff for injuries allegedly

arising from the malpractice?" Alsip, 197 S.W.3d at 727 (emphasis added). What follows in the opinion is the Court's weighing of the ***interests of the public*** in the contest of *ex parte* communication. Id. (emphasis added).

This Court previously suggested that defendants may still utilize other traditional tools of discovery in place of *ex parte* interviews, such as depositions. See Alsip, 197 S.W.3d at 729. Unfortunately, this ignores the very clear imbalance that occurs when one of the parties is forced to obtain information through a deposition, admissible for any purpose at trial, while the other party is free to obtain that same information informally, off the record, to assist in their pre-trial investigation and information gathering.

A deposition of a non-party witness who has not been designated as an expert may only be used to impeach that witness unless the trial court determines that they are unavailable under the rules of evidence. Tenn. R. Civ. P. 32.01(1) and (3). Thus, normally when a party takes a witness' deposition they may ask questions with the knowledge that they can subpoena to testify at trial. This is true for most witnesses, but under Tennessee law the deposition of a treating physician is admissible for proof at trial because physicians are exempt from subpoenas to trial. Tenn. Code Ann. § 24-9-101(a)(6); Tenn. R. Civ. P. 32.01(3); Tenn. R. Evid. 804(a). Because such a deposition may be used for "any purpose" the deposition of a treating health care provider must necessarily be an evidentiary deposition taken for proof and not a "discovery" deposition under Rule 26.02(4). Tenn. R. Civ. P. 26.02(4); Tenn. R. Civ. P. 32.01(3).[2]

In any event, where the defendant is not given the same opportunity as the plaintiff to

2. Commonly called "the Bearman Rule," the final sentence of Rule 32.01(3) prohibits the introduction, as substantive proof, of discovery depositions of experts taken in accordance with Rule 26.02(4). This sentence was recommended by distinguished Memphis attorney Leo Bearman when he was a member of the Rules Commission. Hence it lives on as "the Bearman Rule." Donald F. Paine, The Bearman Rule, 39 Tenn. B.J. 33 (April 2003).

interview these witnesses informally before they are deposed, defendants must decide whether to forego the discovery of information that could be critical to the defense of the case or accept the costs and high risk of deposing a treating health care provider without first knowing what the provider might say about critical issues in dispute. As intended by the General Assembly, the plain language of Section 29-26-121(f) is a public policy issue and corrects this inequality. Section 29-26-121(f) thus expressly provides for *ex parte* communications between defense counsel and treating health care providers who possess relevant information.

When contemplating the enactment of Section 29-26-121(f), the General Assembly also expressed its clear intent to provide defendants the same means as the plaintiff to more expeditiously discover and investigate relevant health information with a goal towards earlier and less costly evaluation and potential resolution of cases:

> ... 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.

Tenn. S. Judiciary Hearing (March 13, 2012) (testimony of Jeff Parish).

In other words, the statute was designed, in part, to allow defendants to ascertain relevant health care information informally, and potentially more expeditiously, than otherwise allowed by the formal discovery processes in order to evaluate the merits and defensibility of a case..

It is for these reasons the General Assembly viewed the "playing field" as unbalanced and undertook steps to put defendants and their counsel back on equal footing with plaintiffs and their counsel in health care liability actions. Importantly, after the passage of Section 29-26-121(f), the courts of this State have noted that the statute is a statement of the public policy of the State. Subsequent case law makes clear that "the legislature rejected the policy determination

reflected in Alsip in favor of allowing *ex parte* interviews." Caldwell, 2016 Tenn. App. LEXIS 389 at *15-16.

Critics of such *ex parte* meetings argue that disclosing potentially sensitive information to defense counsel, under the cover of a qualified protective order, introduces a risk of disseminating irrelevant health information. This ignores the realities of *ex parte* meetings and depositions. In an *ex parte* meeting under Section 29-26-121 (f), the only persons present are defense counsel, possibly the defendant, and the treating health care provider. But in a deposition, those present will include all counsel, the court reporter, and the treating health care provider. Other persons present could also include all parties, a videographer, Rule 26 experts for one or both sides, and other persons and/or witnesses.[3] After a deposition, moreover, a transcript of the information elicited during the deposition is generated and produced to all counsel; and that transcript may be shared by counsel with others (e.g., outside consultants, experts, the court) and/or filed in the court record.[4] Generally speaking, therefore, depositions are not private events. In fact, depositions have the potential to be less private and less protective of privacy than *ex parte* meetings.

Additionally, despite the formalities of a deposition, "[e]vidence objected to [during depositions] shall be taken subject to the objections." Tenn. R. Civ. P. 30.03. Hence, even if a

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3. In Tennessee, "The Rule" does not apply to depositions. See Tenn. R. Evid. 615 Advisory Commission Cmt. (1992) ("A lawyer who wishes to exclude nonparties from oral depositions must resort to [T.R.C.P.] 26.03(5), allowing on motion a protective order 'that discovery be conducted with no one present except persons designated by the court.'"").

4. Once filed, a deposition transcript like any other discovery document, becomes a public record. See In re NHC - Nashville Fire Litig., 293 S.W.3d 547, 560 (Tenn. Ct. App. 2008) (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) (footnotes omitted) (stating, "Indeed, the United States Supreme Court has observed that 'courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.'")).

proper objection based on relevancy was made during a deposition,[5] the information at issue would still be elicited for all those present to hear and then transcribed and preserved for others to read. This is true even if the plaintiff or her counsel were to suspend the deposition and move the court to terminate or limit the examination based on a relevancy objection. Tenn. R. Civ. P. 30.04. Moreover, in order for the trial court to make a ruling that certain information is relevant or not would require that the information be elicited and then disclosed to the court. Therefore, limiting the defense to only allow depositions of treating physicians instead of ex parte interviews (as Givens and Alsip required) does not even accomplish the intended objective of protecting patient privacy.

As can be plainly seen by the earlier referenced legislative history and subsequent case law, there can be little doubt that the General Assembly instituted Tenn. Code Ann. § 29-26-121(f) as a direct response to Givens and Alsip. Section 29-26-121(f) was clearly intended to equalizing the "playing field," so to speak. This has been reinforced recently when the General Assembly amended the statute again in light of an opinion rendered by this Court but noted to be not for citation[6]. In discussing the bill that created that amendment, there was testimony before the Senate Judiciary Committee which reiterated the strong public policy purpose of the statute.[7]

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5. As the members of this Court already know, most depositions are taken subject to the "Standard Caption" where all objections except as to the form of the questions are reserved. See also Tenn. R. Civ. P. 32.04(3). Generally speaking, therefore, relevancy is not a proper objection during a deposition.

6. Dean-Hayslett v. Methodist Healthcare, No. W2014-00625-COA-R10-CV, 2015 Tenn. App. LEXIS 22 (Tenn. Ct. App. Jan 20, 2015). The TDLA recognizes that Dean-Hayslett is "Not for Citation." However, Plaintiff has cited this opinion and has referenced statements made within that opinion and attempted to use Judge Stafford's concurrence as persuasive authority. Plaintiff's Br. at 10, 15-16; Plaintiff's Br. App'x 1 at 15-16. As a result, the TDLA will briefly parse the discussion of Section 29-26-121(f) in that case.

7. Additionally, Plaintiffs have argued that section 29-26-121(f) is purely procedural because it regulates only the methods, not the substance, of what is discoverable. Plaintiff's Br. at 11. The TDLA would note that the aforementioned amendment to that section changes it to directly address the substance of what may or may not be discovered.

At the hearing Howard Hayden, on behalf of the TDLA, stated as follows:

> Three years ago a bill was passed that leveled the playing field that leveled the playing field in health care liability actions. It once again permitted defense lawyers the same access to non-party treating medical providers as the plaintiffs lawyers have always had in a health care liability action.

Tenn. S. Judiciary Comm. Hearing, S.B. 08929, 109th Gen. Assemb., 2nd Reg. Sess. (Tenn. Apr. 1, 2015), http://tnga.granicus.com/MediaPlayer.php?view_id=278&clip_id=10594.

Considering that Plaintiff urges this Court to take note of Judge Stafford's concurrence in Dean-Hayslett, it is appropriate to direct the Court's attention to the public policy considerations behind the Section 29-26-121(f) as discussed in Dean-Hayslett. The Court of Appeals discussed the statute in question by saying:

> [Section 29-26-121(f)] reflects the General Assembly's re-balancing of a plaintiff's privacy interests and expectations in his health care 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. We observe, moreover, that subsection 121(f) is one subsection in the statutory section that serves to promote the expeditious resolution of allegations of professional negligence in the health care setting....

Dean-Hayslett, 2015 Tenn. App. LEXIS 22 at *29.

Though ultimately the legislature amended Section 29-26-121(f) to allow for less limited *ex parte* discussions than the Dean-Hayslett decision would have allowed for, the Court of Appeals still noted that the statute "modified the supreme court's holdings in Givens and Alsip that ***public policy*** and the implied contract of confidentiality prohibited health care providers from discussing a patient's health care information with third parties other than as otherwise required by law and the formal discovery process." Id. at *48. In saying so, the Court of Appeals recognized that there was a strong public policy purpose behind the legislature's actions. Specifically, the Court of Appeals noted that allowing such *ex parte* interviews allowed defense counsel to evaluate the value of cases much more quickly. Id. at *49. The public policy purpose underlying Section 29-26-121(f) is undeniable.

Plaintiff's argument that the statute is purely procedural in nature is directly contradicted by the statute itself as well as the legislative history that underlies the law. Strangely, Plaintiff asserts that because Section 29-26-121(f) does not accomplish the same policy goals as the rest of the statute there can therefore be no substantial public policy interest which supports it. Plaintiff's Br. at 14. This ignores the fact that a law may be composed of many sections, each of which may have been enacted with a particular public policy goal in mind. As outlined above, the courts of this State have taken notice of the strong public policy goals in mind when Section 29-26-121(f) was created. See Caldwell, 2016 Tenn. App. LEXIS 389, at *15 ("By enacting Tenn. Code Ann. § 29-26-121(f), the legislature rejected the policy determination reflected in Alsip in favor of allowing *ex parte* interviews)

II. Because Givens and Alsip Conflict with Tenn. Code Ann. 29-26-121(f), This Court Should Defer To The Judgment of the Legislature.

The Tennessee Court of Appeals has noted that "Tennessee Code Annotated § 29-26-121(f) effectively legislatively abrogated Givens and Alsip to the extent to which they barred *ex parte* interviews of a plaintiff's treating health care providers by defendants and defense counsel outside the discovery." Dean-Hayslett, 2015 Tenn. App. LEXIS 22 at *17. Plaintiff urges this Court to ignore this rationale, claiming that that "the existing judicial framework is this Court's holding in Alsip." Plaintiff's Br. at 14.

The rest of Plaintiff's argument on this point claims the General Assembly lacks the power to effect any change to the regime set forth in Givens and Alsip and, therefore, Section 121(f) is unconstitutional. This reasoning misses the mark. As this Court has stated that "where a decision of the legislature chiefly driven by public policy concerns infringes upon that power [this Court] will generally defer to the judgment of the legislature." Biscan, 160 S.W.3d at 474 (internal citations omitted). Alsip was based solely upon this Court's evaluation of a public

policy concern. 197 S.W.3d at 727 ("The present case confronts us with the following question: does public policy dictate that the covenant of confidentiality contained in the contract between patient and physician be voided by the filing of a medical malpractice lawsuit"). The legislature has evaluated the Court's determinations in Alsip and has come to a contrary conclusion to the holding of that case and that of Givens. Respectfully, the TDLA urges this Court to hold to its tradition of deferring matters of public policy to the legislature and abrogate Givens and Alsip to the extent they conflict with Tenn. Code Ann. § 29-26-121(f).

## CONCLUSION

The core of the matter at hand is whether Tenn. Code Ann. § 29-26-121(f) is "purely procedural," as claimed by Plaintiffs, or if it represents the carefully considered policy determination of the General Assembly. Respectfully, the legislative history and evidence of the General Assembly's intent makes perfectly clear that the authorization of *ex parte* meetings with physicians was driven by strong public policy concerns. If defendants are no longer able to ask for voluntary *ex parte* meetings with physicians than the goals of achieving earlier settlement opportunities and evening the playing field between plaintiffs and defendants will be undermined. The TDLA, on behalf of its constituents, urges this Court to take note of the incredibly clear public policy interests forwarded by this law and to hold Tenn. Code Ann. § 29-26-121(f) constitutional.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served on the following counsel of record via electronic and U.S. mail, postage prepaid:

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This the 24 day of May, 2017.

Peter Winterburn w/ authority AHP

Peter B. Winterburn