

IN THE CIRCUIT COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT

FILED

2016 MAY 18 PM 12 15

RICHARD R. ROOKE, CLERK

 DC

IN RE Qualified Protective Orders Pursuant to
TENN CODE ANN § 29 26 121(f)

PJ 16

ORDER

This Order supersedes and replaces the PJ Order entered on February 25 2016

The Circuit Courts of the 20th Judicial District jointly find that the following shall apply to all requests for a Qualified Protective Order (QPO) pursuant to TENN CODE ANN § 29 26 121 in a health care liability action We find that the opinion by the Tennessee Supreme Court in *Alsip v Johnson City Medical Center* 197 S W 3d 722 (2006) must be considered in conjunction with any such request and that the implied covenant of confidentiality recognized therein must be respected

Absent extraordinary circumstances *ex parte* communications between defense counsel and non party treating physicians and health care providers concerning plaintiff's Protected Health Information (PHI) shall be prohibited except

- 1 If the non party is a defendant's present or former employee(s) partner(s) or owner(s) or
- 2 If defendant obtains a QPO

A defendant seeking to obtain permission for such *ex parte* communications shall file a petition in compliance with TENN CODE ANN § 29 26 121(f) with the Trial Court in which the case is pending requesting permission to obtain PHI of the plaintiff The petition shall identify the treating healthcare provider or providers with whom defendant wishes to communicate For the purposes of any QPO PHI shall have the same scope and definition as set

forth in 45 CFR 160 103 and 160 501 Without limiting the generality of the foregoing PHI includes relevant health information including demographic information relating to either (a) the past present or future physical or mental condition of an individual (b) the provision of care to an individual or (c) the payment for care provided to an individual which identifies the individual or which reasonably could be expected to identify the individual

If the petition is granted the following shall be included in any QPO

1 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

I HEREBY ACKNOWLEDGE THAT I AM NOT OBLIGATED TO PARTICIPATE IN ANY INTERVIEW OR DISCUSSION INVOLVING MY PATIENT PARTICIPATION IN ANY INTERVIEW CONCERNING A PATIENT IS STRICTLY VOLUNTARY BY SIGNING THIS ACKNOWLEDGMENT, 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

2 Any *ex parte* interviews with treating health care providers shall be conducted for the purpose of obtaining relevant PHI See T C A § 29 26 121(f)(1) Relevant PHI may include for purposes of this Order opinions as to the standard of care of any defendant

compliance with or breach of the standard and causation of the alleged injury See T C A § 29 26 121(f)(2) ¹

3 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

4 Dissemination of any PHI obtained during the interviews is expressly limited to the litigation pending before this Court The Defendant or Defendants who conducted the interview shall return to the healthcare provider or destroy any PHI obtained in the course of any such interview including all copies at the end of the litigation See T C A § 29 26 121(f)(1)(C)(I)

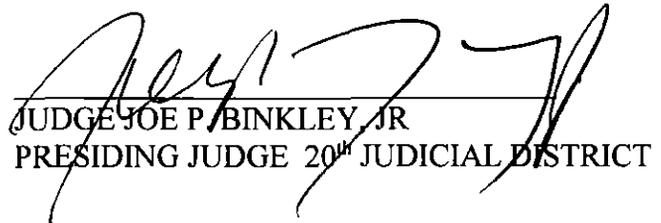
5 Nothing in this Order shall be construed to prohibit the parties from entering into an Agreed Qualified Protective Order that is compliant with Tenn Code Ann § 29 26 121

6 Nothing in this Order shall be construed to prohibit a party from questioning non party individuals by use of formal discovery methods

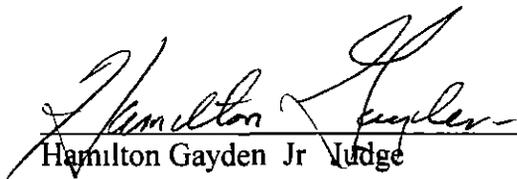
¹ Section (f)(2) effective April 24 2015 does not impair a vested right of the Plaintiff because a plaintiff does not have a vested right in his treating physician's opinions regarding the standard of care breach of the standard of care and/or causation Therefore Section (f)(2) applies retroactively In *Nutt v Champion Int'l Corp* 980 S W 2d 365 368 (Tenn 1998) the Court stated as follows A procedural or remedial statute is one that does not affect the vested rights or liabilities of the parties A procedural statute is one that addresses the mode or proceeding by which a legal right is enforced Remedial statutes are defined as [l]egislation providing means or method whereby causes of action may be effectuated wrongs redressed and relief obtained Statutes that create a new right of recovery or change the amount of damages recoverable are however deemed to have altered the parties vested right and thus are not considered remedial (citations omitted) A vested right is defined as a right which is proper for the state to recognize and protect and of which [an] individual could not be deprived arbitrarily without injustice In re *D A H* 142 S W2d 267 273 (Tenn 2004) *Black's Law Dictionary* defines vested as having become a completed consummated right for present or future enjoyment not contingent unconditional absolute *Black's Law Dictionary* (10th ed 2014) Section (f)(2) which permits opinions regarding standard of care breach and causation does not impair a plaintiff's vested rights because such opinions can be obtained through traditional discovery methods such as a discovery deposition of a treating physician

This Order is effective upon filing

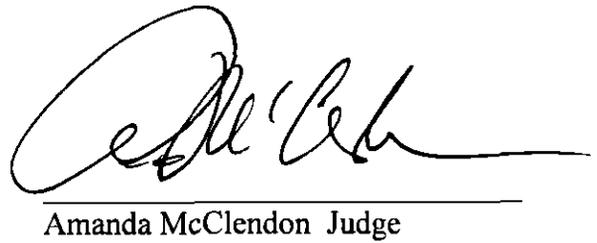
IT IS SO ORDERED



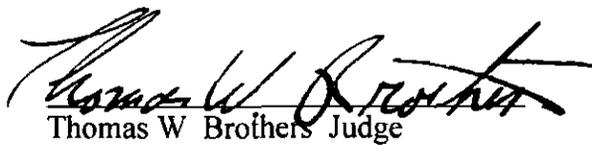
JUDGE JOE P BINKLEY JR
PRESIDING JUDGE 20th JUDICIAL DISTRICT



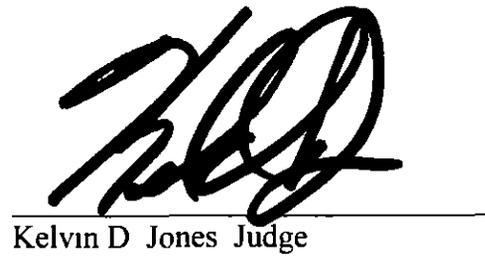
Hamilton Gayden Jr Judge



Amanda McClendon Judge



Thomas W Brothens Judge



Kelvin D Jones Judge