

IN THE COURT OF APPEALS OF TENNESSEE  
AT JACKSON  
October 21, 2014 Session

**S. W., BY HEATHER WARREN AND THOMAS C. WARREN, AS HIS  
NATURAL PARENTS AND NEXT FRIENDS v. BAPTIST MEMORIAL  
HOSPITAL, ET AL.**

**Appeal from the Circuit Court for Shelby County  
No. CT00338012 Robert L. Childers, Judge**

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**No. W2014-00621-COA-R10-CV - Filed February 27, 2015**

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RICHARD H. DINKINS, J., concurring separately.

I concur in the result reached by the majority opinion. I reach my conclusion, however, applying the abuse of discretion standard to the court's action in imposing the specific restrictions and conditions in the protective order.

I agree with the majority opinion's adoption of the analysis and holding in *Hayslett v. Methodist Healthcare, et al.*, No. W2014-00625-COA-R10-CV, (Tenn. Ct. App. Jan. 20, 2015) as to the historical background and evolution of Tenn. Code Ann. § 29-26-121(f). I do not believe, however, that the statute deprives a trial court of its broad discretionary authority to control proceedings, *see Barnett v. Tenn. Orthopaedic Alliance*, 391 S.W. 3d 74, 79 (Tenn. Ct. App. 2012), authority which, I believe, is inherent to the administration of justice.

As noted in *Hayslett*, Tenn. Code Ann. § 29-26-121(f) was enacted in 2012 and amended the statutes governing the conduct of health care liability actions. In so doing, the Legislature crafted a role for the courts—to consider a petition for an order to allow defendants to conduct an *ex parte* interview with plaintiff's other healthcare providers along with any objections to the petition and to issue the protective order when appropriate. The orders are unique in several respects: they are not governed by the rules and standards applicable to orders relating to discovery or other trial procedures issued pursuant to the Tennessee Rules of Civil Procedure; they authorize voluntary *ex parte* interviews with persons who are not parties to the proceeding and, consequently, are not themselves bound by the orders; and there is no enforcement mechanism specifically set forth in the statute.

I do not believe that the Legislature, defining a role for the courts to consider the petition for such an order and any objections thereto pursuant to § 29-26-121(f)(1)(B), would then limit the authority of the court to enforce the order or to otherwise insure compliance with § 29-26-121(f)(1)(C). I believe it is reasonable to conclude that the Legislature was cognizant of and did not intend to abrogate the discretion afforded the court in supervising the conduct of matters pending before it.

I, therefore, consider the challenge to the order entered in this case under the abuse of discretion standard.<sup>1</sup> In so doing, I conclude that the conditions that the interviews be conducted under oath, recorded and filed under seal were not supported by evidence and exceeded the court's authority under the statute.

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RICHARD H. DINKINS, JUDGE

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An abuse of discretion occurs when a court strays beyond the framework of the applicable legal standards or when it fails to properly consider the factors customarily used to guide that discretionary decision. Discretionary decisions must take the applicable law and relevant facts into account. Thus, reviewing courts will set aside a discretionary decision only when the court that made the decision applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party.

*Konvalinka v. Chattanooga Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008) (citations omitted).