

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
Opinion on Remand

**AUBREY E. GIVENS, ADMINISTRATOR OF THE ESTATE OF JESSICA  
E. GIVENS, DECEASED, ET. AL. V. THE VANDERBILT UNIVERSITY D/B/A  
VANDERBILT UNIVERSITY HOSPITAL, ET. AL.**

**Appeal from the Circuit Court for Davidson County  
No. 10C2046 Hon. Amanda J. McClendon, Judge**

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**No. M2013-00266-COA-R3-CV - Filed February 27, 2014**

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This is a medical malpractice<sup>1</sup> action arising from the death of Decedent. Defendants moved to dismiss the action for failure to comply with the notice requirements set out in Tennessee Code Annotated section 29-26-121(a)(1). The trial court agreed and dismissed the action without prejudice. Plaintiffs appealed the dismissal to this court, and we vacated the dismissal order and remanded for further proceedings, holding that section 29-26-121 did not mandate dismissal for noncompliance with its terms. *Givens v. Vanderbilt Univ.*, No. M2013-00266-COA-R3-CV, 2013 WL 5773431, at \*6 (Tenn. Ct. App. Oct. 24, 2013). Defendants filed an application for permission to appeal our decision. The Tennessee Supreme Court granted the application for purposes of remanding the case for reconsideration in light of its decision in *Stevens v. Hickman Community Health Care, Inc.*, – S.W.3d –, 2013 WL 6158000 (Tenn. Nov. 25, 2013). Upon our reconsideration, we affirm the decision of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Affirmed; Case Remanded**

JOHN W. MCCLARTY, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY and THOMAS R. FRIERSON, II, JJ., joined.

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<sup>1</sup>Tennessee Code Annotated section 29-26-101 now defines most all cases occurring in a medical context as “health care liability actions.” The statute specifies that such an action “means any civil action, including claims against the state or a political subdivision thereof, alleging that a health care provider or providers have caused an injury related to the provision of, or failure to provide, health care services to a person, regardless of the theory of liability, on which the action is based.” *See* Acts 2011, ch. 510, § 8. Effective April 23, 2012, the term “health care liability” replaced “medical malpractice” in the Code. *See* Acts 2012, ch. 798. The provisions of the revised statute do not apply to this action.

Steven E. Anderson and Sean C. Wlordarczyk, Nashville, Tennessee, for the appellants, the Vanderbilt University d/b/a Vanderbilt University Hospital and David Slosky, M.D.

Aubrey T. Givens and John Jay Clark, Nashville, Tennessee, for the appellees, Aubrey E. Givens, individually and as administrator of the estate of Jessica E. Givens, deceased, and Jessica R. Givens.

## **OPINION**

### **I. BACKGROUND**

On September 8, 2006, Jessica E. Givens (“Decedent”) was admitted to the Vanderbilt University d/b/a Vanderbilt University Hospital (“Vanderbilt”) for cardiac evaluation. While at Vanderbilt, David Slosky, M.D. placed two stents in her left coronary artery. Decedent was released from care and allowed to return home, where she subsequently suffered another cardiac event. Upon returning to Vanderbilt, Dr. Slosky placed additional stents. Decedent passed away on August 28, 2007.

Jessica R. Givens and Aubrey E. Givens, individually and as administrator of Decedent’s estate, (collectively “Plaintiffs”) have filed three complaints against Vanderbilt and Dr. Slosky (collectively “Defendants”) in their attempt to recover for Decedent’s injuries. In each complaint, Plaintiffs alleged that Defendants were negligent in caring for Decedent and that their negligence resulted in Decedent’s subsequent injuries and death.

The first complaint (“Lawsuit 1”) was filed on September 11, 2007. During the pendency of the action, the General Assembly enacted statutory changes to the Tennessee Medical Malpractice Act (“TMMA”), setting forth new requirements for medical malpractice actions filed on or after October 1, 2008. Tenn. Code Ann. §§ 29-26-121(a), -122. Plaintiffs voluntarily dismissed Lawsuit 1 on June 5, 2009. Shortly thereafter, the General Assembly amended the statutory changes to the TMMA, which were applicable to medical malpractice actions filed on or after July 1, 2009. Tenn. Code Ann. §§ 29-26-121(a), -122.

The statutory changes and amendments, which required the filing of pre-suit notice 60 days prior to the filing of a complaint and the filing of a certificate of good faith with a complaint bringing forth an action that required expert testimony, were in effect when the second complaint (“Lawsuit 2”) was filed on June 3, 2010. Plaintiffs attached a certificate of good faith to the complaint but failed to provide the statutorily required 60-day pre-suit notice. Plaintiffs provided Defendants with written notice on the day of filing.

On September 24, 2010, Plaintiffs filed the third complaint (“Lawsuit 3”) with an attached certificate of good faith and a statement exhibiting compliance with the statutory notice requirements. Plaintiffs attempted to consolidate Lawsuit 2 with Lawsuit 3. The trial court refused to consolidate and dismissed Lawsuit 3. Plaintiffs appealed. A panel of this court affirmed the dismissal because “Lawsuit 3 was not filed within the statute of limitations.” *Givens v. Vanderbilt Univ.*, No. M2011-00186-COA-R3-CV, 2011 WL 5145741, at \*3 (Tenn. Ct. App. Oct. 28, 2011), *perm. app. denied* (Tenn. Feb. 21, 2012). This court further explained that consolidation would not have cured the untimeliness of Lawsuit 3 because the two suits would have remained separate and distinct even if consolidated. *Id.*

Upon remand, Defendants sought the dismissal of Lawsuit 2, alleging that Plaintiffs had failed to comply with the notice requirements set out in section 29-26-121. The trial court agreed and dismissed Lawsuit 2 without prejudice. Plaintiffs appealed the dismissal of Lawsuit 2 to this court. We vacated the dismissal order and remanded for further proceedings, holding that section 29-26-121 did not mandate dismissal for noncompliance with its terms. *Givens*, 2013 WL 5773431, at \*6. Defendants filed an application for permission to appeal to the Tennessee Supreme Court, which granted the application for the purpose of remanding the case for reconsideration in light of *Stevens*.

## II. ISSUES

Having been directed to reconsider our opinion, we will simply restate the issues that were previously considered:

- A. Whether the failure to comply with the notice requirements set forth in Tennessee Code Annotated section 29-26-121(a)(1) mandates dismissal of the action in this case.
- B. Whether the trial court abused its discretion by failing to excuse compliance pursuant to Tennessee Code Annotated section 29-26-121(b).
- C. Whether Defendants are entitled to attorney fees on appeal.

### III. STANDARD OF REVIEW

In this action, Defendants properly filed a motion to dismiss. *Myers v. AMISUB (SFH), Inc.*, 382 S.W.3d 300, 307 (Tenn. 2012) (“The proper way for a defendant to challenge a complaint’s compliance with Tennessee Code Annotated section 29-26-121 is to file a Tennessee Rule of Procedure 12.02 motion to dismiss.”). In *Myers*, the Court further provided as follows:

In the motion, the defendant should state how the plaintiff has failed to comply with the statutory requirements by referencing specific omissions in the complaint and/or by submitting affidavits or other proof. Once the defendant makes a properly supported motion under this rule, the burden shifts to the plaintiff to show either that it complied with the statutes or that it had extraordinary cause for failing to do so. Based on the complaint and any other relevant evidence submitted by the parties, the trial court must determine whether the plaintiff has complied with the statutes. If the trial court determines that the plaintiff has not complied with the statutes, then the trial court may consider whether the plaintiff has demonstrated extraordinary cause for its noncompliance.

*Id.* The trial court’s grant of the motion to dismiss is subject to a de novo review with no presumption of correctness because we are reviewing the trial court’s legal conclusion. *Blackburn v. Blackburn*, 270 S.W.3d 42, 47 (Tenn. 2008); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

“The question of whether [plaintiff] has demonstrated extraordinary cause that would excuse compliance with the statutes is a mixed question of law and fact, and our review of that determination is de novo with a presumption of correctness applying only to the trial court’s findings of fact and not to the legal effect of those findings.” *Myers*, 382 S.W.3d at 307-08 (citing *Starr v. Hill*, 353 S.W.3d 478, 481-82 (Tenn. 2011)). This court reviews a “trial court’s decision to excuse compliance under an abuse of discretion standard.” *Id.* at 308. “A trial court abuses its discretion only when it ‘applie[s] an incorrect legal standard or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.’” *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)). If a discretionary decision is within a range of acceptable alternatives, we will not substitute our judgment for that of the trial court simply because we may have chosen a different alternative. *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

This appeal also involves the interpretation of statutes. Statutory construction is a question of law that is reviewed de novo without any presumption of correctness. *In re Estate of Tanner*, 295 S.W.3d 610, 613 (Tenn. 2009). This court’s primary objective is to carry out legislative intent without broadening or restricting the Act beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the legislature is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, we should apply the plain meaning without complicating the task. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004).

#### IV. DISCUSSION

##### A. & B.

Plaintiffs assert that the trial court erred in dismissing Lawsuit 2 because Tennessee Code Annotated section 29-26-121 does not provide for dismissal as a sanction for failure to comply. They alternatively assert that “extraordinary cause exists that would excuse compliance as to notice.” Defendants respond that the trial court did not err in dismissing Lawsuit 2 because dismissal of the complaint was a proper penalty for noncompliance with section 29-26-121(a)(1). They further contend that Plaintiffs failed to demonstrate extraordinary cause to excuse their noncompliance.

As to notice before the suit, the TMMA provides, in pertinent part,

(a)(1) Any person, or that person’s authorized agent, asserting a potential claim for health care liability shall give written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon health care liability in any court of this state.

(2) The notice shall include:

(A) The full name and date of birth of the patient whose treatment is at issue;

(B) The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient;

(C) The name and address of the attorney sending the notice, if applicable;

(D) A list of the name and address of all providers being sent a notice; and

(E) A HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.

(3) The requirement of service of written notice prior to suit is deemed satisfied if, within the statutes of limitations and statutes of repose applicable to the provider, one of the following occurs, as established by the specified proof of service, which shall be filed with the complaint:

(A) Personal delivery of the notice to the health care provider or an identified individual whose job function includes receptionist for deliveries to the provider or for arrival of the provider's patients at the provider's current practice location. Delivery must be established by an affidavit stating that the notice was personally delivered and the identity of the individual to whom the notice was delivered; or

\* \* \*

(b) If a complaint is filed in any court alleging a claim for health care liability, the pleadings shall state whether each party has complied with subsection (a) and shall provide the documentation specified in subdivision (a)(2). The court may require additional evidence of compliance to determine if the provisions of this section have been met. The court has discretion to excuse compliance with this section only for extraordinary cause shown.

Tenn. Code Ann. § 29-26-121(a)-(b).

In *Myers*, a case similarly involving a re-filed complaint, the Tennessee Supreme Court ruled that the statutory requirements that a plaintiff give 60 days pre-suit notice and file a certificate of good faith with the complaint were mandatory and not subject to substantial compliance. 382 S.W.3d at 310. The Court held that the re-filed action commenced pursuant to the saving statute was a new action governed by the statutory provisions in sections 29-26-121 and 122. However, the Court also held that “the legislature

did not expressly provide for the consequence of dismissal with prejudice as it did in [ ] section 29-26-122.” *Id.* at 312. Indeed, the Court refrained to address the “appropriate sanction” for failure to comply with section 29-26-121 because plaintiff had also failed to comply with the certification requirements, which mandated dismissal. *Id.*

Since that time, the Court has finally addressed the appropriate sanction for failure to comply with section 29-26-121(a). *Stevens*, 2013 WL 6158000, at \*8. In *Stevens*, plaintiff filed the required 60-day pre-suit notice but failed to include a HIPAA compliant medical authorization form. *Id.* at \*1. The form provided by plaintiff was deficient because it failed to permit “the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.” Tenn. Code Ann. § 29-26-121(a)(2)(E). Defendants sought dismissal based upon plaintiff’s failure to fully comply with section 29-26-121(a)(2). The trial court denied the motion, and the Court granted the defendants’ application for permission to appeal. The Court held that plaintiff was merely required to “substantially comply” with the content requirements set forth in section 29-26-121(a)(2). *Id.* at \*3-4. Despite that finding, the Court ultimately held that plaintiff had not substantially complied with the content requirements. In so holding, the Court stated,

In determining whether a plaintiff has substantially complied with a statutory requirement, a reviewing court should consider the extent and significance of the plaintiff’s errors and omissions and whether the defendant was prejudiced by the plaintiff’s noncompliance. Not every non-compliant HIPAA medical authorization will result in prejudice. But in this case, the medical authorization submitted by Plaintiff was woefully deficient. The errors and omissions were numerous and significant. Due to Plaintiff’s material non-compliance, Defendants were not authorized to receive any of the Plaintiff’s records. As a result of multiple errors, Plaintiff failed to substantially comply with the requirements of [section 29-26-121(a)(2)(E)].

*Id.* at \*5. The Court denied any relief based upon extraordinary cause before discussing the consequences of plaintiff’s failure to comply with section 29-26-121(a)(2). The Court acknowledged that section 29-26-121 provided no “explicit penalty or consequence” for failure to comply with its terms but ultimately held that dismissal of plaintiff’s case *without* prejudice was the appropriate penalty. *Id.* at \*8. In so holding, the Court acknowledged but declined to address the fact that its dismissal without prejudice operated as a dismissal with prejudice because any future claim would be time-barred. *Id.* at \*9.

We are mindful of the fact that this case presents a substantially different scenario than the one presented in *Stevens*. It is undisputed that Plaintiffs filed Lawsuit 1 prior to the enactment of section 29-26-121 and that Plaintiffs did not even attempt to comply with

section 29-26-121(a)(1) before filing Lawsuit 2. Accordingly, Plaintiffs failed to comply with the mandatory requirements of section 29-26-121(a)(1) pursuant to the Court's holding in *Myers*.

Having concluded that Plaintiffs failed to comply with section 29-26-121(a)(1), we must address the question of whether the trial court abused its discretion by failing to excuse compliance pursuant to section 29-26-121(b). Plaintiffs allege,

Based upon the lack of case law during the time period wherein [Plaintiffs were] filing [the] complaint pursuant to the saving statute and the extraordinary efforts of Plaintiffs in attempting to comply with the statute should be deemed extraordinary cause and [Plaintiffs] should be excused from failure to strictly comply with same.

Plaintiffs' attempts to comply with the pre-suit notice requirements were anything but extraordinary. The pertinent provisions of the TMMA had been enacted for approximately 19 months by the time Lawsuit 2 was filed. Yet, Plaintiffs made no effort to afford Defendants *any* pre-suit notice of Lawsuit 2. *Myers*, 382 S.W.3d at 310 (discussing the importance of notice relating to the continuation of medical malpractice claims). With these considerations in mind, we conclude that the trial court did not abuse its discretion by refusing to excuse compliance with section 29-26-121(a)(1).

For the foregoing reasons, we affirm the dismissal of Plaintiffs' claim without prejudice based upon the Court's reasoning in *Stevens*. In so holding, we acknowledge that any further claims by Plaintiff will be time-barred.

C.

Defendants request attorney fees on appeal. Tennessee Code Annotated section 27-1-122 provides for an award of sanctions in the form of attorney fees when an appeal is determined to be frivolous. To find an appeal frivolous, the appeal must be wholly without merit and lacking in justiciable issues. *See Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977); *Indus. Dev. Bd. of Tullahoma v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995). An appellate court's decision on this issue is discretionary, and this court is generally reluctant to award such damages because we do not want to discourage legitimate appeals. *Whalum v. Marshall*, 224 S.W.3d 169, 180-81 (Tenn. Ct. App. 2006). Following our review, we respectfully deny the request for attorney fees on appeal.



## V. CONCLUSION

The judgment of the trial court is affirmed, and the case is remanded for such further proceedings as may be necessary. Costs of the appeal are taxed equally to the appellees, Aubrey E. Givens, individually and as administrator of the estate of Jessica E. Givens, deceased, and Jessica R. Givens.

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JOHN W. McCLARTY, JUDGE