If the Purpose of the Tennessee Health Care Liability Act Is to Block Access to the Courts, Then It Is Succeeding—But "Surely, That Is Not the Intent of Our Elected Representatives"[1]

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[W]e cannot endorse the proposition that a lawsuit . . . is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy: "we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." ***That our citizens have access to their civil courts is not***

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1. Brown v. Samples, No. E2013-00799-COA-R9-CV, 2014 WL 1713773, at *5 (Tenn. Ct. App. Apr. 29, 2014).

> ***an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride.***[2]
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> *Tennessee courts have long recognized that the interests of justice are promoted by providing injured persons an opportunity to have their lawsuits heard and evaluated on the merits.*[3]

I. INTRODUCTION

No jury will ever learn about Laileeana Wendalee Scott, the five-day-old baby who died before she ever really got to live.[4] Tiffinne Runions arrived at Jackson-Madison County General Hospital ready to

2. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 643 (1985) (emphasis added) (citation omitted).

3. *Brown*, 2014 WL 1713773, at *8.

4. Runions v. Jackson-Madison Cnty. Gen. Hosp. Dist., 549 S.W.3d 77, 79–80 (Tenn. 2018).

become a mother, but the hospital sent her home the next day with a diagnosis of false labor.[5] When Ms. Runions came back a day later with more signs of labor, providers discovered Laileeana in fetal distress and performed an emergency cesarean section.[6] Instead of taking her baby home, Ms. Runions spent the next five days in the hospital watching Laileeana struggle to breathe, struggle to eat, and struggle to survive.[7] After Laileeana died from a traumatic brain injury resulting from lack of oxygen or inadequate blood flow to her brain,[8] Ms. Runions filed a health care liability action against Jackson-Madison County General Hospital for wrongful death under the Tennessee Health Care Liability Act ("THCLA"). But the courtroom doors will never open for Ms. Runions's health care liability claim, and no jury will ever decide whether Jackson-Madison County General Hospital caused Laileeana's death.

Why not? Because of a procedural trap that lurks in front of every victim of medical malpractice, a trap that solely snags health care liability claims. The THCLA contains a notice statute requiring a plaintiff who asserts a health care liability claim to notify the defendant of the action prior to filing her claim.[9] The notice itself must comply with two separate statutory requirements: (1) the express notice requirement[10] and (2) the content requirements.[11] The express notice

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5. Brief of Plaintiff-Appellee at 8, Runions v. Jackson-Madison Cnty. Gen. Hosp. Dist., 549 S.W.3d 77 (Tenn. 2018) (No. W2016-00901-COA-R9-CV), 2016 WL 6916263, at *8.

6. *Id.*

7. *See id.* Providers placed Laileeana "on respiratory and nutritional support due to multiple complications." *Id.*

8. *Id.*

9. TENN. CODE ANN. § 29-26-121 (2023).

10. *See id.* § 29-26-121(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." (emphasis added)).

11. The notice must contain:

> (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;

requirement ensures that each plaintiff gives written notice to each defendant at least sixty days prior to filing her health care liability claim.[12] The content requirements outline the specific types of information that must be included in the notice, such as a HIPAA compliant medical authorization permitting the provider to obtain complete medical records from every other potential defendant.[13] The HIPAA compliant medical authorization comes with six of its own extratextual requirements mandated by federal law.[14]

> (C) The name and address of the attorney sending the notice, if applicable;
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> (D) A list of the name and address of all providers being sent a notice; and
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> (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.

Id. § 29-26-121(a)(2).

12. *Id.* § 29-26-121(a)(1).

13. *Id.* § 29-26-121(a)(2).

14. Martin v. Rolling Hills Hosp., LLC, 600 S.W.3d 322, 332 (Tenn. 2020) ("'[F]ederal regulations' mandate . . . six 'core' elements for a HIPAA compliant medical authorization." (quoting Stevens *ex rel.* Stevens v. Hickman Cmty. Health Care Servs., Inc., 418 S.W.3d 547, 555 (Tenn. 2013))). These six requirements are:

> (i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
>
> (ii) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.
>
> (iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.
>
> (iv) A description of each purpose of the requested use or disclosure [. . .].
>
> (v) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure [. . .].
>
> (vi) Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must also be provided.

45 C.F.R. § 164.508(c)(1) (2013).

The Tennessee General Assembly purportedly enacted the notice statute to facilitate early resolution of claims through pre-suit settlement.[15] But the notice statute's procedural obstacles block plaintiffs like Ms. Runions from reaching a court based on technicalities that do not apply to almost any other kind of plaintiff. The error made by Ms. Runions's attorney was not minor—the complaint named the wrong defendant—but it was curable in almost any case except one brought under the THCLA.[16] Ms. Runions's attorney sent notice to the correct address but named the defendant as Bolivar General Hospital, Inc. d/b/a Jackson-Madison County General Hospital, Inc. instead of the correctly named Jackson-Madison County General Hospital District d/b/a Jackson-Madison County General Hospital.[17] Both Jackson-Madison County General Hospital and Bolivar General Hospital are governmental entities run by West Tennessee Healthcare.[18]

Ms. Runions's attorney explained that Ms. Runions named the hospital as Bolivar General Hospital, Inc. because the Tennessee Secretary of State's information service listed Bolivar General Hospital, Inc. as the facility located at the address at which Ms. Runions birthed her baby, and it stated that Jackson-Madison County General Hospital, Inc. was the former name of the facility now known as Bolivar General Hospital, Inc.[19] The notice statute directs a plaintiff's attorney to send notice to "both the address for the agent for service of process, and the provider's current business address," which is usually published on the Tennessee Secretary of State's website.[20] Even today,

15. *Stevens*, 418 S.W.3d at 554 (stating that the objective of the notice statute is to "facilitate early resolution of healthcare liability claims" and to "equip[] defendants with the actual means to evaluate the substantive merits of a plaintiff's claim by enabling early discovery of potential co-defendants and early access to a plaintiff's medical records").

16. Despite naming the wrong defendant, Ms. Runions's attorney sent the notice to Jackson-Madison County General Hospital's address, the same address at which Ms. Runions delivered her baby. Runions v. Jackson-Madison Cnty. Gen. Hosp. Dist., 549 S.W.3d 77, 79–80 (Tenn. 2018).

17. *Id.* at 80.

18. *See* WEST TENN. HEALTHCARE, https://www.wth.org/find-a-location/?form=2 (last visited Feb. 5, 2023) (listing hospitals in West Tennessee Healthcare's system).

19. *Runions*, 549 S.W.3d at 81.

20. TENN. CODE ANN. § 29-26-121(a)(3)(B)(ii) (2023).

the only listing on the Tennessee Secretary of State's website for Jackson-Madison County General Hospital, Inc. states that its new name is Bolivar General Hospital, Inc.[21]

A plaintiff's attorney can normally solve this type of error by either refiling the case or amending the complaint to substitute in the correct party.[22] Tennessee Rule of Civil Procedure 15.03 explicitly allows an amendment that seeks to change the opposing party to relate back to the original filing date of the complaint as long as (1) the amendment arises "out of the conduct, transaction, or occurrence set forth in the original pleading"; (2) the party introduced by the amendment had notice of the action before the commencement of the action or within 120 days afterwards; and (3) the party introduced by the amendment knew or should have known that the original suit would have been brought against them but for a mistake about their identity.[23] The entire purpose of the rule is to "ameliorate" the harsh effect of the statute of limitations where the correct party knew the action existed and knew the action should have been brought against it.[24]

Even though Ms. Runions's attorney named the wrong defendant, there was "clear and unambiguous proof" that Jackson-Madison County General Hospital knew about Ms. Runions's claim and knew that Ms. Runions should have named it as a defendant.[25] General counsel for Jackson-Madison County General Hospital received the notice as the registered agent for Bolivar General Hospital.[26] Instead of denying any connection with Bolivar General Hospital, the Director of Risk Management for Jackson-Madison County General Hospital responded to Ms. Runions's written notice

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21. *Business Entity Detail*, TENN. SEC'Y OF STATE, https://tnbear.tn.gov/Ecommerce/FilingDetail.aspx?CN=06608208714611323223802200421201811305309802
5034 (last visited Feb. 5, 2023).

22. *See, e.g.*, TENN. R. CIV. P. 15.01 (directing courts to freely give leave to amend pleadings early in a case); TENN. R. CIV. P. 15.03 (allowing an amendment to relate back to the date of the original pleading if the timing of the amendment is outside of the limitations period under certain conditions).

23. TENN. R. CIV. P. 15.03.

24. *Runions*, 549 S.W.3d at 84 (quoting Doyle v. Frost, 49 S.W.3d 853, 856 (Tenn. 2001)).

25. *Id.* at 83 (quoting Runions v. Jackson-Madison Cnty. Gen. Hosp. Dist., No. W2016-00901-COA-R9-CV, 2017 WL 514583, at *7 (Tenn. Ct. App. Feb. 7, 2017)).

26. *Id.* at 86.

and advised that "she was the 'designated contact for [Ms. Runions's] claim.'"[27] If she had been litigating almost any other type of claim, Ms. Runions could have solved her procedural error by proposing to amend her complaint to substitute in Jackson-Madison County General Hospital. Her amendment would have related back to the filing of the original complaint under Rule 15.03 because the amendment involved the same incident asserted in the complaint, the hospital had notice of the claim prior to filing, and the hospital knew that the claim should have been asserted against it but for a mistake.[28]

The fundamental "purpose of [Rule 15.03] is to prevent a claim from becoming time-barred by the statute of limitations due to a mere 'mistake concerning the identity of the proper party.'"[29] Despite satisfying all of the elements of Rule 15.03, Ms. Runions could not receive its benefit because she did not strictly comply with the THCLA's express notice requirement. Even though Ms. Runions mailed her notice to Jackson-Madison County General Hospital's general counsel, and even though she identified that her intended defendant was doing business as Jackson-Madison County General Hospital, the Tennessee Supreme Court refused "to authorize indirect notice" to the hospital under the express notice requirement established by Tennessee Code Annotated section 29-26-121(a)(1).[30] Confined to the statutory language,[31] the Tennessee Supreme Court strictly construed the express notice requirement and held that a plaintiff must properly name the defendant on the written notice; substantial compliance with the spirit of the statute is not sufficient.[32]

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27. *Id.*

28. *Id.* at 90 (concluding that "the proposed amendment may, under Tennessee Rule of Civil Procedure 15.03, relate back to the filing of the original complaint").

29. Daniel A. Horwitz, *Tennessee's Medical Malpractice Statute Traps Another Plaintiff*, SUP. CT. OF TENN. BLOG (June 18, 2018), https://scotblog.org/2018/06/tennessees-medical-malpractice-statute-traps-another-plaintiff/.

30. *Runions*, 549 S.W.3d at 87.

31. The Tennessee Supreme Court emphasized the express notice requirement's directive that a plaintiff "*shall give written notice* of the potential claim *to each health care provider* that will be a named defendant." *Id.* (quoting TENN. CODE ANN. § 29-26-121(a)(1)). The court reasoned that the "language is clear, unambiguous, and requires strict compliance." *Id.*

32. *Id.* (stating that "[u]nder the language of Tennessee Code Annotated section 29-26-121(a)(1), the proper inquiry is whether the plaintiff *gave* pre-suit notice

If a victim of medical malpractice is able to jump through each hoop established in the notice statute by strictly complying with the express notice requirement and substantially complying with each and every content requirement,[33] then Tennessee extends the one-year statute of limitations by 120 days.[34] A plaintiff's attorney bringing a health care liability action therefore "operate[s] under the assumption that they have 485 days—rather than 365 days—within which to file a complaint."[35] The plaintiff's attorney has no reason to believe that they would not benefit from this provision tolling the statute of limitations because they have no reason to believe they failed to comply with any of the provisions contained in the notice statute. If an attorney intended to "fastidiously examine his pre-trial notice letter for technical errors, then it seems safe to assume that he would have done so *before* sending it, rather than afterward."[36] But a defective notice does not trigger the 120-day extension, and a plaintiff's attorney who relies on the extension to file a claim will almost never discover the error until after the one-year statute of limitations has already expired,[37] which is exactly what happened to Ms. Runions. Like many Tennessee attorneys operating under a short amount of time to investigate and file a health care liability claim, Ms. Runions's attorney filed her complaint in reliance on the extension of the statute of limitations promised by the notice statute—an extension she did not receive.[38]

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to the health care provider to be named a defendant, not whether the health care provider knew about the claim based on pre-suit notice of the claim directed to" someone else).

33. The plaintiff must strictly comply with the explicit written notice requirement under Tennessee Code Annotated section 29-26-121(a)(1) and substantially comply with each of the enumerated content requirements under Tennessee Code Annotated section 29-26-121(a)(2). *See* discussion *infra* Section II.B-C (providing a detailed overview of the notice statute and compliance).

34. TENN. CODE ANN. § 29-26-121(c) (2023).

35. Daniel A. Horwitz, *The Law of Unintended Consequences: Avoiding the Health Care Liability Act Booby Trap*, NASHVILLE BAR J., June 2015, at 3.

36. *Id.*

37. *See* discussion *infra* Section III.A.

38. Runions v. Jackson-Madison Cnty. Gen. Hosp. Dist., 549 S.W.3d 77, 90 (Tenn. 2018) (holding that Ms. Runions's Rule 15.03 motion would be futile because she did not comply with the express notice requirement, did not receive the benefit of the tolling provision, and therefore filed her complaint outside of the limitations period).

The Tennessee Supreme Court denied Ms. Runions the benefit of Rule 15.03 even though the defendant knew about the action because she filed her complaint outside of the limitations period, and she filed her claim outside the limitations period because she did not strictly comply with the THCLA's express notice requirement.[39] Ms. Runions fell into the notice statute's time trap. Because she was forced to wait sixty days to file her complaint after giving notice,[40] she filed her claim outside of the limitations period, her complaint was time-barred, her motion to amend was futile, and the case of five-day-old Laileeana came to a quiet end—not because of its merits but because the exacting language of the express notice requirement compelled the court to deny Ms. Runions the benefit available to almost any other plaintiff.[41]

The unanimous decision to dismiss Ms. Runions's claim before considering its merits "represents only [one of the] casualties in a long line of [health care liability actions] that have been doomed from their inception due to attorneys' procedural mistakes."[42] The notice statute itself does not provide for the effects of non-compliance.[43] The Tennessee Supreme Court recognizes the harsh effect of the notice statute and has made it a policy to grant dismissals based on defective notice without prejudice,[44] but this "general presumption against

39. *Id.*

40. The plaintiff must give notice at least sixty days before filing the claim. TENN. CODE ANN. § 29-26-121(a)(1) (2023). Thus, a plaintiff who gives notice within two months of the statute of limitations must wait sixty days until after the original statute of limitations has passed to file the complaint.

41. *Runions*, 549 S.W.3d at 90.

42. Horwitz, *supra* note 29.

43. *Compare* TENN. CODE ANN. § 29-26-121 (2023) (not providing a sanction for non-compliance), *with* TENN. CODE ANN. § 29-26-122(c) (2023) ("The failure of a plaintiff to file a certificate of good faith in compliance with this section shall, upon motion, make the action subject to dismissal with prejudice."). The Tennessee General Assembly enacted the notice statute and the certificate of good faith statute at the same time when it passed the THCLA. Foster v. Chiles, 467 S.W.3d 911, 916 (Tenn. 2015).

44. *See, e.g.*, Stevens *ex rel.* Stevens v. Hickman Cmty. Health Care Servs., Inc., 418 S.W.3d 547, 560 (Tenn. 2013) ("If the legislature had intended to punish a plaintiff's failure to comply with the requirements of Tenn. Code Ann. § 29-26-121(a)(2)(E) by requiring courts to dismiss all such cases with prejudice, the legislature could easily have done so, as it did in Tenn. Code Ann. § 29-26-122. Thus, we can only interpret the legislature's failure to mandate the same remedy for Tenn.

dismissing cases with prejudice on procedural grounds" has proven to be a leaky rescue boat doomed to sink.[45] A time-barred complaint dismissed without prejudice cannot be refiled. Tennessee courts do not give the benefit of the 120-day extension on the statute of limitations to plaintiffs who substantially comply with the notice statute as a whole but fall short of satisfying the complex standards for compliance with each requirement.[46] Thus, the Supreme Court's dismissal of a plaintiff's complaint in this manner "effectively operate[s] as a dismissal with prejudice."[47] This "fatal litigation trap lurking beneath the [THCLA's] surface . . . currently functions to transform even dismissals without prejudice into permanent bars to recovery."[48]

Code Ann. § 29-26-121(a)(2)(E) violations as an indication that dismissal with prejudice for such violations is not compulsory.").

45. *Id.*

46. A plaintiff who does not strictly comply with the express notice requirement under subsection (a)(1) does not receive the benefit of the extension on her statute of limitations. *See, e.g.*, Runions v. Jackson-Madison Cnty. Gen. Hosp. Dist., 549 S.W.3d 77, 90 (Tenn. 2018) ("Ms. Runions did not comply with Tennessee Code Annotated section 29-26-121(a)(1) by giving the [defendant] written pre-suit notice; thus, she cannot rely on the 120-day filing extension of Tennessee Code Annotated section 29-26-121(c)."). The Tennessee Supreme Court has yet to address whether a plaintiff who strictly complies with the express notice requirement under subsection (a)(1) but does not substantially comply with a single content requirement under subsection (a)(2) can receive the benefit of the 120 days. *See* Martin v. Rolling Hills Hosp., LLC, 600 S.W.3d 322, 343 n.7 (Tenn. 2020) (Kirby, J., concurring in part and dissenting in part) ("In *Stevens*, the Court expressly declined to rule on whether the plaintiffs must substantially comply with the content requirements in subsection (a)(2) of Section 121 in order to be entitled to the 120-day extension of time to file suit. The majority opinion in the instant case presumes plaintiffs must comply with the content requirements in subsection (a)(2) in order to rely on the 120-day extension[] but does not separately analyze the issue; that question is left for another day." (citation omitted)). In the absence of official guidance, the lower courts deny the 120-day extension to a plaintiff who strictly complies with the express notice requirement under subsection (a)(1) but does not substantially comply with a single content requirement under (a)(2). *See* discussion *infra* Section II.B-C (providing a detailed overview of the notice statute and compliance).

47. *Martin*, 600 S.W.3d at 343 n.7.

48. Horwitz, *supra* note 35, at 2.

While the court pretends that it is only shutting the door to justice for now, it knows the door will automatically lock once closed.[49]

Access to justice is the cornerstone of American jurisprudence because the interests of justice are best served when citizens can pursue their claims.[50] Tennessee courts are rightfully "reluctant to give effect to rules of procedure which seem harsh and unfair, and which prevent a litigant from having a claim adjudicated upon its merits."[51] But as the *Runions* court emphasized, the courts cannot rewrite policy decisions made by the legislature,[52] and the Tennessee General Assembly created a pre-suit obstacle course containing "red tape with fangs for medical malpractice plaintiffs."[53] If the Tennessee General Assembly truly intended to facilitate early resolution of claims by giving the defendant "the opportunity to investigate and . . . settle the case before it is actually filed,"[54] then the THCLA is failing.

This Note demonstrates the imbalance of the THCLA and proposes to amend the notice statute to eliminate the time trap that

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49. *See Martin*, 600 S.W.3d at 337 (referencing appellate court opinions denying the 120-day extension to plaintiffs who did not substantially comply with a single content requirement).

50. *See* Brown v. Samples, No. E2013–00799–COA–R9–CV, 2014 WL 1713773, at *8 (Tenn. Ct. App. Apr. 29, 2014) ("Tennessee courts have long recognized that the interests of justice are promoted by providing injured persons an opportunity to have their lawsuits heard and evaluated on the merits."); Tenn. Dep't of Hum. Servs. v. Barbee, 689 S.W.2d 863, 866 (Tenn. 1985) ("[T]he interests of justice are best served by a trial on the merits . . . ."); Henley v. Cobb, 916 S.W.2d 915, 916 (Tenn. 1996) ("It is well settled that Tennessee law strongly favors the resolution of all disputes on their merits . . . .").

51. Childress v. Bennett, 816 S.W.2d 314, 316 (Tenn. 1991).

52. Runions v. Jackson-Madison Cnty. Gen. Hosp. Dist., 549 S.W.3d 77, 87–88 (Tenn. 2018).

53. Horwitz, *supra* note 35, at 1.

54. John A. Day, *Med Mal Makeover 2009 Act Improves on '08: The New Medical Malpractice Notice and Certificate of Good Faith Statutes*, 45 TENN. BAR J. 7, 16 (2009), http://www.tba.org/sites/default/files/journal_archives/2009/TBJ0709.pdf; *see also* Stevens *ex rel* Stevens v. Hickman Cmty. Health Care Servs., Inc., 418 S.W.3d 547, 554 (Tenn. 2013) (stating that the objective of the THCLA is "to facilitate early resolution of healthcare liability claims" and to "equip[] defendants with the actual means to evaluate the substantive merits of a plaintiff's claim by enabling early discovery of potential co-defendants and early access to a plaintiff's medical records").

derails otherwise meritorious claims contrary to the statute's stated purpose. Section II describes the purpose of the THCLA, surveys the evolution of the notice statute from its inception in 2008 to present, discusses other significant reforms related to health care liability claims, and outlines the application of the notice statute in the courts. Section III explains how the THCLA blocks access to the courts by constructing a labyrinth of procedural barriers which cause plaintiffs' claims to be dismissed on technicalities before they are heard on their merits. Section IV proposes that the Tennessee General Assembly amend the THCLA to extend the 120-day tolling provision to plaintiffs who substantially comply with Tennessee Code Annotated section 29-26-121(a)(1)–(4) as a whole. Section V concludes that change is necessary to bring application of the THCLA in line with its stated purpose—unless, of course, injustice was the purpose all along.

II. HISTORY AND BACKGROUND

In the early 2000s, interest groups representing medical patients and healthcare providers worked together to improve medical malpractice litigation in Tennessee for everyone involved in the process.[55] This work culminated in the metamorphosis of Tennessee's Medical Malpractice Act into the THCLA. By the time the Tennessee General Assembly passed the THCLA in 2008,[56] it had been over thirty years since the last update to Tennessee's Medical Malpractice Act.[57] The 2008 amendments represented a complete overhaul of the entire system.[58] The legislature intended to provide each defendant with the

55. Day, *supra* note 54, at 16.

56. Even though the 2008 amendment to the Medical Malpractice Act is now known as the THCLA, it remained known as the Medical Malpractice Act until the Tennessee General Assembly amended the title in the Tennessee Civil Justice Act of 2011 (TCJA) and replaced all references to "medical malpractice" with "health care liability" throughout the entire Tennessee Code Annotated. 2012 Tenn. Pub. Acts ch. 798. The TCJA also limited the potential recovery a victim could receive. *See* discussion *infra* Section III.B.

57. Prior to 2008, the Tennessee General Assembly last amended the Medical Malpractice Act in 1975. TENN. NEWS REL., S. REP. 2008.

58. *See* Ashley Adams, Note, *2011 Amendments to Tennessee Health Care Liability Laws: A Hasty Attempt at Clarification and the Lingering Ambiguities for Claims Brought under the Governmental Tort Liability Act*, 45 U. MEM. L. REV. 203, 213 (2014).

tools to evaluate the merits of a health care liability claim so that the parties could "facilitate early resolution" prior to suit by requiring the plaintiff to give each potential defendant pre-suit notice of the potential claim.[59] Since enacting the THCLA in 2008, the Tennessee General Assembly has amended it seven times to better align its application with the equally important goals of reducing meritless suits, preventing protracted litigation, and encouraging early settlement. Each amendment shows that the legislature did not intend to enact a procedural obstacle course designed to prevent all but the most experienced litigators from successfully filing a health care liability claim. In effect, however, the THCLA's notice statute facilitates early resolution by requiring dismissal for failure to comply with procedural requirements that do not apply to almost any other claim. Justice Kirby recognized that this framework is "contrary to Tennessee's longstanding policy of deciding civil actions on their merits [instead of] procedural technicalities . . . that have nothing to do with advancing appropriate and legitimate societal interest and public policy."[60] Instead of advancing any legitimate public policy, this framework undermines the THCLA's stated purpose to facilitate pre-suit discovery and settlement.[61]

A. Purpose of the THCLA: Early Access, Early Resolution

Health care liability laws bend to two competing interests that constantly pull legislatures into opposite directions: the needs of the patient and the interests of the health care provider.[62] On the patient's

59. Stevens *ex rel.* Stevens v. Hickman Cmty. Health Care Servs., Inc., 418 S.W.3d 547, 554 (Tenn. 2013) (stating that the distinct goals of the THCLA are "to give defendants written notice that a potential healthcare liability claim may be forthcoming," to "facilitate early resolution of healthcare liability claims," and to "equip[] defendants with the actual means to evaluate the substantive merits of a plaintiff's claim by enabling early discovery . . . and early access to a plaintiff's medical records").

60. Martin v. Rolling Hills Hosp., LLC, 600 S.W.3d 322, 345–46 (Tenn. 2020) (Kirby, J., concurring in part and dissenting in part).

61. *See id.* at 346 (Kirby, J., concurring in part and dissenting in part).

62. *See, e.g.*, WIS. STAT. § 893.55(1d)(a) (2023) ("The objective of the treatment of this [medical malpractice] section is to ensure affordable and accessible health care for all of the citizens of Wisconsin while providing adequate compensation to the victims of medical malpractice.").

side, medical error is a leading cause of death across the country. A 2016 study conducted by Johns Hopkins patient safety experts concluded that medical error is the third highest cause of death in the United States, after heart disease and cancer.[63] Medical malpractice is "so massive" and its effects so harmful that it must be deterred.[64] At the same time, some commentators claim that "[m]edical malpractice lawsuits have been a factor in increasing the cost of health care nationwide."[65] Higher liability costs lead to increased insurance

63. Michael Daniel, *Study Suggests Medical Errors Now Third Leading Cause of Death in the U.S.*, JOHNS HOPKINS MEDICINE (May 3, 2016), https://www.hopkinsmedicine.org/news/media/releases/study_suggests_medical_errors_now_third_leading_cause_of_death_in_the_us; Ray Sipherd, *The Third-Leading Cause of Death in US Most Doctors Don't Want You to Know About*, CNBC (Feb. 22, 2018, 9:31 AM), https://www.cnbc.com/2018/02/22/medical-errors-third-leading-cause-of-death-in-america.html; Martin A. Makary & Michael Daniel, *Medical Error—the Third Leading Cause of Death in the US*, BMJ (May 3, 2016), https://www.bmj.com/content/353/bmj.i2139; *see also* Michael J. Saks & Stephen Landsman, *Use Systems Redesign and the Law to Prevent Medical Errors and Accidents*, STAT (Aug. 4, 2021), https://www.statnews.com/2021/08/04/medical-errors-accidents-ongoing-preventable-health-threat/ ("Death by medical error or accident is the nation's leading cause of accidental death . . . ."). These medical errors are not necessarily due to bad doctors, and the "ease with which medical errors can occur is striking." *Id.* The issue of largescale medical malpractice is more representative of "systemic problems, including poorly coordinated care, fragmented insurance networks, the absence or underuse of safety nets, and other protocols, in addition to unwarranted variation in physician practice patterns that lack accountability." Daniel, *supra* note 63.

64. Saks & Landsman, *supra* note 63. Accountability for medical errors has existed since as early as 2030 BC, when the Code of Hammurabi advised that "[i]f the doctor has treated a gentlemen [sic] with a lancet of bronze and has caused the gentleman to die, or has opened an abscess of the eye for a gentleman with a bronze lancet, and has caused the loss of the gentleman's eye, one shall cut off his hands." B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, 467 CLINICAL ORTHOPAEDICS & RELATED RES. 339, 339 (2009), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628513/pdf/11999_2008_Article_636.pdf (quoting J.M. Powis Smith, THE ORIGIN AND HISTORY OF HEBREW LAW (1931)). Roman law similarly treated medical malpractice as a legal wrong, and these laws were introduced to continental Europe around 1200 AD. *Id.*

65. TENN. NEWS REL., S. REP. 2008; *see also* Jackson v. HCA Health Servs. of Tenn., Inc., 383 S.W.3d 497, 504 (Tenn. Ct. App. 2012) ("Because of alleged increasing numbers of claims, insurance companies had grown reluctant to write medical malpractice policies. Where policies were available, premiums had risen astronomically.").

premiums, which in turn increases the costs for physicians and health care institutions.[66] In enacting the THCLA, the legislature sought to balance the need to compensate victims of medical malpractice and deter subpar care against the need to lower costs for health care providers and keep health care accessible.[67]

The THCLA is designed to "weed[] out meritless medical malpractice lawsuits" and facilitate early resolution of meritorious claims.[68] It accomplishes these goals by requiring the plaintiff to consult with at least one medical expert to obtain a certificate that her claim has merit and by enabling early access to relevant information, including the plaintiff's medical records, prior to the filing of the complaint.[69] The requirement of a certificate of good faith confirming

66. W. Kip Vscusi, *Medical Malpractice Reform: What Works and What Doesn't*, 96 DENV. L. REV. 775, 778–79 (2019).

67. *See* Adams, Note, *supra* note 58, at 212; Day, *supra* note 54, at 16.

68. TENN. NEWS REL., S. REP. 2008.

69. *Id.* The certificate of good faith requirement represents another obstacle to the courts for victims of medical malpractice. Rebecca Blair, *Med-Mal Obstacles*, TENN. BAR ASS'N: TBA L. BLOG. (Aug. 19, 2008), https://www.tba.org/?pg=LawBlog&blAction=showEntry&blogEntry=9062 ("[I]f the Certificate of Good Faith requirement does not add at least a couple of extra butterflies to your stomach while sitting through the deposition or trial testimony of your expert, then you should not be handling malpractice cases."). Some state supreme courts have stricken certificate of good faith requirements in health care liability actions as unconstitutional. *See, e.g.*, Putnam v. Wenatchee Valley Med. Ctr., P.S., 216 P.3d 374, 380 (Wash. 2009) (en banc) ("The court must strike down this law because it violates the right of access to courts and conflicts with the judiciary's inherent power to set court procedures."); Summerville v. Thrower, 253 S.W.3d 415, 421 (Ark. 2007) (invalidating a statute requiring victims of medical malpractice to submit an affidavit of reasonable cause from a medical expect within 30 days of filing); Wimley v. Reid, 991 So. 2d 135, 138 (Miss. 2008) (striking a statutory requirement for the plaintiff to submit a certificate of good faith prior to filing). *But see* Jackson v. HCA Health Servs. of Tenn., Inc., 383 S.W.3d 497, 505 (Tenn. Ct. App. 2012) (upholding Tennessee's certificate of good faith requirement).

Many plaintiffs have found their complaints forever barred because their attorneys did not file the certificate of good faith with the complaint. Daniel A. Horwitz, *The Law of Unintended Consequences: Avoiding the Health Care Liability Act Booby Trap*, NASHVILLE BAR. J. (June 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577156 (compiling cases); *See, e.g.*, Goodwin v. United States, No. 2:13-CV-13445, 2014 WL 1685899, at *3 (E.D. Mich. Apr. 29, 2014) (holding that "failure to comply with TCA § 29-26-122 requires [courts] to dismiss [the] complaint with prejudice"); Portwood v. Montgomery Cnty,

that the plaintiff conferred with an expert who reviewed the claims and believes they are pursued in good faith "satisfies the goal of attempting to ensure that suits proceeding through litigation have some merit."[70] Early notice and access to discovery, on the other hand, is designed to "help resolve the case before it goes to court."[71]

B. The THCLA's Notice Statute

The "essence" of the THCLA lies in the notice statute codified at Tennessee Code Annotated section 29-26-121, which requires the plaintiff to give a defendant notice of a health care liability claim before it is filed so the defendant can participate in early access to discovery

Tenn., No. 3:13–CV–0186, 2013 WL 6179188, at *5 (M.D. Tenn. Nov. 25, 2013) ("If either a plaintiff or a defendant fails to comply with Section 122, the plaintiff's complaint or the defendant's allegations of fault against a non-party are, upon motion, subject to mandatory dismissal with prejudice."); Myers v. AMISUB (SFH), Inc., 382 S.W.3d 300, 311 (Tenn. 2012) (holding that a plaintiff's failure to file a certificate of good faith with a complaint subjects the complaint to dismissal with prejudice); Sirbaugh v. Vanderbilt Univ., 469 S.W.3d 46, 53 (Tenn. Ct. App. 2014) ("[Plaintiff] was obligated to file a statutorily compliant certificate of good faith with her amended complaint. She violated Tennessee Code Annotated section 29–26[-]122 by failing to do so. Therefore, dismissal of the claims against [the defendants] was mandated."); Mathes v. Lane, No. E2013-01457-COA-R3-CV, 2014 WL 346676, at *8 (Tenn. Ct. App. Jan. 30, 2014) ("[Plaintiff] offers no explanation for his failure to file the certificate of good faith other than his general assertion that the trial court should have afforded leniency in his pleadings due to his *pro se* and incarcerated status. . . . [Plaintiff's] self-represented status does not excuse him from following the procedural rules that represented parties must observe. . . . The trial court did not err in dismissing [Plaintiff's] complaint . . . ."); Caldwell v. Vanderbilt Univ., No. M2012-00328-COA-R3-CV, 2013 WL 655239, at *6–7 (Tenn. Ct. App. Feb. 20, 2013) ("The certificate filed by [the plaintiff] is not in compliance with the requirements outlined in Tenn. Code Ann. § 29-26-122 . . . . As a consequence, [the] complaint must be dismissed . . . ."). *See also* TENN. CODE ANN. § 29-26-122(c) (2012) ("The failure of a plaintiff to file a certificate of good faith in compliance with this section shall, upon motion, make the action subject to dismissal with prejudice.").

70. Hinkle v. Kindred Hosp., No. M2010-02499-COA-R3-CV, 2012 WL 3799215, at *8 (Tenn. Ct. App. Aug. 31, 2012) (citing Jenkins v. Marvel, 683 F. Supp. 2d 626, 639 (E.D. Tenn. 2010)).

71. *Jenkins*, 683 F. Supp. 2d at 639 (E.D. Tenn. 2010) (quoting TENN. NEWS REL., S. REP. 2008).

and pre-suit settlement.[72] This type of notice statute is not novel,[73] and courts have looked to states who have enacted similar statutes, like Texas, for guidance in interpreting the intent of the legislature.[74] "The purpose of a notice requirement . . . is to encourage pre-suit negotiations and settlement and to reduce litigation costs."[75] Thus, the notice period is designed to "set aside [time] for discussion between the parties, in order that an amicable agreement might be reached without the necessity for formal legal action."[76]

1. The Express Notice Requirement

The 2008 amendments to the THCLA introduced the express notice requirement as a preliminary threshold to filing a claim against a health care provider.[77] For the first time, victims of medical malpractice in Tennessee were required to "give written notice of such potential claim to each health care provider against whom such

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72. *Myers*, 382 S.W.3d at 309.

73. Ten states other than Tennessee—including California, Florida, Massachusetts, Michigan, Mississippi, Ohio, South Carolina, Texas, Utah, and West Virginia—and the District of Columbia have pre-suit notice requirements for health care liability actions. CAL. CIV. PROC. CODE § 364 (2023); FLA. STAT. § 766.106(2) (2023); MASS. GEN. LAWS ch. 231, § 60L (2023); MICH. COMP. LAWS § 600.2912b (2023); MISS. CODE. ANN. § 15-1-36(15) (2023); OHIO REV. CODE ANN. § 2305.113(B)(1) (2023); S.C. CODE ANN. § 15-79-125 (2023); TEX. CIV. PRAC. & REM. CODE ANN. § 74.251 (2023); UTAH CODE ANN. § 78B-3-412 (2023); W. VA. CODE § 55-7B-6 (2023); D.C. CODE § 16-2802 (2023).

74. *See, e.g.*, Jenkins v. Marvel, 683 F. Supp. 2d 626, 638 (E.D. Tenn. 2010) ("[The provisions contained within the THCLA] have been in effect for some time [in other states] and Texas state and federal courts have produced case law on the purpose of the notice requirement. Although not in any way binding on this Court, the interpretations do provide some guidance in determining the appropriate application of Tennessee's similar statute."). While the health care liability schemes in Texas and Tennessee are very similar, there is one major difference: the statute of limitations. *See* statutes cited *infra* note 161.

75. *Jenkins*, F. Supp. 2d at 638 (quoting Hill v. Russell, 247 S.W.3d 356, 360 (Tex. App. 2008) (citing De Checa v. Diagnostic Ctr. Hosp., Inc., 852 S.W.2d 935, 938 (Tex. 1993))).

76. *Id.* (quoting Schepps v. Presbyterian Hosp. of Dallas, 652 S.W.2d 934, 937 (Tex. 1983)).

77. 2008 Tenn. Pub. Acts ch. 919, § 1 (codified as amended at TENN. CODE ANN. § 29-26-121(a)(1)-(2)).

potential claim is being made at least sixty (60) days before the filing of a complaint."[78] The legislature designed this new scheme "to help resolve the case before it goes to court."[79] In addition to sending notice, the statute required the plaintiff to include a list of all health care providers to whom notice is sent.[80] If the plaintiff complied with the notice statute, then the applicable limitations period tolled for up to ninety days.[81] After sending the notice, the statute required the plaintiff to plead in the complaint that she complied with the notice statute and attach proof of compliance.[82] The Tennessee General Assembly also provided for another form of pre-suit discovery—speedy medical records production. The notice statute required the plaintiff to either provide each defendant a complete copy of her medical records from any other potential defendant or produce an authorization to release those medical records to the defendant within thirty days of a request.[83] As plaintiff's lawyers struggled to comply with the new statutory scheme, it became clear that the 2008 notice statute was punishingly vague.[84]

The 2008 statute failed to specify whether notice must be given to only those who will be named as a defendant or their agents and representatives as well, failed to indicate methods of effective service, and failed to indicate the accepted methods of proving notice.[85] The open-ended provisions left little guidance for plaintiffs' lawyers fighting their way through this new and dark terrain.[86] The Tennessee

78. *Id.*

79. TENN. NEWS REL., S. REP. 2008; *see also* 2008 Tenn. Pub. Acts ch. 919, § 1 (codified as amended at TENN. CODE ANN. § 29-26-121(a)(1)-(2)).

80. 2008 Tenn. Pub. Acts ch. 919, § 1 (codified as amended at TENN. CODE ANN. § 29-26-121(a)(1)-(2)).

81. *Id.*

82. *Id.*

83. 2008 Tenn. Pub. Acts ch. 919, § 1 (codified as amended at TENN. CODE ANN. § 29-26-121(d)(1)).

84. Blair, *supra* note 69; *see* Day, *supra* note 54, at 16.

85. 2008 Tenn. Pub. Acts ch. 919, § 1 (codified as amended at TENN. CODE ANN. § 29-26-121(a)(1)-(2)); Blair, *supra* note 69; Day, *supra* note 54, at 16

86. *See* Blair, *supra* note 69 ("In sum, while these new hurdles to filing a medical malpractice action are not insurmountable, they are burdensome and will most certainly be the downfall of some attorneys who have in the past dabbled in medical malpractice cases. The simplicity of Tenn. Code Ann. 29-26-121's notice requirement is troubling and will no doubt be the root of several appellate decisions as lawyers

General Assembly quickly recognized problems with the 2008 overhaul and almost immediately passed legislation to attempt to resolve them.[87]

When the legislature amended the THCLA in 2009, it "substantially reorganized and expanded" the original notice statute codified at Tennessee Code Annotated section 29-26-121.[88] For the first time, the Tennessee General Assembly specified the content required in the notice, and the THCLA as it appears today finally began to materialize.[89] The 2009 amendment makes it obvious that the plaintiff must only give notice to the entities that will be named as a defendant.[90] The legislature further outlined the requirements for

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flesh out what it really means to give pre-suit notice. The speedy production of medical records requirement is also too vague in this lawyer's opinion and does little to protect the privacy concerns of injured plaintiffs.").

87. Day, *supra* note 54, at 16 ("Most will agree that the 2009 Act is an overall improvement over the 2008 Statute. This is not to condemn the sponsors of the legislation that resulted in the 2008 [s]tatute[, and] any lawyer who understands the legislative process knows that when crafting legislation out of whole cloth one sleeve may end up a little shorter than the other. What is far more important than looking backward with a critical eye is the willingness to recognize problems with the law and being willing to work in good faith to fix them. That is exactly what happened here. Senate Majority Leader Mark Norris, Senator Doug Overby, and House Judiciary Chairman Ken Coleman are to be congratulated for quickly recognizing the problems in the original statute and working to resolve those problems. Also to be commended are various representatives of the health care industry who provided input into the new act. To be sure, each of the special interest groups sought to secure some advantage in the process, but all conducted themselves with the utmost good faith and professional courtesy to craft legislation that will improve the process.").

88. Martin v. Rolling Hills Hosp., LLC, 600 S.W.3d 322, 342 (Tenn. 2020) (Kirby, J., concurring in part and dissenting in part).

89. 2009 Tenn. Pub. Acts ch. 425, § 1; *see also Martin*, 600 S.W.3d at 342 (Tenn. 2020) (Kirby, J., concurring in part and dissenting in part) ("Meanwhile, the 2009 amendments placed the new content requirements for the pre-suit notice into a new separate subsection. This new separate "content" subsection for the first time required plaintiffs to provide identifying information for the patient at issue, as well as contact information for the claimant and the attorney sending the notice.").

90. *Compare* 2008 Tenn. Pub. Acts ch. 919, § 1 (stating that a plaintiff "shall give written notice of such potential claim to each health care provider *against whom such potential claim is being made*" (emphasis added)), *with* 2009 Tenn. Pub. Acts ch. 425, § 1 (stating that a plaintiff "shall give written notice of the potential claim to each health care provider *who will be a named defendant*" (emphasis added)).

mailing the notice[91] and extended the tolling provision to 120 days.[92] Today, the express notice requirement provides:

> 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.[93]

Though some plaintiffs still struggle to comply with the express notice requirement, most of the procedural deficiencies arise in the context of the content requirements.

2. The Content Requirements

The 2008 statute failed to indicate what information must be included in the notice other than a list of other providers to whom notice will also be given.[94] The 2009 amendment filled that gap and specified that the plaintiff's pre-suit notice must include (1) "[t]he full name and date of birth of the patient whose treatment is at issue"; (2) "[t]he name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient"; (3) "[t]he name and address of the attorney sending the notice"; (4) "[a] list of the names and addresses of all providers being sent a notice"; and (5) "[a] HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice."[95] Each HIPAA compliant medical authorization must include:

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91. 2009 Tenn. Pub. Acts ch. 425, § 1.

92. *Id.* ("When notice is given to a provider as provided in this section, the applicable statutes of limitations and repose shall be extended for a period of one hundred twenty (120) days from the date of expiration of the statute of limitations and statute of repose applicable to that provider.").

93. TENN. CODE ANN. § 29-26-121(a)(1) (2023).

94. 2008 Tenn. Pub. Acts ch. 919, § 1 (codified as amended at TENN. CODE ANN. § 29-26-121(a)(1)-(2)); Blair, *supra* note 69.

95. 2009 Tenn. Pub. Acts ch. 425, § 1.

> (i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
> (ii) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.
> (iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.
> (iv) A description of each purpose of the requested use or disclosure [. . . .]
> (v) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure [. . . .]
> (vi) Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must also be provided.[96]

Though the Tennessee General Assembly sought to fix the imbalance of early versions of the notice statute, the imbalance remains present today, and it is only exacerbated by its interpretation in the courts.

C. Statutory Interpretation and Compliance

Following the legislature's attempt to clarify the notice requirements that were first presented in the 2008 amendment, the appellate courts worked to "put some meat on the bones of these statutes."[97] The courts now refer to the mandate that plaintiffs must give written notice of the claim, codified at Tennessee Code Annotated section 29-26-121(a)(1), as "an express pre-suit notice requirement" and the subset of five specific types of disclosures, enumerated at Tennessee Code Annotated section 29-26-121(a)(2), as individual

96. Martin v. Rolling Hills Hosp., LLC, 600 S.W.3d 322, 332 (Tenn. 2020) (quoting Stevens *ex rel.* Stevens v. Hickman Cmty. Health Care Servs., Inc., 418 S.W.3d 547, 555 (Tenn. 2013) (quoting 45 C.F.R. § 164.508(c)(1) (2013))).

97. Clinton Kelly, *Medical Malpractice*, TENN. BAR. J., Nov. 1, 2013, at 12, 13.

"content requirements."[98] Each of these requirements has its own standard for compliance and affects the plaintiff's ability to receive the benefit of the 120-day extension on the statute of limitations.

Despite the legislature's intent to solve the ambiguities presented by the 2008 amendment, many plaintiffs found their complaints forever barred because their attorneys fell short of meeting the standard to satisfy the pre-suit notice requirements presented in Tennessee Code Annotated section 29-26-121, which have defeated even the strongest of claims due to hyper-technical errors like sending notice via FedEx instead of the United States Postal Service.[99] Another court dismissed a plaintiff's re-filed case because she did not provide notice before the second filing even though she provided proper notice the first time, and the re-filed complaint was "essentially identical" to the first one.[100]

1. Strict Compliance with the Express Notice Requirement

As plaintiffs struggled to jump through these procedural hoops, Tennessee courts struggled to find a resolution that would not undermine their dedication to providing plaintiffs with a forum.[101] But

98. Martin v. Rolling Hills Hosp., LLC, 600 S.W.3d 322, 339 (Tenn. 2020) (Kirby, J., concurring in part and dissenting in part) (citing Thurmond v. Mid-Cumberland Infectious Disease Consultants, PLC, 433 S.W.3d 512, 520 (Tenn. 2014)).

99. Arden v. Kozawa, No. E2013-01598-COA-R3-CV, 2014 WL 2768636, at *8 (Tenn. Ct. App. June 18, 2014), *rev'd*, 466 S.W.3d 758 (Tenn. 2015). Though the Court of Appeals's decision in *Arden* was later reversed by the Tennessee Supreme Court, the uncertainty caused by overly strict interpretations leaves plaintiff's attorneys wondering what compliance really means.

100. Foster v. Chiles, 467 S.W.3d 911, 913, 916 (Tenn. 2015).

101. *See, e.g.*, Brown v. Samples, No. E2013-00799-COA-R9-CV, 2014 WL 1713773, at *5 (Tenn. Ct. App. Apr. 29, 2014) (concluding that "[the court] feel[s] confident in finding that the General Assembly never intended that the amendments to the Medical Malpractice Act would completely strip away the rights of Tennessee citizens, who might have legitimate medical malpractice claims, because of some minor and hyper-technical error in initiating such a claim"); Hinkle v. Kindred Hosp., No. M2010-02499-COA-R3-CV, 2012 WL 3799215, at *15 (Tenn. Ct. App. Aug. 31, 2012) ("Dismissal of a meritorious complaint even where the defendant had actual notice and allowing a defendant to participate in discovery and negotiations while waiting to raise technical objections is not consistent with the purposes of the statutory requirements for filing medical malpractice lawsuits.").

courts have been strict in their interpretation of the statute, and many plaintiffs are forever barred from having their cases heard. The Tennessee Supreme Court first parsed the language of the THCLA's notice provision in *Myers v. AMISUB (SFH), Inc.*[102] After suffering a stroke, Mr. Myers filed a medical malpractice complaint in 2007, prior to the overhaul of health care liability claims in 2008.[103] Mr. Myers voluntarily dismissed his claim without prejudice after the passage of the THCLA in 2008, and then refiled his claim after the passage of the 2009 amendment.[104] But Mr. Myers neither sent pre-suit notice to the defendants prior to refiling, nor did he file a certificate of good faith contemporaneous with the refiling of the complaint as required by the 2009 amendment.[105]

Mr. Myers asserted that he satisfied the spirit of the statute because the defendants had notice of the nature of the suit by virtue of the original action, and he previously filed expert disclosures in the original action, fulfilling the notice and certificate of good faith requirements respectively.[106] But the Tennessee Supreme Court held that the use of the word "shall" in Tennessee Code Annotated sections 29-26-121(a)(1)[107] and 29-26-122(a)[108] "indicates that the legislature

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102. Myers v. AMISUB (SFH), Inc., 382 S.W.3d 300 (Tenn. 2012).

103. *Id.* at 304.

104. *Id.* By the time Mr. Myers refiled, the 2009 amendment had already taken effect, and the law required Mr. Myers to provide pre-suit notice and file a certificate of good faith with his complaint. *Id.*

105. *Id.* at 306.

106. *Id.*

107. TENN. CODE ANN. § 29-26-121(a)(1) (2023) ("Any person . . . 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 . . . ." (emphasis added)).

108. TENN. CODE ANN. § 29-26-122(a) (2023) ("In any health care liability action in which expert testimony is required by § 29-26-115, the plaintiff or plaintiff's counsel *shall* file a certificate of good faith with the complaint." (emphasis added)).

109. *Myers*, 382 S.W.3d at 308–309 ("The 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. The essence of Tennessee Code Annotated section 29-26-122 is that a defendant receive assurance that there are good faith grounds for commencing such action. The requirements of pre-suit notice of a potential claim under Tennessee Code Annotated section 29-26-121 and the filing of a certificate of good faith under Tennessee Code Annotated section 29-26-122 are

intended the requirements to be mandatory, not directory."[109] Mandatory requirements cannot be satisfied by substantially complying with the statute, and substantial compliance is only sufficient when the statute's requirements are directory.[109] The Tennessee Supreme Court reminded the parties that the statute provides "clear guidance and detailed instruction for meeting those requirements, and it is not our prerogative to rewrite the statute[]."[110] Ultimately, the Tennessee Supreme Court strictly construed the express notice requirement under Tennessee Code Annotated section 29-26-121(a)(1) and held that a plaintiff must give written notice to each potential defendant each time a claim will be filed.[111] And so Mr. Myers's claim was dismissed with prejudice for failure to comply with statutes requiring pre-suit notice and expert consultation even though the defendants had notice of the lawsuit prior to refiling and an expert had already positively opined on the merits of the case.[112]

The Tennessee Supreme Court's decision in *Myers* was only the beginning of elevating form over substance. The decision in *Myers* provided the foundation for the court's holding in *Runions* six years later. The *Runions* court explicitly relied on *Myers* when it held that Ms. Runions failed to strictly comply with the express notice requirement and thus could not receive the benefit of the 120-day extension on the statute of limitations.[113] In explaining its holdings in both cases, the Tennessee Supreme Court felt compelled to emphasize

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fundamental to the validity of the respective statutes and dictate that we construe such requirements as mandatory.").

110. *Id.* at 310. Because Mr. Myers did not strictly comply with the express notice requirement, the Tennessee Supreme Court did not address whether substantial compliance with the content requirements is sufficient to toll the statute of limitations under the notice statute. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 312. Because the court held that Mr. Myers failed to comply with the good faith requirement, which results in dismissal with prejudice, the court did not have to decide whether the failure to strictly comply with the express notice requirement under the notice statute also requires dismissal with prejudice. *Id.* The court later decided that it does not. Foster v. Chiles, 467 S.W.3d 911, 916 (Tenn. 2015).

114. Runions v. Jackson-Madison Cnty. Gen. Hosp. Dist., 549 S.W.3d 77, 86 (Tenn. 2018) (citing *Myers* to establish that the express notice requirement is mandatory and requires strict compliance).

that "it is not [the court's] prerogative to rewrite the statute[],"[114] and its holdings are "dictated by the language of [the express notice requirement], which the Legislature enacted based on public policy considerations."[115] Despite acknowledging the policy considerations underlying the notice statute—early discovery and early resolution on the merits—the Tennessee Supreme Court failed to acknowledge that its holdings in *Myers* and *Runions* undermine those considerations. "Dismissal of a meritorious complaint even where the defendant had actual notice . . . is not consistent with the purposes of the statutory requirements for filing medical malpractice lawsuits."[116] Instead, it "borders on the 'absurd result' that [the court is] to avoid in construing statutes."[117]

2. Substantial Compliance with Each of the Content Requirements

Though the *Myers* court strictly construed the THCLA's express notice requirement, it did not decide whether a plaintiff must strictly comply with the content requirements of the notice statute. "[C]ognizant of the harsh result" of strict compliance with such an exacting statutory scheme,[118] the Tennessee Supreme Court addressed the question of substantial compliance with the individual content requirements in *Stevens ex rel. Stevens v. Hickman Community Health Care Services, Inc.*[119]

115. *Myers*, 382 S.W.3d at 310.

116. *Runions*, 549 S.W.3d at 87–88.

117. Hinkle v. Kindred Hosp., No. M2010-02499-COA-R3-CV, 2012 WL 3799215, at *15 (Tenn. Ct. App. Aug. 31, 2012) ("Dismissal of a meritorious complaint even where the defendant had actual notice and allowing a defendant to participate in discovery and negotiations while waiting to raise technical objections is not consistent with the purposes of the statutory requirements for filing medical malpractice lawsuits.").

118. Martin v. Rolling Hills Hosp., LLC, 600 S.W.3d 322, 346 (Kirby, J., concurring in part and dissenting in part) (quoting Tennessean v. Metro. Gov't of Nashville, 485 S.W.3d 857, 872 (Tenn. 2016)).

119. Thurmond v. Mid-Cumberland Infectious Disease Consultants, PLC, 433 S.W.3d 512, 516 (Tenn. 2014) (quoting Thurmond v. Mid-Cumberland Infectious Disease Consultants, PLC, No. M2012-02270-COA-R3-CV, 2013 WL 1798960, at *3 n.2 (Tenn. Ct. App. Apr. 25, 2013)).

120. Stevens *ex rel.* Stevens v. Hickman Cmty. Health Care Servs., Inc., 418 S.W.3d 547, 554–55 (Tenn. 2013).

Mr. Stevens went to the emergency room at Hickman Community Hospital in the hopes that its physicians could diagnose and treat the illness causing him fever, weakness, difficulty breathing, wheezing, sore throat, and a toothache.[120] The hospital sent him home with medicine only for Mr. Stevens to come back two days later with similar complaints.[121] This time, the doctor prescribed oxycodone and again discharged Mr. Stevens.[122] When Mr. Stevens decided to go to a different hospital three days later, he received a diagnosis of septic shock, respiratory failure, pneumonia, renal failure, and multi-system organ failure, and he ultimately passed away.[123]

After Mr. Stevens died from his illness, his widow and next of kin sent pre-suit notice to the defendants. Her notice, however, included a defective HIPAA-compliant medical authorization that only allowed disclosure of the records to plaintiff's counsel when it should have allowed disclosure to defendant's counsel.[124] The *Stevens* Court held that while a plaintiff must strictly comply with the express notice requirement under Tennessee Code Annotated 29-26-121(a)(1), the plaintiff needed to substantially comply with the content requirement at section 29-26-121(a)(2)(E).[125] The Court reasoned that a "plaintiff's less-than-perfect compliance with [the content requirement of a HIPAA-compliant medical authorization] . . . should not derail a healthcare liability claim" because "errors and omissions will not always prejudice defendants by preventing them from obtaining a plaintiff's relevant medical records."[126] Despite this lifeline for

121. *Id.* at 552.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 551–52.

126. *Id.* at 555.

127. *Id.* The Tennessee Supreme Court has held similarly for the other content requirements contained within the notice statute. For example, in *Thurmond v. Mid-Cumberland Infectious Disease Consultants, PLC*, Mr. Thurmond neglected to specify in his complaint the date on which he sent pre-suit notice and did not provide an affidavit by the person who sent the notice via mail. 433 S.W.3d 512, 513–16 (Tenn. 2014). The defendants predictably moved for dismissal as a result of the plaintiff's failure to comply with Tennessee Code Annotated section 29-26-121(a)(4). *Id.* But the defendants did not argue that the failure to attach the affidavit prejudiced their defense in any way. *Id.* at 513. Instead, the defendants contended that the notice statute demands strict compliance with all of its individual requirements, including the

plaintiffs struggling to strictly comply with the content requirements of the notice statute,[127] the Tennessee Supreme Court held that Mrs. Stevens failed to substantially comply with the HIPAA content requirement because the defendants were unable to actually obtain medical records via the defective authorization.[128]

The *Stevens* court next had to decide the consequences for plaintiff's noncompliance. The THCLA itself does not provide an explicit penalty for failing to substantially comply with a content requirement of pre-suit notice.[129] Recognizing the general rule that "courts should be 'reluctant to give effect to rules of procedure which seem harsh and unfair, and which prevent a litigant from having a claim adjudicated upon its merits,'" the Tennessee Supreme Court reaffirmed its "general presumption against dismissing cases with prejudice on procedural grounds" where the statute does not so require.[130] The court dismissed Ms. Stevens's claim without prejudice.[131] In doing so, the Tennessee Supreme Court acknowledged but did not address that its dismissal without prejudice created the question of whether a plaintiff

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content requirements, and dismissal is the mandatory remedy for noncompliance even if noncompliance resulted in no prejudice. *Id.* The trial court dismissed the complaint even though no one contended that the notices were never sent and the Court of Appeals was "convinced the statute require[d] this result." *Id.* at 516. The Tennessee Supreme Court disagreed and reversed the harsh dismissal, holding that substantial compliance with the affidavit requirement under subsection (a)(4) was sufficient and the plaintiff substantially complied. *Id.* at 521–22. The *Martin* court stated that the "content requirements are directory and may be satisfied by substantial compliance." Martin v. Rollings Hills Hosp., LLC, 600 S.W.3d 322, 331 (Tenn. 2020).

128. This did not change the court's holding in *Myers*, which strictly construed the explicit notice requirement. The *Stevens* court merely held that a plaintiff who strictly complies with Tennessee Code Annotated section 29-26-121(a)(1) must then substantially comply with the content requirement enumerated at section 29-26-121(a)(2)(E), a HIPAA compliant medical authorization. Thus, the holdings in *Stevens* and other cases requiring substantial compliance with the content requirements under Tennessee Code Annotated section 29-26-121(a)(2) would not have saved Ms. Runions or Mr. Myers, who both failed to strictly comply with the explicit notice requirement under Tennessee Code Annotated section 29-26-121(a)(1).

129. *Stevens*, 418 S.W.3d at 556 (Tenn. 2013).

130. TENN. CODE ANN. § 29-26-121 (2023).

131. Stevens *ex rel.* Stevens v. Hickman Cmty. Health Care Servs., Inc., 418 S.W.3d 547, 560 (Tenn. 2013) (quoting Childress v. Bennett, 816 S.W.2d 314, 316 (Tenn.1991)).

132. *Id.*

who fails to substantially comply with a specific content requirement but substantially complies with subsection (a)(2) as a whole receives the benefit of the 120-day extension on the statute of limitations.[132]

The Tennessee Supreme Court has yet to address the issue of whether substantial compliance with the content requirements as a whole would warrant the extension.[133] But that has not stopped the Tennessee Courts of Appeals from summarily time-barring otherwise meritorious complaints without any substantive analysis and based solely on failure to substantially comply with a specific content requirement.[134] And the Tennessee Supreme Court has yet to put any

133. The plaintiff in *Stevens* relied on the tolling provision to file the complaint outside of the original statute of limitations but within the tolling period promised by the notice statute. *Id.* Even though the Tennessee Supreme Court dismissed the plaintiff's complaint without prejudice, it did not decide whether it was time-barred as a result of his failure to substantially comply with the HIPAA content requirement. *Id.* at 555, 560 ("Defendant argues that even if Plaintiff's claim is dismissed without prejudice, dismissing Plaintiff's claim in this case would effectively operate as a dismissal with prejudice because Plaintiff's claim would be time-barred. The trial court did not reach this issue and, accordingly, we decline to address it." (citation omitted)).

134. Though a subsequent plaintiff in *Martin v. Rolling Hills Hospital, LLC* raised the issue on appeal, the Tennessee Supreme Court held that it was waived and criticized Justice Kirby for addressing the issue on its merits in her concurrence in part and dissent in part. 600 S.W.3d 322, 337 (Tenn. 2020). Justice Kirby recognized that the practical effect of requiring the plaintiff to substantially comply with each and every content requirement in order to receive the benefit of the 120-day extension is "misguided and at odds with the legislative intent of Section 121." *Id.* at 343 (Kirby, J., concurring in part and dissenting in part).

135. *See, e.g.*, Gray v. Saint Francis Hospital-Bartlett, Inc., No. W2018-00836-COA-R9-CV, 2019 WL 1750945, at *21-*22 (Tenn. Ct. App. Apr. 16, 2019) *perm. app. denied*; Webb v. AMISUB (SFH) Inc., No. W2017-02539-COA-R3-CV, 2019 WL 1422884, at *4 (Tenn. Ct. App. Mar. 29, 2019) *perm. app. denied*; Wenzler v. Xiao Yu, No. W2018-00369-COA-R3-CV, 2018 WL 6077847, at *11 (Tenn. Ct. App. Nov. 20, 2018); Dortch v. Methodist Healthcare Memphis Hosps., No. W2017-01121-COA-R3-CV, 2018 WL 706767, at *4 (Tenn. Ct. App. Feb. 5, 2018), *perm. app. denied* (Tenn. June 7, 2018); Lawson v. Knoxville Dermatology Grp., P.C., 544 S.W.3d 704, 713 (Tenn. Ct. App. 2017) *perm. app. denied*; Rush v. Jackson Surgical Assocs. PA, W2016-01289-COA-R3-CV, 2017 WL 564887, at *5 (Tenn. Ct. App. Feb. 13, 2017), *perm. app. denied*; Piper v. Cumberland Med. Ctr., No. E2016-00532-COA-R3-CV, 2017 WL 243507, at *4-5 (Tenn. Ct. App. Jan. 20, 2017); J.A.C. *ex rel.* Carter v. Methodist Healthcare Memphis Hosps., 542 S.W.3d 502, 514 (Tenn. Ct. App. 2016), *perm. app. denied*; Dolman v. Donovan, No. W2015-00392-COA-R3-CV, 2015 WL 9315565, at *5 (Tenn. Ct. App. Dec. 23, 2015), *perm. app. denied*;

teeth into the provision requiring a defendant to identify the correct parties to the action.[135] Justice Kirby recognized that the Tennessee court of appeals often dismisses health care liability claims on these technical grounds, and dismissal with prejudice has become "the *de facto* sanction for filing a flawed medical authorization," the most common type of defective content requirement.[136]

III. THE THCLA'S NOTICE STATUTE BLOCKS ACCESS TO THE COURTS

In spite of the early dismissals encouraged by the THCLA's notice statute, there is "no indication whatsoever" from the THCLA's "text, purpose, or legislative history that the [] amendments were intended to create the fatal booby trap for unwary plaintiffs that they have recently become."[137] Instead, Tennessee maintains a

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Johnson v. Parkwest Med. Ctr., No. E2013-01228-COA-R3-CV, 2014 WL 3765702, at *6-7 (Tenn. Ct. App. July 31, 2014), *perm. app. denied*; Roberts v. Prill, E2013-02202-COA-R3-CV, 2014 WL 2921930, at *1 (Tenn. Ct. App. June 26, 2014). All of these dismissals were based at least in part on defective HIPAA-compliant authorizations.

136. *See, e.g.*, Bidwell *ex rel.* Bidwell v. Strait, 618 S.W.3d 309, 322 (Tenn. 2021) ("The Plaintiff asserts that the physician Defendants' failure to [notify her of the Defendants' correct employer] alone constitutes extraordinary cause [to add the correct employer as a defendant without providing notice]. . . . Although the trial court did not directly address this argument when ruling on whether extraordinary cause existed, it did note that, while the misinformation the Plaintiff found during his pre-suit investigation may have caused confusion and 'created difficulty for the Plaintiff,' the facts did not give rise to extraordinary cause. We agree. Even if we accept the Plaintiff's assertion that its failure either to provide Erlanger with pre-suit notice or name it as a defendant resulted from the physician Defendants' failure to comply with their statutory notification requirement, we cannot agree that this is enough, standing alone, to constitute extraordinary cause in this case."). Ms. Runions, who was referenced in the Introduction, did not receive the benefit of the reverse-notice provision because she filed her claim before the legislature enacted Tennessee Code Annotated section 29-26-121(a)(5). After the Tennessee Supreme Court's decision in *Bidwell*, however, it does not appear that it would have made much difference for Mr. Runions at all. Instead, it appears as though it "reward[s] defendants for failing to fulfill [their] duty" under Tennessee Code Annotated section 19-26-121(a)(5). *Bidwell*, 618 S.W.3d at 335 (Kirby, J., concurring).

137. *Martin*, 600 S.W.3d at 346 (Kirby, J., concurring in part and dissenting in part).

138. Horwitz, *supra* note 35, at 8; *see also* Brown v. Samples, No. E2013-00799-COA-R9-CV, 2014 WL 1713773, at *5 (Tenn. Ct. App. Apr. 29, 2014)

"longstanding, consistent public policy" favoring the adjudication of disputes on their merits.[138] But the exacting requirements of the THCLA's notice statute "make it even more difficult for plaintiffs with valid claims to get to the courthouse."[139] And the Tennessee Supreme Court refuses to address the insidious time trap that stops them from getting there. As a result, plaintiffs are locked out of court not only because their attorneys fail to comply with the THCLA's exacting requirements, but also because fewer and fewer attorneys are willing to attempt compliance with the THCLA at all.

A. The Notice Statute's Time Trap

Plaintiffs who believe they have complied with the notice provisions in the THCLA can unknowingly exceed the statute of limitations while waiting for the mandatory sixty days of notice to pass before they can file their complaints. If a plaintiff sends notice two months before the expiration of her statute of limitations, then the original limitations period is guaranteed to expire before she is permitted to file her complaint. If the plaintiff's notice does not strictly comply with the express notice requirement and substantially comply with each content requirement, then the plaintiff will file her complaint

(concluding that "[the court] feel[s] confident in finding that the General Assembly never intended that the amendments to the Medical Malpractice Act would completely strip away the rights of Tennessee citizens, who might have legitimate medical malpractice claims, because of some minor and hyper-technical error in initiating such a claim"); Hinkle v. Kindred Hosp., No. M2010-02499-COA-R3-CV, 2012 WL 3799215, at *15 (Tenn. Ct. App. Aug. 31, 2012) ("Dismissal of a meritorious complaint even where the defendant had actual notice and allowing a defendant to participate in discovery and negotiations while waiting to raise technical objections is not consistent with the purposes of the statutory requirements for filing medical malpractice lawsuits.").

139. Brown v. Samples, No. E2013–00799–COA–R9–CV, 2014 WL 1713773, at *8 (Tenn. Ct. App. Apr. 29, 2014) ("Tennessee courts have long recognized that the interests of justice are promoted by providing injured persons an opportunity to have their lawsuits heard and evaluated on the merits."); Tenn. Dep't of Hum. Servs. v. Barbee, 689 S.W.2d 863, 866 (Tenn. 1985) (quoting Securities and Exchange Commission v. Seaboard Corp., 666 F.2d 414 (9th Cir. 1982)) ("[T]he interests of justice are best served by a trial on the merits . . . ."); Henley v. Cobb, 916 S.W.2d 915, 916 (Tenn. 1996) ("It is well settled that Tennessee law strongly favors the resolution of all disputes on their merits . . . .").

140. Blair, *supra* note 69.

outside of the statute of limitations. When the court ultimately dismisses the claim without prejudice due to failure to comply with the notice statute, the court will effectively dismiss the claim with prejudice because the plaintiff is now outside of the limitations period. This "fatal litigation trap" leads to "permanent bars to recovery."[140]

Proponents of the THCLA in both chambers of the General Assembly clearly indicated their belief that the notice statute would allow both plaintiffs and defendants to know the precise date when the statute of limitations would expire.[141] The notice statute, however, facilitates "asymmetrical knowledge" about the date of the statute of limitations and the applicability of the tolling provision.[142] While the plaintiff is unlikely to scrutinize her pre-suit notice for defects after already sending it to the defendants, the defendant is incentivized to comb through these notice letters for hyper-technical errors that could support a motion to dismiss on procedural grounds—not obtain the pre-suit discovery the notice is meant to provide. And the defendants have little to no incentive to inform plaintiffs of their errors.[143] Justice Kirby

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141. Horwitz, *supra* note 35, at 2.

142. *See, e.g.*, H.B. 2233, 106th Gen. Assem. (statement of Kent Coleman) (Tenn. May 26, 2009), https://tnga.granicus.com/player/clip/1439?view_id=34&redirect=true&h=21997ca4091a66c03f0ce07c2fb1e026 ("[The THCLA] makes sure the statute of limitations is expanded to a date certain."); S.B. 2109, 106th Gen. Assem. (statement of Doug Overbey) (Tenn. May 20, 2009), https://tnga.granicus.com/player/clip/1439?view_id=34&redirect=true&h=21997ca4091a66c03f0ce07c2fb1e026 ("[The THCLA] makes the date upon which the statute of limitations expires 'much clearer' so that parties 'don't have to guess at that[.]'"); H.B. 2233, 106th Gen. Assem. (statement of Kent Coleman) (Tenn. May 6, 2009), https://tnga.granicus.com/player/clip/1439?view_id=34&redirect=true&h=21997ca4091a66c03f0ce07c2fb1e026 ("[Tenn. Code Ann. § 29-26-121(c)] extends . . . the statute of limitations or the statute of repose by 120 days . . . . That way everybody knows the date certain [on] which the statute would lapse."). Cf. Myers v. AMISUB (SFH), Inc., 382 S.W.3d 300, 309 n.8 (Tenn. 2012) (noting that "in committee discussion of the periods of time allowed for compliance with the statutes' filing requirements, Senator Jim Kyle observed 'the whole bill is date driven . . . we don't need the judiciary to interpret our desire there as to what the date is.'" (citing S.B. 2001, 102nd Gen. Assem. (Tenn. Mar. 27, 2007))).

143. Horwitz, *supra* note 35, at 2.

144. Indeed, it is the plaintiff and not the defendant who is "responsible for complying" with the notice statute. Stevens *ex rel.* Stevens v. Hickman Cmty. Health Care Servs., Inc., 418 S.W.3d 547, 559 (Tenn. 2013); *see also* Roberts v. Prill, No.

noted that "[i]n real life, as opposed to the virtual reality of legal proceedings, if a person presents a medical provider with an imperfect medical authorization, the authorization is handed back with a directive to fix it and re-submit it."[144] In the health care liability context, however, the defendant is instead incentivized to delay until it is too late for the plaintiff to cure the issue, which is the scenario that took place in *Stevens* itself.[145]

If defendants are incentivized to remain silent about procedural deficiencies, then they will not engage in the pre-trial settlement discussions that the notice statute seeks to foster. Though health care liability claims are down, which has in turn lowered health care liability insurance premiums, this reduction in claims does not necessarily translate to a decrease in medical malpractice.[146] Instead, the decrease in claims is most likely due to the dismissal of otherwise valid claims on purely technical grounds, which is contrary to Tennessee's

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E2013-02202-COA-R3-CV, 2014 WL 2921930, at *6 (Tenn. Ct. App. June 26, 2014) ("Plaintiff admits that she intentionally left sections of the form blank and anticipated that Defendants would fill in the form. She essentially argues that the onus should be placed on Defendants to test the sufficiency of the form or even to complete an inadequate form. Plaintiff's argument is akin to the argument rejected by the [Tennessee Supreme] Court in *Stevens*, namely that defendants should have informed plaintiff of the errors in the form before filing a motion to dismiss."); Vaughn v. Mountain States Health All., No. E2012-01042-COA-R3-CV, 2013 WL 817032, at *4 & n.8 (Tenn. Ct. App. Mar. 5, 2013) ("[Plaintiff] argues . . . that the [Defendants] should have contacted his counsel prior to an action being filed against them in order to inform [Plaintiff's] counsel that the requirements of Tennessee Code Annotated section 29-26-121 had not been met. We find that [Plaintiff's] contention is without merit, as no provision in the Act requires potential defendants to assist a claimant with compliance. As noted by [Defendant's] counsel, 'if defense counsel assisted Plaintiff's counsel with prosecuting a malpractice case against our clients, we'd arguable [sic] be guilty of malpractice.'").

145. Martin v. Rolling Hills Hosp., LLC, 600 S.W.3d 332, 347 (Tenn. 2020) (Kirby, J., concurring in part and dissenting in part).

146. The defendant in *Stevens* ignored the facially deficient HIPAA-compliant medical authorization for over seven months and did not move to dismiss the complaint for failure to comply with the notice statute until the plaintiff's one-year statute of limitations expired. *Stevens*, 418 S.W.3d at 564 (Wade, C.J., concurring in part and dissenting in part). Notably, the majority opinion did not address the defendant's delay.

147. Ashley D. McGhee, *Evaluating the Performance of the Tennessee Health Care Liability Act*, 20 Tenn. J. Bus. L. 971, 974 (2019).

longstanding policy of deciding cases on their merits.[147] The evolution of the notice statute from its bare-bones version in 2008, its expanded version in 2009, and its subsequent additions to date indicates that the legislature did not add the content requirements "to trip up plaintiffs; [they were] added to facilitate pre-suit settlement negotiations."[148] But defendants have weaponized these pre-suit requirements to keep plaintiffs out of court.

Subsequent amendments to the notice statute tried but failed to blunt its harsh effects. As litigants learned the contours of the notice statute, the Tennessee General Assembly became concerned with making sure that only the proper parties are brought into a lawsuit for health care liability.[149] Legislators initially struggled to find a way to limit the number of defendants in health care liability actions without unfairly blocking a victim's access to a remedy.[150] The final

148. *Martin*, 600 S.W.3d at 345 (Kirby, J., concurring in part and dissenting in part).

149. *Id.* at 347 (Kirby, J., concurring in part and dissenting in part).

150. Representative Durham sponsored legislation in 2015 to address "a minority of cases" in which "defendants don't really have a whole lot to do with the claim." *An Act to Amend Tennessee Code Annotated, Title 29, Chapter 26, Part 1, Relative to Healthcare Liability Actions: Hearing on H.B. 1285 Before the H. Civ. Just. Subcomm.*, H. 109-1285, at 2:55–3:47 (Tenn. 2015), https://tnga.granicus.com/player/clip/10499?view_id=335&redirect=true&h=77fa1c06a7433d667b5f2955e90cf51f. Durham's concern was that plaintiff's attorneys were suing landlords and other related entities who could never be held liable under a theory of health care liability. *An Act to Amend Tennessee Code Annotated, Title 29, Chapter 26, Part 1, Relative to Healthcare Liability Actions: Hearing on H.B. 1285 Before the H. Civ. Just. Subcomm.*, H. 109-1285, at 2:55–3:47 (Tenn. 2015), https://tnga.granicus.com/player/clip/10499?view_id=335&redirect=true&h=77fa1c06a7433d667b5f2955e90cf51f. This proposed bill listed out the appropriate entities against whom a claim for health care liability could be asserted. H.B. 1285, 109th Gen. Assemb., First Reg. Sess. (Tenn. 2015) ("Except as provided in this section, a health care liability action against a licensee may be brought only against the licensee, the licensee's management company, the licensee's managing employees, or an individual caregiver who provided direct health care services, whether an employee or independent contractor. A passive investor shall not be liable under this part.").

151. Plaintiff's Attorney Jim Higgins described how some health care providers are owned by shell companies that insulate the owner from liability:

> [W]e have out of state corporations that will come in and they'll purchase nursing homes that are underperforming, and the way they will make these profitable is they butcher their budget, which keeps

amendment to the notice statute sought to balance these interests by narrowing the class of potential defendants in a health care liability action while also requiring a defendant to notify a plaintiff "of any other person, entity, or health care provider who may be a properly named defendant" based on knowledge and information available within thirty days of receipt of notice.[151] Though the Tennessee General Assembly sought to fix the imbalance of the notice statute, the Tennessee Supreme Court refused to give this new provision any teeth by holding that a defendant's failure to fulfill its duty to notify does not

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> them from having the proper staff and the proper people to care for these folks. And what they do is they run the actual home through a different corporation at a deficit . . . when the actual corporation is making millions.

An Act to Amend Tennessee Code Annotated, Title 29, Chapter 26, Part 1, Relative to Healthcare Liability Actions: Hearing on H.B. 1285 Before the H. Civ. Just. Subcomm., H. 109-1285 (Tenn. 2015), https://tnga.granicus.com/player/clip/10499?view_id=335&redirect=true&h=77fa1c06a7433d667b5f2955e90cf51f.
Representative Durham's proposed amendment would make it difficult for plaintiff's claims to reach the owner of the nursing home whose failure to adequately fund the nursing home proximately caused the negligent care.

152. 2015 Tenn. Pub. Acts ch. 254, § 3. Initially, Representative Beck suggested that the provision require the health care provider to identify any and all potential defendants. *An Act to Amend Tennessee Code Annotated, Title 29, Chapter 26, Part 1, Relative to Healthcare Liability Actions: Hearing on H.B. 1285 Before the H. Civ. Just. Subcomm.*, H. 109-1285, at 44:45–45:37 (Tenn. 2015), https://tnga.granicus.com/player/clip/10499?view_id=335&redirect=true&h=77fa1c06a7433d667b5f 2955e90cf51f. He suggested that failure to do so result in the unidentified defendant automatically being brought into the lawsuit. *An Act to Amend Tennessee Code Annotated, Title 29, Chapter 26, Part 1, Relative to Healthcare Liability Actions: Hearing on H.B. 1285 Before the H. Civ. Just. Subcomm.*, H. 109-1285, at 44:45–45:37 (Tenn. 2015), https://tnga.granicus.com/player/clip/10499?view_id=335&redirect=true&h=77fa1c06a7433d667b5f2955e90cf51f. Representative Durham compromised with Representative Beck and described the enacted provision as follows: "After thirty days, [the defendant] must tell [the plaintiff], '[]I don't think I'm the proper defendant—here's who I think it is,' in good faith." *An Act to Amend Tennessee Code Annotated, Title 29, Chapter 26, Part 1, Relative to Healthcare Liability Actions: Hearing on H.B. 1285 Before the H. Calendar and Rules Comm.*, H. 109-1285 (Tenn. 2015),
https://tnga.granicus.com/player/clip/10499?view_id=335&redirect=true&h=77fa1c06a7433d667b5f2955e90cf51f.

constitute cause for failure to comply with the notice statute.[152] Ms. Runions did not receive the benefit of the reverse-notice provision because she filed her claim before Tennessee Code Annotated section 29-26-121(a)(5) became effective. After the Tennessee Supreme Court's interpretation of the reverse-notice provision, however, it does not appear that it would have made much difference for Ms. Runions at all. Instead, it appears as though the court "reward[s] defendants for failing to fulfill [their] duty" under Tennessee Code Annotated section 29-26-121(a)(5).[153]

These results are not consistent with the purported intent of the legislature to encourage pre-suit settlement discussions and resolution, and they are even harsher than states with similar notice provisions. Eleven other states have notice statutes similar to the notice statute in the THCLA.[154] On the whole, however, the notice statute is unpopular.[155] One state's supreme court struck a similar notice statute as unconstitutional because of its failure to live up to its purpose:

> [B]y placing numerous pitfalls in the path of unsuspecting plaintiffs, the effect of this notice

153. *See, e.g.*, Bidwell *ex rel* Bidwell v. Strait, 618 S.W.3d 309, 322 (Tenn. 2021) ("The Plaintiff asserts that the physician Defendants' failure to [notify her of the Defendants' correct employer] alone constitutes extraordinary cause [to add the correct employer as a defendant without providing notice]. . . . Although the trial court did not directly address this argument when ruling on whether extraordinary cause existed, it did note that, while the misinformation the Plaintiff found during his pre-suit investigation may have caused confusion and 'created difficulty for the Plaintiff,' the facts did not give rise to extraordinary cause. We agree. Even if we accept the Plaintiff's assertion that its failure either to provide Erlanger with pre-suit notice or name it as a defendant resulted from the physician Defendants' failure to comply with their statutory notification requirement, we cannot agree that this is enough, standing alone, to constitute extraordinary cause in this case.").

154. *Bidwell*, 618 S.W.3d at 335 (Kirby, J., concurring).

155. *See supra* note 73 for a list of the eleven states plus the District of Columbia that require pre-suit notice.

156. Thirty-nine states do not require this kind of pre-suit notice, including Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

> requirement is to unjustly hinder the prosecution of many claims. The fact that three of the plaintiffs in these consolidated appeals had their suits dismissed for failure to strictly comply with [the statute], even though the trial court found that the defendants in fact had notice of the impending litigation, demonstrates that this section is a *procedural trap for the unwary and not an effective means to encourage pretrial settlement or investigation*. . . . [T]he notice requirement is a *procedural hurdle* which has the potential to prolong the time and increase the cost of medical malpractice litigation. Because of this, it unfairly postpones the time at which a malpractice victim may expect to recover for his injuries. Any conceivable public benefit conferred by [the statute] is outweighed by the restrictions it imposes on private rights. The statute is therefore unconstitutional and void.[156]

Texas has a similar notice statute that "is littered with landmines, pitfalls, and traps."[157] But Texas has a two-year statute of limitations for medical malpractice claims, so a plaintiff in Texas has 365 more days to give proper notice.[158] While Texas plaintiffs may be able to effectuate "the golden rule . . . to never rely on the [] tolling provision[] to avoid this potential minefield," a Tennessee plaintiff is not given the luxury of time.[159] Tennessee is one of five states—including California, Kentucky, Louisiana, and Ohio—to give victims of medical malpractice only 365 days to file a claim.[160] Victims of

157. Carson v. Maurer, 424 A.2d 825, 834–35 (N.H. 1980) (emphasis added).

158. Paula Sweeney, *The Statute of Limitations Under Chapter 74*, 51 TEX. TECH L. REV. 811, 831 (2019).

159. *Id.*

160. Robert Painter, *Legislature Updated Medical Malpractice Pre-Suit Notice Requirements*, 55 HOUS. LAW. 46, 46 (2017).

161. *See* CAL. CIV. PROC. CODE § 340.5 (2023) (one year); KY. REV. STAT. ANN. § 413.140(1)(e) (2023) (one year); LA. STAT. ANN. § 9:5628 (2023) (one year); OHIO REV. CODE ANN. § 2305.113 (2023) (one year); TENN. CODE ANN. § 29-26-115 (2023) (one year). *But see* ALA. CODE § 6-5-482 (2023) (at least two years); ALASKA STAT. § 09.10.070 (2023) (at least two years); ARIZ. REV. STAT. ANN. § 12-542 (2023) (at least two years); ARK. CODE. ANN. § 16-114-203(a) (2023) (at least two years); COLO. REV. STAT. § 13-80-102.5 (2023) (at least two years); CONN. GEN. STAT. § 52-584

medical malpractice in Tennessee are given at most half as much time to file their claims as citizens in every almost every contiguous state.[161] The one contiguous state that also has a one-year statute of limitations—Kentucky—notably does not force plaintiffs to provide

(2023) (at least two years); DEL. CODE. ANN. tit. 18, § 6856 (2023) (at least two years); D.C. CODE § 12-301 (2023) (at least 3 years); FLA. STAT. § 95.11 (2023) (at least two years); GA. CODE. ANN. § 9-3-71(a) (2023) (at least two years); HAW. REV. STAT. § 657-7.3 (2023) (at least two years); IDAHO CODE § 5-219 (2023) (at least two years); ILL. COMP. STAT. § 5/13-212 (2023) (at least 2 years); IND. CODE § 34-11-2-3 (2023) (at least two years); IOWA CODE § 614.1 (2023) (at least two years); KAN. STAT. ANN. § 60-513 (2023) (at least two years); ME. STAT. § 2902 (2023) (at least three years); MD. CODE. ANN. § 5-109 (2023) (at least three years); MASS. GEN. LAWS § ch. 260, § 4 (2023) (at least three years); MICH. COMP. LAWS § 600.5805 (2023) (at least two years); MINN. STAT. § 541.076 (2023) (at least four years); MISS. CODE. ANN. § 15-1-36(1) (2023) (at least two years); MO. REV. STAT. § 516.105(1) (2023) (at least two years); MONT. CODE ANN. §27-2-205 (2023) (at least two years); NEB. REV. STAT. § 44-2828 (2023) (at least two years); NEV. REV. STAT. § 41A.097 (2023) (at least two years); N.H. REV. STAT. ANN. § 507-C:4 (2023) (at least two years); N.J. STAT. ANN. § 2A:14-2 (2023) (at least two years); N.M. STAT. ANN. § 41-5-13 (2023) (at least three years); N.Y. C.P.L.R. § 214-a (2023) (at least 2.5 years); N.C. GEN. STAT. § 1-15 (2023) (at least three years); N.D. CENT. CODE § 28-01-18 (2023) (at least two years); OKLA. STAT. tit. 76, §18 (2023) (at least two years); OR. REV. STAT. § 12.110 (2023) (at least two years); 42 PA. CONS. STAT. § 5524 (2023) (at least two years); Tit. 9 R.I. GEN. LAWS § 9-1-14.1 (2023) (at least three years); S.C. CODE ANN. § 15-3-545 (2023) (at least three years); S.D. CODIFIED LAWS § 15-2-14.1 (2023) (at least two years); TEX. CIV. PRAC. & REM. CODE ANN. § 74.251 (2023) (at least two years); UTAH CODE ANN. § 78B-3-404 (2023) (at least two years); VT. STAT. ANN. tit. 12, § 521 (2023) (at least three years); VA. CODE ANN. § 8.01-243 (2023) (at least two years); WASH. REV. CODE § 4.16.350 (2023) (at least three years); W. VA. CODE § 55-7B-4 (2023) (at least two years); WIS. STAT. § 893.55 (2023) (at least three years); WYO. STAT. ANN. § 1-3-107 (2023) (at least two years).

162. ALA. CODE § 6-5-482(a) (2023) (stating that medical malpractice claims "must be commenced within two years"); ARK. CODE. ANN. § 16-114-203(a) (2023) (stating that "all actions for medical injury shall be commenced within two (2) years after the cause of action accrues"); GA. CODE. ANN. § 9-3-71(a) (2023) (stating that "an action for medical malpractice shall be brought within two years"); MISS. CODE. ANN. § 15-1-36(1) (2023) (stating that medical malpractice claims must be "filed within two (2) years"); MO. REV. STAT. § 516.105(1) (2023) (stating that medical malpractice claims "shall be brought within two years"); VA. CODE. ANN. § 8.01-243(A) (2023) (stating that medical malpractice claims "shall be brought within two years"); N.C. GEN. STAT. § 1-15(c) (2023) (stating that medical malpractice victims have at least "three years" to file their claims). *But see* KY. REV. STAT. ANN. § 413.140(1)(e) (2023) (stating that medical malpractice actions "shall be commenced within one (1) year").

any pre-suit notice at all. Even in states like Texas[162] and Florida[163] that have similarly exacting notice requirements and states like Mississippi[164] with more relaxed notice requirements, victims of medical malpractice are given at least double the amount of time that victims in Tennessee receive.[165] The only two states with a one year statute of limitations that also have a notice requirement are California, which does not mandate any specific content requirements in the notice,[166] and Ohio, which allows the plaintiff to choose whether to give notice in the first place.[167]

To avoid the risk of filing outside of the statute of limitations by failing to comply with the notice statute, a victim of medical malpractice in Tennessee must realize she has a claim she wants to file, hire an attorney willing to take the claim, obtain medical records, review medical records, consult with an expert, "conduct intense pre-suit research to identify all potential tortfeasors,"[168] draft pre-suit notice letters, double or even triple check the notice letters, and send the notice letters in compliance with the notice statute within ten months of the accrual of her claim. If she waits any longer than ten months, then she must rely on the tolling provision from which she may not benefit to file her complaint within the statute of limitations. The notice statute purports to extend the amount of time that a plaintiff has to file a claim, but it effectively shortens it by two months for plaintiffs who want to avoid falling into the time trap.

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163. TEX. CIV. PRAC. & REM. CODE ANN. § 74.251(a) (2023).

164. FLA. STAT. § 766.106(2) (2023).

165. MISS. CODE. ANN. § 15-1-36(15) (2023).

166. TEX. CIV. PRAC. & REM. CODE ANN. § 74.251(a) (2023) (stating that a health care liability claim must "be commenced . . . within two years"); FLA. STAT. § 95.11(4)(b) (2023) (stating that "[a]n action for medical malpractice shall be commenced within [two] years"); MISS. CODE. ANN. § 15-1-36(1) (2023) (stating that medical malpractice claims must be "filed within two (2) years").

167. CAL. CIV. PROC. CODE § 364(b) (2023) ("No particular form of notice is required . . . .").

168. OHIO REV. CODE ANN. § 2305.113(B)(1) (2023) (stating that a plaintiff may give notice to receive an extension on the statute of limitations).

169. Clint Kelly, *Identifying Tortfeasor Tripwires in Health Care Liability*, 58 TENN. BAR J. 30, 33 (2022).

B. Exodus of Plaintiff's Attorneys Willing to Handle THCLA Claims

The THCLA's harsh application not only harms plaintiffs whose claims get dismissed, but it also punishes future victims of medical malpractice who cannot secure an attorney willing to take a case under the THCLA. In an attempt to solicit physicians to live and practice in Tennessee, the legislature inadvertently caused an exodus of plaintiff's attorneys willing to take a health care liability claim. The THCLA created a health care liability landscape that "is more hostile for plaintiff lawyers,"[169] especially new lawyers gaining competence in the field. With caps on non-economic and punitive damages,[170] plaintiff's attorneys are "under relentless pressure to refuse employment in all but the exceptional cases," and the risk of non-compliance with the THCLA "would have devastating financial consequences."[171] Without some sort of efficient and effective system to check for the most minute of mistakes, a plaintiff's lawyer "can turn a medical malpractice case into a legal malpractice case."[172]

The risk of non-compliance is not worth the rare reward. A smart plaintiff's attorney will not risk losing years of time and tens of thousands of dollars in litigation costs for the prospect of a maximum recovery of $750,000 when plaintiffs lose against health care providers nearly 80% of the time.[173] Of that recovery, a plaintiff's attorney will typically only receive thirty-three percent plus expenses. Unless there is a catastrophic injury or truly egregious negligence, "it's not

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170. Kelly, *supra* note 97.

171. Every health care liability action is now subject to an aggregate cap of $750,000 in non-economic damages for non-catastrophic injuries and $1 million in non-economic damages for catastrophic injuries. Clinton Kelly, *Medical Malpractice*, TENN. BAR. J. (Nov. 1, 2013), https://www.tba.org/?pg=Articles&blAction=showEntry&blogEntry=15576. A catastrophic injury is defined as one that involves "[s]pinal cord injury resulting in paraplegia or quadriplegia"; "[a]mputation of two (2) hands, two (2) feet or (1) of each"; "[t]hird degree burns over forty percent (40%) or more of the body as a whole or third degree burns up to forty percent (40%) percent or more of the face"; or "[w]rongful death of a parent leaving a surviving minor child or children for whom the deceased parent had lawful rights of custody or visitation." TENN. CODE ANN. § 29-39-102(d) (2023).

172. Kelly, *supra* note 97.

173. *Id.*

174. *Id.*

economically viable to take one of these cases."[174] Health care liability claims are already procedurally risky, and the minimal financial incentive to litigate these claims is not worth the rare reward. Most attorneys have decided to avoid health care liability claims altogether.[175]

The notice statute's disincentive to bring a health care liability claim affects some groups of victims more than others. Plaintiff's lawyers are especially incentivized to refuse employment by the elderly, the impoverished, and the disabled.[176] Elderly victims like nursing home residents and disabled people who can no longer work typically receive limited economic damages and are therefore capped in their overall recovery.[177] Impoverished people will likely not qualify for enough economic damages to make the risk of noncompliance worth the reward. The fact that vulnerable segments of the population cannot easily access our system of justice because they do not have the means to do so is a problem that must be addressed by the Tennessee General Assembly.

IV. CLOSE IS CLOSE ENOUGH—SUBSTANTIAL COMPLIANCE WITH THE NOTICE STATUTE

Plaintiffs who do not strictly comply with the express notice requirement do not benefit from the 120-day extension, even if the defendants receive actual notice of the claim. Though the Tennessee Supreme Court has punted on the issue both times it had the chance to address it, the Court hinted its reluctance to hold that substantial compliance with the content requirements as a whole provides the

175. Todd South, *Medical Malpractice Suits Drop in Tennessee; 2008 Reforms Praised, Panned*, CHATTANOOGA TIMES FREE PRESS, https://www.timesfreepress.com/news/2013/dec/03/medical-malpractice-suits-drop-reforms-that/ (Dec. 3, 2013, 10:15 AM).

176. Horwitz, *supra* note 29. One attorney stated, "Quite frankly, we've gotten out of medical malpractice altogether." South, *supra* note 175.

177. South, *supra* note 175.

178. The disincentive to represent the elderly comes at a time in which "more than two (2) million cases of elder abuse are reported every year, and almost one (1) out of every ten (10) elderly individuals will experience some form of elder abuse." *Nursing Home Abuse Statistics*, NURSING HOME ABUSE GUIDE, https://www.nursinghomeabuseguide.org/nursing-home-abuse-statistics/.

benefit of the 120-day extension.[178] Without any binding guidance from the highest court, the Tennessee Courts of Appeals have time-barred complaint after complaint for failure to substantially comply with an intricate content requirement mandated by the notice statute.[179] In light of the Tennessee Supreme Court's inability to apply the law in a manner consistent with the legislature's intent, it is time for the Tennessee General Assembly to make its intent clear. The Tennessee General Assembly should amend the first sentence of Tennessee Code Annotated section 29-26-121(c) as follows: "When a claimant substantially complies with subdivisions (a)(1)–(4) as a whole, the applicable statutes of limitations and repose shall be extended for a period of one hundred twenty (120) days from the date of expiration of the statute of limitations and statute of repose applicable to that provider."[180] This language would allow each plaintiff who substantially complies with the notice statute as a whole to benefit from the extension on the statute of limitations.

In practice, this would mean that a plaintiff's overall compliance with Tennessee Code Annotated section 29-26-121(a)(1)–(4) is sufficient to benefit from the promise of the 120-day extension even if the plaintiff did not meet the compliance standards for each requirement individually.[181] Thus, even though the plaintiff in *Stevens* sent a defective HIPAA authorization, he would still benefit from the

179. Despite criticizing Justice Kirby for considering the merits of the plaintiff's waived argument in *Martins* relating to the form of substantial compliance necessary to receive the 120-day extension, the majority felt "constrained to make . . . observations" about her analysis. Martin v. Rolling Hills Hosp., LLC, 600 S.W.3d 322, 338 (Tenn. 2020). The Tennessee Supreme Court went on to argue in dicta that "Justice Kirby's assertion that courts have misconstrued Section 121 and frustrated the General Assembly's intent is refuted by the fact that in the eleven years since its enactment the General Assembly has not amended the statute to abrogate these allegedly erroneous judicial decisions [from the Tennessee Courts of Appeals]." *Id.* (citing Coffee Cnty. Bd. of Educ. v. City of Tullahoma, 574 S.W.3d 832, 847 (Tenn. 2019)).

180. *See* cases cited *supra* note 135.

181. The section currently states, "When notice is given to a provider as provided in this section, the applicable statutes of limitations and repose shall be extended for a period of one hundred twenty (120) days from the date of expiration of the statute of limitations and statute of repose applicable to that provider." TENN. CODE ANN. § 29-26-121(c) (2023).

182. Horwitz, *supra* note 29.

tolling provision because he substantially complied with every other content requirement, culminating in overall substantial compliance. Justice Kirby has recognized that the current standard for substantial compliance applied in the Tennessee Courts of Appeals is nearly impossible to meet.[182] This solution would correct the trajectory of the THCLA so that disputes are settled on their merits rather than on hyper-technical procedural grounds.

This solution does not reward plaintiffs for their noncompliance. Failure to either strictly comply with the explicit notice requirement or substantially comply with a content requirement will still result in dismissal of the health care liability claim without prejudice, but it would not by itself prevent plaintiffs from relying on the 120-day extension. Justice Kirby reasoned that if a plaintiff whose only error is an "imperfect medical authorization . . . can rely on the 120-day extension, dismissal of the lawsuit without prejudice gives them the opportunity to re-file their lawsuits with corrected medical authorization."[183] Plaintiffs will not be rewarded for their noncompliance—they will just be given a chance to try again, like almost every other plaintiff who is not forced to wait until the

183. Plaintiffs especially struggle to satisfy the content requirement concerning the HIPAA-compliant medical authorization to release medical records to potential defendants. *Martin*, 600 S.W.3d at 345 (Kirby, J., concurring in part and dissenting in part) ("Plaintiffs who sent imperfect medical authorizations have been found substantially compliance in very few instances."). When courts have determined that the plaintiff substantially complied with the medical records authorization provision, it is because the defendant successfully obtained medical records independently or from the defective HIPAA authorization. *See, e.g.*, Hunt v. Nair, No. E2014-01261-COA-R9-CV, 2015 WL 5657083, at *6 (Tenn. Ct. App. Sept. 25, 2015), *perm. app. denied* (error in medical authorization did not prejudice defendants because all but one provider produced the medical records in response to the authorization, and that one provider declined because it misread the authorization, not because of the plaintiff's error); Hamilton v. Abercrombie Radiological Consultants, Inc., 487 S.W.3d 114, 120–21 (Tenn. Ct. App. 2014), *perm. app. denied* (only error in medical authorization was the date the authorized party signed the HIPAA form, and there was no evidence defendants were prejudiced by the error because defendant physician may have had access to the records through her employment with codefendant medical group). Because the *Martin* Court held that defendants need not test a facially deficient HIPAA authorization, there will be even fewer cases of substantial compliance because defendants have no incentive to try to obtain the records in the face of an error. *Martin*, 660 S.W.3d at 345 (Kirby, J., concurring in part and dissenting in part).

184. *Martin*, S.W.3d at 347 (Kirby, J., concurring in part and dissenting in part).

expiration of their original statute of limitations to file their complaint.[184] Access to justice demands this second chance.

V. CONCLUSION

It is not a secret that the THCLA's notice statute blocks access to the courts. To realign the notice statute's practical effect with its purported goals, the Tennessee General Assembly should amend the notice statute to confer the benefit of the 120-day extension on the statute of limitations to every plaintiff who substantially complies with the notice statute as a whole. If the Tennessee General Assembly continues to do nothing, Tennessee residents will have no choice but to believe that purpose of the THCLA was not to balance the needs of patients and physicians at all—instead, they will have to confront the fact that the legislature designed the THCLA to leave victims out of the balance entirely. But "[s]urely, that is not the intent of our elected representatives."[185]

185. This solution would permit plaintiffs who make a mistake in complying with the notice statute to voluntarily dismiss their claims, resend notice in compliance with the notice statute, and re-file their claims under Tennessee's saving statute.

186. Brown v. Samples, No. E2013-00799-COA-R9-CV, 2014 WL 1713773, at *5 (Tenn. Ct. App. Apr. 29, 2014).