IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
January 17, 2023 Session

FRED HAYWARD v. CHATTANOOGA-HAMILTON COUNTY HOSPITAL AUTHORITY d/b/a ERLANGER HEALTH SYSTEM ET AL.

Appeal from the Circuit Court for Hamilton County
No. 21C577 Kyle E. Hedrick, Judge

No. E2022-00488-COA-R3-CV

This health care liability action was brought against a hospital and a physician. The plaintiff sent pre-suit notice to three[1] potential defendants prior to initiating the action. The trial court found, however, that the plaintiff failed to include as part of the pre-suit notice a HIPAA-compliant medical authorization because one of the six core elements was incorrect on the authorization. Following a motion to dismiss filed pursuant to Tenn. R. Civ. P. 12.02(6), the trial court granted the motion and dismissed the action against the defendant hospital due to noncompliance with Tenn. Code Ann. § 29-26-121. The plaintiff argues, among other things, that he should have been allowed to conduct limited discovery in order to determine whether the defendant hospital had been prejudiced by his failure to provide a HIPAA-compliant medical authorization. We vacate the trial court's grant of the motion to dismiss and hold that the plaintiff should have been permitted to conduct limited discovery regarding whether prejudice existed for the trial court to consider in its determination of whether the plaintiff substantially complied with the pre-suit notice requirements of Tenn. Code Ann. § 29-26-121.

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

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which ARNOLD B. GOLDIN and KRISTI M. DAVIS, JJ., joined.

Michael M. Thomas and W. Neil Thomas, III, Chattanooga, Tennessee, for the appellant, Fred Hayward.

Daniel M. Stefaniuk and Drew H. Reynolds, Chattanooga, Tennessee, for the appellee, Chattanooga-Hamilton County Hospital Authority d/b/a Erlanger Health System.

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[1] Although pre-suit notice listed four potential defendants, Erlanger conceded that it and UT Urology are the same entity. Therefore, there were only three distinct potential defendants sent pre-suit notice.

OPINION

Background

The plaintiff, Fred Hayward ("Plaintiff"), sought the medical advice of Anand Shridharani, MD, who recommended that Plaintiff undergo surgery as his best option. At the time, Dr. Shridharani was a licensed physician practicing medicine at UT Urology and Chattanooga-Hamilton County Hospital Authority d/b/a Erlanger Health System ("Erlanger") and was an assistant professor of Urology at the University of Tennessee. Dr. Shridharani obtained Plaintiff's medical history, which included a history of prostate cancer and radiation treatment, and performed the recommended surgery in July 2019. Due to Plaintiff's prior radiation treatment, complications arose, and Plaintiff underwent several subsequent surgeries. According to the complaint, Plaintiff was advised by Dr. Shridharani that "the only option was a complete bladder removal with an internal or external pouch (cystectomy) or to live the rest of his life with a supra pubic catheter that required monthly replacement." Plaintiff obtained a second opinion from a specialist at the Cleveland Clinic, who recommended surgery to rebuild his urethra before considering the cystectomy, which was completed.

Plaintiff filed his complaint in the Hamilton County Circuit Court ("Trial Court") in June 2021 against the defendants, Erlanger, UT Urology, and Dr. Shridharani.[2] According to Plaintiff's complaint, he only recently had learned that the July 2019 surgery should not have been performed in the way it was performed and was not in compliance with the standard of care. As an exhibit, he included an affidavit by Plaintiff's attorney, Michael M. Thomas, stating that he had sent to the defendants the required 60-day notice of the claims on July 20, 2020. No copy of the pre-suit notice was attached to the complaint. Also attached as an exhibit was Plaintiff's certificate of good faith.

Erlanger filed a motion to dismiss, arguing that Plaintiff failed to substantially comply with Tenn. Code Ann. § 29-26-121(a)(2)(E) by not providing Erlanger with a HIPAA-compliant medical authorization. According to Erlanger, the "purpose" section failed to substantially comply with the statute and the authorization allowed Erlanger only to disclose medical records to other providers and did not allow Erlanger to obtain medical records from the other providers. Erlanger further argued that Plaintiff failed to file a certificate of mailing from the United States Postal Service and failed to attach a copy of the pre-suit notice, as required by Tenn. Code Ann. § 29-26-121(a)(4). Erlanger also argued that Plaintiff failed to comply with Tenn. Code Ann. § 29-26-121(b) by providing documentation specified in subsection (a)(2).

[2] Dr. Shridharani was initially named as a defendant, but the action against him was voluntarily dismissed. UT Urology was also a named defendant in the action, but Erlanger represented to the Trial Court that UT Urology and Erlanger were not separate or distinct entities. The only defendant at issue in this appeal is Erlanger.

Erlanger attached to its motion a letter dated July 20, 2020 from Plaintiff's counsel stating that he was representing Plaintiff and that Plaintiff was asserting a potential health care liability action due to Plaintiff's care while a patient. The July 2020 letter was addressed to Dr. Shridharani, Erlanger, "UT Erlanger Urology," and Dr. Ben Waldorf. The letter listed information required by Tenn. Code Ann. § 29-26-121(a)(2). The letter lists the providers being sent notice as those to whom the letter is addressed, and states that a HIPAA-compliant medical authorization is being provided "permitting you to provide me, and each other, with copies of the requested medical information." The two attached medical authorizations list Erlanger as the agency making the disclosure. One of the authorizations lists "Thomas & Thomas" located in Chattanooga, Tennessee, as the organization to which the disclosure was to be made. The other authorization lists "UT Erlanger Urology, Anand Shridharani, and Ben Waldorf" as individuals or organization to which the disclosure may be made. Both authorizations further state that the purpose of the authorization was to "provide my attorney full and complete access to all records and films and physician notes relevant to the care provided Fred Hayward generated by UT Erlanger Urology, Anand Shridharani, and Ben Waldorf."

Plaintiff filed a response to Erlanger's motion to dismiss, wherein Plaintiff lists as facts that Dr. Shridharani was an employee of Erlanger and that UT Urology was a division of Erlanger, not a separate and distinct entity. As such, Plaintiff argues that he fully complied with Tenn. Code Ann. § 29-26-121(a)(2)(E) by permitting the disclosure of Plaintiff's medical records to "Each Other." According to Plaintiff, although the document does not authorize the parties to obtain the records, they were permitted to request the medical records from each other and each was permitted to disclose the records. Plaintiff further alleges that because UT Urology was a division of Erlanger, "Erlanger was itself a party through UT Urology and a request of one is a request of the other." Regarding the "purpose" section in the authorization, Plaintiff acknowledged a scrivener's error in his response but stated that the letter accompanying the authorization clearly stated the purpose of the request. Plaintiff stated that the parties were not prejudiced due to the error in the authorization because "they each had access to the same treatment records and each knew of the purpose of the release as stated in the Notice Letter."

Plaintiff stated that he reserved the right to amend his complaint to include the certificates of mailing in compliance with subsection (a)(4) and the notice documentation in compliance with subsection (b). He acknowledged that he had not attached the certificate of mailing regarding Erlanger to the complaint but attached it as an exhibit to the response. Plaintiff further states that the certificate was not necessary because the parties each acknowledge receiving the notice letter. Regarding the letter and authorization, Plaintiff states that the letter had been attached to the motion to dismiss, which the Trial Court could view in its entirety. Plaintiff also attached to his response two different medical authorizations. One authorization lists "UT Erlanger Urology, Anand Shridharani, and Ben Waldorf" as the agency making the disclosure and Erlanger as the

organization to which they may make a disclosure. The other authorization lists "UT Erlanger Urology, Anand Shridharani, and Ben Waldorf" as the providers making the disclosure and listed "Each Other" as the individuals or organization to which the disclosure would be made. Each authorization states that the purpose of the disclosure was to provide information to Plaintiff's attorney.

Erlanger filed a reply to Plaintiff's response citing to *Parks v. Walker*, 585 S.W.3d 895 (Tenn. Ct. App. 2018), wherein this Court found similar authorizations allowing the provider to "release, use, or disclose" medical information as being insufficient to allow the provider to obtain the plaintiff's medical records. Erlanger also responds to Plaintiff's argument that the purpose of the authorization could be determined from the accompanying letter, stating that several appellate cases have held that the HIPAA-compliant medical authorization cannot be supplemented by other pre-suit notice materials.

On September 13, 2021, the Trial Court heard arguments regarding Erlanger's motion to dismiss and Plaintiff's response thereto. During that hearing, the following transpired between Plaintiff's counsel and the Trial Court Judge:

> PLAINTIFF'S COUNSEL: In this case, the only thing that's known about these medical records is, when the request was made, the only medical records that were received back from Dr. Waldorf, Dr. Shridharani, UT-Urology and Erlanger were provided by Erlanger; and it was, as you can imagine, a stack that would break this table (indicating).
>
> THE COURT: Right.
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> PLAINTIFF'S COUNSEL: There might be some discovery, limited discovery, needed if we interpret the Wenzler case the way I'm interpreting it.
>
> THE COURT: Well, I'll hold that in abeyance. If I'm inclined to say that there are facts that can change the Court's mind, I'll let you know; and we'll have some discovery. I'm, frankly, going to be surprised if that's the answer.
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> And, you know, I mean, I don't like to dismiss cases not on the merits; but I also am bound to do what the legislature tells me to do and what the courts above me tell me to do. And so I'll take a look at this.
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> I will -- I will -- as soon as I get your motions to clean up whatever you want to clean up, Mr. Thomas, we'll get orders entered making those amendments and cleaning up that record, and then I'll put an order down on this dismissal once I've had a fair chance to read this Wenzler case and better understand what it's saying and how it relates to the other cases.

Subsequently, on September 23, 2021, Plaintiff filed a motion to amend the complaint to attach the certificates of mailing regarding the pre-suit notice and a copy of the pre-suit notice. Plaintiff argued that defendants would not be prejudiced because they have acknowledged receipt of the pre-suit notice. Also on September 23, 2021, the Trial Court entered its judgment, granting Erlanger's motion to dismiss. In its order, the Trial Court stated as follows:

> [Erlanger] filed its motion alleging that the Plaintiff has failed to substantially comply with the requirements of T.C.A. §29-26-121. More specifically, [Erlanger] asserts that the medical authorization is fatally deficient in that (1) the "purpose" section of the medical authorization provided by the Plaintiff is not consistent with the statutory purpose of the authorization set forth in T.C.A. §29-26-121(a)(2)(E) (i.e., to obtain complete medical records from each other's provider being sent a notice; and (2) that the medical authorization allow Erlanger to "disclose" but not to "obtain" medical records from each other. The Court disagrees that use of the term "disclose" rather than use of the term "obtain" is not fatally defective to the Plaintiff's cause. The failure of the "purpose" section, however, is a bit more problematic.
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> In its Response to Motion to Dismiss, Plaintiff "...acknowledges a scrivener's error with respect to the HIPAA Release." This alleged scrivener's error occurs where the authorization provides in pertinent part "The purpose of the authorized disclosure is to: provide my attorney full and complete access to all records and films and physician notes relevant to the care provided Fred Hayward generated by UT Erlanger Urology, Anand Shridharani; and Ben Waldorf." Plaintiff argues that this scrivener's error is remedied by the 60 Day Notice Letter as such letter "clearly states the purpose of the request." Plaintiff's argument, however, fails. Primarily, the argument fails because the person who has the sole ability to provide a HIPAA authorization, the Plaintiff, signed the document containing the alleged scrivener's error. To accept Plaintiff's argument would leave [Erlanger] in the position of having to ignore the express authorization of its patient and instead, substitute an unsworn letter signed by an attorney to satisfy the requirements of HIPAA. While the Court may (and does) believe that the language in the medical authorization to [Erlanger] was nothing more than an error; this does not resolve the material defect in the authorization and cannot be relied upon to render the authorization substantially compliant.

In its order, the Trial Court included a footnote stating that it had permitted Plaintiff an opportunity to correct his failure to attach the certificates of mailing through an amendment

or supplementation, but "[a]s of the writing of this Memorandum and Order, no filings have been received."

Plaintiff subsequently filed a motion and amended motion, seeking to set aside the Trial Court's order and to permit limited discovery in this matter. Plaintiff requested that the Trial Court allow limited discovery "to show that Erlanger possessed all medical records related to the facts at hand and that no separate medical records were provided by Anand Shridharani, M.D. and/or Ben Foster, M.D." In its motion, Plaintiff cites to *Wenzler v. Yu*, No. W2018-00369-COA-R3-CV, 2018 WL 6077847, at *10 (Tenn. Ct. App. Nov. 20, 2018), arguing that this Court found there was no showing of prejudice after notice was found to be deficient because no medical authorization was necessary for the provider to see its own records. According to Plaintiff, the only medical records Plaintiff received from the defendants were from Erlanger, and limited discovery would likely show that no other medical records exist other than those in the possession of Erlanger.

Erlanger filed a response in opposition to Plaintiff's motion, arguing that plaintiffs are generally not entitled to conduct discovery when responding to a motion to dismiss pursuant to Tenn. R. Civ. P. 12.02 and that Plaintiff would have received no benefit from conducting discovery on the issue. Erlanger further filed a response in opposition to Plaintiff's request to amend the complaint, arguing that any amendment would be futile due to the insufficiency of the medical authorization.

Regarding Plaintiff's request to set aside the Trial Court's order and conduct limited discovery, the Trial Court entered an order in April 2022, stating as follows:

> The Court had previously entered an Order granting [Erlanger's] Motion to Dismiss based upon the Plaintiff's failure to substantially comply with T.C.A.§ 29-26-121. More specifically, Plaintiff seeks to set aside the Order to engage in limited discovery in the hopes of finding evidence which may give rise to a factual scenario similar to *Wentzles*[sic] *v. Xiao Yu, et. al.*, No. W2018-00369-COA-R3-CV. To be clear, the Court has already found (as previously held in *Parks v. Walker*, No. E2017-01603-COA-R3-CV) that the "scrivener's error" of listing of Plaintiff's counsel as the sole purpose of the disclosure constitutes a lack of substantial compliance. The Court has further found that this non-compliant HIPPA[sic] form prejudiced [Erlanger]. Plaintiff here urges that substantial compliance, if the discovery bears it out, would be excused. This Court disagrees. This Court can find no [basis] upon which to grant the relief sought by Plaintiff.

The Trial Court entered a final order on July 7, 2022, stating as follows:

> On April 5, 2022, the Court entered an Order denying Plaintiff's Amended Motion to Set Aside Order and to Permit Limited Discovery. Pursuant to the

> aforementioned orders, Plaintiff's claims against Erlanger have been dismissed without prejudice, and Plaintiff's claims against Dr. Shridharani have been voluntarily dismissed without prejudice pursuant to *Tenn. R. Civ. P.* 41.01(3). In light of Erlanger's representation to the Court that Erlanger Urology, also known as UT Erlanger Urology and identified in the Complaint as "UT Urology," is not a separate entity from Erlanger and there being no opposition from Plaintiff in this regard, it appears to the Court that all claims and/or all rights and liabilities of all the parties have been adjudicated.

Plaintiff timely filed a notice of appeal with this Court.

Discussion

Although not stated exactly as such, Plaintiff raises the following issues for our review on appeal: (1) whether the Trial Court erred by granting Erlanger's motion to dismiss without permitting limited discovery when Erlanger had not denied that it was in possession of all the medical records and (2) whether the medical authorization provided to Erlanger was HIPAA compliant. Erlanger also raises as additional issues the following, which we restate slightly: (1) whether the Trial Court properly denied Plaintiff's motion to amend his complaint and (2) whether the Trial Court properly denied in part Plaintiff's Amended Motion to Set Aside Orders and to Permit Limited Discovery.

This case was resolved on a motion to dismiss. Our Supreme Court in *Martin v. Rolling Hills Hospital, LLC*, 600 S.W.3d 322, 334-35 (Tenn. 2020), recently confirmed that the proper avenue to challenge a plaintiff's compliance with the pre-suit notice requirement in Section 121 is by a Tenn. R. Civ. P. 12.02(6) motion to dismiss. A trial court's grant of a motion to dismiss, filed pursuant to Tenn. R. Civ. P. 12.02(6), is a question of law, which we review *de novo* with no presumption of correctness. *Ellithorpe v. Weismark*, 479 S.W.3d 818, 824 (Tenn. 2015).

We first address Plaintiff's issue concerning whether the medical authorization provided by Plaintiff with his pre-suit notice was defective as found by the Trial Court. In this case, the Trial Court found that the medical authorization was not HIPAA compliant due to the incorrect purpose listed on the face of the authorization. Although the authorization was directed toward the medical providers authorizing each of them to release medical records to each other, the authorization states the purpose of the disclosure as follows: "provide my attorney full and complete access to all records and films and physician notes relevant to the care provided Fred Hayward generated by UT Erlanger Urology, Anand Shridharani, and Ben Waldorf."

In *Martin*, the Supreme Court stated that in order for a medical authorization to be HIPAA compliant, the authorization must include all six core elements. 600 S.W.3d at

334. The relevant federal regulation, 45 C.F.R. § 164.508(c)(1), provides that a valid HIPAA-compliant medical authorization must contain the following core elements:

> (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.

A medical authorization, therefore, is not HIPAA compliant under federal law "if '[t]he authorization has not been filled out completely, with respect to' a core element." *Martin*, 600 S.W.3d at 334 (quoting 45 C.F.R. § 164.508(b)(2)(ii)).

In the present case and as found by the Trial Court, Plaintiff included a clearly incorrect purpose in his medical authorization because the records were not being requested for his attorney's use. Instead, disclosure of the records to the potential defendants was intended to comply with Tenn. Code Ann. § 29-26-121(a)(2) by allowing the potential defendants to investigate the merits of the claims against them and pursue settlement negotiations prior to the lawsuit being filed, which our Supreme Court has identified as the purpose of the pre-suit notice requirement. *See Martin*, 600 S.W.3d at 331; *Runions v. Jackson-Madison Cnty. Gen. Hosp. Dist.*, 549 S.W.3d 77, 86 (Tenn. 2018). Plaintiff acknowledges this as a "scrivener's error with respect to the HIPAA release," and the Trial Court found that the error was a "material defect in the authorization." We agree with the Trial Court that the medical authorization is not HIPAA compliant as it contains an obvious incorrect purpose on the medical authorization, and the purpose requirement is a core element of a HIPAA-compliant medical authorization.

Despite the defective medical authorization, Plaintiff argues that substantial compliance with the pre-suit notice requirements of Tenn. Code Ann. § 29-26-121 is still possible, citing to our Supreme Court's opinion in *Stevens ex rel. Stevens v. Hickman*

Community Health Care Services, Inc., 418 S.W.3d 547, 556 (Tenn. 2013), in which the Court states that "[n]ot every non-compliant HIPAA medical authorization will result in prejudice." In the subsequent opinion released in *Martin*, our Supreme Court clarified that prejudice was not a separate and distinct element for the trial court to consider but that whether a defendant was prejudiced is a consideration for the court to consider when determining whether a plaintiff has substantially complied with pre-suit notice, pursuant to Tenn. Code Ann. § 29-26-121(a)(2). *Martin*, 600 S.W.3d at 333-34. Our Supreme Court in *Martin* emphasized the importance that prejudice plays when evaluating compliance with Section 121(a)(2). *Id.* The Supreme Court explained that prejudice, or the absence thereof, is "especially relevant" when assessing the extent and significance of a plaintiff's noncompliance with pre-suit notice. *Id.* at 334. As such, the Supreme Court held that if a plaintiff's noncompliance with pre-suit notice "frustrates or interferes with the purposes of Section 121 or prevents the defendant from receiving a benefit Section 121 confers, then the plaintiff likely has not substantially complied with Section 121." *Id.* The Tennessee Supreme Court identified the purpose of pre-suit notice required by Tenn. Code Ann. § 29-26-121 as affording a potential defendant in a healthcare liability action timely notice to allow the defendant to investigate the merits of the claim and pursue settlement negotiations prior to the lawsuit being filed. *Martin*, 600 S.W.3d at 331; *Runions*, 549 S.W.3d at 86.

The *Martin* Court explained that a defendant can establish prejudice by showing how the plaintiff's statutory noncompliance with pre-suit notice has "frustrated or interfered with the purposes of Section 121 or deprived the defendant of a benefit Section 121 confers." *Martin*, 600 S.W.3d at 334. According to *Martin*, one way a defendant can satisfy its burden of demonstrating prejudice in a motion to dismiss is by alleging that the plaintiff's medical authorization furnished as part of his or her pre-suit notice lacks one or more of the six core elements required for HIPAA compliance under federal law. *Id.* Erlanger has demonstrated that in the present case.

According to our Supreme Court, failure to provide a HIPAA-compliant medical authorization would ordinarily deprive the defendant of the benefit Section 121 confers because the defendant would be unable to obtain medical records from any other provider receiving pre-suit notice. *Martin*, 600 S.W.3d at 334. However, the conclusion that a deficient medical authorization would ordinarily deprive a defendant of the benefit of Section 121 does not mean that such deficiency will ***always*** result in such deprivation. Our Supreme Court stated in *Martin* that prejudice against the defendant is an element to be considered when determining whether a plaintiff has substantially complied with the pre-suit notice requirements of Tenn. Code Ann. § 29-26-121. If a defective medical authorization ***automatically*** meant a plaintiff failed to comply with section 121 pre-suit notice, there would be no reason to consider prejudice.

Our Supreme Court in *Martin* recently adopted a burden-shifting approach in health care liability actions wherein a defendant wishes to challenge the validity of pre-suit notice.

In doing so, the Court clarified the burden of proof for each party concerning whether a plaintiff has complied with the pre-suit notice requirements of Tenn. Code Ann. § 29-26-121(a)(2). *Martin*, 600 S.W.3d at 334. In these health care liability actions, the plaintiff carries the initial burden of establishing compliance with Section 121(a)(2), which can be accomplished by including a statement regarding compliance in the complaint and attaching documentation reflecting such compliance. *Id.* Alternatively, a health care liability plaintiff may allege in the complaint that extraordinary cause exists to excuse any noncompliance to the pre-suit notice requirement. *Id.*

If a health care liability defendant chooses to challenge the plaintiff's compliance with the pre-suit notice requirement, the defendant should file a motion to dismiss, pursuant to Tenn. R. Civ. P. 12.02(6), to allege that the plaintiff has failed to state a claim for which relief can be granted. *Id.* A defendant's motion to dismiss must demonstrate how the plaintiff has failed to comply with Section 121(a)(2) by "referencing specific omissions" and by providing an explanation of "the extent and significance of the plaintiff's errors and omissions and whether the defendant was prejudiced by the plaintiff's noncompliance." *Id.* (quoting *Myers v. AMISUB (SFH), Inc.*, 382 S.W.3d 300, 307 (Tenn. 2012); *Stevens ex rel. Stevens*, 418 S.W.3d at 556). After the defendant has established a prima facie case that Plaintiff has failed to substantially comply with the pre-suit notice requirements in Tenn. Code Ann. § 29-26-121(a)(2), "the plaintiff then bears the burden of establishing substantial compliance with Section 121, which includes the burden of demonstrating that the noncompliance did not prejudice the defense." *Martin*, 600 S.W.3d at 335.

Following Erlanger's motion to dismiss in this case in which Erlanger established a prima facie case that Plaintiff failed to comply with the statutory pre-suit requirements because of the insufficient medical authorizations, Plaintiff had the burden of establishing substantial compliance with Tenn. Code Ann. § 29-26-121, which includes the consideration of whether Erlanger was prejudiced by Plaintiff's failure to provide a HIPAA-complaint medical authorization. In his attempt to establish substantial compliance, Plaintiff states that he believes Erlanger was already in possession of all medical records developed by all the potential defendants. Plaintiff explained that in response to his requests for his own medical records directed toward each potential defendant, he received records only from Erlanger. As such, Plaintiff requested to conduct discovery to determine whether Erlanger had been prejudiced. Erlanger, however, argues that Plaintiff is not permitted to conduct discovery because this case involves a Tenn. R. Civ. P. 12.02 motion to dismiss and any discovery would be futile. Although Plaintiff had not filed a written motion requesting limited discovery until his post-judgment motion, he had informed the Trial Court during the motion hearing that discovery may be necessary. In response, the Trial Court held that request in abeyance and stated that if it was inclined to say that certain facts may change the Court's mind regarding its granting of the motion to dismiss, it would notify Plaintiff and permit discovery. With the Trial Court's granting of the motion to dismiss and the denial of Plaintiff's later motion asking for discovery, no discovery was permitted.

Our Supreme Court has recognized that the requirement of a HIPAA-compliant medical authorization does not apply when there is only one potential defendant receiving pre-suit notice because the authorization only allows the defendant to obtain medical records from the other health care providers also given pre-suit notice. *See Bray v. Khuri*, 523 S.W.3d 619, 620, 622 (Tenn. 2017) ("We hold that a prospective plaintiff who provides pre-suit notice to one potential defendant is not required under Tennessee Code Annotated section 29-26-121(a)(2)(E) to provide the single potential defendant with a HIPAA-compliant medical authorization."). When there are no other potential defendants receiving notice, there is no other health care defendant from which to obtain records. The Supreme Court held that the requirement of a HIPAA-compliant medical authorization does not apply when only a single health care provider received pre-suit notice. *Id.* at 624.

Although there was more than one potential defendant in the present case, the analysis in *Bray* is still relevant to the present case. In *Bray*, the Court analyzed whether a physician defendant already in possession of the medical records could use the records for the purposes of Section 121. *Id.* at 622-23. The Supreme Court in *Bray* concluded that the "health care operations" exception to HIPAA allowed the physician defendant to use the patient's protected health care records in his possession and consult with legal counsel in order to evaluate the merits of a potential claim. *Id.* at 623.

Following *Bray*, this Court released its opinion in *Lawson v. Knoxville Dermatology Group, P.C.*, 544 S.W.3d 704, 711 (Tenn. Ct. App. 2017). In *Lawson*, this Court concluded that the one potential defendant exception promulgated in *Bray* was not applicable when there are two defendants, even if the second defendant was an employee of the first defendant. Additionally, this Court in *Lawson* rejected a similar argument to the one in this case that a defendant was not prejudiced when it already possessed the relevant medical records. *Id.* at 710-11, 713. In doing so, the *Lawson* Court relied extensively on the pre-*Bray* case of *Roberts v. Prill*, No. E2013-02202-COA-R3-CV, 2014 WL 2921930 (Tenn. Ct. App. June 26, 2014), which also rejected this argument. *Lawson*, 544 S.W.3d at 710. The *Lawson* Court concluded that the medical practice defendant was not permitted to use or disclose the records in its possession without a HIPAA-compliant medical authorization. *Lawson*, 544 S.W.3d at 711, 713 ("Upon thorough review, we conclude that [the medical practice defendant] was prejudiced by the inadequacy of the [plaintiffs'] pre-suit medical authorization because [the practice defendant] would not be allowed to use [the patient's] medical records to mount a defense.").

Subsequently, this Court released its opinion in *Wenzler v. Yu*, 2018 WL 6077847, at *10. In *Wenzler*, defense counsel for the health care provider conceded that the only other potential defendant possessed no records and that the health care provider was already in possession of all the medical records. *Id.* at *8. The *Wenzler* Court relied on *Bray* to conclude that a defendant medical practice had not suffered prejudice when it was already

in possession of all the relevant medical records. *Id.* at *10. In *Wenzler*, this Court stated as follows regarding our Supreme Court's holding in *Bray* in pertinent part:

> The supreme court recognized the "general rule" that "HIPAA prohibits a healthcare provider from using or disclosing protected health information without a valid authorization." *Id.* (citing 45 C.F.R. § 164.508(a)(1)). However, examining HIPAA regulations, the supreme court found an applicable "regulatory exception to the general requirement of a HIPAA-compliant medical authorization." *Id.* at 623. The court explained that HIPAA regulations permit a health care provider to use or disclose protected health information for its own "health care operations," with some exceptions. *Id.* at 622 (citing 45 C.F.R. § 164.506(a)). "Health care operations" include "[c]onducting or arranging for ... *legal services*," and the website maintained by the United States Department of Health and Human Services indicated that a health care provider may use or disclose protected health information with its lawyer for litigation. *Id.* at 622-23. As such, the supreme court concluded that "HIPAA does not require [the physician defendant] to obtain a medical authorization *to use* a patient's medical records in his possession and consult with counsel to evaluate the merits of a potential claim." *Id.* at 623 (emphasis added).

Wenzler v. Yu, 2018 WL 6077847, at *7 (internal footnote omitted).

This Court in *Wenzler* acknowledges that its holding appears in conflict with that in *Lawson* but noted that the *Lawson* Court "did not discuss whether the 'health care operations' exception to HIPAA that was secondarily discussed in *Bray* would nevertheless permit the defendant-practice to use the records in its possession." 2018 WL 6077847, at *10. After considering this Court's opinion in *Lawson* and the Supreme Court's opinion in *Bray*, this Court in *Wenzler* held that based on our Supreme Court's decision in *Bray* permitting the use of protected health information by the medical provider for "health care operations," the defendant health care provider was not prejudiced when it already possessed all of the relevant medical records. *Id*. We agree with this Court's conclusion in *Wenzler* and determine it to be most consistent with our Supreme Court's holding in *Bray*.

In this case, Plaintiff alleges that he was able to obtain his personal medical records only from Erlanger and that no records were sent to him from the two physicians following his requests for records, leading Plaintiff to the reasonable conclusion that the potential physician defendants maintained no medical records of their own regarding Plaintiff and that Erlanger was in possession of the only medical records in existence among the potential defendants. Therefore, Plaintiff argues that he should be entitled to conduct discovery to determine whether Erlanger possessed all the medical records relevant to his medical care and treatment at issue and, if so, Erlanger was not prejudiced. Erlanger,

however, argues that discovery is not permitted in this proceeding at the motion to dismiss stage.

Erlanger's position proposes a Catch-22 for plaintiffs in health care liability actions. If we adopt Erlanger's position, the result would be that a health care liability plaintiff must prove in response to a motion to dismiss that a defendant was not prejudiced as part of its response to the motion to dismiss, but the plaintiff is not entitled to any discovery under any circumstances to attempt to prove to the trial court that the defendant has not been prejudiced by the lack of a HIPAA-compliant medical authorization. This approach creates an impossible hurdle for health care liability plaintiffs and is not consistent with statute or case law, including *Bray*. If our Supreme Court's holding that whether a defendant was prejudiced is for the trial court to consider in determining whether a plaintiff has substantially complied with pre-suit notice as required by the statute is to mean anything, a plaintiff must be given a legitimate opportunity to prove no prejudice. *Martin*, 600 S.W.3d at 333-34.

We agree with Erlanger that trial courts have properly denied discovery when a motion to dismiss was pending when such discovery would have been no benefit to the plaintiff. *E.g. Elvis Presley Enters., Inc. v. City of Memphis*, No. W2019-00299-COA-R3-CV, 2022 WL 854860, at *16 (Tenn. Ct. App. Mar. 23, 2022); *Reese v. Waters of Clinton, LLC*, No. E2020-01466-COA-R3-CV, 2021 WL 3401285, at *9 (Tenn. Ct. App. Aug. 4, 2021). However, this is not such a case. Our Supreme Court has developed a burden-shifting approach to these health care cases which lays the ultimate burden on Plaintiff at the motion to dismiss stage to demonstrate substantial compliance with Section 121 by showing no prejudice to the healthcare defendant exists.

Erlanger cites to this Court's opinion in *Reese v. Waters of Clinton, LLC*, No. E2020-01466-COA-R3-CV, 2021 WL 3401285 (Tenn. Ct. App. Aug. 4, 2021), for the proposition that discovery would be futile because no possible benefit would result from discovery to ascertain whether a defendant was prejudiced when a medical authorization is not HIPAA compliant. Erlanger, relying on *Reese*, makes a broad argument essentially contending that when there is no HIPAA-compliant medical authorization, discovery would be futile. We disagree with that mischaracterization of the holding in *Reese*. In *Reese*, there were multiple potential defendants, some of which had no known affiliation with the defendant at issue. *Id.* at *1. This Court did not hold in *Reese* that discovery will never be beneficial or available for a health care plaintiff to determine whether prejudice exists. Instead, under the circumstances of those in *Reese*, discovery would not have been beneficial. *See id.* at *9. The existence of multiple, unaffiliated potential defendants from whom the defendant would be entitled to obtain medical records makes the facts of *Reese* distinguishable from the present case.

Under the circumstances of this case, two potential defendants were employed by the third potential defendant, Erlanger. Plaintiff has legitimate reason to believe Erlanger

possessed all his relevant medical records that would be available to Erlanger even if the pre-suit notice medical authorizations were HIPAA compliant. If Erlanger was in possession of all the relevant medical records and, as consistent with *Bray*, was permitted to use those records to consult legal counsel and investigate the merits of the upcoming action against it, we fail to see any prejudice that Erlanger would suffer resulting from the non-compliant HIPAA authorization. Plaintiff should have been permitted limited discovery regarding this issue as first discussed by Plaintiff's lawyer and the Trial Court at the motion to dismiss hearing and later requested in Plaintiff's motion to set aside and for limited discovery. Therefore, we hold that the Trial Court erred in this case by failing to allow Plaintiff to conduct limited discovery to determine whether Erlanger had been prejudiced by Plaintiff's failure to provide a HIPAA-compliant medical authorization because the existence of such alleged prejudice must be considered in the Trial Court's decision regarding whether Plaintiff substantially complied with Tenn. Code Ann. § 29-26-121. As such, we vacate the Trial Court's judgment dismissing Plaintiff's action and remand to allow limited discovery regarding whether Erlanger was prejudiced by Plaintiff's failure to provide a HIPAA-compliant medical authorization.

We note that Erlanger raises an issue regarding whether the Trial Court erred by denying Plaintiff's motion to amend. Plaintiff filed his motion to amend in order to attach "the green certificates of mailing the certified letter with the 60-Day Notice, in addition to the 60-Day Notice itself in accordance with T.C.A. § 29-26-121." Plaintiff's motion to amend the complaint was filed on the same day as entry of the Trial Court's judgment dismissing the action. The Trial Court's judgment mentioned that as of the drafting of the court order, no motion to amend the complaint had been filed. Upon remand, the Trial Court should consider Plaintiff's motion to amend his complaint.

Conclusion

The judgment of the Trial Court is vacated, and this cause is remanded to the Trial Court for further proceedings consistent with this Opinion. Costs on appeal are assessed to the appellee, Chattanooga-Hamilton County Hospital Authority-Chattanooga.

D. MICHAEL SWINEY, CHIEF JUDGE