

Nos. 12-0304 and No. 12-0210



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

No. 12-0304

STATE EX REL. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

v.

THE HONORABLE JOHN LEWIS MARKS, JR.
Judge of the Circuit Court of Harrison County, and **MATTHEW HUGGINS,**
Respondents.

From the Circuit Court of Harrison County, West Virginia
Civil Action No. 10-C-176-1

No. 12-0210

NATIONWIDE MUTUAL INSURANCE COMPANY,
Petitioner,

v.

CARMELLA J. FARIS and ROBERT FARIS,
Respondents

From the Circuit Court of Harrison County, West Virginia
Civil Action No. 10-C-176-1

***Amicus Curiae* Brief of the West Virginia
Association for Justice in Support of Respondents**

Marvin W. Masters (WVSB #2359)
Kelly Elswick-Hall (WVSB #6578)
Richard A. Monahan (WVSB #6489)
THE MASTERS LAW FIRM LC
181 Summers Street
Charleston, West Virginia 25301
(304) 342-3106
mwm@themasterslawfirm.com
keh@themasterslawfirm.com
ram@themasterslawfirm.com

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I. IDENTITY OF AMICUS CURIAE AND STATEMENT OF ITS INTEREST AND AUTHORITY TO FILE

The West Virginia Association for Justice (“WVAJ”) is a voluntary state bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits, including personal injury actions, consumer lawsuits, and employment related cases.¹ Its members represent a substantial number of wrongfully injured citizens in the state. Throughout its history, the association has championed the fundamental right of every West Virginian to legal recourse for redress of wrongful injury and protection of their legal rights. Part of that process involves protecting the privacy and security of the medical information of those wrongfully injured. Thus, WVAJ has a substantial interest in the outcome of these proceedings. Mindful of the high duty of this Honorable Court in interpreting and clarifying the rights of the citizens of this State under and pursuant to law, WVAJ respectfully requests this Honorable Court consider the experience and knowledge of its membership who are charged with responsibilities of protecting the rights of those wrongfully injured and consider the legal positions set out in this brief.

The WVAJ brief will assist the court in identifying the rights of the wrongfully injured to the return of their private medical information at a time following the conclusion of their case and after a time when the insurance company, wrongdoer, or their legal counsel have no legitimate need for the documents. The issue is of paramount importance in this age of technology, where the insurance industry is forwarding private medical information and medical records to outside entities, where they are accessible by third parties. It would be helpful to this Court to receive an *amicus curiae* brief from a group that primarily represents the people whose interests will also be affected by the outcome of the case. WVAJ supports the position of the

¹ The undersigned counsel affirms that counsel for a party did not author this brief in whole or in part and did not make a monetary contribution to fund its preparation or submission.

Respondents as against the prayers of the Petitioners, though the basis for relief it urges may or may not vary in part from that of the Respondents.

II. INTRODUCTION

The United States District Court, Northern District of West Virginia, made a finding that the reason for State Farm and Nationwide's intense desire to obtain the unrestricted right to West Virginia citizens' private medical records is to send them to ISO (International Organization for Standardization) and NICB (National Insurance Crime Bureau), both private industry trade organizations. *Small v. Ramsey*, 280 F.R.D. 264, 270 (N.D.W.V. 2012). So, what does ISO want with all of these medical records? According to <http://www.verisk.com/Press-Releases/2012/ISO-ClaimSearch-Surpasses-800-Million-Claims.html>, on June 25, 2012, ISO announced that the ISO ClaimSearch® "all-claims database" has surpassed 800 million property and casualty insurance industry claims, with 63.5 million new claims added in the past 12 months. If these West Virginia residents' medical records are sent to ISO, it makes them available to its subscribers for a fee. Insurance companies, third party administrators for employers, liability insurance companies and their attorneys, and anyone or any organization which ISO deems acceptable is apparently allowed to access this information if they pay the fee. ISO brags about the fact that it collects and has available extensive and abundant private data which, of course, is no longer private.

The question is whether West Virginia courts should allow themselves to be co-opted as an instrument of insurance companies to create a pipeline for private medical records to be sent to private databases somewhere maintained by someone for access and use by maybe anyone.

Trial courts and attorneys, both plaintiff and defense, have regularly turned to protective orders to balance the efficiency called for in West Virginia Rules of Civil Procedure 1, 16 and

26. Litigants receive a level of comfort that their private records they are producing will be utilized only for use in that case and, upon conclusion, all will be returned and remain confidential. Is the age-old ancient doctrine established of Hippocrates less important than trade secrets of a pharmaceutical company or the inner files demonstrating that an insurance company committed a fraud on their insured? Private records of many kinds are regularly required by courts in West Virginia to be produced in discovery but then returned upon conclusion of the litigation via protective orders. It is not just West Virginia citizens who are injured and seek redress in West Virginia courts. Attorneys, businessmen and women, physicians, all have families who are injured and may be involved in litigation. No one should be required to produce their private medical records and then have them forever disclosed on some database when they are produced solely for redress of a tortious injury.

As set forth below in more detail, insurance companies have the resources and opportunity to discover whether a claim is fraudulent during the litigation. They have the best attorneys and immense resources. Further, the claimant's medical records are kept and maintained by the medical providers. If there is fraud suspected later, they can recreate the medical file or otherwise investigate the possible fraud. Obviously, and as admitted by Petitioners, they want these records for other purposes, including having access to an individual's records to determine an individual's insurability for healthcare purposes and for multiple other reasons which have nothing to do with fraud prevention or the litigation in West Virginia.

This Court possesses the sole jurisdiction to control the production of documents for litigation purposes and it has the sole authority and responsibility to protect all litigants from the fear that by filing or defending a claim their private medical records will land in the public

domain forever. This Court should also consider the effect that granting Petitioners the requested relief will have on the trial courts across the State. If that occurs, no longer will injured claimants give releases or produce documents voluntarily for access to any medical record which is not relevant to the injury. Presently, differences on these matters are settled by protective orders issued guaranteeing the claimant's confidentiality of medical records. Trial courts, then, will have to deal with the disputes over insurance companies' demands for access and litigants' rights to refuse under *Keplinger v. Virginia elec. and Power Co.*, 208 W.Va. 11, 537 S.E.2d 632 (2000).

This Court should deny the Petitioners the relief that they request. If this Court does not deny the Petitioners' relief, then it should remand this matter to the trial court with an order requiring the trial court to conduct a full hearing with Mr. Small having the right to utilize the West Virginia Rules of Civil Procedure to discover what State Farm and Nationwide have done with medical records of West Virginia citizens they obtained for use for litigation of a case and what uses they and others, including ISO and NICB, are now and in the future planning for these records.

III. PETITIONERS' REQUESTED RELIEF RAISES FAR-REACHING PUBLIC POLICY ISSUES FOR THIS CAUSE

The Petitioners' broad and far-reaching requests for relief raise a number of substantial public policy issues:

(a) For years, the trial courts and trial counsel in West Virginia have utilized protective orders to enhance the effective flow of documents and discovery in a case without constant trial court involvement. This was and is true for medical records. Insurance co-counsel is never satisfied with a claimant's word on what records are relevant and therefore demands a complete medical history. Obviously, if this Court grants Petitioners relief, this must come to an

end. Claimant's counsel will be required to invoke the rulings of this Court in *Keplinger v. Virginia elec. and Power Co.*, 208 W.Va. 11, 537 S.E.2d 632 (2000), and object and file motions to protect anything which is not relevant, thus invoking constant trial court involvement. And trial courts will have another burden added to their already head load of responsibility.

(b) West Virginia has determined that its citizens have a right to privacy with respect to medical information and documents based upon the contractual relationship of physicians and patients and the implied fiduciary duty of the medical providers to maintain the confidentiality of medical information. *See State ex rel. Kitzmiller v. Henning*, 190 W.Va. 142, 144, 437 S.E.2d 452, 454 (1993). This ruling would be violated if private medical documents are disseminated to third parties or kept on databases indefinitely.

(c) In order to allow Petitioners to forever keep the citizens' medical records and to disseminate them to third parties, this Court will have to agree that protected and private documents produced in the litigation as required by this Court's own rules and sometimes by its Orders may be disseminated outside of its jurisdiction and control, thereby abandoning its ability to protect its citizens.

(d) Petitioners request the Court to abandon West Virginia's own public policy, a United States constitutionally-recognized right to privacy of its own citizens and to defer to laws of other states by molding West Virginia public policy and its civil procedures in order to accommodate laws passed in another state. *Accord Franchise Tax Bd. of Calif. v. Hyatt*, 538 U.S. 488, 494 (2003). For example, if California decided State Farm was required to post all medical records in an insurance company's possession on a database, is West Virginia required to or will it concede its own citizens' right to privacy by conceding the above public policy?

(e) If insurance companies may keep a claimant's medical records for research and fraud prevention, why can't consumer organizations, police, government agencies and claimant attorneys be provided insurance company claim files and trade secret files, etc., produced in discovery by insurance companies, employers and others?

This Court should consider the findings and holdings of the U. S. District Court of the Northern District of West Virginia. The Northern District of West Virginia recently addressed the issues in this case and agrees with the lower court's finding with regard to the necessity for and substance of the protective order. The Northern District analyzed the same proposed protective order and found that the plaintiff established good cause to support issuance of the protective order because the plaintiff had a recognized privacy interest in his medical records, the defendant insurers intended to distribute medical records obtained in discovery to third parties within their organizations and other organizations, outside of those necessarily involved in evaluation and resolution of plaintiff's claims, and a protective order would merely limit use of medical records as necessary for defense of the claims, and as permitted by West Virginia law. *Small v. Ramsey*, 280 F.R.D. 264, 269-270, (N.D.W. Va. 2012). The Court ordered that the medical information and documents be returned or destroyed after six years and that the records were not to be disclosed to third parties or those not involved in the processing of the case. *Id.*

The Northern District addressed the arguments made by the insurance companies and their *amicus curiae* in this case and soundly rejected each one. The court held, *inter alia*, that 1) the order did not violate the First Amendment right to disseminate information, as the obtaining of medical records through discovery in a civil action does not constitute speech. *Id.* at 283. 2) The protective order as crafted provides insurance companies and the state with the tools to combat fraud for a period of six (6) years plus "without denigrating forever the rights of the

individual to ultimate privacy in some of life's most intimate details—his medical records.” *Id.* at 284. 3) W.Va.Code § 33-41-5 does not mandate disclosure of a plaintiff's medical records unless the insurance company has “knowledge or a reasonable belief that fraud or another crime related to the business of insurance is being, will be, or has been committed.” *Id.* at 272. 4) Any Medicare reporting requirements could be met in a six (6) year statute of limitations, and an insurance company could seek a modification of the protective order at a later date to address Medicare issues, if it were necessary. *Id.* at 277. 5) With regard to the arguments made by the insurance commissioner in this case, the court noted that the West Virginia Insurance Commissioner is not authorized to directly prosecute suspected fraud and, instead, must work through the duly constituted prosecuting authorities, who with the grand jury have the right to obtain the records through subpoena or search warrant.² 6) That, from a federal standpoint, Executive Order 13181 generally restricts investigative and prosecutorial authorities' use of personal health care information to specific instances where a judicial officer has determined good cause. *Id.* at 277. 7) The “patchwork of laws and regulations,” cited by the insurance companies are not adequate to protect the privacy interest of the individual in his medical records, reasoning that the insurance company admits it intends to disseminate medical records to those outside of the evaluation and resolutions process and even to those outside of the confines of State Farm and Nationwide for purposes wholly unrelated to the original purpose of providing the records. *Id.* at 275, 282. 8) That any procedures the insurance company has in place to prevent the unauthorized disclosure of medical records do not protect against unauthorized disclosure and use and dissemination by ISO and NICB over which the insurance

² The Court rejected the contention that the West Virginia Insurance Commissioner's letter carries the force of law holding “That letter is simply an announcement of the “[i]nsurance Commissioner's interpretation and enforcement position as it relates” to a matter.” *Id.* at 277-78, citing *State, ex rel. Crist v. Cline*, 219 W.Va. 202, 209, 632 S.E.2d 358 (2006).

company has no control. *Id.* at 282. 9) That the protective order does not place the insurance company in the position of disobeying the Court's order and facing contempt or disobeying the Illinois statute, *Id.* at 279-80, because it noted that State Farm will still have a sufficient information to meet its requirements, that it has six (6) years from the date of settlement or final judgment to obtain leave of the director of insurance for Illinois to remove the plaintiff's medical records from its files, and there is no evidence to date that State Farm has sought and been denied permission to dispose of a claimant's medical records in that five (5) or six (6) years period. 10) That the regulations cited by State Farm do not specifically mention or require retention of medical records. *Id.* at 280, 281. Finally, the court held that, if State Farm must have the medical records under any interpretation of another state law it has six years with proper notice to the plaintiff to request an order from this Court for use of the records. *Id.* at 280.³

IV. PETITIONERS' REQUESTED RELIEF WOULD UNNECESSARILY AND UNREASONABLY INVADE INJURED CITIZENS' PRIVACY RIGHTS

Petitioners, State Farm and Nationwide are requesting this Court to rule that West Virginia courts are not to restrict, in any manner, insurance companies' "access, use and retention" of West Virginia citizens' medical records. *See* State Farm's Petition for Writ of Prohibition, p. 5. However, absent West Virginia trial courts' control over their access, use and retention, West Virginia citizens' privacy rights will be destroyed simply by their availing themselves of their constitutional right to file a civil suit for damages. As the United States District Court, Northern District of West Virginia, stated, "it is clear that State Farm and to a lesser extent Nationwide intend to distribute any medical records ... to third parties within their

³ The court further rejected the argument that removal of the medical records from their complex computer system is would be unduly burdensome, reasoning that "What the insurer's IT departments have created they can modify." *Small v. Ramsey*, 280 F.R.D. 264, 281 (N.D.W. Va. 2012).

own organizations ... and to such other organizations such as ISO and NICB (National Insurance Crime Bureau).” *Small v. Ramsey*, 280 F.R.D. 264, 270 (N.D.W.V. 2012). Both ISO and NICB are private insurance trade organizations. The U. S. District Court, however, after a full hearing found that NICB and ISO could not obtain Small’s records on their own and, importantly, “[o]nce NICB and ISO obtain Small’s records, Small has lost all control of his own records.” *Id.* at 281.

No doubt there is money to be made by ISO and other third party companies. As stated above, on June 25, 2012, ISO announced that the ISO ClaimSearch® all-claims database has surpassed 800 million property and casualty insurance industry claims, with 63.5 million new claims added in the past 12 months. Source: <http://www.verisk.com/Press-Releases/2012/ISO-ClaimSearch-Surpasses-800-Million-Claims.html>. ISO charges a fee for access to this information. While the insurance companies in this case have refused discovery into what they are really doing with private medical information, from ISO’s website it appears that, in addition to detailed medical claim information, any entity that pays the fee can actually order medical records. Source: <http://www.iso.com/Products/ISO-ClaimSearch/ISO-ClaimSearch-Accessing-the-ISO-ClaimSearch-System.html>. Millions of peoples’ private medical information is essentially available for purchase. Medical information is not only available to those adjusting a claim; it is available to any subscribing insurance sales agents in determining whether to offer to sell insurance to someone.⁴ ISO’s parent company, Verisk recently announced a partnership to share information with retailers and Ebay: “The two companies are developing methods to share and use data....” Source: <http://www.verisk.com/Press-Releases/2012/eBay-and-the-Law->

⁴ The ISO promotional materials state that its system will *automatically* display information, including credit scores, driver’s license numbers, additional potential drivers, number of vehicles in the household, current policy coverages and *claims information*. Source: http://www.iso.com/dloads/quickfill/brochure/QuickFill_PersAuto.pdf. Presumably, an insurance agent could purchase a mailing list and look up the information about the people on it to determine who to send solicitation materials to, as an example.

Enforcement-Retail-Partnership-Network-Form-Alliance-to-Fight-Retail-Crime.html. So the bottom line is what it always is with insurance companies and these related entities—making money. ISO is panicked that it will lose access to this profitable venture.

It should be kept in mind that State Farm and Nationwide want to collect and keep litigants' records forever, claiming it is to prevent fraud and criminal activity, to assist in rate making and for numerous other purposes unrelated to the subject litigation. This Court has held that if a claimant places their medical condition at issue in litigation they have impliedly consented to the release of medical information related to the condition which is the subject of the action. *Kitzmiller, supra*, 437 S.E.2d at 454. However, the records are not required to be disclosed for any purpose other than the lawsuit in question and certainly not for everything the insurance company may wish to use it for into eternity. *Small v. Ramsey*, 280 F.R.D. 264, 270 (N.D.W.V. 2012).

State Farm and Nationwide's argument that they must collect, use and retain the medical records and information forever in order to uncover fraudulent claims is not credible. Nowhere do they explain why such fraud can better be discovered more than six years after the litigation has been concluded than it could have been as part of the litigation plus the additional six years allowed by the court to accommodate the Insurance Commissioner's rules. They do not explain why, with their immense resources, they are unable to discover the fraud while the case is being litigated. In fact, they acknowledge in their petition that they do not contend Mr. Small committed any fraud or that he was suspected of it. State Farm and Nationwide hire the best law firms to obtain every record, review the records, demand medical information and exhaustively utilize the discovery rules and subpoena power to obtain medical records from the claimant's medical providers, which may include obstetricians, gynecologists, urologists, psychologists,

cardiologists, internists, and physicians from all other areas of medicine. In addition, the company may send the claimant for an independent medical examination pursuant to WVRCP 35. And, the independent examiner may examine the claimant and request diagnostic tests and other possible procedures to buttress their opinion. Petitioners' independent physician will then render an opinion as to the extent of the claimant's injury and may be allowed to testify against the claimant.

Therefore, while anything is possible, it seems nearly impossible given State Farm and Nationwide's immense resources and the discovery tools set forth in West Virginia's Rules of Civil Procedure for a claimant to be able to defraud any insurance carrier. The discovery described above is routinely granted and enforced by West Virginia's Judges. More importantly, however, in doing the above, insurance companies' attorneys routinely obtain and review claimants' medical and/or psychological records which may not be totally irrelevant to the case. A claimant's sex life, personal and emotional issues which may have nothing whatsoever to do with the injury complained of in the case are cobbled together with relevant records reviewed by law firms and sent to the insurance company. Yet, here, State Farm, Nationwide, and industry supporters call the trial judge and his court rulings an unnecessary third level of regulatory authority or "regulation through litigation." This Court should not be misled or intimidated by these inappropriate remarks and characterizations.

West Virginia courts recognize their responsibility to protect litigants from the unnecessary disclosure of privileged and sometimes matters not privileged when the litigant could be unnecessarily embarrassed or harmed by public disclosure. West Virginia Rules of Civil Procedure which govern the procedures in all trial courts of record in all civil actions state that the rules "shall be construed and administered to secure the just, speedy, and inexpensive

determination of every action.” WVRCP 1. One of the tools available to the trial courts and litigants to more efficiently and economically advance the above purposes are the discovery rules. “Parties may obtain discovery regarding any matter, not privileged ... of any discoverable matter.” And Rule 26(b)(1) specifically states that “[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” WVRCP 26(b)(1). In the discovery process, the parties frequently disagree over the production of documents and information whether privileged or not, but particularly documents and information which are recognized by West Virginia as privileged.

Documents which are produced regularly in litigation and which may be subject to being recognized as privileged include trade secrets, tax records, attorney-client privilege, work-product and medical information and records. Litigants regularly require and are granted protective orders requiring the party to return all privileged and confidential documents. Rule 26(c) provides that trial courts “may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense....” Specifically included in Rule 26 are trade secrets or other confidential research, development or commercial information. Truckloads of documents are produced and disclosed routinely in product liability and commercial litigation, which are made subject to protective orders. In order to advance the purpose of the discovery rules in efficiently processing and managing civil actions as outlined in Rule 16, trial courts, in their discretion, attempt to manage discovery by utilizing protective orders so that parties are satisfied to produce documents to which they otherwise would object because they know they will receive the documents back and that their

confidentiality will be maintained once the litigation is complete. An injured claimant's records should not be treated differently.

This Court, in *Keplinger v. Virginia elec. and Power Co.*, 208 W.Va. 11, 537 S.E.2d 632 (2000), held that the only medical information discoverable in personal injury actions was the medical information as it related to the condition a plaintiff has placed at issue in a lawsuit. However, the realities in actual practice in West Virginia is that most trial judges require claimants to produce all medical records, relevant or not, for as much as 5 to 10 years prior to injury and usually all records after injury. Insurance companies like State Farm and Nationwide never accept a claimant's decision as to what record is and is not relevant to their injury and damage claim. And trial courts generally and routinely order the production of the total history. Trial courts then regularly permit attorneys for insurance companies to peruse through medical records, whether relevant or not, within what the court's opinion is a reasonable time period prior to injury up to trial. Consequently, claimants' attorneys routinely request protective orders or limited releases as mentioned in *Keplinger, supra*, to deal with these issues. As a result, however, insurance companies nearly always end up with possession of substantially more irrelevant medical information on claimants than ones that are relevant, which often times concerns embarrassing information which would likely damage the claimant if ever disclosed. If the claimant claims to have suffered emotional distress, the insurance company then demands the claimant's psychological records.

V. **THIS COURT SHOULD RULE THAT MEDICAL RECORDS PRODUCED IN DISCOVERY OR IN CONTEMPLATION OF LITIGATION DOES NOT WAIVE A PRIVILEGE**

In 2010, the South Dakota Supreme Court adopted a rule in *all* cases restricting the reproduction, distribution, or use of a medical record for any purpose other than the purpose for

which it was produced. As modified by the court on March 2, 2011, SDCL section 19-2-13 states:

The production of a record of a health care provider, whether in litigation or in contemplation of litigation, does not waive any privilege which exists with respect to the record, other than for the use in which it is produced. Any person or entity receiving such a record may not reproduce, distribute, or use it for any purpose other than for which it is produced.

See James D. Leach, *Medical Privacy: The South Dakota Supreme Court Adopts Sdcl 19-2-13*, 57 S.D. L. Rev. 1 (2012). In *Brende v. Hara*, 153 P.3d 1109, 1111 (Haw. 2007), the Hawaii Supreme Court found “no present legitimate need for disclosure of petitioners’ health information unrelated to the underlying litigation,” and ruled that “disclosure outside the litigation of petitioners’ health information produced in discovery will violate petitioners’ information privacy right under article I, section 6” of the Hawaii Constitution.”

Learned scholars across various demographics acknowledge the need for stringent privacy protection of medical records as a matter of public policy. The National Academy of Sciences, National Academy of Engineering, the Institute of Medicine and the National Research Council were commissioned by the National Library of Medicine and the Warren Grant Magnuson Clinical Center of the National Institutes of Health to initiate a study on maintaining privacy and security of health care information. See Clayton, Paul, et al., *For the Record: Protecting Electronic Health Information*, National Academy Press (1997). As one of the lead agencies within the executive branch relating to health care applications, the NLM identified privacy and security as primary issues that need to be addressed. *Id.* at vii. After a two year national study of the laws and technologies related to medical records, the Committee concluded that **“Most state statutes fail to recognize the particular challenges posed by the use of electronic health records and by rapid growth of organizations that compile information**

about patients—in both patient identifiable and aggregated form—for sale to interested corporations.” *Id.* at 45 citing Office of Technology Assessment, 1993, *Protecting Privacy in Computerized Medical Information*, OTA-TCT-576, U.S. Gov’t Printing Office, Wash. D.C., September, pp. 43-44 (emphasis added). The Committee also alarmingly found that, “in preparing and implementing laws and policies to provide privacy, policy makers cannot ignore the possibility that individuals may be discriminated against on the basis of specific illnesses or conditions they have or that sensitive or adverse information may be used against an individual’s economic interest in some way.” *Id.* at 51. The Committee gave an example that an employer may refuse to hire or promote an individual with a long and expensive history of medical claims or with the prospect of probable expensive or chronic medical problems in the future based on family history. *Id.* The Committee concluded that, **“Policy makers must assume that such discrimination is likely to continue in future.”** *Id.* at 51-52 (emphasis added).

In this case and others, the insurance companies contend they must keep plaintiffs’ medical records so they can distribute them or information from them to groups like the NICB and ISO as part of its role in possible fraud prevention. State Farm conceded in the *Small* case, that NICB and ISO are private entities and that it is a paying member of each. NICB and ISO are not involved in the evaluation and resolution of the claims. NICB and ISO could not obtain medical records on their own. “Once NICB and ISO obtain [a plaintiff’s] records, [the plaintiff] has lost all control of his own records.” *See Small v. Ramsey*, 280 F.R.D. 264, 281 (N.D.W. Va. 2012).

VI. ONLY THE WEST VIRGINIA SUPREME COURT HAS JURISDICTION OF THE DISPOSITION OF DOCUMENTS PRODUCED IN WEST VIRGINIA CIVIL LITIGATION AND COMITY DOES NOT REQUIRE WEST VIRGINIA COURTS TO CONCEDE TO ILLINOIS LAW

Only this Honorable Court is bestowed and entrusted by West Virginia's Constitution with the constitutional authority to administer the West Virginia court system. "Article VIII, Section 1 of [the West Virginia] Constitution vests the judicial power of the State 'solely in a supreme court of appeals and in the circuit courts, and in such intermediate appellate courts and magistrate courts as shall be hereafter established by the legislature, and in the justices, judges and magistrates of such courts.'" *Kessel v. Monongalia County General Hospital Co.*, 220 W.Va. 602, 616, 648 S.E.2d 366, 380 (2007). Consistent with the grant of this judicial power, the rule-making clause of Article VIII, Section 3 of the West Virginia Constitution provides, in part, that "[t]he [Supreme Court of Appeals] shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the state relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law." W.Va. Const. Art. VIII, § 3.⁵ *Accord Louk v. Cormier*, 218 W.Va. 81, 88, 622 S.E.2d 788, 795 (2005); *Bennett v. Warner*, 179 W.Va. 742, 372 S.E.2d 920 (1988); Syl. Pt. 5, *State v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999); Syl. Pt. 7, in part, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994); *Laxton v. National Grange Mut. Ins. Co.*, 150 W.Va. 598, 148 S.E.2d 725 (1966), *overruled on other grounds by*, *Smith v. Municipal Mut. Ins. Co.*, 169 W.Va. 296, 289 S.E.2d 669 (1982).

⁵ Article VIII, Section 3 of our Constitution also provides, in part, that "[t]he court shall have general supervisory control over all intermediate appellate courts, circuit courts and magistrate courts." W.Va. Const. Art. VIII, § 3. Additionally, it has been long recognized that our Constitution both inherently and by express recognition provides the Supreme Court of Appeals with exclusive authority to define, regulate, and control the practice of law within our State. *See, e.g., Shenandoah Sales & Service, Inc. v. Assessor of Jefferson County*, 228 W.Va. 762, 724 S.E.2d 733, 740-41 (2012) (citing cases). This authority of the Court over the practice of law has also been recognized and addressed by the Legislature in W.Va.Code § 51-1-4a (1945).

Only the Supreme Court of Appeals of the State of West Virginia has the jurisdiction and authority to decide what information may be “obtained, used and retained” by litigants in its trial courts and certainly the ISO, NICB and the State of Illinois legislature do not have that power.

Neither does the protective order violate the Full Faith and Credit Clause, Principles of Comity, or the Due Process Clause by creating conflicts with State Farm’s legal obligations under other state and federal laws. State Farm cites no authority that in actuality requires this Court to treat the laws and public policy of West Virginia as subservient to those of Illinois. Under the circumstances of this case, State Farm’s reliance on the Full Faith and Credit Clause of the United States Constitution, Art. IV, § 1, is misplaced. As explained by the United States Supreme Court:

Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. “In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded.” *Milwaukee County [v. M.E. White Co.]*, 296 U.S. [268], at 277, 56 S.Ct. [229], at 234 [(1935)]. *The Full Faith and Credit Clause does not compel “a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.”* *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 501, 59 S.Ct. 629, 632, 83 L.Ed. 940 (1939); *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-819, 105 S.Ct. 2965, 2977-2978, 86 L.Ed.2d 628 (1985). Regarding judgments, however, the full faith and credit obligation is exacting. . . .

A court may be guided by the forum State's “public policy” in determining the law applicable to a controversy. See Nevada v. Hall, 440 U.S. 410, 421-424, 99 S.Ct. 1182, 1188-1190, 59 L.Ed.2d 416 (1979). But our decisions support no roving “public policy exception” to the full faith and credit due *judgments*. . . .

Baker v. General Motors Corp., 522 U.S. 222, 232-33 (1998) (Emphases added; footnote omitted). *Accord Franchise Tax Bd. of Calif. v. Hyatt*, 538 U.S. 488, 494 (2003) (“We have held that the Full Faith and Credit Clause does not compel “a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to

legislate.”” (internal citations omitted)); *Carroll v. Lanza*, 349 U.S. 408, 413-14 (1955) (finding that Full Faith and Credit Clause did not require Arkansas, as forum state, to honor exclusivity provision of Missouri Compensation Act; holding that “Missouri can make her Compensation act exclusive, if she chooses, and enforce it as she pleases within her borders. Once that policy is extended into other States, different considerations come into play. Arkansas can adopt Missouri’s policy if she likes. Or . . . she may supplement it or displace it with another, insofar as remedies for acts occurring within her boundaries are concerned. Were it otherwise, the State where injury occurred would be powerless to provide remedies or safeguards to nonresident employees working within its borders. We do not think the Full Faith and Credit Clause demands that subserviency from the State of the injury.”).⁶ See also *Pasquale v. Ohio Power Co.*, 187 W.Va. 292, 418 S.E.2d 738 (1992) (discussing Full Faith and Credit Clause and United States Supreme Court’s decision in *Carroll v. Lanza*, *supra*).

As to comity, the respect that courts routinely demonstrate in pending litigation for the laws of other jurisdictions, this Court has held:

Comity is a court-created doctrine through which the forum court may give the laws or similar rights accorded by another state effect in the litigation in the forum state. Comity is a flexible doctrine and rests on several principles. One is legal harmony and uniformity among the co-equal states. A second, grounded on essential fairness, is that the rights and expectations of a party who has relied on foreign law should be honored by the forum state. *Finally, and perhaps most important, the forum court must ask itself whether these rights are compatible with its own laws and public policy.*

Syl. Pt. 1, *Pasquale v. Ohio Power Co.*, *supra*. Accord Syl. Pt. 2, *Russell v. Bush & Burchett, Inc.*, 210 W. Va. 699, 701, 559 S.E.2d 36, 38 (2001).

⁶ The cases cited by State Farm do not disagree with the above authority but instead are consistent with it. See *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (“it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 & n. 16 (1996) (noting that no State has the authority to enact a policy for the entire Nation or to “even impose its own policy choice on neighboring States”).

As previously discussed herein, the law and public policy of West Virginia recognizes and protects the privacy and confidentiality interests of a party in his or her medical records. Consistent with this law and public policy of West Virginia, the protective order at issue in this case seeks to reasonably protect these confidentiality and privacy interests of parties in their medical records and information. This Court cannot conclude under the circumstances of this case that the law and public policy of West Virginia in protecting the privacy and confidentiality interests of parties in their medical records are outweighed by the public policy of Illinois in having insurance companies indefinitely maintain their files and records; particularly when--for those very reasons articulated by United States Magistrate Judge Kaul in *Small v. Ramsey*, 280 F.R.D. 264, 279-80 (N.D.W.Va. 2012)--State Farm is unable to demonstrate that honoring the protective order would actually and unconditionally place it in violation of Illinois law. Accordingly, neither the Full Faith and Credit Clause nor the doctrine of comity supports the Petitioner's writ.

For the same reasons set forth above, State Farm's reliance on the Due Process Clause is also misplaced. The lower court's protective order does not require State Farm to destroy its own business records and property but merely the medical records and information of Respondent to which State Farm lacks any legitimate ownership rights or interest. Moreover, State Farm has the right to petition the appropriate Illinois agency for permission to return or dispose of these medical records in accordance with the provisions of the protective order at issue herein. If the State of Illinois would decline to give this permission for any reason, State Farm could always petition the circuit court for modification of its protective order. It is difficult to imagine what legitimate hardship this could cause Illinois or State Farm, particularly when under the terms of the protective order, the State of Illinois would have 5 years to examine the

records if deemed necessary for any reason prior to their destruction or return. If ever needed thereafter for any legitimate reason by State Farm or the State of Illinois, the medical records could be subpoenaed from the Respondent or the medical providers. The Due Process Clause simply is not offended by the protective order at issue herein because State Farm can neither show that it has a protected property interest in the medical records and information of Respondent nor that honoring the protective order would actually and unconditionally place it in violation of Illinois law.⁷ See *Small v. Ramsey*, 280 F.R.D. 264, 270 (N.D.W.V. 2012).

VII. WEST VIRGINIA CITIZENS HAVE A CONSTITUTIONAL RIGHT TO PRIVACY OF THEIR MEDICAL RECORDS

The West Virginia Supreme Court long ago held that there is a fiduciary relationship between a physician and a patient. Syl. Pt. 1, *State ex rel. Kitzmiller v. Henning*, 190 W.Va. 142, 437 S.E.2d 452 (1993); Syl. Pt. 1, *Morris v. Consolidation Coal Company*, 191 W.Va. 426, 446 S.E.2d 648 (1994). In both cases, the Supreme Court recognized the fiduciary duty of physicians to keep and maintain their patients' medical records confidential. In *Hammonds v. Aetna Casualty & Surety Company*, 243 F.Supp. 793 (1965), cited with approval in *Kitzmiller, supra*, the federal court described the relationship between the doctor and patient as a contract with the doctor impliedly warranting that the information the doctor learns will be kept and maintained confidentially. As the federal court stated in *Hammonds, supra*, the patient "must disclose all information in his consultations with his doctor -- even that which is embarrassing, disgraceful or incriminating. To promote full disclosure, the medical profession extends the promise of secrecy...." *Hammonds, supra*, 243 F.Supp. at 801. In *Hammonds* the court held that if a doctor

⁷ The cases cited by State Farm are distinguishable on one or more of these bases. Indeed, at least one of the cases cited by State Farm would appear to support the Respondent's position. See *Sovereign News Co. v. United States*, 690 F.2d 569, 577-78 (1982) (noting that the business records at issue were the sole property of Sovereign News and that "[t]he government may not keep the copies purely for the sake of keeping them or because it is 'hopeful' they may be relevant to some future investigation. . . . This amounts to harassment.").

should reveal any of these confidences, he surely effects an invasion of the privacy of his patient and that “the preservation of the patient’s privacy is no mere ethical duty upon the part of the doctor; there is a legal duty as well.” *Id.* at 801-802. Therefore, the patient’s right to confidentiality of these medical records is based upon the contractual relationship and the implied fiduciary duty springing from that relationship.

West Virginia recognizes the individual’s right to privacy with respect to his or her medical records. “There is no question that disclosure would cause an invasion of privacy. An individual’s medical records are classically a private interest.” *Child Protection Group v. Cline*, 177 W.Va. 29, 350 S.E.2d 541 (1986). This common law recognition grew out of a line of cases culminating with *Crump v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 320 S.E.2d 70 (1983). The West Virginia Court therein held that under West Virginia law, there are four types of invasion of privacy, any one of which may be the basis of a cause of action. “An ‘invasion of privacy’ includes (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another’s name or likeness; (3) unreasonable publicity given to another’s private life; and (4) publicity that unreasonably places another in a false light before the public.” Syl. pt. 8.

West Virginia’s citizens have a United States constitutional right to privacy of medical records. In *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510 (1965), the United States Supreme Court acknowledged the constitutional right to privacy determining that there was a “zone of privacy created by several fundamental constitutional guarantees.” These include the First Amendment, which the court held has a penumbra where privacy is protected from governmental intrusion. *Griswold v. Connecticut*, 381 U.S. 479, 483, 85 S. Ct. 1678, 1681, 14 L. Ed. 2d 510 (1965). They include specific guarantees in the Bill of

Rights which have “penumbras, formed by emanations from those guarantees that help give them life and substance.” *Id.* at 484, citing *Poe v. Ullman*, 367 U.S. 497, 516-522, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (dissenting opinion). The court noted that various guarantees create zones of privacy, including the right of association contained in the penumbra of the First Amendment; the Third Amendment in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner as another facet of that privacy; the Fourth Amendment in its explicit affirmation of the ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures;’ the Fifth Amendment in its Self-Incrimination Clause, which enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment; and the Ninth Amendment, which provides, ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’ *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S. Ct. 1678, 1681, 14 L. Ed. 2d 510 (1965).

As the *Griswold* court explained, the Fourth and Fifth Amendments were described as protection against all governmental invasions “of the sanctity of a man’s home and the privacies of life.” *Id.* at 484-485 (citations omitted). The court referred to *Mapp v. Ohio*, 367 U.S. 643, 656, 81 S.Ct. 1684, 1692, 6 L.Ed.2d 1081, discussing the Fourth Amendment as creating a ‘right to privacy, no less important than any other right carefully and particularly reserved to the people.’ *Id.* at 484-485 also citing Beaney, *The Constitutional Right to Privacy*, 1962 Sup.Ct.Rev. 212; *Griswold*, *The Right to be Let Alone*, 55 Nw.U.L.Rev. 216 (1960).

Griswold concluded: “We have had many controversies over these penumbral rights of ‘privacy and repose’ ... These cases bear witness that the right of privacy which presses for

recognition here is a legitimate one.” *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510 (1965).

Other cases have discussed the right to privacy relating to medical information including *Whalen v. Roe*, 429 U.S. 589, 606, 97 S. Ct. 869, 880, 51 L. Ed. 2d 64 (1977). (Justice BRENNAN, concurring opinion: “The Court recognizes that an individual’s “interest in avoiding disclosure of personal matters” is an aspect of the right of privacy.”) *See also, United States v. Sutherland*, 143 F. Supp. 2d 609, 611 (W.D. Va. 2001), acknowledging that the third Circuit recognizes a constitutional right to privacy in a patient’s prescription records. While HIPAA does not govern the activity at issue, nevertheless, the standards it contains indicate a strong federal policy to protect the privacy of patient medical records. *United States v. Sutherland*, 143 F. Supp. 2d 609, 612 (W.D. Va. 2001).

CONCLUSION

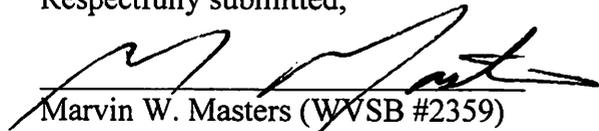
This Court is certainly aware of the scope and import of the decision it makes in the protection of the privacy of its citizens. Insurance company and third party groups are really seeking a determination by this Court that third party, private groups, who are not governmental agencies, can pool and circulate peoples’ private medical information and medical records on data bases and allow access to and circulation of that medical information and medical records to other third party, non-governmental entities, for profit and personal benefit of those third parties. If this Court allows the circulation of plaintiffs’ private medical information and medical records, it loses the power and authority to control their use in any manner.

This Court must not waive the constitutional and common law privacy protections of its citizens in order to allow third party, non-governmental entities to use that information for profit, under the guise of a potential of assisting law enforcement in catching the very few offenders.

This is especially true since governmental agencies have the authority to obtain the information by other legitimate means.

For these reasons and those asserted by the Respondents, the West Virginia Association for Justice urges this Court to adopt the position of the Respondents and protect the privacy of its citizens and the Court's power and authority over the conduct of civil litigation.

Respectfully submitted,



Marvin W. Masters (WVSB #2359)
Kelly Elswick-Hall (WVSB #6578)
Richard A. Monahan (WVSB #6489)
THE MASTERS LAW FIRM LC
181 Summers Street
Charleston, West Virginia 25301
(304) 342-3106
mwm@themasterslawfirm.com
keh@themasterslawfirm.com
ram@themasterslawfirm.com

Counsel for Amicus Curiae
West Virginia Association for Justice

Dated: August 31, 2012

Nos. 12-0304 and No. 12-0210

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

No. 12-0304

STATE EX REL. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

v.

THE HONORABLE JOHN LEWIS MARKS, JR.
Judge of the Circuit Court of Harrison County, and **MATTHEW HUGGINS,**
Respondents.

From the Circuit Court of Harrison County, West Virginia
Civil Action No. 10-C-176-1

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**No. 12-0210**

**NATIONWIDE MUTUAL INSURANCE COMPANY,**  
*Petitioner,*

v.

**CARMELLA J. FARIS and ROBERT FARIS,**  
*Respondents*

From the Circuit Court of Harrison County, West Virginia  
Civil Action No. 10-C-176-1

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**CERTIFICATE OF SERVICE**

I, Marvin W. Masters, do hereby certify that on the 31st day of August, 2012, I served the foregoing “*Amicus Curiae* Brief of the West Virginia Association for Justice in Support of Respondents” upon the below listed counsel of record by depositing a true copy thereof in the United States Mail, postage prepaid, in envelopes addressed to the following:

David J. Romano, Esquire  
Romano Law Office  
363 Washington Avenue  
Clarksburg, WV 26301  
Counsel for Matthew Huggins, Carmella J. Faris and Robert Faris

Tammy R. Harvey, Esquire  
Flaherty Sensabaugh & Bonasso, PLLC  
200 Capitol Street  
Post Office Box 3843  
Charleston, WV 25338-3843  
Counsel for Nationwide Mutual Insurance Company

Denise D. Pentino, Esquire  
Dinsmore & Shohl LLP  
2100 Market Street  
Wheeling, WV 26003-3828  
Counsel for State Farm Mutual Automobile Ins. Co.

Laura A. Foggan, Esquire  
Wiley Rein LLP  
1776 K Street NW  
Washington DC 20006  
Counsel for State Farm Mutual Automobile Ins. Company

Charles S. Piccirillo, Esquire  
Shaffer & Shaffer, PLLC  
350 State Street  
Post Office Box 38  
Madison, WV 25130  
Counsel for State Farm Mutual Automobile Ins. Company

April J. Wheeler, Esquire  
Nationwide Trial Division  
53 Fourteenth Street, Suite 602  
Wheeling WV 26003  
Counsel for Woodward Video, LLC and Thomas Shuman

Michelle Winiesdorffer-Schirripa, Esquire  
Nationwide Trial Division  
53 Fourteenth Street, Suite 602  
Wheeling WV 26003  
Counsel for Linda Harding

Allison S. McClure, Esquire  
McNeer, Highland, McMunn & Varner  
BB&T Bank Building  
Post Office Drawer 2040  
Clarksburg WV 26302-2040  
Counsel for Farmers & Mechanics Fire & Casualty Insurance, Inc.

Brian D. Morrison, Esquire  
Bailey & Wyant, PLLC  
500 Virginia Street, Suite 600  
Post Office Box 3710  
Charleston, WV 25337  
Counsel for Defense Trial Counsel of West Virginia

D.C. Offutt, Jr., Esquire  
Matthew Mains, Esquire  
Offutt Nord Burchett, PLLC  
949 Third Avenue, Suite 300  
Post Office Box 2868  
Huntington, WV 25728  
Counsel for West Virginia Mutual Insurance Company

David K. Hendrickson, Esquire  
R. Scott Long, Esquire  
Barbara A. Samples, Esquire  
Hendrickson & Long, PLLC  
214 Capitol Street  
Charleston, WV 25301  
Counsel for National Insurance Crime Bureau and Coalition Against Insurance Fraud

Ancil G. Ramey, Esquire  
Steptoe & Johnson PLLC  
Post Office Box 2195  
Huntington, WV 25722-2195  
Counsel for American Tort Reform Association

Mark A. Behrens, Esquire  
Cary Silverman, Esquire  
Shook, Hardy & Bacon, L.L.P.  
1155 F Street, NW, Suite 200  
Washington, DC 20004  
Counsel for American Tort Reform Association

James D. Lamp, Esquire  
Matthew J. Perry, Esquire  
Lamp, O'Dell, Bartram, Levy, Trautwein & Perry, PLLC  
Post Office Box 2488  
Huntington, WV 25725-2488  
Counsel for WV Insurance Federation, American Insurance  
Association and National Association of Mutual Insurance Companies

Corey L. Palumbo, Esquire  
Thomas Hancock, Esquire  
Bowles Rice McDavid Graff & Love, LLP  
600 Quarrier Street  
Post Office Box 1386  
Charleston, WV 25325-1386  
Counsel for Brickstreet Mutual Insurance Company

Andrew R. Pauley, Esquire  
Victor A. Mullins, Esquire  
Offices of the West Virginia Insurance Commissioner  
1124 Smith Street  
Post Office Box 50540  
Charleston, WV 25305-0540  
Counsel for West Virginia Insurance Commissioner

Donald L. Kopp, II, Clerk  
Circuit Court of Harrison County  
301 West Main Street  
Clarksburg, WV 26301

The Honorable John Lewis Marks, Jr.  
Circuit Court of Harrison County  
Harrison County Courthouse  
301 West Main Street  
Clarksburg, WV 26301

  
Marvin W. Masters  
West Virginia State Bar No. 2359