35700

No. 101301

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINA
At Charleston

THERESA COLEMAN, as Administratrix
of the Estate of Sara Bryanne Coleman, deceased

Petitioner - Plaintiff

v.

PATTI HACKNEY, CNM, RN,
MITCHELL NUTT, M.D. and
THE HONORABLE DAVID PANCAKE,
Judge of the Circuit Court of Cabell County, West Virginia
Respondents - Defendants

From the Circuit Court of
Cabell County, West Virginia
Civil Action No. 06-C-589

PETITION FOR WRIT OF PROHIBITION

J. Franklin Long, Esq. (# 2237)
727 Bland Street
Bluefield, WV 24701
Telephone: (304) 327-5544
Facsimile: (304) 325-8854

Dwight J. Staples, Esq. (# 3566)
Gail Henderson-Staples, Esq. (#1676)
711 Fifth Avenue
Huntington, WV 25701
Telephone: (304) 523-5732
Facsimile: (304) 523-5169

Counsel for the Petitioner - Plaintiff,
Theresa Coleman, As Administratrix
of the Estate of Sara Bryanne Coleman

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
AT CHARLESTON

THERESA COLEMAN,
Administratrix of the
Estate of Sara Bryanne Coleman,

Petitioner-Plaintiff,

v. Case Number _____

HONORABLE DAVID M. PANCAKE, CIRCUIT JUDGE OF THE CIRCUIT COURT OF CABELL COUNTY, PATTI HACKNEY, CMN, RN, and MITCHELL NUTT, M.D.,

Respondents-Defendants.

BRIEF IN SUPPORT OF WRIT OF PROHIBITION

I.

INTRODUCTION

Theresa Coleman, as Administratrix of the Estate of Sara Byranne Coleman, the plaintiff below and the petitioner herein ("Mrs. Coleman"), has petitioned this Court to issue a rule to show cause why it should not issue a writ of prohibition, and then to issue a writ of prohibition against respondent The Honorable David M. Pancake, Judge of the Circuit Court of Cabell County ("the trial court" or "the court below"), so as to prevent the trial court from enforcing a Protective Order limiting the questions Mrs. Coleman's counsel is to be allowed

to pose to defendants' expert, Richard Neal Mitchell, Ph.D., M.D., during the plaintiff's deposition of Dr. Mitchell. Mrs. Coleman files this Brief in support of her Petition seeking her Writ of Prohibition.

II.

FACTUAL BACKGROUND

A. Medical Malpractice Case

This is a medical malpractice case resulting from when eighteen year old Sara Bryanne Coleman who had a known personal history of obesity and smoking and a known family history of blood clots, pulmonary embolism and deep vein thrombosis was prescribed oral contraceptives on April 8, 2004 to control symptoms of irregular menses and dysfunctional uterine bleeding, with dysmenorrhea. It was well known in the medical community in 2004 that oral contraceptives increase the probability of blood clots, pulmonary embolism and deep vein thrombosis. It is uncontroverted that Sara Bryanne Coleman died from a blood clot on August 16, 2004, less than five months after being prescribed and taking oral contraceptives.

B. The Plaintiff Contends the Defendants Were Negligent

The plaintiff contends that the defendants were negligent when the decedent was given oral contraceptives that caused a fatal blood clot, which resulted in the unnecessary death of an innocent eighteen year old, who had just been admitted with a good academic record, as a Freshman, at Marshall University.

The plaintiff asserts that genetics play a significant role in the development of blood clots, pulmonary embolism and deep vein thrombosis. Knowing her personal medical history and her family medical history, the defendants fell below the accepted standard of care when they made oral contraceptives available to Sara Bryanne Coleman. The defendants should have used an alternate treatment for the medical condition of Sara Bryanne Coleman, who was not sexually active.

C. Defendants Contend That A Fall Off A Trampoline Caused The Decedent To Die

The defendants contend that Sara Bryanne Coleman fell on a trampoline two to three days before her death. This fall allegedly caused the creation of the fatal blood clot that killed the decedent.

The Chief State Medical Examiner, Dr. James Kaplan, who performed the autopsy on Sara Bryanne Coleman has given a deposition opinion that the Sara Bryanne Coleman fatal blood clot was not caused by the trauma of a fall. There is no evidence describing the alleged trampoline; no evidence as to where the alleged fall occurred; no evidence as to how the alleged fall occurred; no evidence of trauma on the outside or the inside of the decedent's body after the alleged fall; and there is no witness that saw the alleged fall or has first-hand knowledge of the alleged fall. The defendants rely solely on a statement made in the medical records after the death of Sara Bryanne Coleman that there was a trampoline fall.

III.
SEQUENCE OF DISCLOSURE AND DEPOSITION EVENTS

The following are a sequence of significant events concerning the plaintiff's Motion for a Writ of Prohibition.

A. In a second Scheduling Order filed by this Court on March 14, 2008, a trial was set for April 6, 2009. The Plaintiff was to identify her experts by June 30, 2008 and the defendants were to identify their experts by July 30, 2008.

B. In the Third Scheduling Order entered during October, 2009, the Court set a new trial date of August 9, 2009 and the Court "closed" the date for the plaintiff to identify additional experts and the Court "closed" the date for the defendants to identify new experts.

C. The defendants identified a new expert witness, Richard Mitchell, M.D., Ph.D. by service on September 7, 2010.

D. The trial in this wrongful death medical malpractice case was continued to October 19, 2010 by the Court to permit the defendants to obtain the service of another expert after the defendants' expert, Dr. Colin Bloor became ill. The Court refused to keep the August 9, 2010 trial date and permit the deposition of Dr. Bloor to be read to the jury. The Court placed no deadlines on the defendants for the disclosure of their additional experts. The defendants gave the plaintiff one day at the end of September (plaintiff had a conflict) and other dates in October to discover a new witness and be prepared for an October 19, 2010 trial.

E. On September 22, 2010 the plaintiff served a Notice to Take the Deposition of Dr. Richard Mitchell in Boston, Massachusetts on October 5, 2010.

F. On September 24, 2010, the defendants served an Objection and Motion for Protective Order on Behalf of the Defendants, Patti Hackney, CNM and Mitchell Nutt, M.D. in Response to Plaintiff's Notice to Take the Deposition of Dr. Richard Mitchell.

G. On September 27, 2010, the plaintiff filed her Opposition to Defendants' Objection and Motion for Protective Order on Behalf of the Defendants, Patti Hackney, CNM and Mitchell Nutt, M.D. in Response to Plaintiff's Notice to Take the Deposition of Dr. Richard Mitchell.

H. On September 24, 2010, the defendants served:

1. A Notice of Hearing on Defendants' previously filed Motion to Strike and to Exclude Portions of Plaintiff's Attempted Cross Examination of David Ayers, M.D. and Motion to Exclude Improper Attempted Use of Discovery Depositions at Trial; and

2. A Notice of Hearing and Objection and Motion for Protective Order on Behalf of the Defendants, Patti Hackney, CNM and Mitchell Nutt, M.D. in Response to Plaintiff's Notice to Take the Deposition of Dr. Richard Mitchell.

I. The defendants unilaterally scheduled a hearing date with the Court and set a hearing on two of the defendants' Motions for October 1, 2010, without consulting plaintiff's counsel. Plaintiff's counsel, J. Franklin Long who was handling these matters had made a commitment to be at a Continuing Legal Education Seminar in Columbia, South Carolina on October 1, 2010.

J. Both opposition responses to these two Motions were made by J. Franklin Long and were to be defended and argued by J. Franklin Long. Mr. Long informed the Court that he would be out of State on October 1, 2010. Mr. Long wrote a letter and asked

the Court to allow him to participate in the hearing on the Motion for a Protective Order by telephone. The Court did not respond. Mr. Long's legal assistant, Susan Dodson called the Court's secretary on this matter and was told that the Court would not permit Mr. Long to participate in the hearing for Protective Order by telephone. Realizing that the deposition of Dr. Mitchell was set for October 5, 2010 and the trial of this case is scheduled for October 19, 2010, Mr. Long asked co-counsel, Dwight Staples, Esquire to attend this October 1, 2010 hearing on behalf of the plaintiff.

K. On October 1, 2010 the Court granted the defendants' Motion for Protective Order and restricted the plaintiff from questioning Dr. Richard Mitchell concerning certain matters, including the standard of care. The Court ruled from the bench that the plaintiff could not question Dr. Mitchell about estrogen and oral contraceptives, which was not requested by the defendants' in their Motion.

L. Additionally, the Court ruled in the defendants favor on the defendants' Motion to Strike and to Exclude Portions of Plaintiff's Attempted Cross-Examination of David Ayers, M.D. and Motion to Exclude Improper Attempted Use of Discovery Depositions at Trial. The Court found that David Ayers, who was qualified as a medical doctor, who testified via a video trial deposition concerning medical treatment he provided to Sara Bryanne Coleman was a lay witness and the plaintiff could not cross-examine Dr. Ayers, as an expert witness.

M. The Court was aware that Mr. Long was conflicted and unable to participate in the October 1, 2010 hearing; that Mr. Staples was present for the Protective Order

hearing, only; and that Mr. Staples was not present to defend the defendants' Motion to Strike and to Exclude Portions of Plaintiff's Attempted Cross Examination of David Ayers, M.D. and Motion to Exclude Improper Attempted Use of Discovery Depositions at Trial. Yet, the Court ruled on this Motion, anyway, without providing time for the plaintiff to properly prepare.

N. After the adverse ruling on October 1, 2010, the plaintiff informed the defendants on that date that the scheduled October 5, 2010 deposition of Dr. Richard Mitchell in Boston, Massachusetts would not take place.

O. Dr. Richard Mitchell is the defendants' most significant witness. He is expected to testify that the plaintiff died from a trampoline fall.

P. At least four other expert witnesses are relying upon the opinion of Dr. Mitchell.

Q. The plaintiff needs immediate relief to permit her to adequately discover Dr. Richard Mitchell and the plaintiff needs additional time to prepare for trial with the recent disclosure of Dr. Mitchell.

IV.

PROCEDURAL BACKGROUND

A. Supplemental Expert Disclosure

In their September 7, 2010 Supplemental Expert Disclosure ("The Supplemental Disclosure", please see Exhibit Number 1) the defendants identified Dr. Mitchell as a potential witness. The defendants stated that "Dr. Mitchell ... will

be made available for a discovery deposition in Boston, Mass., and will appear at trial to testify in this matter" (Supplemental Disclosure p. 1). Defendants then outlined what they purported to be Dr. Mitchell's findings with respect to the case (*Id.* pp. 3-4).

B. Notice to Take Deposition

On September 24, 2010, Mrs. Coleman served a Notice to Take the Deposition of Dr. Richard Mitchell ("the Notice"). Please see Exhibit Number 2. In that submission, Mrs. Coleman outlined the matters into which she expected her counsel to delve during that deposition (Notice p. 2-4). The deposition was scheduled for October 5, 2010 (*Id.* p. 1), but had to be postponed because of the lower Court's restriction.

C. Defendants Ask For A Protective Order To Limit The Scope Of The Examination Of Their New Expert

Defendants responded by filing an Objection and Motion for Protective Order on Behalf of the Defendants, Patti Hackney, CNM and Mitchell Nutt, M.D., in Response to Plaintiff's Notice to Take the Deposition of Dr. Richard Mitchell ("the Motion"). Please see Exhibit Number 3. In that Motion, defendants sought a protective order "prohibiting Plaintiff from inquiring at deposition as to subjects beyond the scope of expertise of defendants' cardiovascular pathologist, Dr. Richard Mitchell" (Motion p. 1). Defendants' theory is that "Dr. Mitchell is not being offered for standard of care opinions [but rather] is a causation witness" (Motion p. 3). The

defendants allege that Mrs. Coleman is seeking to go into matters beyond the purpose for which defendants have engaged Dr. Mitchell. Defendants allege that

> To inquire as to such materials is irrelevant, a waste of time, not admissible and unrelated to the pathology opinions Dr. Mitchell has and will offer at trial. WVRE 401, 402, 403, 701.

(Motion p. 4).

D. Defendants Have Limited The Boundary Of Questioning

The effect is that the defendants have limited the boundaries to which inquiries can be made by the plaintiff to the defendants' designated expert by declaring that their expert is designated to provide opinions on a limited basis and no inquiries can be made by plaintiff's counsel beyond the defendants' self-imposed limitation. The lower Court agreed with the defendants in its ruling on October 1, 2010.

E. Plaintiff Opposes Protective Order

Mrs. Coleman responded to the Motion with a Plaintiff's Opposition to Defendants' Objection and Motion for Protective Order on Behalf of the Defendants, Patti Hackney, CNM and Mitchell Nutt, M.D., in Response to Plaintiff's Notice to Take the Deposition of Dr. Richard Mitchell ("the Response"). Please see Exhibit Number 4. Notwithstanding, the trial judge sustained the Motion and is in the process of issuing a Protective Order.

V.

URGENT NEED FOR IMMEDIATE RELIEF

Because a paramount need to depose the defendants' most significant witness, Dr. Richard Mitchell in the fashion contemplated by W.Va.R.Civ.P. 26, 30, and since time is of

the essence with respect to any deposition of Dr. Mitchell, Mrs. Coleman seeks (a) a Writ of Prohibition prohibiting the trial court from enforcing its Protective Order; and by separate Motion (b) a stay of the trial court proceedings until the Court can adjudicate Mrs. Coleman's Petition.

VI.

TRANSCRIPT AND FINAL ORDER

The plaintiff has requested a transcript from the October 1, 2010 hearing. The plaintiff was told that it will be some time before a transcript is available. No Final Order has been entered for this October 1, 2010 hearing.

VII.

ARGUMENT

MRS. COLEMAN IS ENTITLED TO A WRIT OF PROHIBITION AGAINST THE TRIAL COURT'S ERRONEOUS GRANT OF A PROTECTIVE ORDER

A. Writ of Prohibition Available for Abuse of Discovery

A writ of prohibition is available to correct a clear legal error resulting from a trial Court's substantial abuse of its discretion in regards to discovery. *Const. Art. 8, §3; Code 53-1-1 et seq. State ex rel. U.S. Fidelity and Guar. Co. v. Canady, 1995, 460 S.E.2d 677, 194 W.Va. 431; State ex rel. Westbrook Health Services, Inc. v. Hill, 2001, 550 S.E.2s 646, 209 W.Va. 668; State ex rel. Kaufman v. Zakaib, 2000, 335 S.E.2d 727, 207 W.Va. 662; State ex rel. Means v. King, 1999, 520 S.E.2d 875, 205 W.Va. 708; State ex rel. Allstate Ins. Co. v. Gaughan, 1998, 508 S.E.2d 75, 203 W.Va. 358; State ex rel. West Virginia Fire &*

Cas. Co. v. Karl, 1998, 505 S.E.2d 210, 202 W.Va. 471; State ex rel. Ward v. Hill, 1997, 489 S.E.2d 24, 200 W.Va. 270; State ex rel. Paige v. Canady, 1996, 475 S.E.2d 154, 197 W.Va. 154; State ex rel. Arrow Concrete Co. v. Hill, 1995 460 S.E.2d 54, 194 W.Va. 239; State ex rel. Erickson v. Hill, 1994, 445 S.E.2d 503, 191 W.Va. 320; State ex rel. McCormick v. Zakaib, 1993, 430 S.E.2d 316, 189 W.Va. 258; State Farm Mut. Auto. Ins. Co. v. Stephens, 1992, 425 S.E.2d 577, 188 W. Va. 622; State ex rel. Wright v. Stucky 1999, 517 S.E.2d 36, 205 W.Va. 171; State ex rel. Medical Assurance of West Virginia v. Recht, 2008, 583 S.E.2d 80, 213 W.Va. 457; State ex rel. Pritt v. Vickers, 2003, 588 S.E.2d 210, 214 W.Va. 221.

Although most discovery orders are interlocutory and reviewable only after final judgment, in certain circumstances involving a purely legal issue, a clear cut error, inadequate alternate remedies, and judicial economy issues, Supreme Court of Appeals may issue writ of prohibition when circuit court abuses its discretion with regard to discovery. *State ex rel. Ward v. Hill, 1997, 489 S.E.2d 24, 200 W.Va. 270.*

Clearly, this Court has authority to issue a writ of prohibition when there is a substantial abuse of discretion.

B. Jurisdiction

It has long been clear that "this Court has original jurisdiction over matters of prohibition . . . by virtue of Section 3 of Article VIII of the West Virginia Constitution and W.Va.Code 51-1-3 (1923)." *State ex rel. Rusen v. Hill,* 193 W.Va. 133, 454 S.E.2d 427, 432 (1994)(footnotes omitted). The test which the Court traditionally applies in deciding whether to grant a rule to show cause for a writ of prohibition was recently restated in *State*

ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, ___ W.Va. ___, 697 S.E.2d 139,145-46 (2010), as follows:

> This Court has long maintained that "[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). In cases such as here where Petitioners maintain that a circuit court exceeded its legitimate powers in addressing a matter within its jurisdiction, we consider five factors in determining whether to entertain and issue the writ of prohibition. Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). These general guidelines include:
>
> > (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

The Court in *Sanders* then issued the rule and hence the writ of prohibition. Mrs. Coleman urges the Court to find that the principles embodied in the extensive body of law cited in *Sanders*, when applied to the facts of this dispute, clearly require the granting of a rule in this case as well.

C. Five Requirements To Consider A Writ Of Prohibition

1. No Other Adequate Means

The Plaintiff has no other adequate means to address the abuse of discretion used by the lower Court other than a writ of prohibition. Procedurally, there is no direct appeal to

overturn the Protective Order prior to the taking of the deposition of Dr. Richard Mitchell or prior to incurring the huge expense in presenting a medical malpractice case.

2. The Plaintiff will be Damaged and Prejudiced

The Plaintiff will be damaged and prejudiced in a way that is not correctable on appeal if she cannot discover the testimony of Dr. Richard Mitchell as contemplated under Rule 26(b)(1) of the West Virginia Rules of Civil Procedure.

Dr. Mitchell is expected to testify that the decedent died as a result of a trampoline fall. In their Supplemental Disclosure (Exhibit Number 1), the defendants stated that their experts, Dr. Stephen Thomas, Dr. Phillip Comp, Dr. Michael Paidas and Dr. Kevin Yingling "are of the opinion that Dr. Mitchell's independent review is consistent with and supportive of the previous opinions they have offered."

The plaintiff will be damaged and prejudiced if she cannot fully inquire as to how Dr. Mitchell's opinions relate to the opinions of Drs. Stephen Thomas, Phillip Comp, Michael Paidas and Kevin Yingling.

Additionally, it should be noted that it is extremely expensive to try a medical malpractice case. The plaintiff would have to pay the cost for the first trial and pay an unnecessary cost for a second trial, if the lower Court is reversed on appeal. The extra cost can be avoided, if this Court decided the scope of the Rule 26(b)(1) scope prior to the first trial.

3. Lower Court is Erroneous

The ruling of the lower Court is clearly erroneous as a matter of law. Rule 26(b)(1) of the West Virginia Rules of Civil Procedure clearly permits the plaintiff to discover any matter, not privileged, which is relevant to the subject matter involved in the pending action. Additionally, the plaintiff can inquire to obtain information if it appears reasonably calculated to lead to the discovery of admissible evidence.

The Protective Order prevents the plaintiff from discovering matters not privileged which are relevant to the subject matter. The Protective Order prevents the plaintiff from discovering matters that appear reasonably calculated to lead to admissible evidence.

The plaintiff has the right to ask Dr. Mitchell who is a medical doctor about matters commonly known by medical doctors. The plaintiff was restricted by the Court's October 1, 2010 ruling. She cannot ask Dr. Mitchell questions pertaining to estrogen, oral contraceptives, the standards of care and other matters. Clearly, the broadness of Rule 26(b)(1) permits the plaintiff to inquire about these relevant matters.

4. Lower Court Has Repeated Errors In This Case Which Manifests A Disregard For Procedure and Substantive Law

(a) The Court Erroneously Granted Summary Judgment

The plaintiff sued Dr. Allan Chamberlain in this case. This suit was based upon the fact that the plaintiff's obstetric-gynecologist experts, Dr. Steven Eisinger and Dr. Jeffrey Koren gave opinions that Dr. Chamberlain was negligent when he fell below the accepted standard of care during the medical treatment of Sara Bryanne Coleman.

The lower Court ignored the Summary Judgment standard. The Court in this case ignored the opinions of Dr. Eisinger and Dr. Koren. The Court usurped the jury's role and

granted Summary Judgment in favor of the defendant, Dr. Allan Chamberlain and ignored that there was a genuine issue of material fact as to whether Dr. Chamberlain was, or was not, negligent.

(b) The Court Erroneously Ruled That The Plaintiff Cannot Present Relevant Evidence To The Jury

The plaintiff has alleged from the beginning of this case that the defendants removed a medical record from the file of Sara Bryanne Coleman subsequent to her August 16, 2004 death. In Theresa Coleman's deposition, she testified in part as follows:

> "Q. Now, do you contend that there is a piece of your daughter's medical records missing from United Health Professionals?
>
> A. Yes.
>
> Q. Tell me what you believe is missing.
>
> A. The family medical history sheet.
>
> Q. How do you know one existed?
>
> A. I helped fill it out."
>
> "Q. With all respect, then, ma'am, how do you believe one existed?
>
> A. Because I filled it out with my daughter."
>
> "A. I had just had my pulmonary embolism about a month before. I was scared. I had almost died. I put on the form, "Family blood history of clotting. DVTs, pulmonary emboli."
>
> Q. Are those the specific words you used?
>
> A. To my best knowledge, recollection, yes."

A. We were given some papers to fill out, which included the family medical history form."

The lower Court decided that the plaintiff will not be permitted to present any evidence concerning the Sara Bryanne Coleman removed medical record.

Clearly, the missing medical record is relevant under Rules 401 and 403 of the West Virginia Rules of Evidence. This evidence has a "tendency to make the existing of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The lower Court usurped the jury role of the jury and decided this factual question concerning the decedent's missing medical record.

The Court has ruled that the plaintiff will not be permitted to produce any evidence concerning the missing medical record of Sara Bryanne Coleman during the trial of this case.

This is two examples of errors where the Court has manifested a disregard for the procedure and substantive law. There are other instances in which the Court has disregarded the procedure and substantive law. Each time there was a disregard for the proper procedure or a disregard for the proper law by the lower Court, the defendants benefitted.

5. New or Important Problems And Issues Of Law Of First Impression

This case does not raise new problems. This case does raise important problems. It is important for counsel to be able to make inquiries where he or she can fully discover the opinions of an opposing expert, Without being able to fully discover, there will be the potential of significant evidence not being presented to the jury. Trial by ambush will be

more likely to take place. Insurers will be less likely to offer reasonable settlement, if they can restrict what evidence can be discovered.

There are no known issues of first impressions in this case.

D. The Protective Order is Erroneous on Multiple Grounds and Should be Prohibited

1. Discovery is Broad and Liberal

As the Court is aware, the rules governing discovery provide for wide-ranging fact and evidence gathering:

> *"W. Va. R. Civ. P.* 26(b)(1) provides, in relevant part:
>
> "(b) *Discovery scope and limits.*--Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: "(1) In general.--Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It 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."

State ex rel. United Hospital Center, Inc. v. Bedell, 199 W.Va. 316, 484 S.E.2d 199, 208-09 (1997)(Petition for writ of prohibition denied). In short, pretrial discovery is meant to be a liberal and useful component of the litigation process:

> The Rules of Civil Procedure generally provide for broad discovery to ferret out evidence which is in some degree relevant to the contested issue. [5] This broad discovery policy is incorporated in Rule 30(d), which limits only *unreasonable* annoyance, embarrassment, or oppression during a deposition. Federal cases follow this view under their similar rules.

Policarpio v. Kaufman, 183 W.Va. 258, 395 S.E.2d 502, 505 (1990)(petition for writ of prohibition denied). As the Court noted in *Policarpio*, federal courts follow the same philosophy. *See, e.g., Miller v. Pruneda*, 236 F.R.D. 277, 280 (N.D.W.Va. 2004)("'the discovery rules are given a broad and liberal treatment"); *Fisher v. Baltimore Life Insurance Co.*, 235 F.R.D. 617, 622 (N.D.W.Va. 2006))("'the discovery rules are given a broad and liberal treatment").

2. Defendants Attempt To Scale Down The Scope Of Discovery

The Defendants' attempt to scale down to their taste the scope of which matters Dr. Mitchell can be questioned about by the plaintiff is contrary to Rule 26(b)(1). In particular, defendant's objection that the material which Mrs. Coleman seeks to elicit is "not admissible" (Motion p. 4) and it is irrelevant. Discovery depositions are not limited to the exploration of admissible evidence, so long as '"the information sought appears reasonably calculated to lead to the discovery of admissible evidence.'" *State ex rel. United Hospital Center, Inc. v. Bedell, supra,* 484 S.E.2d at 208-09.

3. Trial Court Has Allowed The Defendants To Define Relevancy Of Their Witnesses' Testimony

Here, the trial court has wrongly allowed defendants to define for themselves the relevancy of their own witness' potential testimony. The defendants are attempting to exercise impermissible control over their experts' deposition. The defendants have been allowed to restrict and limit the questions to be asked by the plaintiff to the defendants' expert. The control that the court has given the defendants in restricting the plaintiff's deposition discovery is in conflict with the letter and spirit of W.Va.Civ. P. 26(b)(1) in

particular and the Rules of Civil Procedure in general. If this practice were to become widespread, with opposing counsel deciding what can be discovered in a deposition, discovery depositions would become essentially useless in many cases. The goals inherent in the rules governing discovery depositions would be thwarted if defendants were allowed to act as the man behind the curtain, orchestrating in advance the questions its opponents could ask of that witness.

4. Limited Inquiries Limit The Ability To Fully Cross-Examine

One of the primary reasons for deposing an opponent's expert—particularly a medical expert—is to develop avenues of inquiry for cross-examination—both of the expert himself and of other witnesses a defendant might call to the stand. To limit a party to a rigid framework of inquiry that is designed by his opponent renders that process less useful than the rules of discovery contemplate. Of course, that is precisely why defendants sought such limitations. Such tactics are the warp and woof of some litigation practitioners. The trial judge, however, should not have indulged defendants in their strategy. Because he did, the issuance of a writ of prohibition is appropriate. *See generally State v. Brooks v. Zakaib*, 216 W.Va. 600, 609 S.E.2d 861, 868-70 (2004).

5. Protective Order That Wrongfully Restrict Are Prohibited

As this Court has held on numerous occasions, *see, e.g., State ex rel. Paige v. Canady*, 197 W.Va. 154, 475 S.E.2d 154, 160 (1996), protective orders that seek wrongfully to restrict legitimate discovery are subject to being prohibited. This Court has indicated:

> In this case, the protective order stated that "the Court cannot completely rule out the possibility of relevant evidence from Attorney

> Hamstead based on what is now before it . . . ." Issuance of a broad protective order, based upon the assertion of a blanket privilege against discovery, without scrutiny of each proposed area of inquiry and without giving full consideration to a more narrowly drawn order constitutes abuse of discretion under West Virginia Rule of Civil Procedure 26(c). The protective order was plain error in this case because the order ignored the fact finding function of the proposed deposition as well as its importance in the discovery process in this matter.

Bennett v. Warner, 179 W.Va. 742, 372 S.E.2d 920, 927-28 (1988).

This Court added in a footnote, "[a]s a result of the overly-broad protective order, it was impossible for the trial court to determine what, if any, relevant evidence Hamstead could offer, and in what form such relevant evidence might be introduced." *Id.*, 372 S.E.2d at 928 n.10. This has occurred in the Protective Order in our case. The testimony that Dr. Mitchell might have given absent the Protective Order will, unless a writ of prohibition be issued, never be known.

6. Protective Order In This Case Does Not Pass Muster Under *Bennett*

Given that Mrs. Coleman's goal at all times is to elicit testimony that will ultimately result in admissible evidence at trial, the Protective Order entered by the trial judge in this case simply cannot pass muster under *Bennett* and like cases. For that reason, alone, a Writ should issue.

7. Defendants Fail To Show Good Cause For A Protective Order

The Protective Order in issue is particularly inappropriate because defendants have failed to show the good cause required to obtain it. A recent decision in this Court explained the importance of such a showing.

> In seeking prohibition, State Farm argues that the circuit court exceeded the scope of its authority by prohibiting electronic storage of Mrs. Blank's medical records because Mrs. Blank failed to show good cause for the protective order. Although trial courts generally have broad discretion in issuing protective orders, West Virginia Rule of Civil Procedure 26(c):
>
> > requires that good cause be shown for a protective order. This puts the burden on the party seeking relief to show some plainly adequate reason therefor. The courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish good cause.
>
> *State ex rel. Shroades v. Henry*, 187 W. Va. 723, 728, 421 S.E.2d 264, 269 (1992) (*quoting* 8 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2035 at 264-65 (1970)) (emphasis added).
>
> > Although Mrs. Blank contends that she needs a protective order to ensure that her medical information will remain private, she fails to present the "particular and specific demonstration of fact" required under Rule 26(c) to establish good cause for the order. *See Shroades*, 187 W. Va. at 728, 421 S.E.2d at 269.

State ex rel. State Farm Mutual Automobile Insurance Co. v. Bedell, 697 S.E.2d 730, 2010 W.Va. Lexis 79 at *25 to *26 (W.Va., filed June 16, 2010).

The failures outlined in Bedell are identical to those of the defendants in this case. The most defendants can offer in support of their protective order is that the questions to be asked by the plaintiff might potentially go beyond the use they intend to make of Dr. Mitchell (Motion pp. 3-4). Mrs. Coleman submits that this sort of self-interested demonstration is far from the "'particular and specific demonstration of fact' required under Rule 26(c) to establish good cause for the order." *State ex rel. State Farm Mutual Automobile Insurance Co. v. Bedell, supra,* 697 S.E.2d 730, 2010 W.Va. Lexis 79 at *26.

8. Defendants' Arguments Are Not Related To Particular And

Specific Facts

Defendants, go through the motions of reciting the required litany of reasons why a protective order should issue. *See* Motion p. 4. But because this litany has no connection to the required particularized and specific demonstration of fact, defendants' argument is revealed to be a mere stereotyped and conclusory exercise. This inadequate recitation of general principals is insufficient to support the issuance of a protective order in this case. *See AT & T Communications of West Virginia, Inc. v. Public Service Commission*, 188 W.Va. 250, 42 S.E.2d 859, (1992). A writ of prohibition should issue to prohibit this abuse of the trial court's power.

VIII.

DIFFERENT STANDARDS FOR THE PARTIES

The Court has been very liberal with its discovery ruling for the defendants and very conservative with its rulings for the plaintiff. For example, the Court permitted the defendants to take a third deposition of one of the plaintiff's experts, Dr. Alexander Duncan in Atlanta, Georgia. It was ordered that the defendants could ask any question of Dr. Duncan, in the third deposition, if the same question had not been asked by the defendants in the Duncan first deposition or the Duncan second deposition.

In contrast, the Court ruled on October 1, 2010 that the plaintiff will be restricted in questioning Dr. Richard Mitchell, even though Rule 26(b)(1) of the West Virginia Rules of Civil Procedure indicates that discovery is broad.

IX.

EXHIBITS

The plaintiff wants to note that because of the fifty page Supreme Court limitation, she is including only the relevant sections in each attached Exhibit.

X.

CONCLUSION

For the reasons set out above, plaintiff-petitioner Theresa Coleman respectfully asks the Court to grant a rule to show cause in prohibition and to issue a writ of prohibition so as to require the trial court to vacate the Protective Order issued in this case.

Respectfully submitted,

THERESA COLEMAN, Administratrix of the
Estate of Sara Bryanne Coleman,
By Counsel

J. Franklin Long
Co-Counsel for the Plaintiff
727 Bland Street
Bluefield, West Virginia 24701
WV Bar ID No. 2237

Gail Henderson-Staples
Co-Counsel for the Plaintiff
Henderson, Henderson and Staples, LC
711 ½ Fifth Avenue
Huntington, West Virginia 25701
WV Bar ID No. 3566

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

THERESA COLEMAN,
Administratrix of the
Estate of Sara Bryanne Coleman,

Petitioner,

v.

PATTI HACKNEY, CNM, RN.
MITCHELL NUTT, M.D.
HONORABLE DAVID PANCAKE,

Respondents.

CERTIFICATE OF SERVICE

I, J. Franklin Long, counsel for plaintiff, Theresa Coleman, Administratrix of the Estate of Sara Bryanne Coleman, hereby certify that I served a copy of the foregoing "**PETITION FOR WRIT OF PROHIBITION**" by hand delivery on this 7th day of October, 2010, upon the following:

Honorable David M. Pancake
Sixth Judicial Circuit Court Judge
750 Fifth Avenue – Suite 215
Huntington, WV 25701
Telephone: (304) 526-8612
Facsimile: (304) 526-8676

Michael Farrell, Esq.
Tamela J. White, Esq.
Allison Carroll, Esq.
Farrell, Farrell & Farrell, PLLC
PO Box 6457
Huntington, WV 25772-6457
Telephone: (304) 522-9100
Facsimile: (304) 522-9162

J. Franklin Long

J. FRANKLIN LONG, ESQ. (#2237)

727 Bland Street
Bluefield, WV 24701
Telephone: (304) 327-5544
Facsimile: (304) 325-8854

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF CABELL, TO-WIT:

Theresa Coleman, being first duly sworn, deposes and says that she is the Administratrix of the Estate of Sara Bryanne Coleman; the petitioner – plaintiff herein; that she has read the Petition for Writ of Prohibition and that she has personal knowledge of the facts alleged therein or, to the extent she does not have personal knowledge, she believes, based upon information made known to her, the same to be true.

Theresa Coleman, Administratrix

THERESA COLEMAN, ADMINISTRATIRX OF
THE ESTATE OF SARA BRYANNE COLEMAN

Taken, subscribed, and sworn to before me this 7th day of October, 2010, by Theresa Coleman, In Her Capacity as Administratrix Of The Estate of Sara Bryanne Coleman.

Vickie Harmon

NOTARY PUBLIC

My Commission Expires: Nov. 28, 2010

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
VICKIE HARMON
2203 - 9th AVENUE
HUNTINGTON, WV 25703
My commission expires November 28, 2010

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE