

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. ~~101417~~ 35738

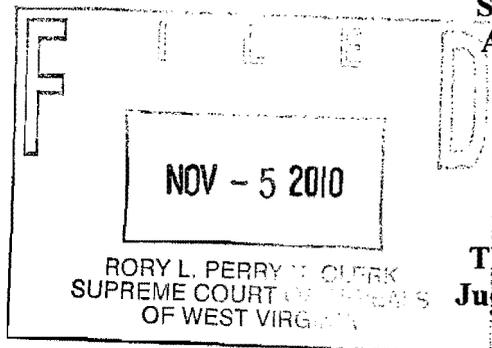
STATE EX REL. STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

THE HONORABLE THOMAS A. BEDELL,
Judge of the Circuit Court of Harrison County,
West Virginia,

Respondent.



Circuit Court of Harrison County
Thomas A. Bedell, Judge
Civil Action No. 09-C-67-2

**AMICUS CURIAE BRIEF SUBMITTED BY THE DEFENSE TRIAL COUNSEL
OF WEST VIRGINIA IN SUPPORT OF PETITIONER**

Todd A. Mount (#6939)
Shaffer & Shaffer, PLLC
330 State Street
Madison, WV 25130
T: 304-369-0511
F: 304-369-5431
tmount@shafferlaw.net
DTCWV Amicus Committee

Lee Murray Hall (#6447)
Jenkins Fenstermaker, PLLC
325 8th Street (25701)
Post Office Box 2688 (25726)
Huntington, West Virginia
T: 304-399-9704
F: 304-523-2347
lmh@jenkinsfenstermaker.com
President, DTCWV

Jeffrey A. Holmstrand (#4893)
Flaherty Sensabaugh & Bonasso, PLLC
1225 Market Street
Wheeling, WV 26003
T. 304-230-6600
F. 304-230-6610
jholmstrand@fsblaw.com
Chair, DTCWV Amicus Committee

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INTRODUCTION

The Defense Trial Counsel of West Virginia (“DTCWV”) files this brief as *amicus curiae* because the protective order at issue unduly restricts the adversary system of justice by unfairly limiting the ability of its members to fully investigate, evaluate and counsel clients regarding the medical issues raised in personal injury litigation in a timely fashion; places untenable restrictions on the interactions of its members with their clients’ insurers; unnecessarily and improperly interferes with its members’ ethical obligations; gives rise to the danger of manipulative litigation conduct; undermines the goal of timely and fair settlement negotiations; and unnecessarily exposes its members to unnecessary potential liability. DTCWV therefore respectfully urges this Court to issue a rule to show cause and, ultimately, to provide the relief sought by petitioner from the Circuit Court’s October 25, 2010 Order.

FACTUAL BACKGROUND

This Court is generally aware of the background of this litigation from its prior decision in *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, ___ W.Va. ___, 697 S.E.2d 730 (2010). The underlying facts are tragic: an automobile accident resulted in the deaths of Lynn Blank and Jeremy Thomas, and injuries to Carla Blank. Mrs. Blank, individually and as personal representative of her late husband’s estate, filed suit for personal and bodily injuries and death against the estate of Thomas. She also sued State Farm Mutual Automobile Insurance Company (“State Farm”), the Blank’s insurance carrier. In this particular case, State Farm insured not only the Blank vehicle, but also issued the liability policy on the Thomas vehicle. State Farm hired defense counsel to represent the Thomas Estate and hired its own separate counsel in relation to the direct

claims against State Farm. Pursuant to *State ex rel. Allstate Ins. Co. v. Karl*, 190 W. Va. 176, 437 S.E.2d 749 (1993), counsel for the Estate of Thomas and counsel for State Farm jointly agreed to cooperate in the defense of this matter.

State Farm's counsel served discovery on the plaintiffs, which sought medical records of the plaintiff and her decedent. Plaintiff's counsel refused to provide the records without the entry of an overly restrictive Protective Order to which neither State Farm nor the Estate of Thomas would agree. On February 11, 2010, the Circuit Court entered the Protective Order sought by Plaintiffs and required defense counsel to certify pursuant to Rule 11 that all medical records and medical information provided in the case had been destroyed by counsel, defense experts and insurer(s) at the conclusion of the litigation, or alternatively that counsel had returned all such information to counsel for the plaintiffs. State Farm sought a writ of prohibition from the circuit court's order and this Court held the order exceeded the Circuit Court's legitimate powers in *State ex rel. State Farm Mut. Ins. Co. v. Bedell*, ___ W. Va. ___, 697 S.E.2d 730 (2010). As a result, on June 16, 2010, this Court granted the writ of prohibition sought by State Farm and prevented enforcement of the February 1, 2010 Order.

After the issuance of the Court's mandate, the case returned to the Circuit Court of Harrison County. On October 25, 2010, about four months after this Court's decision, the Circuit Court entered a new order, identical in all respects to the rejected protective order except deleting a prohibition on electronic storage and extending the date of the "destroy or return" provision applicable to the insurer to the expiration of the time period(s) set forth in *W. Va. Code of State Rules* § 114-15-4.2(b) – a period of approximately 5 to 6 years subsequent to the conclusion of litigation.

STATEMENT OF INTEREST

DTCWV is an organization of over 500 attorneys who engage primarily in the defense of individuals and corporations in civil litigation in West Virginia. DTCWV is an affiliate of the Defense Research Institute, a nationwide organization of over 23,000 attorneys committed to research, innovation, and professionalism in the civil defense bar. Some DTCWV members also on occasion represent plaintiffs in civil litigation. In addition, and as relevant to this Motion, DTCWV's goals include elevating the standards of trial practice within the state of West Virginia, working for elimination of Court congestion and delays in civil litigation in West Virginia, promoting improvement of the administration of justice in West Virginia and increasing the quality of legal services provided to our citizens.

DTCWV is interested in the issue before the Court regarding the enforceability of the Protective Order at issue in this proceeding because it directly affects DTCWV members and their practice of law in West Virginia. As we explain below, orders such as the one at issue here unduly limit the ability of our members to investigate, evaluate and counsel clients regarding the medical issues surrounding personal injury lawsuits without sufficient justification; interfere with our members' duty and obligation to fully inform a client's insurer of medical information for purposes of such insurer's proper evaluation of claims against its insureds; and expose our members to unfair and burdensome adverse litigation tactics. The effect of these types of orders not only hampers the provision of legal services to defendants but also has a chilling and delaying effect on the ability to engage in meaningful settlement negotiations. These effects further contribute to court congestion and delays in litigation.

Such orders also unduly burden our members with duties of records management more significant than those already imposed on attorneys for the proper handling and protection of confidential client information; unduly expose our members to the risk of sanction or other legal action for inadvertent violations by others; and unduly limit attorney records retention for purposes of fee disputes, malpractice considerations, attorney and staff training, and other appropriate and necessary activities.

ARGUMENT

The stated bases for the Circuit Court's decision are not supported by West Virginia law or prior decisions of this Court. As we discuss below, the Order raises four issues that affect DTCWV members. First, personal injury cases necessarily involve medical records and not every case alleging personal injury requires the entry of a protective order such as that entered here. Second, even in cases where some sort of protection is warranted, the order at issue here overreaches because it requires defendants to certify the conduct of carriers over whom they have no control many years following the conclusion of the litigation. Third, the Order prevents our members from satisfying their ethical obligation to communicate with their clients and their clients' insurers. Fourth, the Order slows the discovery process, delays the litigation and prevents a timely and meaningful case evaluation. For all of these reasons, the Court should issue a rule to show cause and ultimately grant the requested writ – as it has already done once in this case – and prohibit the enforcement of the protective order entered here.

1. “Good Cause” Pursuant to Rule 26(c) Does Not Exist In Every Case Which Involves Medical Records

This Court has recognized that Rule 26(c) of the West Virginia Rules of Civil Procedure is similar to its federal counterpart and has cited with approval the following:

The rule [Rule 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. 8 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2035 at 264-65 (1970) (footnotes omitted).

State ex rel. Shroaders v. Henry, 187 W. Va. 723, 421 S.E.2d 264 (1992). Here, the Circuit Court concluded plaintiffs demonstrated a “particular and specific demonstration of fact” as well as good cause for the issuance of a protective order for the following reasons: “medical records are private in nature;” “medical records are protected by privilege between the treating physician or care provider and the patient;” “medical records have the potential to contain facts that are embarrassing to the patient;” and “the law recognizes that the dissemination of medical records must be done with the plaintiff’s consent.” The Court accordingly found that plaintiffs were entitled to a “general protective order” regarding their medical records and medical information.

Medical records are necessary evidence in nearly every bodily injury case that is brought in West Virginia. Attorney’s communication with their clients, their insurers and the defense experts necessarily involves the summary, analysis and dissemination of “medical information.” Accordingly, if the subject Protective Order is approved by this Court under the findings of fact in the present case, similar orders could be sought in every pending and future personal injury case in this State. The problem is that the Order

here is devoid of any particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements. The Circuit Court made no properly supported finding of any danger defense clients, defense counsel, defense experts, or the defendant's insurer would be likely to improperly disseminate the plaintiffs' medical records or medical information in any fashion.

2. The Protective Order Here Requires Our Members to Certify the Actions of Entities Over Whom They Have No Control.

The Protective Order entered by the Circuit Court places our members in an untenable position of vouching for the actions of entities over whom it has no control five years after the conclusion of the litigation. Even though counsel for the Thomas Estate do not represent the insurer and therefore have no authority to bind or control the insurer's actions, the Order requires defense counsel to certify – under threat of Rule 11 and/or contempt sanctions – that the insurer has returned or destroyed all medical records and medical information provided to it during the litigation. Further, and pursuant to this Court's previous decision, an insurer has an obligation to retain the records for the time required by *W. Va. C.S.R. § 114-15-4.2(b)*, which will be at least 5 years. Therefore, defense counsel must certify to actions taken by an insurer some five (5) years after the conclusion of the litigation. As this Court already recognized in *State ex rel. State Farm Mut. Ins. Co. v. Bedell*, -- W. Va. --, 697 S.E.2d 730 (2010), protective orders such as these place underlying defense counsel in a "predicament," as said counsel "is not able to bind [the liability carrier] to any agreements or otherwise assert control over [that carrier]." The inability to comply with such an order prevents counsel from seeking or accepting medical records and, in turn, from properly representing the client.

3. The Protective Order Unduly Intrudes On the Defense Attorney's Ethical Obligations.

A. The Defense Attorney's Ethical Duty To Communicate With The Client and The Client's Insurer is Unduly Impaired By The Order.

West Virginia attorneys have a duty to communicate with clients to reasonably inform them of the status of a matter, promptly respond to requests for information, and to “*explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.*” See, *West Virginia Rules of Professional Conduct*, Rule 1.4 (emphasis added). The Protective Order entered by the Circuit Court improperly hampers members’ ability to communicate with clients and their insurers about medical records, summaries of said records and evaluations based on plaintiffs’ “medical information.” This Court has unequivocally recognized that in representing an insured defendant, defense counsel has a further important duty to facilitate the relationship between the insured and insurer by making a “full and frank consultation between a client and a legal advisor...” *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 371 (W. Va. 1998) (Citing *State ex rel. USF & G v. Canady*, 194 W. Va. at 438, 460 S.E.2d at 684).

The *Gaughan* Court properly recognized that although defense counsel represents the insured rather than the insurance company, significant information, evaluation and advice *must* be communicated to the insurer in the litigation context. Further, “normally, all communications between attorney and client, including conversations on phone calls, are memorialized in writing... An insurance company must have an honest and candid evaluation of a case, possibly including a ‘worst case scenario.’” *Id.*, at 372 (internal citation omitted). The importance of the communication between the insured’s

counsel and the insurance company was ultimately found by this Court to be so significant as to create a *quasi*-attorney client privilege, available to an insurer to protect against discovery of the contents of its claims file subsequent to the initiation of the underlying litigation.

Here, the Protective Order extends the “return or destroy” provision to any documents containing medical information of the plaintiff and requires clients, experts, and the client’s insurer to destroy all documents, including those containing summaries or evaluations which contain medical information. As the defense attorney is not in the position to certify that the client, expert and/or insurer will destroy all communications which contain medical information, the defense attorney is prevented by this Order from discharging counsel’s ethical duties of summarizing, evaluating and communicating with the client and the client’s insurer regarding the medical information in the case.

B. The Protective Order is Unnecessary Because it Ignores Defense Counsel’s Ethical Duty to Maintain the Confidentiality of Client Files.

The Protective Order provides that the defense attorney may retain copies of medical records and medical information, but only if placed under seal in the attorney’s file and not used for any purpose. Such a limitation is unwarranted because adequate protection of the confidentiality of client files is already mandated by Rule 1.6 of the *West Virginia Rules of Professional Conduct*. The protection mandated by Rule 1.6 has been recognized to be “more extensive than either the attorney-client privilege or work product doctrine.” *See West Virginia Legal Ethics Opinion 02-01*. Once medical records are received and attorney communications, summaries and similar documents containing medical information are generated, they become a part of the file. Under Rule 1.6,

defense attorneys, like all attorneys in this State, are responsible for zealously maintaining the security and confidentiality of their files, including attorney-client privileged information, *quasi*-attorney-client privileged information and work product. There is simply no legitimate justification for imposing additional limitations on defense counsel's retention of medical records and medical information contained in the attorney's own notes, reports, evaluations and communications with clients or their insurers. Further, there is no legitimate reason to prevent a lawyer's internal use of medical records or medical information for purposes of training new attorneys, paralegals or legal assistants of the law firm; assessing similar medical questions in later cases; and other such activities.

4. Blanket Protective Orders In All Cases Involving Medical Records Expose Defense Counsel to Improper Litigation Tactics.

The orderly administration of justice calls for certain actions to take place within a certain time frame. Circuit Courts have latitude in managing their dockets and most control the same by use of a scheduling order, which establishes deadlines for discovery. In most personal injury cases, the discovery process includes collecting medical records, deposing plaintiff's medical providers, obtaining medical examinations and retaining and disclosing the opinions of defense experts.

In terms of evaluating damages (and often liability depending on the mechanism of causation), the first step is the collection of medical records. The records are a prerequisite to evaluating the nature and extent of damages, and whether discovery depositions, responsive physical examinations or experts are necessary. When unreasonable conditions are attached to the receipt of medical records or the provision of

medical authorizations, they impair and often effectively prevent counsel from promptly, efficiently and properly developing the case defense. In such cases, motions to compel and motions for protective orders must be briefed, argued and resolved before medical records can be obtained. As this process unfurls, the available time in which to conduct medical depositions, engage experts and conduct medical examinations passes, leaving the defense attorney the choice of to proceed with such discovery without the critical information (the records), or alternatively, to risk being unable to conduct such additional discovery if the actual medical records are not received prior to the other deadlines.

This case below appears to illustrate the point. The October 25, 2010 Order required disclosure of the medical records by plaintiffs within 14 calendar days (November 8, 2010), but set a trial date the week of December 13, 2010, a period of approximately 5 weeks later (including the week of Thanksgiving). Indeed, the Court clearly reminded the parties in its October 25, 2010 Order that trial was only a few weeks away. Thus, counsel was faced with the prospect of sacrificing its ethical obligation to prepare for trial or seeking this Court's guidance as to its ethical obligations, all while knowing that the underlying trial date was only weeks away.

While this additional time pressure on defense counsel to develop the case may not be the intention of plaintiffs in the present case, this Court's approval of this litigation tactic would certainly encourage counsel in other cases to engage in similar strategies for the sole or primary purpose of preventing the defense from timely developing its evidence and meeting its deadlines.

5. The Delay Engendered By Extensive Motion Practice Relating to Overly Broad Protective Orders Also Interferes With The Goal of Settlement.

The same tactics that delay case discovery and evaluation also hamper settlement efforts. West Virginia law favors and “encourages the resolution of controversies by contracts of compromise and settlements rather than by litigation[.]” See, *e.g.*, *F.S. & P. Coal Co. v. Inter-Mountain Coals*, 179 W. Va. 190, 366 S.E.2d 638 (W. Va. 1988). Disputes arising from overly broad protective orders based only on “stereotyped or conclusory statements” prevent members from advising their client and/or client’s insurers about their case evaluation which prevents insurers from efficiently evaluating the case for settlement purposes.

6. The Protective Order Unnecessarily Exposes Our Members To Potential Liability.

Members are required by the Rules of Professional Conduct, internal file retention policies and their own malpractice carriers to retain their files, including the medical records, summaries, reports and evaluations in their files. The time periods vary from firm to firm and case to case. The Protective Order seeks to limit an attorney’s ability to retain medical records, and all of the attorney’s letters, summaries, reports, evaluations and notes containing medical information, to the period of time set forth in *W. Va. C.S.R.* § 114-15-4.2(b). This limitation is inconsistent with defense counsel’s own legitimate interests in preserving file information as recommended or required by legal malpractice insurers. This limitation is particularly unworkable in cases involving minors, incompetent persons, or the potential applicability of a contract statute of limitations. The Code requires file retention of only five years, which would be insufficient in any

case involving a young minor or an incompetent person, which could require retention of up to 18 years, or even beyond.

Further, there is no justification in the Circuit Court's Order for designating the defense attorney as the records management service of any defense experts. Defense experts that would be privy to any medical records or medical information are medical professionals themselves, well versed in the necessity and methods of protecting the confidentiality of such documents and aware of the potential liabilities in failing to do so. Requiring the defense attorney to be the person ultimately responsible for an expert's records management is simply unnecessary absent any specific and particular demonstration of fact that there is a true need to do so in a particular case.

Likewise, insurers are heavily regulated entities that must comply with both federal and state laws governing the retention of records, protection of privacy and maintenance of confidentiality. It is unduly burdensome and unnecessary to hold the defense attorney responsible for the insurer's records management obligations for five years following the conclusion of every case.

Finally, the Order requires defense counsel to certify that the client, any expert, and the client's insurer has destroyed or returned all medical records and medical information regarding the plaintiff at the expiration of the period provided by *W. Va. Code of State Rules* § 114-15-4.2(b) – a period of approximately 5 to 6 years subsequent to the conclusion of litigation. That is an onerous and unnecessary burden on defense counsel as it creates a duty in a particular matter many years subsequent to the conclusion of the work.

CONCLUSION

For all of these reasons, the Court should issue a rule to show cause and ultimately grant the requested writ – as it has already done once in this case – and prohibit the enforcement of the Protective Order entered below.

DEFENSE TRIAL COUNSEL OF
WEST VIRGINIA
By Counsel:

 # 6939

Todd A. Mount (#6939)
Shaffer & Shaffer, PLLC
330 State Street
Madison, WV 25130
T: 304-369-0511
tmount@shafferlaw.net

Lee Murray Hall (#6447)
Jenkins Fenstermaker, PLLC
325 8th Street (25701)
Post Office Box 2688 (25726)
Huntington, West Virginia
T: 304-399-9704
lmh@jenkinsfenstermaker.com

Jeffrey A. Holmstrand (#4893)
Flaherty Sensabaugh & Bonasso, PLLC
1225 Market Street
Wheeling, West Virginia 26003
T: 304-230-6600
jholmstrand@fsblaw.com

CERTIFICATE OF SERVICE

I, Todd A. Mount, hereby certify that, on this 5th day of November, 2010,
I have placed a true and exact copy of the foregoing “Motion for Leave to File an *Amicus Curiae* Brief in Support of Petitioner” and “*Amicus Curiae* Brief Submitted by the Defense Trial Counsel of West Virginia in Support of Petitioner” in the United States Mail, postage properly paid, in envelopes addressed as follows:

David J. Romano, Esquire
Romano Law Office
363 Washington Avenue
Clarksburg, West Virginia 26301

E. Kay Fuller, Esquire
Martin & Seibert, L.C.
P.O. Box 1286
Martinsburg, West Virginia 25402

Tiffany R. Durst, Esquire
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
2414 Cranberry Square
Morgantown, West Virginia 26508

Joseph Shaffer, Prosecuting Attorney
Harrison County Prosecutor’s Office
Harrison County Courthouse
301 W. Main Street
Clarksburg, West Virginia 26301



Todd A. Mount (WVSB #6939)
SHAFFER & SHAFFER, PLLC
330 State Street
P.O. Box 38
Madison, West Virginia 25130
Telephone: (304) 369-0511