

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 10-1417

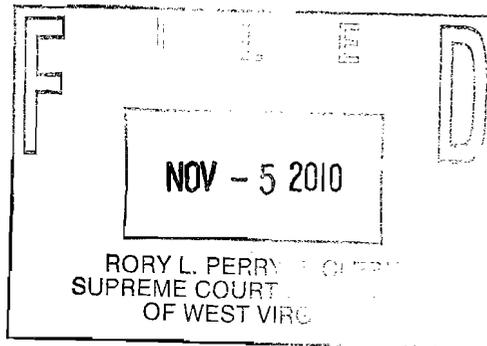
STATE EX REL. STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

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

Respondent.



From the Circuit Court of
Harrison County, West Virginia
Civil Action No. 09-C-67-2

AMICUS CURIAE BRIEF OF WEST VIRGINIA INSURANCE COMMISSIONER

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**BRIEF AMICUS CURIAE OF THE WEST VIRGINIA INSURANCE
COMMISSIONER IN SUPPORT OF PETITIONER'S
PETITION FOR WRIT OF PROHIBITION**

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Upon information and belief, Carla Jayne Blank, individually and as the personal representative of the Estate of Lynn Robert Blank, Plaintiff below, has asserted various claims in the Circuit Court of Harrison County, West Virginia ("Circuit Court"), against State Farm Mutual Automobile Insurance Company ("State Farm"), Petitioner and Defendant below, and Lana S. Eddy Luby as the personal representative of the Estate of Jeremy Jay Thomas, Defendant below. The claims stem from a head-on automobile crash involving Jeremy Thomas, Lynn Blank and Carla Blank.

The parties recently appeared before this Honorable Court after State Farm petitioned for a writ of prohibition to prevent the Circuit Court from enforcing its protective order issued February 11, 2010.¹ That protective order required the destruction or return of all medical records released in connection with the case upon the conclusion of the civil action. The protective order further prohibited the electronic retention of the Plaintiff's medical records. State Farm contended that the ordered destruction or return of the medical records directly contravened a legislative rule promulgated by the West Virginia Insurance Commissioner and that the Plaintiff failed to show good cause for ordering the prohibition against electronic record retention. After full consideration of the matter, this Court granted the writ of prohibition on June 16, 2010. *See State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, ____ W. Va. ____, 697 S.E.2d 730 (2010).

¹ The West Virginia Insurance Commissioner, as well as Defendant Lana Luby and three other amici curiae, submitted a brief in support of State Farm's petition for a writ of prohibition.

Thereafter, the Plaintiff requested that the Circuit Court enter another protective order pertaining to the medical records at issue. State Farm likewise submitted a proposed protective order and also filed an “Objection to Plaintiff’s Proffered Medical Confidentiality Order.” The Plaintiff next proffered a proposed “Temporary Protective Order Granting Plaintiff Protection for Her Confidential Medical Records and Medical Information.” During a pre-trial conference of September 29, 2010, the Circuit Court heard oral arguments concerning the issuance of a second protective order. On October 25, 2010, the Circuit Court issued its “Order Entering Protective Order, Directing Disclosure of Relevant Medical Records, and Setting Trial Date,” which shall hereinafter be referred to as the “Protective Order.” A true copy of the Protective Order is attached hereto as “Exhibit 1.” As part of the Protective Order, the Circuit Court prohibited the Defendants from sharing the Plaintiff’s confidential medical information with *any* third party unless the Plaintiff consents. It is with this prohibition that the Insurance Commissioner has issue and thus respectfully submits this amicus curiae brief.

II. INTERESTS OF AMICUS CURIAE

The Insurance Commissioner is the state agency charged by the Legislature to regulate the insurance industry and its activities in West Virginia and to otherwise enforce the provisions of the state insurance code. *See* W. Va. Code §33-2-3(a). The Insurance Commissioner’s area of regulation includes, *inter alia*, the examination and oversight of the financial status of insurers and overall authority to review any phase of the operations of an insurer in the state (*see* W. Va. Code §33-2-9); the licensing of insurers transacting insurance in this state (*see* W. Va. Code §33-3-1, *et seq.*); the approval of all forms used by an insurer in this state (*see* W. Va. Code §33-6-9); the approval of rates charged by an insurer in this state (*see* W. Va. Code §33-20-1, *et seq.*);

the licensing of insurance producers doing business in this state (*see* W. Va. Code §33-12-1, *et seq.*); and the investigation of insurance fraud and other crimes related to the business of insurance to assist in the detection and prosecution of such crimes (*see* W. Va. Code §33-41-1, *et seq.*). The Governor appoints the Insurance Commissioner by and with the advice and consent of the Senate. *See* W. Va. Code §33-2-1.

The Insurance Commissioner submits this amicus curiae brief for the limited purpose of emphasizing her statutorily mandated role in the investigation and detection of insurance fraud. It is not the intention of the Insurance Commissioner to comment upon the facts of the underlying dispute or arguments of the parties. Nor is it the Insurance Commissioner's aim to suggest that the Plaintiff is in anyway dishonest or nefarious in her motives. Rather, the Insurance Commissioner wishes to inform this Honorable Court of her concern over the Protective Order's encroachment onto the authority bestowed upon her by the West Virginia Legislature.

III. ASSIGNMENT OF ERROR

The Circuit Court exceeded its authority by entering an order that prohibited the Defendants from sharing the Plaintiff's confidential medical information with *any* third party without the consent of the Plaintiff, which is a directive that could obstruct the prospective reporting of information required by W. Va. Code §33-41-5(a) with respect to actual or suspected criminal activity associated with the business of insurance.

IV. ARGUMENT

The Circuit Court Erred When It Used Overly Broad Language To Prohibit The Defendants From Sharing Medical Information Without The Plaintiff's Consent Because Such Language May Inhibit The Reporting Of Necessary Information To The Insurance Commissioner To Combat Fraudulent Activity.

Pursuant to W. Va. Code §53-1-1, a “writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has [no] jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” *See also* Syl. Pt. 1, *State Farm Mut. Auto Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992) (“A writ of prohibition is available to correct a clear legal error resulting from a trial court’s substantial abuse of its discretion in regard to discovery orders.”). The granting of a writ of prohibition is proper in the instant matter because the Circuit Court exceeded its legitimate powers and/or substantially abused its discretion when it entered a protective order that prohibited “the Defendants from sharing [the Plaintiff’s] confidential, non-public medical information [with] . . . **any third party in general**, without the Plaintiff’s consent.”² *See* Exhibit 1, p. 7 (emphasis added).

This expansive prohibition directly conflicts with the statutory requirement that “person[s] engaged in the business of insurance having knowledge or a reasonable belief that fraud or another crime related to the business of insurance is being, will be or has been committed **shall** provide to the [Insurance Commissioner] the information required by, and in a manner prescribed by, the commissioner.” W. Va. Code §33-41-5(a) (emphasis added); *See also* W. Va. C.S.R. §114-71-3. The use of the word “shall” in the statutory provision is a clear indication that insurance companies and others in the

² While the Circuit Court’s prohibition at issue is made within the context of releasing confidential medical information to organizations like the National Insurance Crime Bureau, the use of the phrase “any third party in general” could reasonably be interpreted to also include regulatory bodies such as the Insurance Commissioner.

insurance industry have a non-discretionary duty to report actual or suspected fraudulent activity to the Insurance Commissioner. Accordingly, it is the public policy of this state that there be a cooperative effort among the Insurance Commissioner and those in the insurance industry with respect to the detection of insurance fraud.

As this Court recently noted, “the West Virginia Legislature in Chapter 33 of the West Virginia Code has established a comprehensive set of laws governing insurers who operate in the State.” *Bedell*, 697 S.E.2d at 735. Because insurance transactions are ripe with the potential for fraud and other illegal activities, the Legislature enacted the Insurance Fraud Prevention Act, codified at W. Va. Code §33-41-1, *et seq.* A principle purpose of the Act is to utilize “the expertise of the commissioner to investigate and help prosecute insurance fraud and other crimes related to the business of insurance more effectively[.]” W. Va. Code §33-41-1(b). To implement the objectives of the Act, the Legislature established the West Virginia Insurance Fraud Unit (“Fraud Unit”) within the Insurance Commissioner’s office. *See* W. Va. Code §33-41-8(a). Among its responsibilities, the Fraud Unit evaluates “reports or complaints of alleged fraud related to the business of insurance activities from federal, state and local law-enforcement and regulatory agencies, persons engaged in the business of insurance and the general public to determine whether the reports require further investigation.” W. Va. Code §33-41-8(b)(2).

Although the pervasiveness of insurance fraud is difficult to precisely measure due to innumerable incidents likely going undetected, the associated costs imputed to the public are of no doubt substantial. The Insurance Information Institute estimates that fraud accounts for approximately ten percent (10%) of the property and casualty insurance industry’s incurred losses and loss adjustment expenses, or around \$30 billion

annually. *See* Insurance Information Institute, Insurance Topics, Insurance Fraud (Issue Update), November 2010, *available at* http://www.iii.org/issues_updates/insurance-fraud.html. Moreover, the Coalition Against Insurance Fraud approximates that healthcare fraud alone costs Americans \$54 billion a year. *See* Coalition Against Insurance Fraud, Consumer Information, Insurance Fraud Backgrounder, *available at* http://www.insurancefraud.org/fraud_backgrounder.htm. These costs include lost personal savings, higher insurance premiums and increased costs for consumer goods. *Id.*

West Virginia is by no means spared from such fraudulent activity or its resulting adverse effects. In 2009, the Fraud Unit received a total of 872 referrals leading to 65 arrests and 57 convictions. *See* West Virginia Offices of the Insurance Commissioner, 2009 Annual Report, at 4, *available at* <http://www.wvinsurance.gov/LinkClick.aspx?fileticket=Hq-kLRl4yKM%3d&tabid=207&mid=799>. Such successful prosecutions could not occur without the cooperation and assistance of law enforcement agencies, the public and the insurance industry. The Fraud Unit's investigation of referred matters has unquestionably developed into a vital tool for combating insurance fraud in West Virginia.

By forbidding State Farm from releasing certain claim information to the Insurance Commissioner, the Circuit Court contravened the reporting requirement of W. Va. Code §33-41-5(a) and thus potentially undermined the Fraud Unit's ability to detect and investigate fraudulent activity occurring in this State. Medical information is particularly important in the detection of insurance fraud because such information may reveal that a claimant has presented with the same injuries after multiple staged accidents or that a medical provider is connected to a number of dubious claims involving similar scenarios. Without such information to expose and verify a pattern of suspicious activity,

certain criminal fraud cases may not get prosecuted. While the likelihood of the Plaintiff in the instant matter perpetrating insurance fraud may be remote, the possibility of future plaintiffs committing undetected fraud rises with every protective order having overreaching language like the one in the case *sub judice*. Therefore, this Court should set a clear precedent for all West Virginia trial courts to follow by prohibiting the enforcement of the Protective Order.

V. CONCLUSION

For the reasons set forth above, the Insurance Commissioner joins State Farm in respectfully requesting that this Honorable Court issue a writ of prohibition to prevent the Circuit Court of Harrison County from enforcing its Protective Order with regard to prohibiting the Defendants from potentially sharing the Plaintiff's confidential, non-public medical information with the West Virginia Insurance Fraud Unit.

Respectfully submitted,

JANE L. CLINE, INSURANCE
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By Counsel



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IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

CARLA JAYNE BLANK, individually, and
in her capacity as the Personal Representative
of the Estate of Lynn Robert Blank,

Plaintiff,

VS.

CIVIL ACTION NO. 09-C-67-2
(Thomas A. Bedell, Circuit Judge)

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a foreign corporation,
LANA S. EDDY LUBY, as the Personal
Representative of the Estate of Jeremy Jay Thomas,

Defendants.

**ORDER ENTERING PROTECTIVE ORDER, DIRECTING DISCLOSURE OF
RELEVANT MEDICAL RECORDS, AND SETTING TRIAL DATE**

Presently before the Court in this matter is the Parties' continued dispute over the disclosure of the Plaintiffs' medical records to the Defendants. This matter has recently returned to the jurisdiction of this Court after a stint with the West Virginia Supreme Court of Appeals on this issue. State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell, 697 S.E.2d 730 (2010). The Court has considered the guidance provided by the aforementioned opinion, and additionally has considered the following briefs which have been submitted by the Parties.

On or about September 24, 2010, the Plaintiffs submitted their "Amended Pre-Trial Memorandum," which included an attached proposed protective order. State Farm submitted its "Pre-Trial Memorandum" which also included a proposed "Protective Order" on or about September 3, 2010. State Farm additionally submitted the "Objection to Plaintiff's Proffered Medical Confidentiality Order," on September 24, 2010. The Plaintiffs

submitted a proposed "Temporary Protective Order Granting Plaintiff Protection for Her Confidential Medical Records and Medical Information," on or about September 28, 2010.

Finally, the Court held a hearing on September 29, 2010, and set this matter for trial. Accordingly, the Court reminds the Parties that this matter is set for trial during the week of **December 13, 2010**. Additionally, the oral arguments on the declaratory judgment action, as well as the final pre-trial conference, are set for **December 2, 2010, at 10:00AM**.

After considering the opinion of the Supreme Court, the Parties' briefs and proposed orders, and the pertinent law, the Court makes the following rulings; first, the Plaintiffs must disclose their relevant medical records, second, the Plaintiffs have demonstrated good cause for the issuance of a reasonable protective order as to the confidentiality of said records, and third, said disclosure shall be in accordance with the protective order outlined within this Order and the Defendants shall be bound by the protective order until the records are offered into the public domain at trial, or the Plaintiffs otherwise give their permission for dissolution of the protective order.

IT IS SO ORDERED.

First, the Court notes that the Defendants have raised the issue of whether the Plaintiffs are entitled to a protective order in regards to their medical records. Contrary to the Defendants' argument, the Supreme Court did not rule that a general protective order was inappropriate in this case, but merely that the Plaintiffs were not entitled to a protective order which conflicted with the record retention rules of the Insurance Commissioner of which prohibited the retention of electronic records.

A court may not issue a protective order directing an insurance company to return or destroy a claimant's medical records prior to the time period set forth by the Insurance Commissioner of West Virginia in §§ 114-15-4.2(b) and 114-15-4.4(a) of the West Virginia Code of State Rules for the retention of such records.

Syl. Pt. 7, State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell, 697 S.E.2d 730 (2010).

And further,

The circuit court, therefore, clearly erred in issuing a protective order prohibiting the electronic storage of Mrs. Blank's medical records, as Mrs. Blank did not show good cause for such order pursuant to Rule 26(c) of the West Virginia Rules of Civil Procedure. Accordingly, the Court grants the writ of prohibition sought by State Farm to prevent the enforcement of the protective order on this ground as well.

Id. at 740. The prior protective order entered by this Court had two (2) invalid terms; the duration of record retention by the Defendants and the availability of electronic record retention. However, the Supreme Court did not hold that there were no grounds for a protective order of any sort.

Accordingly, after considering Rule 26 of the West Virginia Rules of Civil Procedure, the Court holds that the Plaintiffs have demonstrated a "particular and specific demonstration of fact," as well as good cause, for the issuance of an appropriate protective order. Specifically, the Court notes that medical records are private in nature and are protected by privilege between the treating physician or care provider and the patient. Further, 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 patient's consent. Further, the Supreme Court recognized the same, "here, none of Mrs. Blank's medical records will become public unless she consents to their dissemination or until they are introduced at trial." Id. at 739-740. Finally, the Defendants, both in oral argument before the Supreme Court and in their proposed "Protective Order," have stated that the Plaintiffs are entitled to a reasonable protective order. It is the terms of the Order that the Defendants have issue with, not the valid justification for a general protective order.

Therefore, the Plaintiffs have demonstrated a "particular and specific demonstration of fact," as well as good cause, for the issuance of an appropriate protective order. W. Va. R.C. Pro., R. 26.

First, the Court hereby **ORDERS** that the Plaintiffs disclose their relevant medical records, as follows.

The Plaintiffs shall disclose all relevant medical records for a period of ten (10) years prior to the accident, which took place on March 20, 2008, as well as all relevant medical records during the time that has passed since the accident. Any medical records in possession of the Plaintiffs which they claim are either not relevant or non-discoverable for any other reason shall be documented in an appropriate privilege log which shall be submitted to the Defendants and shall identify the date of treatment, the general type of treatment, and the medical provider. The disclosure of said records and any necessary privilege log shall take place within fourteen (14) calendar days, including weekends and holidays, of the date of entry of this Order.

State Farm, and all of its agents, servants, and employees, as well as defense counsel and its agents, servants, and employees, shall be bound by the following protective terms as to the handling and dissemination of the Plaintiffs' medical records.

Therefore, the following terms of confidentiality shall apply to Carla Blank, (Plaintiff) and Lynn Blank's (Decedent) medical records.¹

1. Defendants' counsel will not disclose orally or in summary form, any of the Plaintiff's or Decedent's medical records, or medical information;

¹The Plaintiffs' counsel has the burden of determining which medical records are relevant to the accident, including any potentially relevant pre-existing conditions, and disclosing the same under the good faith principles of the rules of discovery.

to any person other than their clients, office staff, and experts necessary to assist in this case, including necessary servants, agents, and employees of their clients, and any such person shall be advised of this Protective Order and receive and review a copy of it and be informed that they are bound by the non-disclosure terms and the other provisions of this Protective Order if they receive any protected information. If any such protected documents or information need to be part of any pleading, they shall be filed with such pleading under seal pursuant to this Order and also be furnished to this Court with each document marked "confidential."

Provided, however, Defendants' counsel may disclose, either orally, in writing, by paper copies, or electronically, such information to the Defendants' experts and insurance carrier, but any said expert or insurance carrier or any other person receiving said information, shall, pursuant to this Order, receive a copy of this Protective Order and agree in writing to be bound by all of the terms of this Protective Order, including the non-disclosure and non-retention of such material as set forth herein, and be subject to the jurisdiction of this Court for enforcement purposes; a copy of each such written agreement shall be provided to Plaintiffs' counsel upon execution by any person receiving such protected information and in the event any expert receiving such medical information is an undisclosed, non-testifying expert, then in that event, the attorney who provided such information to the undisclosed non-testifying expert shall maintain in his or her office files, the executed written agreement even after the return or destruction of the protected information to Plaintiff's counsel and the final dismissal of this case.

2. Also, upon conclusion of the appropriate period established by W. Va. C.S.R. § 114-15-4.2(b), all medical records, and medical information, or any copies or summaries thereof, will either be destroyed with a certificate from Defendants' counsel as an officer of the Court that the same has been done, or all such material will be returned to Plaintiff's counsel without

retention by Defendants' counsel or any other person who was furnished such materials and information pursuant to the terms of this Protective Order. Specifically, the records shall be kept no longer than the provisions of § 114-15-4.2(b) require, with the time period beginning to run at the conclusion of this case, including any possible appellate litigation. The time period shall be the lesser of "the current calendar year plus five (5) calendar years," or "from the closing date of the period of review for the most recent examination by the commissioner," or "a period otherwise specified by statute as the examination cycle for the insurer." § 114-15-4.2(b).² Provided however should Defendants' counsel desire to retain a copy of the protested medical records produced in this case, the same shall be permitted as long as those protected medical records are maintained in a sealed manner in Defense Counsel's file and not used for any other purpose whatsoever except upon further order of this Court or in response to lawful process after notice to the protected person, or in response to a lawful order of another Court with jurisdiction, or upon written consent of the protected person whose medical records and information is protected herein.

3. Also, any medical records previously received by or on behalf of any party in this case or any other person including an employee of any insurance carrier, even if received prior to the Court's ruling on this Protective Order, are protected regarding the confidentiality and privacy of such records in accordance with the Court's ruling herein.

2

W. Va. C.S.R. § 114-15-4.2(b) states as follows:

All insurer records within the scope of this rule must be retained for the lesser of:

1. The current calendar year plus five (5) calendar years;
2. From the closing date of the period of review for the most recent examination by the commissioner; or
3. A period otherwise specified by statute as the examination cycle for the insurer.

W. Va. C.S.R. § 114-15-4.2(b).

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IT IS SO ORDERED.

The Defendants' argument that case-specific record retention policies are cumbersome is without merit. The purpose of the protective order is to allow the protected disclosure of private, personal, medical records, and the period of retention does not have to be the most convenient for State Farm, but instead, must protect the privacy of the Plaintiff, a former policy holder with State Farm.

Additionally, the Defendants' request that they be allowed to disseminate the Plaintiffs' private, confidential records to third party organizations such as the National Insurance Crime Bureau ("NICB") is **DENIED**. As stated by the Supreme Court:

While the NICB, in its amicus curiae brief, and State Farm both admit that certain claim information is shared between them, **State Farm contends that it complies with West Virginia's laws protecting confidential medical information and, thus, does not provide any nonpublic medical information to the NICB without the patient's consent.**

FN5, State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell, 697 S.E.2d 730, 739 (2010). Accordingly, this Order hereby **PROHIBITS** the Defendants from sharing any confidential, non-public medical information to the NICB, or any third party in general, without the Plaintiffs' consent. The Defendants can be assured that Lynn Blank, their former policy holder, will not be defrauding any insurance companies in the future due to his untimely passing from this Earth.

Further, the Defendants are reminded of the following:

Thus, insurers operating in West Virginia are required to prevent the unauthorized disclosure of confidential medical records contained in claim files, whether those files are stored electronically or in paper format.

State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell, 697 S.E.2d 730, 738 (2010).

IT IS SO ORDERED.

It is hereby directed that a photocopy of this Order be delivered, by first class mail or other means, to the following:

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ENTER: October 25 2010


THOMAS A. BEDELL, Circuit Judge

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 10-1417

**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.

CERTIFICATE OF SERVICE

I, Victor A. Mullins, counsel for Jane L. Cline, West Virginia Insurance Commissioner, do hereby certify that I have served a copy of the foregoing "AMICUS CURIAE BRIEF OF THE WEST VIRGINIA INSURANCE COMMISSIONER IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF PROHIBITION" upon the following by mailing a true and accurate copy of the same, by United States mail, postage prepaid, on this 5th day of November, 2010:

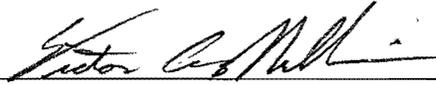
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