IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO.: ~~10-1417~~ 35738

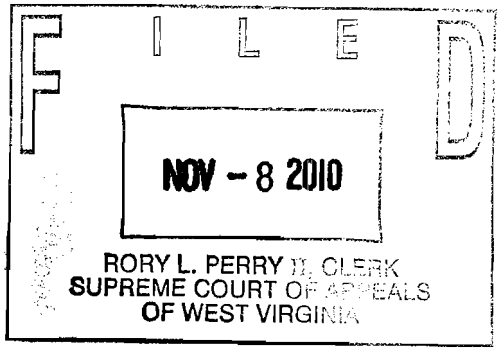
STATE EX REL. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY;

Petitioner,

v.

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

Respondent.



AMICUS CURIAE BRIEF FILED ON BEHALF OF WEST VIRGINIA MUTUAL INSURANCE CO.

Respectfully submitted,

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I. KIND OF PROCEEDINGS AND NATURE OF RULING BELOW

This Court is already familiar with the facts of this case, having already issued a writ of prohibition for a similar protective order that was previously entered by the trial court. *See State Farm Mut. Auto. Ins. Co. v. Bedell*, 226 W.Va. 138, 697 S.E.2d 730 (2010). In the underlying action, the plaintiff, Carla Layne Blank, individually and in her capacity as personal representative of the Estate of Lynn Robert Blank, brought a wrongful death and bodily injury action against the defendant, Lana S. Eddy Luby, as the personal representative of the Estate of Jeremy Jay Thomas, and an uninsured motorist claim against her own insurance carrier, State Farm Mutual Automobile Ins. Co., (St. Farm). During the course of the litigation, the plaintiff argued that State Farm, as the uninsured motorist carrier, was not entitled to conduct discovery because the defendant tortfeasor did not make discovery requests upon the plaintiff. The trial court disagreed and ruled that the plaintiff respond to discovery propounded by State Farm, including providing copies of requested medical records. The Court, however, ruled that all relevant medical records were to be disclosed pursuant to the terms of a protective order which provides that the records could be disclosed to the defendants' experts and insurance carrier in paper form only, and that the records could not be "scanned or stored by computerized storage, filming, photographing, microfiche or other similar method." The first protective order further provided that upon the conclusion of the litigation, all medical records and medical information,

including copies and summaries, either be destroyed with a certificate from Defendants' counsel that the same has been done, or returned to Plaintiff's counsel without retention by Defendants' counsel or any other person who was furnished such materials and information. The only exception to the destruction or return provision of the Protective Order permitted defense counsel to retain a sealed copy of the records, not to be used for any purpose except upon further order of the Court, or in response to a lawful order of another Court with jurisdiction, or upon written consent of the person whose medical records and information is protected.

This Court ruled that the first protective order, as it was previously entered, was improper for two reasons. First, because "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." *State Farm Mut. Auto. Ins. Co. v. Bedell,* 697 S.E.2d at 737-38. Second, the first protective order was improper because the underlying plaintiff failed to demonstrate that State Farm had not complied with state privacy rules and the Insurance Commissioner's regulations against the dissemination of private medical information or that State Farm intended to violate those rules in the future. *Id.* at 738-40.

The Protective Order issued by the Respondent on October 25, 2010 is just as onerous and without legal justification as the Order that garnered the previous Writ of Prohibition from this Court. Particularly, the trial court found that the plaintiff had demonstrated "particular and specific" facts, as required by Rule 26 of the West Virginia Rules of Civil Procedure, to warrant a protective order because "medical records have the potential to contain facts that are embarrassing to the patient[.]" (Order, Oct. 25, 2010, at 3-4.) On that basis, the trial court once again ruled that all medical records that are disclosed must be destroyed by the Petitioner, or anyone acting on the Petitioner's behalf, immediately following the period set forth in §§ 114-15-4.2(b) and 114-15-4.4(a) of the West Virginia Code of State Rules. Further, the trial court ordered that the Petitioner not disclose the Plaintiff's medical records to any third-party organization, even those mandated by statute, without the Plaintiff's consent.

II. STATEMENT OF INTEREST

Because the Mutual has claims arising in Harrison County and is being subjected to similar protective orders issued by other Harrison County Circuit Court Judges, it has a significant interest in this issue. Because these overly restrictive protective orders have a significant impact on the Mutual, the Mutual offers this *Amicus Curiae* brief to the Court and requests that this Court reverse the October 25, 2010 Order of the Circuit Court of Harrison

County as being overly broad, unduly restrictive and unlikely to achieve its intended purpose.

III. STATEMENT OF FACTS

The Mutual is a West Virginia domestic, private, non-stock, nonprofit corporation, formed in 2004 in response to the state's "medical liability insurance crisis." W. Va. Code § 33-20F-1-9. The Mutual currently insures approximately 1550 of the State's physicians. The Mutual insures 60-65% of the physicians in private practice within the State who purchase insurance in the commercial market, i.e., physicians other than those who are employees of the Federal and State government and those who are employed by federally funded clinics. The Mutual has insureds in all fifty-five counties and in all of the judicial circuits in the State. Currently the Mutual has approximately 280 open claim files. It has been adjusting claims since 2004 and has never had a known instance of breaching the confidentiality of the medical records of any claimant during that time period. Likewise, to the Mutual's knowledge, the Harrison Circuit Court is one of relatively few Judicial Circuits in the State where judges have imposed the type of restrictive protective orders entered by Judge Bedell in the underlying case. The most insurmountable problem encompassing Judge Bedell's latest Order is the requirement that the electronic records be destroyed at the end of the case. Further, the trial court's order that information contained in insurance claim files not be disseminated

to third-parties like the NICB is violative of a number of rules, regulations, and policies of the State of West Virginia.

While the trial court did conduct a hearing, considered the parties' briefs and proposed orders, and also considered the previous Opinion of this Court in formulating the Protective Order at issue, the trial court made no findings of fact or conclusions of law concerning any safeguards or lack thereof incorporated in the claims handling system utilized by State Farm to protect the confidentiality of confidential medical information gathered during the claims handling process that would not comply with already enacted legislation. Likewise, the trial court made no findings with regard to safeguarding the interests of State Farm or the impact that compliance with the terms of the Protective Order would have on State Farm's claims handling process.

IV. ASSIGNMENTS OF ERROR

A. The Circuit Court of Harrison County exceeded its authority by entering a protective order without a proper evidentiary foundation in violation of the provisions of West Virginia Rule of Civil Procedure 26(c).

B. The Circuit Court of Harrison County erred by imposing conditions in its protective order on the production of medical records which make it impossible for State Farm and other similarly situated insurance companies to comply with federal and state statutory and regulatory obligations.

V. ARGUMENT

A. The Protective Order Was Entered Without a Proper Evidentiary Basis Being Established by the Trial Court and Exceeds the Court's Powers

The authority for a trial court to issue a protective order regarding discovery is contained in Rule 26(c) of the West Virginia Rules of Civil Procedure (WVRCP). WVRCP 26(c) provides that:

> Upon motion by a party or by the person from whom discovery is sought, including a certification that the movant has in good faith conferred or attempted to confer with other affected parties in a effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (1) That the discovery not be had;
>
> (2) That the discovery may be had only on specified terms and conditions, including a designation of the time and place;
>
> (3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> (4) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;
>
> (5) That discovery be conducted with no one present except persons designated by the court;
>
> (6) That a deposition after being sealed be opened only by order of the court;

> (7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
>
> (8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

The language of WVRCP 26(c) regarding protective orders is identical to the federal rule. Because the West Virginia Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, this Court often refers to interpretations of the Federal Rules when discussing its own rules. *See Painter v. Peavy*, 192 W.Va. 189, 192 n. 6, 451 S.E.2d 755, 758 n. 6 (1994). Because the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, this Court gives substantial weight to federal cases in determining the meaning and scope of the West Virginia Rules of Civil Procedure. *See, e.g., State v. Sutphin,* 195 W.Va. 551, 563, 466 S.E.2d 402, 414 (1995), *Keplinger v. Virginia Elec. & Power Co.,* 208 W.Va. 11, 20 n. 13, 537 S.E.2d 632, 641 n. 13 (2000).

As stated by the Supreme Court of the United States, "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 36 (1984). Likewise, "the unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders." *Id.* The trial court's broad discretion in limiting the scope of discovery under Rule 26, however, is not unfettered. *See, e.g., Marrese*

v. American Academy of Orthopaedic Surgeons, 706 F.2d 1488, 1493 (7th Cir. 1983); *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir. 1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436 (10th Cir. 1977). The issuance of a broad protective order without scrutiny of each proposed area of inquiry and without giving full consideration to alternatives, more narrowly drawn, is outside the scope of the trial court's discretion. *Bennett v. Warner*, 179 W.Va. 742, 750, 372 S.E.2d 920, 928 (1988). Therefore, just as the trial court has an obligation not to permit discovery requests that are unduly burdensome, it also has an obligation to not place unduly burdensome restrictions on discovery through the use of a protective order. As this Court has held, a trial court "abuses its discretion when its rulings on discovery are clearly against the logic of the circumstances." *B.F. Specialty Co. v. Charles M. Sledd Co.*, 197 W. Va. 463, 465, 475 S.E.2d 555, 557 (1996).

Rule 26(c) requires that good cause be shown for a protective order. The burden of persuasion is on the party seeking a protective order. To meet this burden, it must show good cause by demonstrating a particular need for protection. *Traynor v. Liu*, 495 F. Supp. 2d 444 (D. Del. 2007). Courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish good cause. *In re Terra Intern., Inc.*, 134 F.3d 302 (5th Cir. 1998). The existence of good cause for a protective order "is a factual matter to be determined from the nature and character of the information sought by deposition or interrogatory

weighed in the balance of the factual issues involved in each action." *Glick v. McKesson & Robbins*, 10 F.R.D. 477, 479 (W.D. Mo. 1950). Such determination must also include a consideration of relative hardship to the nonmoving party should the protective order be granted. *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204 (8th Cir. 1973), cert. denied, 414 U.S. 1162, 94 S. Ct. 926, 39 L. Ed. 2d 116 (1974).

The Circuit Court of Harrison County made no findings of fact or reasons showing good cause for the issuance of the Protective Order. The Circuit Court's previous protective order that was struck by this Court simply set out safeguards it apparently believed necessary to protect the confidentiality of medical records without stating the particular need for the protection. In fashioning the current Protective Order the Circuit Court found that the Defendants' argument regarding the cumbersome nature of the case-specific retention policies was without merit and that the "period of retention does not have to be the most convenient for State Farm." (Order, Oct. 25, 2010, at 7.) Contrary to the Circuit Court's findings, the restrictions imposed by the Protective Order are overly burdensome and still require State Farm to take action that could potentially affect its interests in future litigation. Further, neither the Circuit Court nor the Plaintiff have set forth any specific facts demonstrating that State Farm has not complied with state privacy rules and the Insurance Commissioner's regulations against the dissemination of private medical information or that State Farm intends to violate those rules in the

future. Without such a showing, the Protective Order exceeds the Circuit Court's discretion in formulating the order. *Bedell*, 697 S.E.2d at 738-40.

As stated in the Mutual's previous brief, West Virginia courts have consistently given medical records a special status with regard to protection from disclosure and improper use. In 1988, this Court recognized a private cause of action by a patient against her psychiatrist for the unauthorized release of her psychiatric records in response to a validly issued subpoena for the records. *Allen v. Smith*, 179 W. Va. 360, 368 S.E.2d 924 (1988). The legal basis for the Court's ruling in *Allen* was W. Va. Code § 27-3-1, which provides that records regarding mental health patients are deemed "confidential information" and can only be released under certain enumerated circumstances. In *State ex. rel. Kitzmittler v. Henning*, the Supreme Court of Appeals prohibited ex parte communications with a patient's treating physicians and held that the West Virginia Rules of Civil Procedure set forth the exclusive means by which an adverse party may obtain pretrial discovery of medical testimony relating to a patient's medical condition. 190 W. Va. 142, 437 S.E.2d 452 (1993). In *Morris v. Consolidation Coal Co.*, 191 W. Va. 426, 446 S.E.2d 648 (1994), this Court held that a patient has a cause of action against a third party who wrongfully induces a physician to breach his fiduciary duty by disclosing confidential information concerning the patient to a third party. In 1981, the West Virginia Legislature enacted the West Virginia Medical Records Act, W. Va. Code § 57-5-4a, to provide a mechanism

to be used to obtain the release of hospital records which contain specific procedures to prevent the improper disclosure of health information obtained from hospitals. In *Keplinger v. Virginia Elec. and Power Co.*, this Court held that the failure to comply with the provisions of W. Va. Code § 57-5-4a by an attorney gives rise to a private cause of action for tortuous interference with a physician/patient relationship as recognized in *Morris*. 208 W. Va. 11, 537 S.E.2d 632 (2000).

This Court has consistently recognized that an individual's medical records are classically a private matter and generally are not subject to public disclosure. *See*, e.g., *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986). However, this privacy right must be balanced against other interests involved. In *Cline*, this Court permitted the inspection of private psychiatric records of a school bus driver by the parents of children who rode on the bus driver's bus.

In the case of an action for personal injury or wrongful death, an individual's medical records are an indispensable piece of evidence in adjudicating the claim. Inherently the individual's right of privacy in his or her medical records will conflict with the right of the defendant, and his or her insurance company, to discover relevant medical information regarding the injury in question. The *Keplinger* opinion specifically noted that because of the highly personal and confidential nature of medical records, they should be subject to special consideration to assure that, in the process of discovery; there

will be no unnecessary disclosure of medical information **that is outside the scope of the litigation**. *Keplinger* at p. 644. (emphasis added). The Protective Order issued by Judge Bedell does nothing to enhance or increase the degree of privacy to be accorded the plaintiff's medical records. Rather, the Protective Order exposes State Farm, and future similarly situated insurance carriers like the Mutual, to numerous problems related to litigation. As set forth in the Petitioner's brief, there are numerous problems that could arise if records are destroyed and needed at a later period of time. (Pet. Brief, at 11-20.) Therefore, the Court should issue another Writ of Prohibition.

B. The terms of the protective order make it legally impossible for the Mutual or other similarly situated insurance companies to comply with statutory, regulatory and contractual obligations regarding the maintenance of claims files.

The Mutual and other similarly situated insurance companies can not perform the duties legally imposed upon them as insurance carriers if they are required to destroy the medical information that forms the basis of many claims files so soon after the current litigation has ended. West Virginia has adopted the model National Association of Insurance Commissioners privacy rules. See 114 CSR §57-15.1. These rules require insurance companies to ensure the security and confidentiality of customer records and information. In addition, the West Virginia Insurance Commissioner requires all claim files maintained by insurance companies doing business in the State to be available for audit and inspection by the Commissioner. In September, 2009, the

Insurance Commissioner issued an Informational Letter, No. 172, to explain and clarify its position on this issue. The Informational Letter, citing W. Va. Code § 33-2-9 and 114 CSR 15, reminded insurance companies of their obligation to maintain claim files and accompanying records for the calendar year in which the claim is enclosed, plus five (5) additional years. The definition of claim files includes medical records. §15-4-4(a)(1). The Informational Letter points out that if a court order requires certain medical documentation be destroyed or returned by the insurer at the conclusion of the litigation, the Office of the Insurance Commissioner is substantially hindered in carrying out its legislative mandate and it may subject insurers to penalties as a result. While the trial court's Protective Order briefly addresses these regulatory requirements that are placed on State Farm and other insurance carriers in the State, it does not take into account that the West Virginia Code of State Rules for the retention of such records set forth a **minimum** period for records retention. The Protective Order issued by Judge Bedell forces companies who are subject to such an order to have to choose between obeying the Court Order and potentially exposing themselves to numerous future problems due to a destruction of records, or complying with the regulations and being in violation of a Court Order.

For instance, one such exposure problem is related to reinsurance agreements. Reinsurance agreements place a contractual obligation on the Mutual to make claim files available for their inspection. Without access to the

reinsurance market, the Mutual would not be able to offer insurance to many physicians. In fact, the Mutual has the statutory right to refuse to insure any physician for whom it can not obtain reinsurance for part of the coverage. West Virginia Code § 33-20F-9(d)(4). It should be noted that in addition to being subject to periodic audits by the Insurance Commissioner, reinsurance companies also require claims files to be available for audit even after the claim has been resolved and the matter closed. The Mutual has taken steps to implement safeguards to protect the inadvertent or deliberate dissemination of personal health information during these required audits, whether by the Insurance Commissioner or a reinsurer. The Mutual requires that each auditor sign a confidentiality agreement and gives the auditor limited access to the claims files to be audited. The auditors must access the claims files while physically at the Mutual's office utilizing a computer that is provided by the Mutual which is attached directly to the Mutual's computer network. Remote access is not permitted and auditors are not allowed to copy or print any part of a claims file or remove it from the Mutual's premises.

The privacy of medical records is also protected by federal law, the Health Information Portability and Accountability Act (HIPAA), and federal regulations issued pursuant to that Act known collectively as the Privacy Rule. HIPAA was enacted in 1996 in part as Congress' response to the need for the protection of the privacy of personal health information. Codified primarily in Titles 18, 29, and 42 of the U.S. Code, HIPAA focuses the computerization of

health information. Congress recognized the need to maintain strict privacy protection for personal health information and therefore directed the Department of Health and Human Services to promulgate regulations known collectively as the Privacy Rule. Codified at 45 C.F.R. §§ 160 and 164, the Privacy Rule creates national standards to keep medical records and other personal health information confidential. It restricts and defines the ability of health plans, health care clearinghouses, and most health care providers to divulge patient medical records.

While the Mutual is not directly subject to HIPAA and the privacy regulations, its insured physicians are regulated by the Act and the regulations. In order for its insureds to comply with HIPAA and the privacy regulations in terms of sharing medical information with the Mutual concerning a claim or potential claim, the Mutual has entered into a contractual Business Associate Agreement with each of its insureds which requires the Mutual to comply with the provisions of HIPAA and the privacy regulations.

The Protective Order also contains a blanket prohibition against the maintenance of medical records produced in discovery from being maintained in an electronic format. The trial court did not make any inquiry into St. Farm's electronic claim handling system before entering this blanket prohibition. As the Mutual pointed out in its prior amicus brief, most modern insurance companies maintain electronic claim files. These electronic claim

files maintained by the Mutual and other insurance carriers have numerous advantages over traditional written claims files in terms of confidentiality and privacy. Access to the records is strictly controlled and all access is monitored electronically. Records can not simply be copied and carried off without the company's knowledge. Unauthorized individuals can not access the electronic files at any time. Electronic records are far more secure than written records which can be left on a desk or in an unlocked file cabinet to be viewed, copied or carried away surreptitiously. Electronic files can not be lost, misfiled or misplaced, unlike their paper counterparts. Finally, electronic claim files, like electronic medical records used in modern hospitals and physicians' offices, promote a more efficient and cost effective claims handling process, all of which inures to the benefit of policyholders in the form of lower insurance premiums and to the general public in the form of lower costs for healthcare and other services.

The trial court failed to take into account any of these competing interests or public policy issues in formulating the Protective Order in question. While the plaintiff certainly has a privacy interest in her medical records, that right is not absolute and must be balanced against the need to disclose the contents of relevant medical records during litigation and the claim handling process. West Virginia law is robust in its protection of the confidentiality of medical records and the Protective Order gives the plaintiff no additional safeguards in this regard. In fact, as demonstrated above,

forcing insurance companies to destroy records potentially exposes them to numerous problems. The Protective Order does nothing to enhance the plaintiff's right to confidentiality of her records and severely shackles the insurance company, making it impossible for the insurance company to handle claims uniformly in its customary business manner, puts it in violation of federal and state laws and regulations and deprives the citizens of the State of West Virginia of the benefits of a modern and efficient claims handling process.

VI. CONCLUSION

The October 25, 2010 Protective Order entered by the Circuit Court of Harrison County is overly broad, unduly burdensome and does not achieve its intended purpose of protecting the confidentiality of the claimant's medical records. If it and similar orders are allowed to stand, it will place insurance companies in a "Catch 22" situation of being forced to either disobey the terms of the protective order or fail to comply with federal and state law and insurance regulations.

VII. RELIEF PRAYED FOR

WHEREFORE, for the foregoing reasons, the West Virginia Mutual Insurance Company requests that this Court issue a rule to show cause and grant a writ of prohibition against enforcement of the October, 2010 Order of the Circuit Court of Harrison County, West Virginia.

CERTIFICATE OF SERVICE

I, D. C. Offutt, Jr., counsel for the West Virginia Mutual Insurance Company, hereby certify that I have served a true copy of the foregoing "***Amicus Curiae* Brief Filed on Behalf of West Virginia Mutual Insurance Company**" upon the following individuals, by placing the same in the U.S. Mail, First Class, postage prepaid, on this the 8th day of November, 2010:

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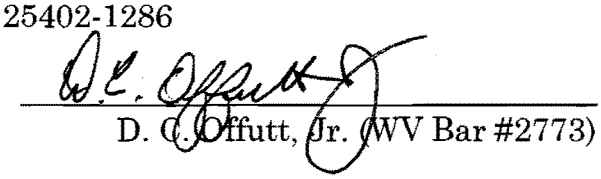

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Respectfully submitted,

WEST VIRGINIA MUTUAL INSURANCE COMPANY

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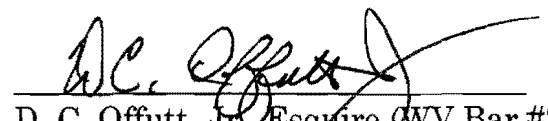

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