

No. 10 -1417

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston**

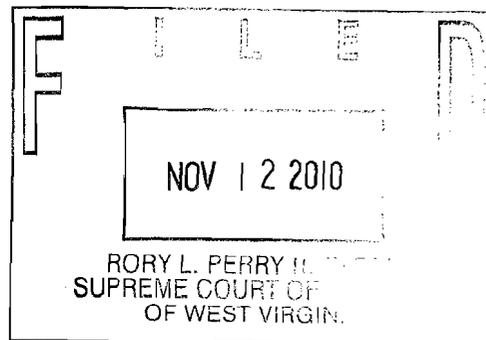
**STATE EX REL. STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,**

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

**RESPONDENT'S BRIEF IN RESPONSE TO STATE FARM'S
PETITION FOR WRIT OF PROHIBITION**

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TABLE OF CONTENTS

Table of Authorities

I. Questions Presented and Facts 1

II. Standard of Review 5

III. The Trial Court’s Order Was Well Within its Broad Discretion to Protect Plaintiff’s Private and Confidential Medical Records as Authorized by Rule 26(c) and it Fully Complied with this Court’s Holding in State ex rel State Farm Ins. Co. v Bedell. 6

IV. Prohibition Is Not a Proper Remedy in this Case 8

 a) State Farm Has Not Satisfied the Five Factor Test Entitling it to a Writ of Prohibition 8

 b) There are Serious Matters of Public Policy Presented in the Petition and The Record Below is Inadequate to Permit this Court Sufficient Information to Decide Such Important Public Policy Issues and State Farm Has “Unclean Hands” for Refusing Discovery of Its Policies as Suggested by This Court in State ex rel State Farm v Bedell 11

V. Plaintiff has an Expectation of Privacy in her Personal and Confidential Medical Records and the Same Is Presumptively Deserving of Protection Under Rule 26(c) 12

VI. Plaintiff’s Personal and Private Medical Records are Not the Business Records of State Farm 21

VII. State Farm’s Assertion that it Cannot Report Fraudulent Activities is Speculative and Specious, And Must Yield to the Litigant’s Personal Privacy Interest in their Medical Records 22

VIII. Illinois Law has no Bearing on the Circuit Court’s Ability to Enter the Protective Order 26

IX. State Farm’s Assertion that its Entire Claim File Would Have to be Destroyed at the Conclusion of Litigation is Erroneous 28

 a) The Court’s Protective Order Only Relates to Return or Destruction of Plaintiff’s Personal and Private Medical Records Received from Healthcare Providers and Nothing Else and If State Farm Is Confused It Should Seek Clarification from the Trial Court Not this Court 28

X.	State Farm has Contrived These Issues to Retain Indefinitely a Litigants Personal and Private Medical Records for the Purpose of Maintaining a "Dossier" on such Litigants for Future Use by State Farm and Others	<u>29</u>
XI.	Conclusion	<u>33</u>

TABLE OF AUTHORITIES

WEST VIRGINIA COURT CASES

Child Protection Group v. Cline,
177 W.Va. 29, 34, 350 S.E.2d 541, 545 - 546 (W.Va.1986) 19, 20

Dallas v. Whitney,
118 W. Va. 196, 188 S.E. 766 (W.Va. 1936) 27

Fields v. West Virginia State Police,
264 F.R.D. 260, 262 (S.D.W.Va., 2010) 17

Keplinger v. Virginia Elec. and Power Co.,
208 W. Va. 11, 23, 537 S.E.2d 632, 644 (W.Va. 2000) 20, 21

Liberty Mutual Insurance Company v. Triangle Industries, Inc.,
182 W. Va. 580, 390 S.E.2d 562 (W.Va. 1990) 26

Miller v. Fluharty,
201 W. Va. 685, 500 S.E.2d 310 (W.Va. 1997) 17

Morris v. Consolidation Coal Co.,
191 W. Va. 426, 431, 446 S.E.2d 648, 653 (W.Va.1994) 24, 25

Paul v. National Life,
177 W.Va. 427, 352 S.E.2d 550 (W.Va. 1986) 27

Province v. Province
196 W. Va. 473, 484, 473 S.E.2d 894, 905 (W.Va. 1996) 11

State ex rel Hoover v. Berger,
483 S.E.2d 12 (W. Va. 1996) 9

State ex rel. Kitzmiller v. Henning,
190 W. Va. 142, 144, 437 S.E.2d 452, 454 (W. Va. 1993) 8, 20

State ex rel. Myers v. Sanders,
206 W. Va. 544, 546, 526 S.E.2d 320, 322 (W.Va. 1999) 7, 15

State ex rel. Nationwide Mut. Ins. Co. v. Kaufman,
658 S.E.2d 728, 729 (W.Va. 2008) 9

<u>State ex rel. Peacher v. Sencindiver,</u> 160 W.Va. 314, 233 S.E.2d 425 (W.Va. 1977)	5
<u>State ex rel. Shepard v. Holland,</u> 219 W. Va. 310, 313-314, 633 S.E.2d 255, 258 - 259 (W.Va. 2006)	6
<u>State ex rel State Farm Mut. Auto. Ins. Co. v. Bedell,</u> 226 W.Va. 138, 697 S.E.2d 730 (W.Va. 2010)	<i>passim</i>
<u>State ex rel. Valley Distributors, Inc. v. Oakley,</u> 153 W.Va. 94, 99, 168 S.E.2d 532, 535 (W.Va. 1969)	5, 6
<u>State ex rel. Ward v. Hill,</u> 200 W. Va. 270, 275, 489 S.E.2d 24, 29 (W. Va. 1997)	9
<u>State ex rel West Virginia National Auto Ins. Co. v Bedell,</u> 672 S.E. 2d 358 (W.Va. 2008)	9
<u>Town of Burnsville v. Cline,</u> 188 W. Va. 510, 425 S.E.2d 186, (W. Va. 1992)	15
<u>Vest v. St. Albans Psychiatric Hosp., Inc.,</u> 182 W. Va. 228, 229-230, 387 S.E.2d 282, 283 - 284 (W. Va. 1989)	26, 27
<u>Walker v. Doe,</u> 558 S.E.2d 290 (W. Va. 2001)	12, 13
<u>Whitlow v. Board of Educ. of Kanawha County,</u> 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (W. Va. 1993)	23, 26

CASES FROM OTHER JURISDICTIONS

<u>AT v. State Farm Ins. Co.,</u> 989 P.2d 219 (Col. App. 1999)	32
<u>A Helping Hand, LLC v. Baltimore Co., Maryland,</u> 295 F.Supp.2d 585, 592 (D.Md.2003)	16
<u>Brende v. Hara,</u> 113 Hawaii 424, 429, 153 P.3d 1109, 1114 (Hawaii 2007)	18
<u>Fischer v. City of Portland,</u> 2003 WL 23537981 (D.Or., 2003)	18, 19

<u>Flaherty v. Seroussi,</u> 209 F.R.D. 300 (N.D.N.Y., 2002)	19
<u>Greidinger v. Davis,</u> 988 F.2d 1344 (4th Cir.,1993)	15
<u>Law v. Zuckerman,</u> 307 F.Supp.2d 705, 711 (D.Md.2004)	17
<u>Meyerson v. Prime Realty Services, LLC,</u> 7 Misc.3d 911, 917, 796 N.Y.S.2d 848, 854 (N.Y.Sup., 2005)	15
<u>Scrimgeour v. Internal Revenue,</u> 149 F.3d 318, 328 (4th Cir.,1998)	15

RULES, STATUTES AND REGULATIONS

W.Va. Civ. Pro. Rule 26(c)	7, 26
W. Va. Code § 11-10-5d (a) [2007]	15
W. Va. Code § 27-3-1(a) [2008]	20
W. Va. Code § 29B-1-4(a)(2)	21
W. Va. Code § 33-41-1	24
W. Va. Code § 33-41-5	22, 23, 25
W. Va. Code 33-41-8	25
W.Va. Code 53-1-1	5
W. Va. C.S.R. § 114-15-4.2(b)	6, 7, 28, 29, 30
W. Va. C.S.R. § 114-57-15 (2002)	6
W. Va. C.S.R. 114-57-15.2 (2002)	6
West Virginia Code of State Rules § 114-57-15.1	13
45 C.F.R. § 164.512(e)(1)(v)	16
45 C.F.R. § 164.512(e)(1)(i)	16

45 C.F.R. § 164.512(e)(1)(ii)	17
45 CFR §§ 164.500-534	18
18 U.S.C. § 2710 [1988]	15
26 U.S.C. § 7431 [1998]	15
South Dakota Medical Privacy Rule	10

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From the Circuit Court of
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Civil Action No. 09-C-67-2

**RESPONDENT'S BRIEF IN RESPONSE TO STATE FARM'S
PETITION FOR WRIT OF PROHIBITION¹**

I. Questions Presented and Facts

The questions presented to this Court in this interlocutory proceeding are as follows:

¹ This brief is as complete as possible given the limited time available for Respondent to respond to the Motion and Petition. The Respondent did not receive a copy of the Petition until the afternoon of Friday, November 5, 2010, and thereafter had only 3 business days to fully research and respond to the multiple issues presented by the Petitioner. Furthermore, it is obvious that State Farm has been preparing to file this Motion for Stay and Petition for some time based upon the number of Amicus briefs submitted, which no doubt required significant cooperation and coordination.

- a) Are State Farm and Defendant Luby entitled to a stay of the proceedings below² based upon the erroneous implication to this Court that they cannot prepare for depositions and trial because they do not have the Plaintiff's medical records?
- b) Should this Court consider an interlocutory appeal regarding the issuance of a discretionary protective order when State Farm has deliberately failed to permit discovery as suggested by this Court and State Farm failed to seek clarification or modification of the Protective Order from the Trial Court?

The answer to both of these questions is No. State Farm's framing of the issues before the Trial Court below are based upon misleading characterizations of the record. Neither State Farm nor Defendant Luby is entitled to a stay of the proceedings below because they have not been entirely candid with this Court as to their grounds for a stay as both Defendants have possessed the Plaintiff's medical records, and those of her deceased husband, since before suit was filed and the Trial Court has ordered, for a second time, that such relevant medical records be produced to the Defendants by its Order entered October 25, 2010. The Plaintiff complied with the Trial Court's October 25 Order the next day, on October 26, when it sent the Defendants approximately 160 pages of Carla and Lynn Blanks' medical records and almost 40 pages detailing the Blanks' medical bills. (See attached "**Exhibit 1**" "Plaintiff's Discovery Response Pursuant to Court's October 25, 2010 Order" without attached medical records & billings). Moreover, State Farm failed to advise this Court that had possessed most of the Plaintiff's medical

² The trial is set to begin on December 13, 2010.

records relating to her injuries received in the automobile crash (her husband was killed and died at the scene) since April 2008. (See attached "**Exhibit 2**" a list of the medical records obtained pre-suit by State Farm) Thus, the reasons asserted by State Farm for the emergency stay from this Court are disingenuous. Both Defendant Luby, as the Personal Representative of the Decedent Jeremy Thomas's Estate, and State Farm have had ample time to review the relevant medical records and medical information for evaluation purposes in this case. Such was not made clear to this Court in State Farm's Motion for Stay wherein it was represented to this Court that "Time is of the essence in this matter because of depositions which are scheduled in this matter for November 10, 2010 which are contingent upon receipt and use of Plaintiff's medical records." [State Farm "Motion for Stay of Proceedings" ¶ 9.] State Farm's representation implied to this Court that it had not received any medical records and this representation was misleading, at best, and entirely inaccurate at worst.

In this same Motion for Stay filed with this Court, State Farm also represents that it cannot "prepare for the deposition or prepare a defense at trial" again inferring that it does not have the necessary medical records of the Plaintiff and her deceased husband. Again this is misleading. State Farm failed to advise this Court that the pertinent medical records had been produced on October 26, 2010, pursuant to the Trial Court's Order. Such misrepresentation and failure to be candid with this Court regarding the status of the proceedings below should result in summary denial of State Farm's request for stay. Furthermore, State Farm also failed to advise this Court that the Plaintiff had provided State Farm with a medical release before retaining counsel, and that State Farm was able to obtain substantially all medical records relevant to this case except for those generated

after such requests were made. See **Exhibit 2**.

Despite State Farm's misrepresentations, from February 12, 2009, when this case was initiated by Complaint filed in the Circuit Court, until the present time, neither Defendant Luby, nor State Farm has noticed any healthcare providers' depositions nor have they sought any other discovery on this issue other than a request for a blanket ex parte medical release, which resulted in the Trial Court's February 11, 2010, Order directing that relevant medical records and information be produced to Defendants Luby and State Farm under a protective order, which records were produced by the Plaintiff on February 18, 2010.³ Since this Court's July 2010 opinion, up to the present time, neither of the Defendants sought any further discovery from any of the healthcare providers even though the Defendants, including State Farm, were well aware of the identities of the healthcare providers, possessed much of the pertinent medical records, and knew the trial was going to be set forthwith by the Trial Court.

Nor did the Defendants take any action to request a modification to the Protective Order entered by the Trial Court on February 11, 2010, which was the subject of the prior Writ. The Trial Court, on August 4, 2010, had requested that the Parties "inform the Court whether they are able to jointly offer an agreed order which would modify the protective order previously entered by this Court in accordance with the Opinion of the Supreme Court...."⁴ The Plaintiff attempted to reach an agreement regarding the modification of the prior Protective Order consistent with this Court's Opinion, but State Farm would not

³ That Trial Court Order which required return or destruction of such medical records at the conclusion of the case resulted in State Farm's first Petition for Writ of Prohibition as detailed in State ex rel State Farm Mut. Auto. Ins. Co. v. Bedell, 226 W.Va. 138, 697 S.E.2d 730 (2010).

⁴ This request was made in the Trial Court's pre-trial/status conference Order entered August 4, 2010.

participate. After receiving the Trial Court's pre-trial/status conference Order, State Farm filed a Pre-Trial Memorandum as requested by the Trial Court wherein State Farm objected to the Plaintiff's proposed protective order only on the grounds that such protective order would result in "private regulation of State Farm and would attempt "to control trade secret protected property of State Farm". (See "**Exhibit 3**" State Farm's "Pre-Trial Memorandum" ¶ 3, attached hereto). The pre-trial/status conference was conducted on September 29, 2010, at which time the Trial Court heard argument concerning the need and form of a protective order regarding Plaintiff's medical records. The Trial Court entered a protective order on October 25, 2010. (Attached hereto as "**Exhibit 4**"). (Hereinafter referred to as "Protective Order.") However, both State Farm and Defendant Luby had the relevant medical records, many of which were obtained pre-suit by State Farm, which had been ordered produced in February 2010.⁵

II. Standard of Review

This Court has set forth the standard of review applicable to a writ of prohibition:

This Court has addressed the standard of review applicable to a writ of prohibition, explaining that "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code 53-1-1.*" Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977). "The writ [of prohibition] lies as a matter of right whenever the inferior court (a) has not jurisdiction or (b) has jurisdiction but exceeds its legitimate powers and it matters

⁵ State Farm and Defendant Luby purportedly refused to review or copy the medical records produced in February 2010; however that was their choice and accordingly these Defendants waived any harm occurring from their unilateral acts; the medical records produced on October 26 are assumed to have been utilized but again that is the choice of these Defendants; the Trial Court can give a litigant water but can't make them drink; the medical records produced pursuant to the Trial Court's Order were used by Defendant Luby's counsel in a more than 3 hour deposition of Plaintiff conducted November 10;

not if the aggrieved party has some other remedy adequate or inadequate.” *State ex rel. Valley Distributors, Inc. v. Oakley*, 153 W.Va. 94, 99, 168 S.E.2d 532, 535 (1969).

State ex rel. Shepard v. Holland, 219 W. Va. 310, 313-314, 633 S.E.2d 255, 258 - 259 (W. Va., 2006).

III. The Trial Court’s Order Was Well Within its Broad Discretion to Protect Plaintiff’s Private and Confidential Medical Records as Authorized by Rule 26(c) and it Fully Complied with this Court’s Holding in State ex rel State Farm Ins. Co. v Bedell.

This Court issued two holdings in State ex rel State Farm Ins. Co. v Bedell.⁶ First, this Court held that “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, Id. Specifically, the Insurance Commissioner’s regulations “require insurers to maintain claim files, including medical records, for approximately five to six calendar years.” Bedell at 738. **Importantly, although requested by State Farm, this Court did not hold that a tortfeasor’s insurance carrier is permitted to retain copies of a Plaintiff’s medical records, received in litigation, in perpetuity to be used for purposes other than the case in which such records were produced.**

⁶ In Bedell, this Court also stated, in *dicta*, that the Insurance Commissioner promulgated W. Va.C.S.R. § 114-57-15 (2002) to protect an insured’s confidentiality. Bedell, at 738. However, this section of the Code of State Rules specifically exempts “claims administration; claims adjustment and management” from the provisions provided for in Series 57. W. Va. C.S.R. 114-57-15.2 (2002). State Farm seeks a copy of the Plaintiff’s medical records specially for the purpose of administering, adjusting and managing the Plaintiff’s claims against the Estate of Jeremy Thomas, a State Farm insured. However, the Plaintiff has filed a civil action and that is not a “claim” as recognized in ordinary insurance practice. Accordingly, the WVIC’s regulations specifically provide that people like the Plaintiff are not subject to the WVIC’s regulations cited by State Farm, and previously cited by this Court in Bedell.

Second, this Court held that the Circuit Court's Protective Order did not provide any basis, nor had the Plaintiff produced any evidence, for restricting electronic scanning and storage of the plaintiff's medical records, and, subsequently, this Court granted State Farm's Writ of Prohibition on this ground as well. Id. Accordingly, to comply with this Court's prior mandates in Bedell, a Protective Order regarding a litigant's medical records would need to permit an insurer to maintain the records in accordance with the time periods set forth in the WVIC's regulations, and, absent evidence as to why scanning should not be permitted, a Protective Order should not restrict the method of storage of the medical records, including by electronic means during the time of retention.

The Circuit Court's Protective Order complies with both of these mandates. First, the Circuit Court's Protective Order specifically states that all medical records and information may be retained until the "conclusion of the appropriate period established by W. Va. C.S.R. § 114-15-4.2(b)[.]" Protective Order, p. 5, ¶ 2. The Circuit Court's Order even goes so far as to set forth how to calculate the appropriate time period. Id. Second, the Circuit Court's Protective Order does not, in any way, restrict the method and manner of storage of the Blanks' medical records during the time of retention.

This Court has long held that "A trial court is permitted broad discretion in the control and management of discovery, and it is only for an abuse of discretion amounting to an injustice that we will interfere with the exercise of that discretion." Syl. Pt. 8, State ex rel. Myers v. Sanders, 206 W. Va. 544, 546, 526 S.E.2d 320, 322 (W. Va. 1999). Rule 26(c) grants Circuit Courts broad discretion to enter necessary Protective Orders to protect confidential and private materials.

Furthermore, this Court has previously found that opposing counsel is restricted to

using the formal discovery process to obtain an opposing party's medical information. State ex rel. Kitzmiller v. Henning, 190 W. Va. 142, 144, 437 S.E.2d 452, 454 (W. Va. 1993). As parties must use the discovery process to obtain an opposing litigant's medical information, and Circuit Courts have broad discretion to control and manage discovery, logic dictates that Circuit Courts have broad discretion when entering Protective Orders regarding a litigant's personal and private medical records and information that is produced in discovery by the power of the trial court. [See Section V below regarding inherent privacy of medical records.]

Accordingly, the Circuit Court was well within its broad discretion when it entered the Protective Order, which fully complies with this Court's mandates in State ex rel State Farm Ins. Co. v Bedell.

IV. Prohibition Is Not a Proper Remedy in this Case

a) State Farm Has Not Satisfied the Five Factor Test Entitling it to a Writ of Prohibition

State Farm has not met any of the five criteria set forth by this Court to entitle it to a rule to show cause. This Court has clearly set forth the five factors that will be examined to determine whether a writ of prohibition should be heard and, concomitantly the proceedings below stayed, as a result of the granting of a rule to show cause. Those five factors are as follows:

- (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.

State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 658 S.E.2d 728, 729 (W.Va. 2008) syl. pt 1; accord, State ex rel West Virginia National Auto Ins. Co. v Bedell, 672 S.E. 2d 358 (W.Va. 2008).

This Court has held that the third factor, whether the Trial Court's Order is clearly erroneous as a matter of law, should be given "substantial weight", Syl. Pt. 1, Kaufman, citing State ex rel Hoover v. Berger, 483 S.E.2d 12 (W. Va. 1996). As set forth above, the Circuit Court's Order complies with this Court's holdings in State ex rel State Farm Ins. Co. v Bedell. The Trial Court's broad discretion when entering discovery orders, such as the Protective Order entered in this case, should not be reviewed piecemeal. Such an interlocutory order can be amended or modified at any time by the Trial Court before final judgment. Ultimately, State Farm has not provided any legal authority holding that the Circuit Court's Protective Order is clearly erroneous as a matter of law and subject to interlocutory review at this stage of the proceedings.

Regarding the first factor, State Farm has other adequate means to obtain the desired relief. Most discovery orders are interlocutory and reviewable by this Court only after final judgment. See State ex rel. Ward v. Hill, 200 W. Va. 270, 275, 489 S.E.2d 24, 29 (W. Va. 1997). Accordingly, the Circuit Court's Protective Order was interlocutory in nature, and can be modified at a later date by the Circuit Court. State Farm did not request that the Circuit Court modify the Protective Order, nor did it present many of its arguments

espoused in its Writ to the Circuit Court in any pleading. If State Farm thought that the Protective Order ran afoul with a West Virginia statute or regulation it should have pointed such out to the Circuit Court and asked the Circuit Court to modify the Protective Order accordingly. Instead, in an attempt to sandbag the Plaintiff and the Circuit Court, State Farm chose to file a Writ in which it presented various arguments that should have been first presented to the Circuit Court. As such, the first factor weighs against this Court issuing a Rule to Show Cause.

The second factor also weighs against this Court issuing a Rule to Show Cause. Neither State Farm nor Defendant Luby will suffer any harm, as a result of the Circuit Court's Protective Order, that is not remediable on direct appeal. By filing this Writ, State Farm is attempting to deny the Plaintiff, Carla Blank, her day in Court. Currently, the trial in this matter is set to occur on December 13, 2010. As both Defendant State Farm and Defendant Luby may appeal the Circuit Court's Protective Order after the trial has occurred, they will not be prejudiced, in any way, by allowing the case to proceed to trial. Conversely, the Plaintiff will be harmed if this Court issues a Rule to Show Cause as she will, once again, have to wait many months before being able to litigate her case before a jury of her peers. Accordingly, second factor also weighs against this Court issuing a Rule to Show Cause.

The fourth factor is whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law. As is set forth in this memorandum, the Circuit Court did not err by entering the Protective Order, so this factor also weighs against this Court issuing a Rule to Show Cause.

Finally, the fifth factor is whether the lower tribunal's order raises new and important

problems or issues of law of first impression. While this case may raise new and important issues, it would be premature to accept this case on an extraordinary Writ at this time. These issues have not been fully briefed before the Circuit Court, and discovery is not complete, so this Court does not have a complete record to review in this case. The issues presented in this case are extremely important as they will likely effect a litigant's ability to protect their medical records and information. As such, it would be prudent for this Court to allow this case to proceed before the Circuit Court, and allow State Farm to seek any modifications of the Protective Order from the Circuit Court directly, to allow the record to fully develop. Accordingly, the fifth factor also weighs against this Court issuing a Rule to Show Cause.

- b) **There are Serious Matters of Public Policy Presented in the Petition and The Record Below is Inadequate to Permit this Court Sufficient Information to Decide Such Important Public Policy Issues and State Farm Has "Unclean Hands" for Refusing Discovery of Its Policies as Suggested by This Court in State ex rel State Farm v Bedell**

Unfortunately, State Farm wishes to have its cake and eat it too, as State Farm claims that its internal policies and procedures provide sufficient protection for the Blanks' medical records and information, yet it refuses to provide any information regarding its access and dissemination. (See Subpoena Duces Tecum attached hereto as "**Exhibit 5**" and State Farm's Motion to Quash attached as "**Exhibit 6**"). It has long been the law in West Virginia "that a party who seeks equity must come with clean hands." Province v. Province 196 W. Va. 473, 484, 473 S.E.2d 894, 905 (W. Va. 1996). State Farm asks this Court to accept its unsubstantiated statements that it protects confidential information and

does not allow excessive access by its personnel and does not disseminate such information but it does so in by conclusion without providing the specifics under oath. Such shenanigans should not be permitted as State Farm is barred from seeking equitable relief, namely a Writ of Prohibition, from this Court because it has unclean hands.

V. Plaintiff has an Expectation of Privacy in her Personal and Confidential Medical Records and the Same Is Presumptively Deserving of Protection Under Rule 26(c)

State Farm claims that Bedell only allows for two methods of demonstrating the necessity of a medical confidentiality order. State Farm Writ, p. 10. Thus, State Farm claims that Carla Blank has only two methods for proving entitlement to a Protective Order which protects confidential medical information in this case: “a showing of either a past failure of State Farm to comply with the state privacy rule and Insurance Commissioner regulations or a reasonable basis that State Farm intended to disseminate private medical information without the claimant’s consent in the future.” State Farm Writ p. 10.

Contrary to State Farm’s claims, the Bedell case did not limit a litigant’s right to seek a Protective Order regarding medical records and medical information to these two sets of circumstances. In Bedell, this Court was simply citing examples for how a litigant could show the need for a Protective Order. Nowhere in its opinion did this Court state that the only way to demonstrate the necessity of a Protective Order was enumerated therein. In fact, had this Court made such a broad holding, it would have been a new point of law, and this Court has long held that “new points of law ... will be articulated through syllabus points as required by our state constitution.” Syllabus Point 2, in part, Walker v. Doe, 558 S.E.2d

290 (W. Va. 2001). As such, the examples cited in Bedell were just that, examples cited in *dicta*, and were obviously not a complete list of the grounds upon which one could show the necessity of a medical Protective Order.⁷

In Bedell, this Court was also critical of the Plaintiff because no “evidence regarding State Farm's policies for the retention of such records” was presented to the Trial Court, presumably to support the Circuit Court’s restriction on scanning of such medical records onto company wide databases. Bedell at 739. Subsequently, the Plaintiff attempted to obtain such evidence by subpoena, from State Farm regarding State Farm’s policies and procedures for storing, retaining, accessing, and destroying medical records. Unfortunately, even though State Farm claims that its internal policies and procedures provide adequate protection for Mrs. Blank’s medical records, it refused to provide any information sought by the subpoena and instead filed a Motion to Quash. (See Subpoena Duces Tecum and State Farm’s Motion to Quash attached as previously hereto).

Yesterday, on November 9, 2010, the Circuit Court granted State Farm's Motion to Quash. (See attached “**Exhibit 7**” Order Granting Motion to Quash). The Circuit Court noted that the Plaintiff sought this discovery from State Farm to further substantiate her

⁷ This Court’s exact language was “She [Carla Blank] presents no evidence, however, that State Farm has failed to comply with West Virginia Code of State Rules § 114-57-15.1, nor any facts which would show a reasonable basis for believing that State Farm intends to disseminate her ‘nonpublic personal health information’ without her consent in the future. Indeed, Mrs. Blank has not even presented any evidence¹ regarding State Farm's policies for the retention of such records, nor does she attempt to explain why the Insurance Commissioner’s legislative rule governing the confidentiality of a claimant's medical records is insufficient to protect her information.” Bedell at 739; unfortunately the Supreme Court’s *dicta* was erroneous as a careful reading of 114-57-15.1 indicates that the regulation exempts claims administration and only protects a customer’s information, not a Plaintiff like Mrs. Blank. A protective order is to prevent what may occur and one should not have to prove wrongdoing before being entitled to a protective order as it is then too late; however State Farm has been found to use such information wrongfully, see A.T. v State Farm, infra., and State Farm has also asserted it is entitled to disseminate such information to its trade group NCIB without consent of Plaintiff.

request for a Protective Order. However, the Circuit Court ruled that such issue was moot as it previously entered the Protective Order on October 25, 2010, in which it held that the Plaintiff had established “good cause.” See Protective Order, at p.1-2.

In its Protective Order, the Circuit Court held that “the Plaintiffs have demonstrated good cause for the issuance of a reasonable protective order as to the confidentiality of said records[.]” Protective Order, p. 2. More specifically, the Circuit Court held that “[t]herefore, the Plaintiffs have demonstrated a ‘particular and specific demonstration of fact,’ as well as good cause, for the issuance of an appropriate protective order.” Protective Order, p. 4, citing W. Va. Civ. Pro. R. 26. The Circuit Court further made the following specific findings supporting its holdings that the Plaintiffs demonstrated a “particular and specific demonstration of fact” and that “good cause” was established:

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* [Bedell] 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.

Protective Order, p. 3.

Essentially, the Circuit Court held that “good cause” was established in this case because medical records are inherently private and, thus, deserving of protection. The Circuit Court’s holding that medical records are inherently private is supported by the

jurisprudence in West Virginia and other jurisdictions. As set forth in Section III above, a trial court is permitted broad discretion in the control and management of discovery. State ex rel. Myers, supra. Thus the Circuit Court had broad discretion to enter a protective order that preserved Carla Blank's privacy in her medical records until such records were introduced at trial.

Courts have recognized that people have a right to privacy in various instances. For example, people have a right to keep their tax records private⁸ and unauthorized disclosure may result in civil and/or criminal penalties.⁹ Additionally, Courts have held that people have a right to keep their social security numbers private^{10,11}. People even have a right to privacy regarding the video tapes they rent or purchase.¹² Surely, if the various types of information and records noted above are considered private, then medical records must be considered inherently private, which is, in and of itself, sufficient to establish "good cause" and warrant the entry of a reasonable protective order, as nothing could be considered more private and confidential than one's medical records.

The federal government's enactment of HIPAA further illustrates the strong public policy interests associated with protecting one's medical records and information. HIPAA's strong privacy policy requires a qualified protective order [QPO] be entered when

⁸ Town of Burnsville v. Cline, 188 W. Va. 510, 425 S.E.2d 186, (W. Va. 1992), and Scrimgeour v. Internal Revenue, 149 F.3d 318, 328 (4th Cir.,1998)

⁹ See W. Va. Code § 11-10-5d (a) [2007] and 26 U.S.C. § 7431 [1998]

¹⁰ Greidinger v. Davis, 988 F.2d 1344 (4th Cir.,1993).

¹¹ Meyerson v. Prime Realty Services, LLC, 7 Misc.3d 911, 917, 796 N.Y.S.2d 848, 854 (N.Y.Sup., 2005).

¹² 18 U.S.C. § 2710 [1988].

confidential medical records and information is requested by an opposing party in litigation.

A “qualified protective order” under HIPAA means an order that: “(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.” 45 C.F.R. § 164.512(e)(1)(v).

One of HIPAA's purposes was to protect patients' privacy rights and prevent disclosure of medical records without complying with the safeguards enumerated therein.¹³ Under the judicial proceedings subsection of HIPAA, disclosure of a person's medical records is not permitted without the entry of a “qualified protective order.”

As was recently noted by the Southern District Court of West Virginia, HIPAA permits the disclosure of a person's private medical records for judicial proceedings in two instances, both of which require entry, of a “qualified protective order” under HIPAA:

The HIPAA regulations permit disclosure of a person's private medical and mental health information pursuant to a court order if a protective order is in place to prohibit disclosure of the information for a purpose other than the litigation and to require return of the information at the conclusion of the proceedings. 45 C.F.R. § 164.512(e)(1)(i); *A Helping Hand, LLC v. Baltimore Co., Maryland*, 295 F.Supp.2d 585, 592 (D.Md.2003). “[O]nly the information expressly authorized by such order” may be disclosed. 45 C.F.R. § 164.512(e)(1)(i). The Agreed Protective Order

¹³ See United States Department of Health and Human Services, Office for Civil Rights, *Summary of the HIPAA Privacy Rule*, at 1, available at: <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf> [last revised May 2003] [The Rule strikes a balance that permits important uses of information, while protecting the privacy of people who seek care and healing.]

which is found on the court's website (LR Civ P 26.4)¹⁴ meets both criteria. An alternative method of obtaining disclosure of protected information, pursuant to a subpoena, discovery request, or other lawful process, entails notice to the individual whose records are sought, an opportunity for the individual to raise an objection, resolution of any objections, **plus the described protective order.** 45 C.F.R. § 164.512(e)(1)(ii); *Law v. Zuckerman*, 307 F.Supp.2d 705, 711 (D.Md.2004).

Fields v. West Virginia State Police, 264 F.R.D. 260, 262 (S.D.W.Va., 2010) (emphasis added).

While there may be some disagreement whether HIPAA actually mandates, by way of preemption, entry of a qualified protective order before disclosure may be made in a judicial proceeding, it is clear that HIPAA's goal is to protect the privacy of people's medical records and information through the use of a qualified protective order.

State Farm asserts that the Circuit Court's Protective Order "is outside the mainstream of law across the country." State Farm Writ, p. 2, 16. This assertion is entirely inaccurate.¹⁵ Various courts have found a significant privacy interest in the confidentiality of one's medical records and medical information both under state constitutional provisions

¹⁴ The qualified protective order example referenced by the District Court is attached as "**Exhibit 8**"; that QPO restricts use of any such medical information to the case for which it was produced and also requires return of all copies at the end of the litigation; this Court also has a suggested QPO in the Mass Tort section of its website ["**Exhibit 9**"]; this Court's QPO is an excellent example of a HIPAA compliant QPO; it restricts dissemination, especially to trade association databases like ISO or similar databases like NCIB, and retention of such information while preserving an insurance company's legitimate use in the protected person's case and for underwriting related to the protected person but not to "**be used for any record compilation or database of Plaintiff's/ Claimant's claim history**". Order at ¶ 2(b); Judge Bedell's QPO was similarly compliant with HIPAA and this Court's suggested QPO.

¹⁵ State Farm has been litigating medical protective orders for many years including a case in this Court in which the same Circuit Court entered Orders protecting the confidentiality of a plaintiff's medical records. See *Miller v. Fluharty* 201 W. Va. 685, 500 S.E.2d 310 (W. Va. 1997). This is further proof that State Farm's assertion is erroneous.

and as embodied in the scope and purpose of HIPAA.¹⁶ The Supreme Court of Hawaii has held that HIPAA is a “federal floor of privacy protections that does not disturb more protective rules or practices.... The protections are a mandatory floor, which other governments and any [Department of Health and Human Services regulated] entities may exceed.” 65 Fed.Reg. 82,462 (Dec. 28, 2000). Thus, in Hawaii, a medical information protective order issued in a judicial proceeding must, **at a minimum, provide the protections of the HIPAA.**” Brende v. Hara 113 Hawaii 424, 429, 153 P.3d 1109, 1114 (Hawaii 2007). (emphasis added)

The Brende Court also held that, based on Hawaii's Constitution, similar HIPAA like restrictions applied to the Defendant's insurance carrier and mandated the entry of a Protective Order stating that **“none of the plaintiffs' protected health information and/or medical information obtained in discovery from any source in Civil No. 05-1-0108 shall be disclosed or used for any purpose by anyone or by any entity outside of Civil No. 05-1-0108 without the plaintiffs' explicit written consent thereto.”** Id. 113 Hawaii 432, 153 P.3d. 1117. (emphasis added).

Additionally, in Fischer v. City of Portland, 2003 WL 23537981 (D.Or., 2003), the District Court of Oregon held that the Plaintiff's “medical and psychological records deserve some level of pretrial protection from unlimited public disclosure. By their very nature, records of medical and psychological treatment are inherently private, if not wholly privileged.” Id. at 4. Based on the inherent privacy afforded to medical records, the

¹⁶ HIPAA is the Health Insurance Portability and Accountability Act which has specific sections dealing with privacy of protected health information (PHI). 45 CFR §§ 164.500-534.

Fischer Court further held that “[i]t is unnecessary, therefore, for Fischer to produce and the Court to review all of Fischer’s medical and psychological treatment records in order for the Court to determine that privacy interest.” Id. The Fischer Court reasoned that “[a]lthough Fischer has waived formal privileges for purposes of this litigation, such a waiver does not warrant unlimited public disclosure of this category of discovery at the pretrial stages of a case brought by a private litigant against her public-body employer.” Id. Ultimately, the Fischer Court concluded that “such records are categorically entitled to some pretrial protection from public disclosure[,]” Id. at 4-5.

Additionally, in Flaherty v. Seroussi, 209 F.R.D. 300 (N.D.N.Y., 2002), the Federal District Court of New York found that medical and educational records of individual litigants are “inherently private information.” Id. at 304. Based on the potential for embarrassment, from dissemination of any medical and educational records, the Court held that “such records are of a nature deserving of Rule 26(c) protection[,]” and entered a Protective Order. Id. Finally, other jurisdictions have recently enacted specific Rules which essentially guarantee all litigants HIPPA like protections which Carla Blank now seeks by prohibiting “[a]ny person or entity receiving such a [medical] record may not reproduce, distribute, or use it for any purpose other than the litigation or claim for which it is produced.” See South Dakota Supreme Court, “Medical Privacy Rule 10-07” attached as **“Exhibit 10.”**

Finally, and most importantly, this Court, in numerous cases, has recognized that medical records are inherently private. This Court has previously stated that “[t]here is no question that disclosure [of medical records] would cause an invasion of privacy. An

individual's medical records are classically a private interest.” Child Protection Group v. Cline, 177 W.Va. 29, 34, 350 S.E.2d 541, 545 - 546 (W. Va.1986). This Court has explicitly held that “A fiduciary relationship exists between a physician and a patient. Syl. Pt. 1, Kitzmiller, 190 W. Va. at 143, 437 S.E.2d at 453. The Kitzmiller Court explained that “[i]nformation is entrusted to the doctor in the expectation of confidentiality and the doctor has a fiduciary obligation in that regard.” Id., 190 W. Va. at 144, 437 S.E.2d at 454. This Court has further held that a litigant does not consent to a release of all her medical information by filing suit and that irrelevant medical records are not discoverable. Keplinger v. Virginia Elec. and Power Co., 208 W. Va. 11, 23, 537 S.E.2d 632, 644 (W. Va. 2000). The Keplinger Court explained that a person’s medical records are very private, and can be embarrassing, and that a person should not be deterred from filing a civil suit for fear that her private medical information will be improperly disclosed:

The reason for this principle is that a person's medical records may contain information that is totally unrelated to a civil action they have initiated. Often, such unrelated medical information is considered by the patient to be very private or, perhaps, embarrassing. When a potential plaintiff desires that medical information unrelated to a civil action remain private, he or she should be able to maintain the confidentiality of that information. A person should not be deterred from filing a civil suit that places a medical condition into issue for fear that unrelated private or embarrassing medical information may be disclosed.

Keplinger, 208 W. Va. at 23, 537 S.E.2d at 644.

The Keplinger Court further recognized that “our Legislature has nevertheless acknowledged the special confidential nature of certain medical records.” Keplinger, 208 W. Va. at 23, 537 S.E.2d at 644. Regarding mental health information, our Legislature has specifically stated that “[c]ommunications and information obtained in the course of treatment or evaluation of any client or patient are confidential information.” W. Va. Code

§ 27-3-1(a) [2008]. Our Legislature's recognition of the inherent privacy accorded to medical records is further illustrated its decision to specifically exclude medical records from disclosure under the West Virginia Freedom of Information Act.¹⁷ Ultimately, **“[b]ecause 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, 208 W. Va. at 23, 537 S.E.2d at 644 (emphasis added).

It is clear that medical records are inherently private and contain a litigant's confidential information. These documents (medical records) belong to the patient/litigant, not to a defendant requesting them, or a defendant's insurance carrier, like State Farm. This Court, and our Legislature, have recognized that a litigant's medical records are confidential and not subject to dissemination. Other Courts have recognized that a litigant's medical records are, by their very nature, private records entitled to protection under Rule 26. Accordingly, this Court should find that the Blanks' medical records are inherently private, and that the Circuit Court had “good cause” to enter the Protective Order.

VI. Plaintiff's Personal and Private Medical Records are Not the Business Records of State Farm

¹⁷ See W. Va. Code § 29B-1-4(a)(2) which provides that medical information is not to be disclosed “unless the public interest by clear and convincing evidence requires disclosure in the particular instance[.]”

Plaintiff's personal and private medical records which are required to be produced to the defendants, including State Farm, in a case by authority of the Trial Court, do not become business records of State Farm and are not converted into such, merely because the Court orders that such records be produced in litigation. If State Farm's argument were to be adopted by this Court, then a Trial Court could never order confidential documents be destroyed or returned after the purpose for their production is concluded as the documents would have become someone's, or something's, business records. Just as documents given to an attorney do not become privileged because the attorney has received them and uses them in a case, neither do medical records, which are the property of someone else, become State Farm's business records simply because they are provided to State Farm in discovery or otherwise. State Farm does not own these records nor State Farm create such records. If this Court accepts State Farm's argument, then Courts would be without the power to direct return of such documents based on the rationale that a defendant "converted" those documents into business records which they want to keep indefinitely. Such is not the law nor should it be.

VII. State Farm's Assertion that it Cannot Report Fraudulent Activities is Speculative and Specious, And Must Yield to the Litigant's Personal Privacy Interest in their Medical Records

State Farm also claims that the Circuit Court's Protective Order will prevent it from reporting fraud under W. Va. Code § 33-41-5. Importantly, State Farm failed to argue, in any of its pleadings or documents submitted to the Trial Court, that a Protective Order may

violate W. Va. Code § 33-41-5.¹⁸ This Court has held that “[o]ur general rule in this regard is that, when non-jurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal. Whitlow v. Board of Educ. of Kanawha County, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (W. Va. 1993) [internal citations omitted]. This Court further explained the rationale behind deeming such arguments waived:

The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.

Id.

State Farm did not raise any issues regarding W. Va. Code § 33-41-5 to the Circuit Court. Additionally, after the Protective Order was entered, State Farm did not seek clarification, or modification, of the Protective Order from Circuit Court regarding any alleged conflicts between the Protective Order and W. Va. Code § 33-41-5. In fact, State Farm never raised any issues regarding W. Va. Code § 33-41-5 until it filed its second Writ of Prohibition. Accordingly, State Farm has waived any arguments it may have regarding W. Va. Code § 33-41-5 because it failed to present any such arguments to the trial court.

Furthermore, State Farm’s arguments regarding W. Va. Code § 33-41-5 are

¹⁸ Additionally, contrary to State Farm’s claims, the Circuit Court’s Orders have not prevented State Farm from reviewing the Carla Blank’s medical records. State Farm has voluntarily chosen not to review such records, even though Mrs. Blank was ordered to disclose such by the Circuit Court. Furthermore, State Farm’s statements are misleading as State Farm already possesses many of Mrs. Blank’s medical records as State Farm obtained a release from Mrs. Blank and acquired some of many of her records directly from the health care providers prior to Mrs. Blank’s retention of counsel.

incorrect. State Farm argues that the Circuit Court's Protective Order will prevent it from reporting suspected fraudulent activity. State Farm Writ of Prohibition, p. 12. State Farm cites various statistics on arrests, indictments and convictions for insurance fraud. State Farm's arguments are essentially "scare tactics" as State Farm suggests that customers' insurance premiums will rise, and insurance fraud will run rampant if it is forced to return Mrs. Blank's medical records that it obtained through the civil litigation process. However, State Farm's arguments are unsubstantiated, and should be rejected by this Court. Ultimately, State Farm fails to explain how returning or destroying Carla Blank's medical records, after five years from the termination of this litigation, will, in any way, hinder its ability to report any suspected insurance fraud if such ever occurs.

W. Va. Code § 33-41-1 et. seq. was intended to aid the Insurance Commissioner not State Farm, in insurance fraud investigations.¹⁹ While fraud prevention is an amiable goal, this Court has held that fraud prevention is not sufficient reason to allow unauthorized communications involving the disclosure of one's confidential medical information. *See Morris v. Consolidation Coal Co.* 191 W. Va. 426, 431, 446 S.E.2d 648, 653 (W. Va.1994) ("Although we disapprove of any fraud and obviously agree that an alleged fraud should be investigated, we do not find that this is a sufficient reason to ignore the principles behind prohibiting unauthorized *ex parte* communication which involves the disclosure of confidential information[.]") Ultimately, the Morris Court held that the fiduciary relationship

¹⁹ W. Va. Code § 33-44-1 provides that "[t]his article is intended to permit use of the expertise of the commissioner to investigate and help prosecute insurance fraud and other crimes related to the business of insurance more effectively, and to assist and receive assistance from state, local and federal law-enforcement and regulatory agencies in enforcing laws prohibiting crimes relating to the business of insurance."

between a physician and a patient²⁰ prohibited a physician from providing oral *ex parte* communications regarding the patient's confidential medical information. *Id.*, 191 W. Va. at 432, 446 S.E.2d at 654. Importantly, the Morris Court specifically stated that “our holding will not end fraud investigations.” *Id.* The same answer is true for State Farm’s “Chicken Little’s the Sky is Falling” argument.

Similarly, the Circuit Court’s Protective Order will not end, or hinder, fraud investigations. W. Va. Code 33-41-8(a) establishes “West Virginia Insurance Fraud Unit within the office of the Insurance Commissioner of West Virginia.” The Fraud Prevention Unit has various investigatory powers, including the power to collect records, conduct investigations and serve subpoenas. *See* W. Va. Code 33-41-8. State Farm does not indicate if, or how often, medical records are ever requested by the Fraud Prevention Unit. Likewise, State Farm does not indicate how often fraudulent insurance investigations require a review of medical records. However, even if the Fraud Prevention Unit was in need of someone’s medical records, it would not need to acquire them from State Farm, as the Fraud Prevention Unit could acquire, via subpoena or otherwise, any necessary medical records directly from the pertinent entity or health care provider. Ultimately, the Fraud Prevention Unit can still investigate and prevent insurance fraud even if State Farm no longer retained Carla Blank’s medical records beyond 5 years after the case has ended. Random vehicle stops and unregulated road blocks, as well as dispensing with the Fourth Amendment, would undoubtedly make law enforcement much more efficient and reduce all types of crimes including serious violent crimes, but the concomitant loss of privacy by

²⁰ Morris specifically dealt with a claimant in a workers’ compensation proceeding.

the people is too great a price to pay for such efficiency.

Accordingly, the Circuit Court's Protective Order does not, and will not, force State Farm to violate W. Va. Code § 33-41-5.

VIII. Illinois Law has no Bearing on the Circuit Court's Ability to Enter the Protective Order

State Farm also failed to raise any issues before the Circuit Court regarding State Farm's duties under any Illinois laws. State Farm never mentioned any duties it was alleged to have under Illinois law until it filed its Second Writ of Prohibition. Accordingly, State Farm has waived any arguments it may have regarding the applicability of any Illinois laws to this proceeding because it failed to present any such arguments to the trial court. See Whitlow.

State Farm claims that the Circuit Court's Protective Order will prevent it from complying with the Illinois Administrative Code. However, State Farm fails to explain how any Illinois law or regulation would be applicable to the Circuit Court's decision to enter a Protective Order in this case. This Court has clearly held "that West Virginia procedure applies in all cases before West Virginia state courts[.]" Vest v. St. Albans Psychiatric Hosp., Inc., 182 W. Va. 228, 229-230, 387 S.E.2d 282, 283 - 284 (W. Va. 1989). The Circuit Court entered its Protective Order under West Virginia Civil Procedure Rule 26(c). As such, the Protective Order was clearly a procedural Order, and West Virginia law, not Illinois law, would apply. To hold otherwise would allow Illinois law to dictate the proceedings in West Virginia Courts. Such logic is absurd.

Furthermore, the underlying tort case involves a car crash, involving West Virginia residents that occurred in West Virginia. "In tort cases, West Virginia courts apply the traditional choice-of-law rule, *lex loci delicti*; that is, the substantive rights between the parties are determined by the law of the place of injury." Vest, 182 W. Va. at 229-230, 387 S.E.2d at 283 - 284 citing Paul v. National Life, 177 W.Va. 427, 352 S.E.2d 550 (W. Va. 1986). This case also involves a claim for underinsured motorists coverage. Likewise, West Virginia law would apply regarding this claim as the insurance policy was formed in West Virginia with regard to personal property located in West Virginia. See Syllabus, Liberty Mutual Insurance Company v. Triangle Industries, Inc., 182 W. Va. 580, 390 S.E.2d 562 (W. Va. 1990). Finally, this Court has "long recognized that comity does not require the application of the substantive law of a foreign state when that law contravenes the public policy of this State." Paul, 177 W. Va. at 433, 352 S.E.2d at 556 citing Dallas v. Whitney, 118 W. Va. 196, 188 S.E. 766 (W. Va. 1936). Therefore, even if an Illinois regulation were applicable in West Virginia Circuit Court proceedings, then it would not be applied as it would contravene the public policy of this State regarding the confidentiality of one's medical records.

Ultimately, State Farm has not cited any authority, nor does any authority exist, which would allow an Illinois law or regulation to dictate proceedings in West Virginia Circuit Court case, involving West Virginia parties, and a car crash that occurred in West Virginia. This Court's previous holdings make clear that West Virginia law, not Illinois law, would apply in this case. Accordingly, State Farm's arguments regarding the applicability of Illinois statutes and administrative codes is without merit and has no bearing on this

Court's analysis of the issues presented in State Farm's Writ.

IX. State Farm's Assertion that its Entire Claim File Would Have to be Destroyed at the Conclusion of Litigation is Erroneous

a) The Court's Protective Order Only Relates to Return or Destruction of Plaintiff's Personal and Private Medical Records Received from Healthcare Providers and Nothing Else and If State Farm Is Confused It Should Seek Clarification from the Trial Court Not this Court

State Farm claims that the Circuit Court's use of the term "medical information" would require State Farm to destroy its entire claim file upon conclusion of the time period set forth in W. Va. C.S.R. § 114-15-4.2(b). State Farm Writ, p. 14. Such is completely inaccurate, and State Farm's assertion is disingenuous and serves no purpose other than to distract this Court from other legitimate issues presented in this Petition.

In all the pleadings and documents that the Plaintiff submitted to the Circuit Court, and in all hearings before the Circuit Court regarding the Plaintiff's request for a Medical Protective Order, the Plaintiff never once requested that State Farm be forced to destroy its entire claim file. State Farm is aware that the Plaintiff only seeks to prevent State Farm from being able to keep copies of medical records in indefinitely beyond what this Court established as the required time period under the Insurance Regulations. The Plaintiff understands that various parts of the claim file may include references to personal injuries and related care for those injuries suffered in the car crash at issue in this case. The Plaintiff has never requested that all claim file documents be destroyed or returned upon completion of the applicable time period. Ultimately, State Farm's interpretation of the

Circuit Court's Order is completely inaccurate and goes against all logic and common sense.

Furthermore, if State Farm had any questions regarding the Circuit Court's use of the term "medical information" it should have sought clarification from the Circuit Court. Instead, State Farm chose to delay this case, waste this Court's time, and present an argument which State Farm knows is not at issue in this case as there has never been any assertion by any party in this case that State Farm would be forced to destroy its entire claim file. Such issue was not presented before the Circuit Court, and State Farm is simply intentionally misconstruing the Circuit Court's Protective Order so as to exaggerate the matter to this Court. Such conduct should not be tolerated and if State Farm is confused it should seek clarification from the Trial Court.

Accordingly, this Court should disregard State Farm's erroneous assertion that the Circuit Court Order requires it to destroy its entire claim file.

X. State Farm has Contrived These Issues to Retain Indefinitely a Litigants Personal and Private Medical Records for the Purpose of Maintaining a "Dossier" on such Litigants for Future Use by State Farm and Others

Ultimately, State Farm's goal is that it be permitted to retain litigants' personal and private medical records indefinitely. Such is clear as State Farm, despite being given multiple opportunities, has repeatedly refused to provide the Circuit Court with an alternative time period for retention. Furthermore, at oral argument before this Court on the first Writ filed in this case, State Farm represented that it did not wish to keep medical records indefinitely. However, State Farm has since "changed its tune" as it now asserts

that the retention period set forth in W. Va. C.S.R. § 114-15-4.2(b) is inadequate. In a desperate attempt to bolster its argument, State Farm cites various statutes and circumstances which are not applicable in this case nor supportive of State Farm's position.

First, State Farm argues that the statute of limitations for breach of contract claims is ten (10) years and that cases involving minors or disabled persons have extended statutes of limitations. State Farm Writ, p. 14-15. However, in its Writ, State Farm admits that a breach of contract "claim is already filed in the present civil action[.]"²¹ *Id.* at 14. Accordingly, as the Plaintiff has already asserted such an action in this case, State Farm's admits that its argument is not applicable to this case. Similarly, this case does not involve any minors or disabled persons, so State Farm's arguments are simply hypothetical and inapplicable to this case.

State Farm also asserts that and that files for cases involving structured settlements must be maintained for extended periods of time. However, this case does not involve any structured settlements, so, once again, State Farm's argument is inapplicable to this case. Moreover merely because a structured settlement is part of a settlement does not warrant such an invasion of privacy to an innocent victim of an impaired driver, as here. Finally, State Farm argues that medical records related to Medicare recipients must be maintained for extended time periods. As there is no assertion that Medicare has provided any benefits, or will provide any future benefits, to the Plaintiff as a result of the car crash, State Farm's argument in this regard is also inapplicable to this case. It also has no bearing on

²¹ State Farm attempts to save its hypothetical argument by asserting that, if the Plaintiff had not already filed a breach of contract claim, "it could have been filed after the conclusion of the underlying tort claim up to 10 years from the date of the alleged breach." However, it is clear that State Farm's argument, by its own admission, is completely moot.

the terms of a protective order.

Even more importantly, State Farm fails to explain why the Blanks' medical records must be maintained for a time period greater than that set forth in W. Va. C.S.R. § 114-15-4.2(b). The Legal ethics opinion 2002-01 regarding the retention and destruction of closed client files, which is cited in State Farm's brief, recommends that attorneys keep records for a minimum of five years, which is consistent with the Circuit Court's Protective Order. Furthermore, the Circuit Court's Protective Order specifically allows for Defendants' counsel, which would include counsel for Defendant Luby and counsel for State Farm, to retain a sealed copy of the medical records produced in this case without any time limitation, so State Farm's assertions are misleading and inaccurate. Protective Order, p. 6, ¶ 2. **State Farm wants to retain such records to consult them for other claims and that is just not right.** An innocent victim as Carla Blank should not lose her privacy merely for being in the wrong place at the wrong time. She and her family have suffered enough.

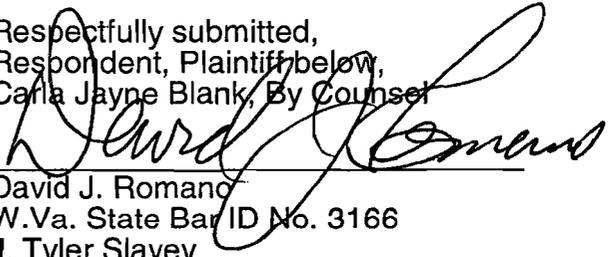
State Farm argues that the time period set forth in W. Va. C.S.R. § 114-15-4.2(b) is inadequate, but State Farm fails to state how long it should be permitted to retain the Blanks' medical records. The core of State Farm's argument is that the Court **cannot set forth any time period** mandating that State Farm return or destroy the Blanks' medical records. State Farm asserts, repeatedly, that it has internal retention policies. State Farm Writ, p. 16. However, State Farm has failed, in any pleading submitted to this Court or the Circuit Court, to explain its policies and procedures for document retention. It has also refused discovery on this matter. If State Farm wishes to retain the Blanks' medical

records for a specific period of time, to comply with its own internal policies, it should have asked the Trial Court to do so and provided cogent reasons for allowing it. Instead of proposing an alternative retention period, State Farm asserts that the Circuit Court cannot place any time restrictions on its ability to retain the Blanks's medical records which were produced as a result of this litigation. Ultimately, State Farm refuses to inform the Court regarding its internal policies for document retention, and State Farm further refuses to agree to any time period for destruction or return of the Blanks' medical records. As such, State Farm will not agree to any limitation on its retention of the Blanks' medical records. All this serves to illustrate State Farm's true intentions, which is to keep copies of litigants' medical records indefinitely. This Court should not permit State Farm to keep copies of the Blanks' medical records forever, as State Farm does not have a very good track record in maintaining the confidentiality of people's medical records; AT v. State Farm Ins. Co. 989 P.2d 219 (Col. App. 1999) [using claimant's confidential medical records to cross-examine same claimant when claimant appeared as expert witness in a separate unrelated civil action]. Moreover Plaintiff will have no way of knowing when, who and why her medical records are being viewed by strangers. This is exactly what a protective order prevents and protects against.

XI. Conclusion

Based on the reasons set forth herein, this Court should deny the request for stay and also reject State Farm's Writ of Prohibition and allow State Farm to proceed on direct appeal should it desire to do so at the appropriate time.

Respectfully submitted,
Respondent, Plaintiff below,
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CERTIFICATE OF SERVICE

I, David J. Romano, do hereby certify that on the 10th day of November, 2010, I served the foregoing **"RESPONDENT'S BRIEF IN RESPONSE TO STATE FARM'S PETITION FOR WRIT OF PROHIBITION"** and **"RESPONDENT'S APPENDIX"** upon the below listed counsel of record by facsimile them their office addresses:

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