

No: 10/417

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

STATE EX REL. STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Petitioner,

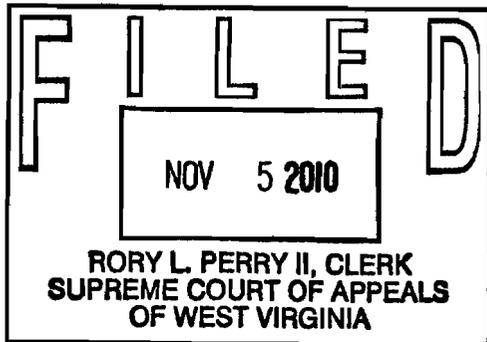
v.

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

**RESPONSE ON BEHALF OF LANA S. EDDY LUBY TO
PETITION FOR WRIT OF PROHIBITION OF STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY**



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**RESPONSE ON BEHALF OF LANA S. EDDY LUBY TO
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COMES NOW the Defendant below, Lana S. Eddy Luby (“Ms. Luby”) as Personal Representative of the Estate of Jeremy Jay Thomas, by counsel, Tiffany R. Durst and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, pursuant to Rule 14(b) of the of the West Virginia Rules of Appellate Procedure, and hereby submits this response to the Petition for Writ of Prohibition filed by State Farm Mutual Automobile Insurance Company (“State Farm”). Given the significant interests at stake with enforcement of the October 25, 2010 Order of the Circuit Court of Harrison County, West Virginia, including onerous burdens placed on defense counsel, burdens previously recognized by this Honorable Court in *State ex rel. State Farm Mutual Automobile Insurance Company*, 226 W. Va. 138, 697 S.E.2d 730 (2010), it is respectfully requested that this Honorable Court grant the writ, as requested, thereby prohibiting enforcement of the October 25, 2010 Order.

I. Standard of Review

This matter is before this Court upon original jurisdiction, pursuant to State Farm’s Petition for Writ of Prohibition, a Petition with which Ms. Luby respectfully joins. A “writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court . . . having such jurisdiction, exceeds its legitimate powers.” *W. Va. Code 53-1-1*. “Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari.” *State ex rel. Westfield Insurance Company v. Madden*, 216 W. Va. 16, 602 S.E.2d 459, 462 (2004)[quoting *Crawford v. Taylor*, 138

W. Va. 207, 75 S.E.2d 370 (1953)]. Further, this Court has previously recognized that a writ of prohibition is available to correct a clear legal error resulting from a lower court's substantial abuse of discretion in regard to orders addressing discovery issues. *See, e.g., State ex rel. USF&G v. Canady*, 194 W. Va. 431, 460 S.E.2d 677 (1995); *State ex rel. State Farm Mutual Automobile Insurance Company v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577, syl. pt. 1 (1992).

In considering whether to entertain original jurisdiction and issue a writ of prohibition in a case such as this, where it is alleged that the lower court exceeded its legitimate powers, this Court has repeatedly addressed the five (5) factors it will examine:

(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. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12, syl. pt. 4 (1996).

This case clearly warrants the issuance of a writ of prohibition. There is no other remedy available to correct the lower court's clear error because defense counsel for Ms. Luby, the named defendant in the underlying personal injury action, cannot accept the medical records of the Plaintiff below, Carla Blank ("Ms. Blank"), under the terms prescribed by the lower court's Order, specifically where said Order places a burden on defense counsel to certify that an entity, over which counsel has no authority or control, has destroyed Ms. Blank's medical records more than five (5) to (6) years after conclusion of defense counsel's involvement in the underlying litigation.

Furthermore, Ms. Luby will be prejudiced in her defense of the claims below in a manner not correctable on appeal – if defense counsel cannot accept Ms. Blank’s medical records, then there is no possible way Ms. Luby can adequately prepare a defense to the claims below, including Ms. Blank’s claim for damages, which is a clear violation of her right to due process of law. As such, Ms. Luby joins with State Farm in requesting that this Honorable Court issue a Rule to Show Cause and thereafter grant the Writ of Prohibition as requested, thereby prohibiting enforcement of the October 25, 2010 Order of the Circuit Court of Harrison County, West Virginia.

II. Issue Presented

The Petition before the Court arises from yet another Order entered by the Circuit Court of Harrison County, West Virginia, this time an October 25, 2010 Order¹ with which, the underlying Co-Defendant and Petitioner herein, State Farm, asserts it cannot comply. Ms. Luby, through her defense counsel, agrees with the requested Petition, but asserts that the enforcement of the Order would have a different, yet equally significant impact, on defense counsel, particularly the requirement of certification by defense counsel that State Farm, an entity over which defense counsel has no authority or control, has either destroyed and/or returned to Ms. Blank’s counsel the entirety of Ms. Blank’s medical records and medical information within the time limitations set forth in the Order. In addition to the burdens placed on State Farm, as outlined in its Petition to this Court, the Order also places burdens upon Ms. Luby’s, with which counsel is incapable of complying. Specifically, the lower court’s October 25, 2010 Order (hereinafter “Order”) requires:

2. Also, upon conclusion of the appropriate period established by W. Va. C.S.R. § 114-15-4.2(b), all medical records, and medical information, or any copies or summaries thereof, will either be destroyed **with a certificate from Defendants’ counsel as an officer of the Court that the same has been done**, or all such

¹A copy of the October 25, 2010 Order was attached as “Exhibit A” to State Farm’s Petition.

materials will be returned to Plaintiff's counsel without retention by Defendants' counsel or any other person who was furnished such materials and information. . .

October 25, 2010 Order at 5-6, ¶ 2 (emphasis supplied). Said provision without question requires the certification by Ms. Luby's counsel, as an officer of the Court, that entities over which counsel has no authority or control have complied with the provisions of the Order. This Court previously recognized the "untenable position" in which counsel for Ms. Luby is placed with the certification requirement. *Bedell*, 697 S.E.2d at 737 ("counsel for the Estate is caught in the untenable position of needing to disclose the medical records to State Farm in order to facilitate a settlement, but being unable to do so because, under the protective order, she cannot certify that State Farm would return or destroy the records upon the conclusion of the case."). Further confounding the dilemma facing defense counsel, such as Ms. Luby's counsel, is the fact that this certification is required by counsel years after counsel's involvement in the case would have concluded. As counsel cannot comply with the Order, counsel is effectively precluded from providing medical records to this Respondent's insurer and is further precluded from preparing a full and zealous defense owed to Ms. Luby.

As part of zealously and fully representing a defendant that has had the foresight to procure insurance, policy proceeds available for settlement claims are controlled by the insurance company for defendants that have had the foresight to procure insurance. To protect the client to whom the duty of zealous and full representation is owed, medical records must be provided to the client's insurance company so it can evaluate the claim.

This decision will impact all counsel hired by insurance companies to represent insured parties. Counsel will be effectively hindered in the representation of the client, which is counsel's first and foremost duty. Any confidentiality concerns with regard to protection of Ms.

Blank's medical records and related medical information, are already protected under existing state and federal privacy laws, as well as regulations promulgated by the Insurance Commissioner. Ms. Blank's "concerns" are more than adequately addressed and certification by defense counsel for Ms. Luby is not necessary. Such a requirement places a restriction on the vigorous representation of clients and unduly violates due process, which this Court should not permit. Therefore, the lower court's Order cannot stand as entered.

III. Proceedings and Rulings Below

As this Court is well aware, this action stems from a March 20, 2008 head-on collision between the vehicle driven by Jeremy Jay Thomas ("Mr. Thomas"), who died as result of the motor vehicle accident, and the vehicle driven by Lynn Robert Blank, also killed in the motor vehicle accident, and occupied by the plaintiff, Carla Blank. Following the accident, and prior to institution of any civil action, Mr. Thomas' insurance carrier, State Farm, offered policy limits on behalf of Mr. Thomas's Estate to Ms. Blank's counsel for the claim on behalf of Lynn Robert Blank, in exchange for a full and complete release of Mr. Thomas' Estate. Said offer was not accepted by Ms. Blank's counsel.

On February 12, 2009, Ms. Blank filed suit against the Estate of Jeremy Jay Thomas and State Farm, as the Plaintiff's underinsured motorist carrier. Plaintiff also alleged "bad faith" on the part of State Farm. Pursuant to Syllabus Point 9 of this Court's opinion in *State ex rel. Allstate Ins. Co. v. Karl* 190 W.Va. 176, 437 S.E. 2d. 749 (1993), counsel for the Estate of Mr. Thomas and counsel for State Farm jointly agreed to cooperate in the defense of this matter, and State Farm's counsel issued formal discovery to Ms. Blank which, in part, requested Carla Blank and Lynn Robert Blank's medical records. Ms. Blank's counsel refused to provide said records without the entry of an



overly restrictive confidentiality agreement. State Farm and this Respondent were not willing to enter into such a restrictive agreement.

The disagreement regarding the confidentiality issue continued up to the point the lower court issued the first protective order in this case on February 11, 2010 Order. This Court is fully aware of the terms and conditions imposed in the February 11, 2010 Order, having previously found the lower court to have exceeded its legitimate authority in entering the said prior Order. *See State ex rel. State Farm Mutual Automobile Insurance Company v. Bedell, supra*, on June 16, 2010.

Thereafter, upon issuance of the mandate by this Court, the lower court set a scheduling conference, which was subsequently continued due to a scheduling conflict of State Farm's counsel. The scheduling conference was ultimately held on September 29, 2010, at which time the lower court addressed the ongoing disagreement regarding the terms and conditions to be contained in a protective order, as requested by Ms. Blank's counsel. At the September 29, 2010 hearing, the lower court advised that a ruling on the protective order issue should be forthcoming within a week to ten (10) days. The lower court also set a trial in the underlying matter for the week of December 13, 2010.

Approximately four (4) months following the issuance of this Court's mandate, the lower court entered a new Order on October 25, 2010, which is the subject of State Farm's Petition. The October 25, 2010 Order is nearly identical to the February 11, 2010 Order with the exception of deleting a prohibition on electronic storage of Ms. Blank's medical records and extending the time frame for the provision requiring destruction or return of Ms. Blank's medical records applicable to State Farm to the time period(s) set forth in *W. Va. C.S.R. § 114-15-4.2(b)* – a period of approximately five (5) to six (6) years following conclusion of the litigation. However, the Order,

pertinent to Ms. Luby, required Ms. Luby's counsel to certify as an officer of the Court that medical records were destroyed by any party to which they were provided, including Mr. Thomas's insurance carrier. Ms. Luby's counsel cannot certify the destruction of records or information by a party over which it asserts no authority or control. As counsel cannot make such a certification, counsel cannot provide medical records to Mr. Thomas's insurance carrier without knowingly violating the October 25, 2010 Order.

Without having access to Ms. Blank's medical records, counsel cannot prepare for and proceed with Ms. Blank's deposition, which is presently set for November 10, 2010. The scheduling of Ms. Blank's deposition, without resolution of the protective order, was necessary as the lower court set a trial date for the week of December 13, 2010. Moreover, after setting the trial date only a little over two (2) months away, the lower court then entered its Amended Pre-Trial and Scheduling Order on November 1, 2010, which provided for a November 12, 2010 discovery deadline. Having only entered the protective order on October 25, 2010, the lower court then ordered the parties to complete discovery by November 12, 2010.

IV. Argument

A. Good Cause Has Not been Shown to Support the Issuance of a Protective Order as Required by This Court's Prior Precedent and Rule 26(c) of the West Virginia Rules of Civil Procedure.

The authority for a lower court to issue a protective order regarding discovery is controlled by Rule 26(c) of the West Virginia Rules of Civil Procedure. This Court has explained the burden required to establish good cause:

The rule [Rule 26(c)] requires that good cause be shown for a protective order. This puts the burden on the party seeking relief to show some plainly adequate reason therefore. The courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish

good cause. 8 C.Wright and Miller, *Federal Practice and Procedure: Civil* § 2035 at 264-65 (1970)(footnotes omitted).

State ex rel. Shroades v. Henry, 187 W. Va. 723, 421 S.E.2d 264 (1992). Relying on its prior precedent, this Court in *Bedell* previously addressed the good cause requirement for issuance of the protective order requested by Ms. Blank. Indeed, the Court stated that, “[i]n the absence of any factual support, the vague fears articulated by Mrs. Blank do not constitute the ‘particular and specific demonstration of fact’ that this Court requires from a party seeking a protective order.” *Bedell* at 740.

With no new factual support submitted by Ms. Blank to the lower court after this Court’s mandate, the lower court nonetheless issued another protective order, holding that “the Plaintiffs have demonstrated a ‘particular and specific demonstration of fact,’ as well as good cause, for the issuance of an appropriate protective order.” *October 25, 2010 Order at 3*. A review of the lower court’s Order demonstrates that the apparent “particularly and specific demonstration of fact” supporting the issuance of a protective order is the fact that medical records and medical information are at issue in this case and such records “are private in nature and are protected by the privilege between the treating physician or care provider and the patient.” *October 25, 2010 Order at 3*.

Medical records and related medical information are necessary evidence in the defense of nearly every bodily injury personal injury claim filed in this State. However, the simple fact that such records and information are at issue does not automatically establish the “good cause” required by this Court for the issuance of a protective order, particularly when there are existing state and federal safeguards already in place designed to protect the confidential nature of medical records and medical information. In fact, to protect the confidentiality of an insured’s medical records, the

West Virginia Insurance Commissioner promulgated *W. Va. C.S.R. § 114-57-15*, ultimately patterned after the federal Gramm-Leach Bliley Act. *See Bedell* at 738.

Moreover, this Court has consistently given medical records special protection from disclosure and improper use. For instance, in *Allen v. Smith*, 179 W. Va. 360, 368 S.E.2d 924 (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 said records. Similarly, in *Morris v. Consolidation Coal Company*, 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. Likewise, in *Keplinger v. Virginia Elec. and Power Co.*, 208 W. Va. 11, 537 S.E.2d 632 (2000), this Court held that the failure to comply with the provisions of W. Va. Code § 57-5-4a, the West Virginia Medical Records Act, by an attorney gives rise to a private cause of action for tortious interference with a physician/patient relationship.

Consequently, it cannot be fairly disputed that there are protections in place to safeguard the confidential medical information of Ms. Blank. The issuance of a blanket protective order, simply because her medical information and records are at issue, does not comply with the good cause requirement. Furthermore, this Court previously found that good cause did not exist as Ms. Blank had not provided any facts to support her "vague fears." *Bedell* at 740. She has not provided any additional factual information since the issuance of this Court's mandate and, thus, it is submitted that good cause does not exist for the issuance of the Order by the lower court.

B. Defense Counsel's Duty Is Owed to the Insured.

It has long been recognized that a tripartite relationship arises when a party is sued and said party carries insurance that pursuant to the terms of the agreement provides a defense to the suit. Said defense is traditionally provided by an independent attorney hired by the insurance company to defend the insured. The tripartite relationship is an ethical mine field for defense counsel as their payment is provided by the insurance company, while the defendant is the client to whom counsel owes an unequivocal duty. This Court previously recognized:

Attorneys have long struggled with the contractual and ethical quandaries presented by the "tripartite" relationship between defense attorney, insurance company, and insured. The Supreme Court of Mississippi once observed that the "ethical dilemma thus imposed upon the carrier-employed defense attorney" by the relationship between insurer, client-insured, and insurance-company-paid defense attorney is one that "would tax Socrates." *Hartford Accident & Indemnity Co. v. Foster*, 528 So. 2d 255, 273 (Miss. 1988).

Barefield v. DPIC Cos., 215 W. Va. 544, 556 (W. Va. 2004). (See also L.E.I. No. 2005-01, *Whether An Agreement to Abide by Insurance Company Guidelines Violates the Rules of Professional Conduct?*) The *Barefield* Court further stated:

In *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75 (1998), we concluded that a defense attorney represents only the insured, and not the insurer that is paying the defense attorney's fee. While it has been argued that the attorney represents both the insurer and insured, we acknowledged that "in reality, the insurer actually hires the attorney to represent the insured." 203 W.Va. at 372, 508 S.E.2d at 89.

Barefield at 556. The *Barefield* Court further clarified the ethical duty placed on counsel hired by an insurance company, "[w]e believe that an attorney retained by an insurance company to defend an insured is ethically required to independently and vigorously defend the interests of the insured." *Id.* at 553.

This Court in *Bedell* recognized the dilemma facing defense counsel for Ms. Luby in light of the lower court's prior protective order:

Mr. Thomas's Estate faces a similar predicament. Although State Farm hired counsel to defend Mr. Thomas's Estate, that counsel owes its duty to the Estate, not to State Farm. Syl. Pt. 7, *Barefield v. DPIC Cos., Inc.*, 215 W. Va. 544, 600 S.E.2d 256 (2004) ("When an insurance company hires a defense attorney to represent an insured in a liability matter, the attorney's ethical obligations are owed to the insured and not to the insurance company that pays for the attorney's services."). Counsel for the Estate, therefore, is not able to bind State Farm to any agreements or otherwise assert control over State Farm.

Bedell at 737. The most recent version of the lower court's protective order does nothing to eliminate the predicament facing Ms. Luby's counsel, as recognized by this Court. The Order still requires Ms. Luby's counsel to certify, as an officer of the Court, that State Farm will either destroy or return Ms. Blank's medical records upon expiration of the time period set forth in *W. Va. C.S.R. § 114-15-4.2(b)*, *i.e.*, approximately five (5) to six (6) years following conclusion of the litigation. To the contrary, the "new" Order entered by the lower court actually extends defense counsel's obligation beyond that set forth in the February 11, 2010 protective order. Now, defense counsel is obligated to certify that an entity, over which counsel has no authority or control, has taken action in the form of either destroying or returning Ms. Blank's medical records some five (5) to six (6) years after defense counsel's involvement in the litigation would have ended. Such an onerous burden on defense counsel surely could not be contemplated within Rule 26(c) of the West Virginia Rules of Civil Procedure. However, this Court has already recognized that "[c]ounsel for the Estate, therefore, is not able to bind State Farm to any agreements or otherwise assert control over State Farm." *Bedell* at 737. Without the authority to bind State Farm to comply with the terms of the Order, counsel for Ms. Luby cannot issue the certification required by said Order. If counsel cannot certify, as an

officer of the Court, as required by the lower court's Order, then counsel cannot comply with the Order. In the absence of compliance with the Order, counsel cannot accept Ms. Blank's medical records, which, in turn, prevents counsel from properly and zealously representing her client, Ms. Luby.

C. **Delivery of Medical Records to the Defendant's Insurer is Necessary to the Representation of a Defendant.**

A primary consideration of counsel for an insured defendant is whether the civil litigation can be settled within the policy limits for which the defendant has contracted, while at the same time providing a full and complete release from liability. To do so is obviously in the best interests of the insured defendant as it protects the insured's personal assets in the event of litigation, which is one of the purposes for which an insured purchases the policy of insurance that provides for their defense.

Though counsel must act independently representing the insured, the insurance company retains control over the policy funds available for settlement and along with that control comes numerous obligations imposed upon an insurer, not the least of which is the duty to evaluate a claim against its insured and alleviate the insured of any further liability by settling a claims against the insured within policy limits if at all possible. In defining the duty of an insurance company to evaluate a claim, this Court has stated:

The insurance company must take into account the interest of its insured and give its insured's interest at least as much consideration as it gives its own interest. What this means, as a practical matter, is that the insurance company should evaluate the chance that a jury award might be entered against the insured in excess of the policy limits and in deciding whether to settle consider its insured's interest as well as its own interest.

Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. 585, 593 (W. Va. 1990).

Necessary to the evaluation of a potential jury award where a plaintiff alleges physical injury, as required under *Shamblin*, is the evaluation of a plaintiff's alleged injuries. As a practical matter, plaintiffs do on occasion make claims that are not supported by the medical records and available information. Therefore, it is absolutely necessary to the evaluation of the claim that the Plaintiff's medical records and information are provided to the insurer so that the insurer can perform its duty to evaluate the claim to determine the chances of a jury award in excess of the insured's policy limits. To fulfill counsel's duty to the insured, counsel for the insured must provide all available information to the insurer that may help resolve the matter within policy limits.

This obligation of defense counsel was also previously addressed by this Court in its prior opinion in *Bedell*. In that regard, the Court recognized:

Mr. Thomas's Estate explains that its interests lie in settling Mrs. Blank's claims against it for the insurance policy limits, with a release of the Estate from all personal liability. Counsel for Mr. Thomas's Estate cannot pursue such a settlement, however, without discussing the Blank's medical records with State Farm because, as the insurer, State Farm must agree to any settlement paid from Mr. Thomas's insurance policy. Accordingly, counsel for the Estate is caught in the untenable position of needing to disclose the medical records to State Farm in order to facilitate a settlement, but being unable to do so because, under the protective order, she cannot certify that State Farm would return or destroy the records upon the conclusion of the case. Consequently, the protective order similarly prevents Mr. Thomas's Estate from being able to prepare for trial or take the steps necessary to reach a settlement in the case.

Bedell at 737. Consequently, the Court concluded that "prohibition [was] the appropriate avenue by which to address this issue." However, the lower court's October 25, 2010 Order wholly fails to address this portion of the Court's opinion. The only difference in the obligations placed on counsel by the lower court's present Order is that the obligation of counsel would extend years beyond the conclusion of the litigation with a requirement that counsel certify, as an officer of the court, that any

records or medical information forwarded to State Farm for evaluation is either destroyed or returned to Ms. Blank's counsel within the time prescribed by *W. Va. C.S.R. § 114-15-4.2(b)*. This change in the time restriction does not eliminate the predicament of Ms. Luby's counsel previously recognized by this Court and, thus, prohibition is again the appropriate avenue to address this recurring issue.

D. The Circuit Court's October 25, 2010 Order Effectively Precludes Counsel for the Insured from Providing Medical Records to the Insurance Company.

The lower court's Order does permit Ms. Luby's counsel to provide Plaintiff's medical records to the insurance carrier, however, the insurer, in this case State Farm, must agree in writing to be bound by all terms of the Order, including non-disclosure and non-retention of the medical information. Quite obviously, based on the issues raised by State Farm in its Petition filed with this Court, it is plain that State Farm could not agree, in writing, as required by the Court's Order. Thus, Ms. Luby's counsel could not and cannot provide any medical records of the Plaintiff to State Farm. Moreover, the lower court's Order still requires Ms. Luby's counsel to certify as an officer of the court that all of the records have been destroyed and/or returned by State Farm within the time frame set forth by *W. Va. C.S.R. § 114-15-4.2(b)*. Again, this is a requirement that effectively precludes counsel from providing medical records and information to State Farm as counsel cannot make such a certification without running afoul of counsel's duty of candor to the tribunal, particularly as "[c]ounsel for the Estate, therefore, is not able to bind State Farm to any agreements or otherwise assert control over State Farm." *Bedell* at 737.

As this Court is well aware, all attorneys are bound by the Rules of Professional Conduct. Rule 3.3 of the Rules of Professional Conduct states, "a lawyer shall not knowingly...make a false statement of material fact or law to the tribunal." In addition to the duty found in Rule 3.3 of

the Rules of Professional Conduct, the United State Court of Appeals for the Fourth Circuit has held that, "A general duty of candor to the court exists in connection with an attorney's role as an officer of the court." *United States v. Shaffer Equip. Co.*, 11 F.3d 450 (4th Cir. W. Va. 1993).

Though counsel for Ms. Luby has been retained by the insurance carrier, counsel has no right to control the insurance carrier or its actions. *Bedell* at 737. In fact, many of the ethical issues raised by the tripartite relationship, discussed *supra*, revolve around the amount of control an insurance company is perceived to retain over the actions of hired counsel. *See L.E.I. No. 2005-01*. Without the ability to control the actions of the insurance carrier, including non-disclosure, non-retention, or destruction of medical information, Ms. Luby's counsel cannot certify to the destruction of records in the insurance carrier's possession within any time frame set forth by the lower court, whether its at the conclusion of the litigation or within the time prescribed by *W. Va. C.S.R. § 114-15-4.2(b)*. To do so would be to knowingly certify to the lower court that actions required by its Order have been done, when there is no way for counsel to effectuate said acts or know if, in fact, they have been done as counsel's client in this case is the insured defendant, not the insurance company. The onerous burden placed on counsel by the lower court's Order regarding certification is further amplified by the fact that the requirement to certify now extends potentially years beyond counsel's involvement in the case. Such a burden should not be placed on defense counsel in this case or any other case and, as such, it is submitted that the lower court exceeded its legitimate powers in issuing its October 25, 2010 Order.

E. **The Destruction Requirement Infringes Upon Ms. Luby's Right to Maintain Her File.**

The lower court's Order does permit Ms. Luby's defense counsel to "retain a copy of the protested [sic] medical records produced in this case.... as long as those protected medical records are maintained in a sealed manner in Defense counsel's file. . ." *October 25, 2010 Order at 6, ¶ 2.* However, other than maintenance by defense counsel, the Order requires destruction and/or return of all of Ms. Blank's "medical records and medical information, or any copies of summaries thereof" *Id at 5, ¶ 2.* This would include not only medical records, but any medical information of Ms. Blank (and the impact of the same on the case) defense counsel may have conveyed to Ms. Luby as part of counsel's representation of Ms. Luby. This exchange of information with Ms. Luby is required by defense counsel as counsel has a duty to communicate with the client to reasonably inform her of the status of the matter, promptly respond to requests for information and "to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" *See Rule 1.4 W. Va. R. Prof. Conduct.*

This ethical duty to communicate with Ms. Luby necessarily requires that counsel share with Ms. Luby information related to the defense of the case, which would include information regarding Ms. Blank's medical condition. This information would be conveyed to Ms. Luby through written communications at various points throughout the litigation; yet the lower court's Order would require not only that Ms. Luby destroy and/or return any communications from counsel which included medical information of Ms. Blank, but also requires that defense counsel certify that the same had been done. To require Ms. Luby to destroy and/or return her attorney-client

communications would seem to be violative of *L.E.I 2002-01 Retention and Destruction of Closed Client Files*. A copy of the *L.E.I 2002-01* is attached hereto as "Exhibit A."

L.E. I. 2002-01 specifically provides, "In prior formal opinions of this Board, it had been impliedly recognized that files are the property of the client, not the attorney. L.E.I 89-02 and 92-02" *L.E.I. 2002-01* at 1. The client's file includes:

... all material provided by the client; all correspondence; all pleadings, motions, other material filed and discovery, including depositions; all documents which have evidentiary value and are discoverable under the Rules of Civil Procedure, such as depositions and business records. The above-described material must be released regardless of any outstanding fees or costs.

L.E.I. 2002-01 at 4 [citing *L.E.I. 92-02*] "Therefore, when a lawyer destroys a file from a concluded representation, that lawyer is destroying someone else's property" *Id.* Thus, the lower court's Order requiring Ms. Luby to either destroy or return communications received from her counsel that include medical information of Ms. Blank effectively require the return or destruction of Ms. Luby's property. Such a practice should not be permitted. If Ms. Luby maintains her attorney-client communications and then improperly shares confidential medical information of Ms. Blank, Ms. Blank is not without recourse, for as noted previously, this Court has permitted private causes of action in varying scenarios when an individual's confidential medical information has been improperly disclosed or utilized. As such, the requirement that Ms. Luby destroy or return her property is not necessary. Thus, the lower court exceeded its legitimate powers.

V. Conclusion

The implications for Ms. Luby and her counsel were not lost on this Court previously, particularly as this Court recognized and cogently explained the predicament facing Ms. Luby's counsel with the certification requirement. However, that "predicament" seems to have been omitted

from consideration by the lower court in the issuance of its October 25, 2010 Order as the same certification requirement is included therein, with only a change in the timing of the destruction and/or return of Ms. Blank's medical records. This "predicament" not only faces Ms. Luby and her counsel, but all defendants (and their counsel) who have had the foresight to purchase insurance that is required to defend them in a civil action and provide proceeds to settle any such action. If the certification requirements placed on counsel by the lower court's Order are permitted to stand, then counsel will be hamstrung in the defense of their clients, to whom their duty is owed. Counsel is placed in an impossible quandary: provide medical records and information to the insurance company, so it can evaluate the claim, as required by the jurisprudence of this state, and then later certify to the Court that the records and information have been destroyed and/or not retained, when counsel has no way of knowing whether the same has been done; or simply not provide the records to the insurance company, which in effect precludes a breach of counsel's duty of candor to Court, but does not permit counsel to properly and represent the client, which is counsel's primary duty. This Honorable Court previously addressed this quandary, or predicament concluding specifically "that prohibition is the appropriate avenue by which to address this issue."

Respectfully submitted this 5th day of November, 2010.

**Respondent herein and Defendant below,
Lana S. Eddy Luby, as Personal
Representative of the Estate of Jeremy Jay
Thomas, By Counsel:**



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CERTIFICATE OF SERVICE

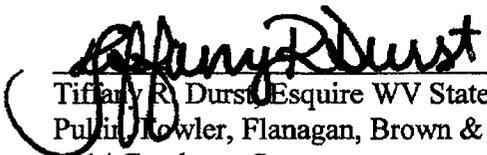
I, Tiffany R. Durst, counsel for the Respondent, Lana S. Eddy Luby, as Personal Representative of the Estate of Jeremy Jay Thomas, hereby certify that I served a true copy of the foregoing *Response on Behalf of Lana S. Eddy Luby to Petition for Writ of Prohibition of State Farm Mutual Automobile Insurance Company* upon the following individuals, by via facsimile and by depositing the same in the U.S. Mail, First Class, postage prepaid, on this 5th day of November, 2010:

The Honorable Thomas A. Bedell
Circuit Court of Harrison County
Harrison County Courthouse
301 West Main Street
Clarksburg, WV 26301

Joseph Shaffer, Esquire
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EXHIBITS

ON

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CLERK'S OFFICE