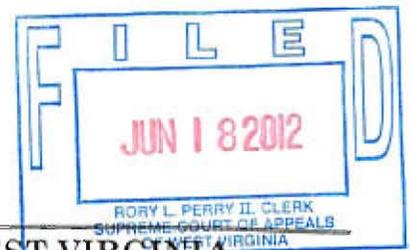


No. 12-0210



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NATIONWIDE MUTUAL INSURANCE COMPANY,

Petitioner,

v.

CARMELLA J. FARIS and ROBERT FARIS

Respondents.

BRIEF OF THE WEST VIRGINIA MUTUAL INSURANCE COMPANY, INC.,
AS *AMICUS CURIAE*, IN SUPPORT OF THE BRIEF OF PETITIONER

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I. INTRODUCTION

The West Virginia Mutual Insurance Company (“the Mutual”) files this brief as *amicus curiae* in support of the briefs filed by Petitioners, of Petitioners State Of West Virginia Ex Rel. State Farm Mutual Automobile Insurance Company (“State Farm”) and Nationwide Mutual Insurance Company (“Nationwide”), on the basis that Protective Orders regarding the medical records of the plaintiffs in the underlying cases entered by the Circuit Court of Harrison County (“Circuit Court”) pose a risk of causing medical professional liability insurers such as the Mutual to incur great financial burden. It is axiomatic that these financial burdens will be passed to the Mutual’s insureds in the form of higher premiums charged to its insureds and ultimately to the consumer in the form of higher medical bills. Judicial creation of such financial burdens on medical liability insurers is in direct contravention of the clear and unambiguous intent of the West Virginia Legislature in enacting the Medical Liability Professional Act (“MPLA”), which sought to reduce premiums and stabilize the medical professional liability marketplace in order to place the State of West Virginia on a competitive footing for retaining and attracting qualified physicians and other health professionals.¹ For the reasons set forth herein, the Mutual respectfully urges this Court to accept this Appeal.²

¹ Pursuant to Rule 30(b) of the Rules of Appellate Procedure, the Mutual provided notice on June 12, 2012, to all parties of its intent to file an *amicus* brief.

² The undersigned counsel authored this brief in its entirety. Neither party nor their respective counsel contributed to or made a monetary contribution specifically

II. STATEMENT OF FACTS

The Mutual adopts and incorporates by reference the factual background as set out by Nationwide in its Notice of Appeal and State Farm as set out in the Petition for Writ of Prohibition.

III. STATEMENT OF INTEREST

The Mutual is a West Virginia domestic, private, non-stock, nonprofit corporation that currently insures approximately 1450 of the State of West Virginia's physicians. The Mutual insures 60-65% of the physicians in private practice within the State of West Virginia who purchase insurance in the commercial market. In matters of significant interest to itself and its insureds, the Mutual appears before state and local legislative bodies, administrative agencies and before the courts of the state on behalf of itself and entities similarly situated, including participation as *amicus curiae* in cases raising significant legal and policy issues.

These appeals, arising from the Harrison Circuit Court regarding onerous and overly broad protective orders concerning medical privacy, present such an issue. The Mutual handles hundreds of medical malpractice cases each year, where medical records are voluminous and central to almost every aspect of the case. In the typical medical malpractice case the medical records of the plaintiff are not only

intended to fund the preparation or submission of this brief. This disclosure is made pursuant to Rule 30 (e)(5) of the Rules of Appellate Procedure.

relevant to the issue of damages, as in other types of personal injury cases, they are also relevant to the issues of liability and causation. If the Mutual and other medical professional liability insurers are subjected to overly restrictive and onerous protective orders such as these in even one case, the burden of compliance with these orders would be unduly heavy. The Mutual, like other insurance carriers, maintains a sophisticated computer system to assist in efficient and effective claims handling. Changes to the Mutual's computer system to comply with an onerous protective order in a single case would have to be implemented system wide and would necessarily affect the handling of all claims by the Mutual and increase the Mutual's cost of doing business.

Since expenses of any insurance company must be incorporated into the premiums paid by consumer, these burdens would be reflected in the premiums charged by the Mutual to its insured physicians in West Virginia. The West Virginia Legislature sought to control such external forces on the medical professional liability insurance marketplace through its enactment of the MPLA, which expressed the clear and unambiguous public policy of reducing and stabilizing medical professional liability insurance rates. Because of this the Mutual has a strong interest in assuring that procedural rulings by state trial courts do not directly or indirectly increase the premiums it charges its insureds, the Mutual files this brief pursuant to Rule 30 of the Revised Rules of Appellate Procedure in support of State Farm's and Nationwide's Petitions.

IV. ARGUMENT

C. Compliance with Overly Broad Protective Orders Regarding Medical Records in Actions for Medical Negligence Will Lead to Increased Medical Professional Liability Insurance Costs

1. *A New Standard for Finding Abuse of Discretion*

It is undisputed that trial courts have broad discretion, with regard to discoverable information, to "... make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense..." W.Va. R. Civ. P. 26 (c). Furthermore, protective orders issued pursuant to W.Va. R. Civ. P. 26 (c) are reviewed only for abuse of discretion. *B.F. Specialty Co., v. Charles M. Sledd Co.*, 197 W. Va. 463, 464, 475 S.E.2d 555, 556 (1996). 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. A trial court abuses its discretion when its rulings on discovery motions are clearly against the logic of the circumstances then before the court and are so arbitrary and unreasonable as to shock our sense of justice and to indicate a lack of careful consideration. *Id.* The Mutual believes, for reasons well argued and put forth by the Petitioners in these matters, as well as for reasons previously argued by the Mutual as *amicus curiae* and the Petitioner in *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 228 W. Va. 252, 719 S.E.2d 722 (2011) *cert. denied*, 32 S. Ct. 761, 181 L. Ed. 2d 508 (U.S.

2011), that onerous and unnecessary protective orders such as those entered by the Circuit Court are a clear abuse of the trial court's discretion. The Mutual further believes that the practical effect of these protective orders provides separate and independent grounds for holding them invalid as an abuse of discretion. While the standard of review for finding an abuse of discretion as set forth in *B.F. Specialty Co.*, has long been of the standard of review applied by this Court, the Mutual believes this Court should recognize an additional ground for finding abuse of discretion with regard to the trial court's control and management of discovery. The Mutual suggests that an abuse of discretion should be found in situations where a trial court's action, when considered in the aggregate, violates a clear and well established public policy of the State of West Virginia.

This Court has long considered public policy when construing the actions of the trial courts of the State of West Virginia for abuse of discretion in the context of a motion to dismiss for procedural violations. See *Davis v. Sheppe*, 187 W. Va. 194, 417 S.E.2d 113 (1992) (Citing public policy of deciding a case on the merits stating that "Appellate courts frequently have found abuse of discretion when trial courts failed to apply sanctions less severe than dismissal"). In addition, the "substantial effects" test established in *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942), while only analogous, permitted the Federal Courts to consider the aggregate effect of purely local activity on interstate commerce in considering the constitutionality of congressional legislation enacted pursuant to the Commerce Clause. A "substantial effects" type test if adapted and applied in this situation

would permit this Court to consider the effect of a trial court's ruling on seemingly benign issues on a statewide level. Such considerations would reveal how isolated and independent actions by the trial courts may lead to judicial trespass into areas firmly committed to the West Virginia Legislature. The Mutual submits that the practical and aggregate effect of a trial court's actions should be considered in light of clear and well established public policies of this State when reviewing for abuse of discretion. It would be a truly exceptional circumstance when the public policies of this State should give way to an individual's needs. If this Court were to consider the aggregate effects of these protective orders on the medical professional liability insurance marketplace, it would be clear that they are in contravention to the clear and unambiguous public policy voiced by the West Virginia Legislature in its enactment of the MPLA.

2. The Aggregate Effect of These Protective Orders Will Lead to Increased Medical Professional Liability Premiums

It is acknowledged by the Mutual that in many instances, a finding of a violation of a clear and well established public policy would not be readily apparent when considering the actions of a trial court in isolation. Nonetheless, in situations, such as the two cases currently pending, where this Court previously upheld the validity a similar protective order (*See, Bedell*), it should be recognized that there is the tendency for such orders to proliferate through the trial courts of this State after affirmation by this Court. In addition, it is not uncommon for attorneys and

judges alike to seize upon the certainty of certain decisions regarding discovery with the result being a unique variety of procedural common law. (e.g. *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990)). Given the likelihood that such protective orders with regard to medical privacy will become common place throughout the courts of West Virginia whenever the medical records of a party are involved, it is only appropriate that this Court consider the aggregate effect of such orders.

The aggregate effect of such orders becomes particularly troublesome in actions for medical professional liability where often the medical records involved are not only central to the dispute, but are also voluminous. As was established in State Farm's "Petition For Writ of Prohibition," insurers in the State of West Virginia have a duty to retain medical records for a variety of state and federal mandated purposes (See State Farm Mutual Automobile Insurance Company's Petition for Writ of Prohibition, Argument (II)(A)). Accordingly, the Mutual has an obligation to retain these medical records for a period of time after the litigation has concluded to fulfill various duties imposed by state and federal statutes. Nonetheless, the terms of these protective orders entered in the State Farm and Nationwide cases, impose the obligation to either destroy or return medical records and medical information of the Plaintiff, regardless of form, after the period of time prescribed by W.Va. C.S.R. § 114-15-4.2(b), which may be insufficient for the Mutual and other insurers to fulfill obligations imposed by other state or federal law. In order to avoid

violating protective orders such as these, insurers, such as the Mutual, will have to establish robust monitoring systems to insure they maintain compliance with the obligations imposed by these protective orders. While conceptually this may seem simplistic, in reality this judicially crafted addition to the medical privacy laws of both this State and the federal government will certainly result in great expense to insurers like the Mutual due to the cost of compliance. Furthermore, it is fully expected that the terms and conditions of each order will vary depending not only on the facts of each case, but vary by local practice and custom. At a minimum the Mutual will have to engage in the following in order to fully comply with the protective orders arising under these cases, (1) monitor each and every claims file to determine if a protective order such as the ones in these cases is entered, (2) review the exact terms of each and every order to determine what must be done to remain in compliance with the terms of the order, (3) monitor the exact location and form that medical records and medical information subject to the order is stored, (4) make a legal determination as to what records and or information is actually protected by the order, (5) determine prospectively when such records need to be removed from their systems, (6) conduct a comprehensive review to insure that records have either been destroyed or returned and (7) engage the insured's counsel to certify that records have been destroyed. It is also fully expected that the Mutual will have to engage in additional activities, such as purchasing a completely separate computer scanning system utilized strictly for the storage of claims files and thereby removing its core function of claims handling from its normal operating

system workflow.

Because virtually every claim against one of the Mutual's insureds is premised on liability under the West Virginia Medical Professional Liability Act ("MPLA") W.Va. Code § 55-7B-1 *et seq.*, every claim handled by the Mutual will necessarily involve medical records and or medical information. Thus, the Mutual will certainly have to incur significant expense to ensure compliance with such protective orders.³ These will likely include maintaining separate paper and/or electronic record keeping systems, hiring additional skilled personnel to maintain and monitor the record keeping system, and possibly even the establishment of a department dedicated solely to record keeping compliance activities. Because the Mutual is statutorily obligated to charge a rate that is neither excessive nor will leave the insurer insolvent (*See* W.Va. Code § 33-20-3(b)), the Mutual and other insurers that provide medical professional liability coverage will be required to incorporate the costs of monitoring and complying with these protective orders into the insurance rates it charges its insureds. As a result, the aggregate effect of these protective orders will be to increase the cost of medical professional liability insurance to physicians and other medical professionals of the State of West Virginia. This unnecessary and unwarranted increase in medical professional liability insurance premiums is in direct contravention to the clear and

³ Preliminary estimations for startup costs alone to enable the Mutual to fully comply with these types of protective orders exceed \$200,000 not including annual labor costs and additional capital investments that may be needed.

unambiguous public policy goals expressed by the West Virginia Legislature in its enactment of the MPLA.

Chapter 55, Article 7B, Section 1 of the West Virginia Code states,

...That it is the duty and responsibility of the Legislature to balance the rights of our individual citizens to adequate and reasonable compensation with the broad public interest in the provision of services by qualified health care providers and health care facilities who can themselves obtain the protection of reasonably priced and extensive liability coverage;

That in recent years, the cost of insurance coverage has risen dramatically while the nature and extent of coverage has diminished, leaving the health care providers, the health care facilities and the injured without the full benefit of professional liability insurance coverage;

That many of the factors and reasons contributing to the increased cost and diminished availability of professional liability insurance arise from the historic inability of this state to effectively and fairly regulate the insurance industry so as to guarantee our citizens that rates are appropriate, that purchasers of insurance coverage are not treated arbitrarily and that rates reflect the competency and experience of the insured health care providers and health care facilities;

... That the cost of liability insurance coverage has continued to rise dramatically, resulting in the state's loss and threatened loss of physicians, which, together with other costs and taxation incurred by health care providers in this state, have created a competitive disadvantage in attracting and retaining qualified physicians and other health care providers....

It is clear from the plain language of W. Va. Code § 55-7B-1, that in enacting the MPLA, the West Virginia Legislature sought to control the influence of extraneous forces on the medical professional liability insurance marketplace and sought to stabilize insurance rates. Section 55-7B-1 sets out that one of the purposes of

enacting the MPLA was to establish rates that are not determined arbitrarily, but “reflect the competency and experience of the insured health care providers and health care facilities.” The Mutual submits that it is clear from the plain language of the MPLA, the West Virginia Legislature sought to prevent extraneous forces, such as a judicial expansion of medical privacy rights, from affecting rates that medical professional liability insurers charge insureds by the enactment of the MPLA.

The West Virginia Legislature included a specific provision in the MPLA related to the collection of a claimant’s medical records, W. Va. Code § 55-7B-6a. This section of the MPLA requires the plaintiff to provide defendants in a medical negligence case with access to all relevant medical records within the plaintiff’s control within 30 days of the filing of an answer. *See*, W. Va. Code § 55-7B-6a(a). For those records outside the plaintiff’s control, the MPLA requires the plaintiff to provide the defendant with a release authorizing the defendant to collect copies of the medical records from the plaintiff’s medical providers. *Id.* If a plaintiff receives a request for records which he or she believes are not reasonably related to the claim, notice must be given to the requesting party of the existence of the records and the plaintiff must schedule a hearing before the court to determine whether access should be provided. *See*, W. Va. Code § 55-7B-6a(c). If a defendant has cause to believe that medical records reasonably related to the claim of medical negligence exist and the plaintiff does not produce the records or provide an authorization to the defendant to access the records within fourteen days of

receiving a written request, the defendant can obtain a hearing before the court. *See*, W. Va. Code § 55-7B-6a(d). In the event a hearing is required regarding a medical record request or a refusal to provide records, the court shall make a finding as to the reasonableness of the parties' request for or refusal to provide records and may assess costs pursuant to the rules of civil procedure, i.e., impose discovery sanctions. *See*, W. Va. Code § 55-7B-6a(e). It can hardly be contended that the West Virginia Legislature through inclusion in the MPLA of provisions regarding the collection and production of medical records, contemplated that the trial court system would impose an additional layer of protection regarding the access and use of medical records over and above those set forth in the MPLA, which, in turn, would raise the cost of medical malpractice insurance to a majority the State's physicians.

By enacting the MPLA, the West Virginia Legislature sought to provide medical professional liability insurers with a better mechanism to match premiums to risk to create stability. By allowing the trial courts of this State to provide extra measures of protection to plaintiffs regarding medical privacy in the form of onerous and unnecessary protective orders, there will be a corresponding loss of the ability of insurers to match premiums to risk. While the Mutual is currently able to adequately anticipate prospective losses so that premiums charged to its insureds are sufficient to cover these losses, the addition of unknown costs in the form of complying with a myriad of protective orders makes it nearly impossible for the Mutual and other insurers to match their premiums to the cost of doing business.

These protective orders create an unknown risk of loss due to the unknown frequency in which they will be utilized by plaintiffs in medical professional liability actions and the unknown cost of complying with the terms of the order, which may vary from case to case and from judicial circuit to judicial circuit. In order to avoid suffering financial losses or risking insolvency, the Mutual and other medical professional liability insurers will be left with only one plausible option, to raise premiums. The Mutual respectfully submits to this Court that this is exactly the kind of extraneous and arbitrary pressure on the medical professional liability insurance marketplace that the West Virginia Legislature sought to protect against through its enactment of the MPLA. The aggregate effect of these orders is to create instability and uncertainty in market, which the legislature sought to stabilize and control. While it is uncertain as to what the exact cost of compliance will be to the Mutual, it is anticipated that these costs will not be trivial.

Although the Mutual respectfully disagrees with this Court's opinion in *Bedell*, the Mutual believes on separate and independent grounds these types of protective orders regarding medical records are an abuse of discretion on the basis that, in the aggregate, they are contrary to West Virginia public policy. This type of protective order, if continued to be sanctioned by this Court, will only proliferate throughout the trial courts of West Virginia and may be present in any and all actions in which a party's medical records might be discovered. Due to the anticipation that the cost of compliance with these types of protective orders will be non-trivial, the aggregate effect on medical professional liability insurers, such as

the Mutual, will inevitably lead to higher insurance premiums. This is in contravention to the MPLA's expression of a clear and unambiguous public policy of insuring "that purchasers of insurance coverage are not treated arbitrarily and that rates reflect the competency and experience of the insured health care providers and health care facilities." See, W. Va. Code § 55-7B-1. Accordingly, this Court should recognize that arbitrary and onerous protective orders such as these, considered in the aggregate, contravene West Virginia public policy and this Court should grant the relief requested by both State Farm and Nationwide.

B. Any Expansion of Medical Privacy Should Be Addressed by Statutory Enactment and Not Through Court Rulings

Both state and federal law provide robust protection of private health information. See W. Va. Code § 27-3-1; W. Va. Code §§ 16-3C- 1—9; 42 U.S.C. 1320d *et seq.*; 42 U.S.C. § 300jj *et seq.*; 42 U.S.C. § 17921 *et seq.*; 45 C.F.R. Parts 160, 162, and 164. While the West Virginia courts might perceive the need to provide additional privacy protections to parties in with regard their medical information, the courts are bound to recognize the extensive protections afforded to parties under both state and federal law. This Court should be weary of an expansion in medical privacy protections, even in isolated cases. As was established herein, this Court's blessing of protective orders patterned on the *Bedell* opinion, will only lead to a proliferation of their occurrence in the trial courts of this state. As such, it is only appropriate for this Court to consider the aggregate effect of such orders, which would be to create a judicial rule providing for increased medical

privacy rights to parties to civil litigation.⁴ “It is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]” *Kasserman & Bowman, PLLC v. Cline*, 223 W. Va. 414, 421, 675 S.E.2d 890, 897 (2009) (citing *Subcarrier Communications, Inc. v. Nield*, 218 W.Va. 292, 299 n. 10, 624 S.E.2d 729, 736 n. 10 (2005)). While W.Va. R. Civ. P. 26 (c) bestows the trial court with broad discretion to control and manage discovery, the Mutual submits that the use of such discretion must be consistent with both this Court’s precedents and the judiciary’s constitutionally assigned function. Rules of broad applicability are better made by the West Virginia Legislature than by the courts. Medical Privacy rights are adequately protected under current law and this Court should not expand those rights without a compelling reason. Respondents cannot show that their privacy rights are not adequately protected under current law. The Mutual urges this Court to recognize the huge impact that overly broad and onerous protective orders will have not only on medical privacy law in the State of West Virginia, but its impact on the medical professional liability insurance market as well.

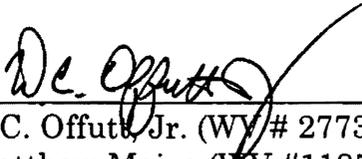
⁴ These protective orders provide the Plaintiffs in these actions with medical privacy rights not afforded to parties involved in civil litigation. While it is true that the Plaintiffs have disclosed sensitive medical information to an adverse party, individuals who settle during the claims process are not afforded the same protections, despite having disclosed sensitive medical information to an adverse party.

V. CONCLUSION

For the foregoing reasons the Mutual respectfully requests that the Court consider these cases for review and grant the Petitioners, State Farm Mutual Automobile Insurance Company and Nationwide Mutual Insurance Company, the relief requested.

WEST VIRGINIA MUTUAL INSURANCE COMPANY

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CARMELLA J. FARIS and ROBERT FARIS

Respondents.

Certificate of Service

I hereby certify that I have this day served a copy of "Brief Of The West Virginia Mutual Insurance Company, Inc., As *Amicus Curiae*, In Support Of The Brief Of Petitioner" upon all parties to this matter by depositing a true copy of the same in the U.S. Mail, postage prepaid, this 13th day of June, 2012, to the following:

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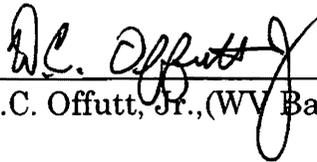
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