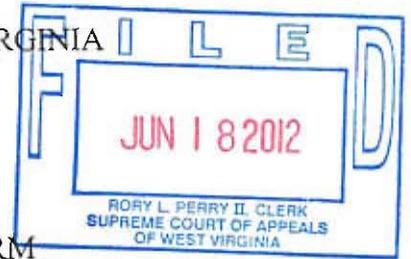


**BRIEF FILED
WITH MOTION**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NOS. 12-0304 AND 12-0210



STATE OF WEST VIRGINIA EX REL. STATE FARM

MUTUAL INSURANCE COMPANY,

PETITIONER

v.

THE HONORABLE JOHN LEWIS MARKS, Judge of the Circuit

Court of Harrison County, and MATTHEW HUGGINS,

RESPONDENTS.

NATIONWIDE MUTUAL INSURANCE COMPANY,

PETITIONER,

v.

CARMELLA J. FARIS AND ROBERT FARIS,

RESPONDENTS.

***AMICUS CURIAE* BRIEF SUBMITTED BY THE DEFENSE TRIAL COUNSEL
OF WEST VIRGINIA IN SUPPORT OF PETITIONERS**

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INTRODUCTION

The Defense Trial Counsel of West Virginia (hereinafter, "DTCWV") files this brief as *amicus curiae* because the Protective Order at issue places new and unworkable burdens on defense attorneys and their clients. Under such a Protective Order, defense attorneys are placed in an ethical Catch-22, whereby they can either comply with the Protective Order and face ethical violations or follow the ethics that bind our entire profession and face contempt charges. Furthermore, the Protective Order in this case places untenable restrictions on interactions with clients and their insurers; inhibits an attorney's defense of the claims against his or her client by restricting the attorney's ability to fully investigate and evaluate the plaintiff's claims and counsel his or her client accordingly; gives rise to manipulative litigation conduct; and unnecessarily exposes attorneys to unnecessary potential liability. The DTCWV, therefore, respectfully urges this Court to provide relief sought by petitioner from the Circuit Court's January 13, 2012 Order.

FACTUAL BACKGROUND

This civil action arises out of a June 6, 2008 motor vehicle accident between Plaintiff Matthew Huggins and Defendant Thomas Shuman who, at the time, is alleged to have been working for Brian Woodward and/or Woodward Video, LLC. The Defendants are insured by Nationwide Mutual Insurance Company (hereinafter, "Nationwide"), while Huggins has medical payments coverage and underinsured motorist insurance coverage through State Farm Mutual Automobile Insurance Company (hereinafter, "State Farm").

In the course of litigation, a dispute arose concerning the terms under which medical information and records would be shared. On May 23, 2011, Judge John Lewis Marks, Jr. entered a Protective Order which prohibited the use of Plaintiff's medical records other than for

the purpose of the current litigation, requires the return or destruction, in all forms, of Plaintiff's medical records at the conclusion of the litigation and following a specified time period, and restricts the use of medical records obtained outside of the discovery process. On January 13, 2012, the trial court affirmed the Protective Order. On March 7, 2012, State Farm filed a Petition for Writ of Prohibition with this Court challenging the trial court's Protective Order.

STATEMENT OF INTEREST

The DTCWV is an organization of over 500 attorneys who engage primarily in the defense of individuals, corporations and insurance carriers in civil litigation in West Virginia. DTCWV is an affiliate of the Defense Research Institute, a nationwide organization of over 23,000 attorneys committed to research, innovation, and professionalism in the civil defense bar. Some DTCWV members also on occasion represent plaintiffs in civil litigation. In addition, and as relevant herein, DTCWV's goals include elevating the standards of trial practice within the state of West Virginia, promoting improvement of the administration of justice in West Virginia and increasing the quality of legal services provided to our citizens.

DTCWV is interested in the enforceability of protective orders such as the one at issue here because it directly affects DTCWV members and their practice of law in West Virginia. Protective orders such as the one at issue here place new and untenable burdens on defense attorneys and their clients by: causing irresolvable ethical conflicts; restricting interaction with clients' insurers which indemnify the attorney's client; potentially creating a system whereby disputes are either resolved only at trial or, alternatively, solely out of fear of the unknown given the lack of medical information upon which to base a reasoned evaluation; restricting attorneys' abilities to provide a proper defense to their respective clients; encouraging manipulative litigation conduct; and exposing attorneys to unnecessary potential liability.

Also, such protective orders unduly burden attorneys with duties of managing records, including those which are not in their care and custody. These obligations, much greater than those already imposed on attorneys for the proper handling and protection of confidential information, unjustifiably expose attorneys to the risk of sanction or other legal action for inadvertent violation by others, and limit attorney records retention for purposes of malpractice considerations, fee disputes, and other necessary activities.

ARGUMENT

The trial court's Protective Order completely ignores facets of our profession that are critical to the integrity and sustainability of our adversarial civil justice system, all of which raises several issues that affect DTCWV members. First, assuming a Protective Order is even necessary in some cases, the Protective Order at issue here overreaches because it requires defendants to certify the conduct of third parties over which they have no control for years after the conclusion of the litigation. Second, the Protective Order creates an obligation upon defense counsel which, given today's technology regarding information, is impossible to fulfill; Third, the Protective Order prevents our members from satisfying their ethical obligation to communicate with and provide legal advice to their clients and their clients' insurers. Fourth, the Protective Order prevents timely case evaluation thereby thwarting meaningful settlement discussions, denies defendants their right to a full and proper defense, and causes a loophole for unfairly prejudicial tactics that deny defendants their right to a fair trial. Finally, personal injury cases necessarily involve medical records and not every case alleging personal injury requires the entry of a Protective Order.

1. The Protective Order Here Requires Attorneys to Certify the Actions of Third Parties Over Whom They Have No Control

The instant Protective Order requires defense counsel to certify that any medical records provided to or obtained by the defendant's expert witnesses or insurance carrier must be returned or destroyed. In other words, counsel must certify as to certain action taken by an insurer five-plus years after the conclusion of litigation, even if counsel no longer has any relationship with the insured client or the insurance carrier. As this Court recognized in *State ex rel. State Farm Mut. Ins. Co. v. Bedell*, 226 W. Va. 138, 697 S.E.2d 730 (2010) (*Bedell I*), this type of provision in a Protective Order puts defense counsel in an unfortunate position because the defense lawyer "is not able to bind [the liability carrier] to any agreements or otherwise assert control over [that carrier]." Of course, there is no means by which the attorney can ensure that the terms of the Protective Order as to the third parties over whom or which the attorney has no control are fulfilled. Nonetheless, under the trial court's Protective Order, defense counsel must certify to specific actions taken by the insurer and client five years or more after the conclusion of the litigation.

Because of this requirement, defense counsel is faced with an unworkable situation. The defense attorney cannot certify that the Protective Order, which binds the attorney and defendant, will likewise be followed by persons or entities over which the attorney and defendant have no control, including insurance carriers and expert witnesses. Yet, the Protective Order in this matter places this burden upon the defense counsel. Thus, by including this requirement of confidentiality in the Protective Order, defense counsel is essentially unable to communicate with his or her client, the client's insurance carrier, and expert witness(es), out of fear of being found in contempt of the Protective Order based upon the conduct of third parties.

2. The Protective Order Creates Factual Impossibilities in Light of Modern Technology

Not only would defense counsel improperly be held responsible for actions taken by third parties, but modern technology make it impossible for counsel to completely rid their own files of protected medical records. Computer systems contain complex files, including backup files in case of a system crash, which cannot be completely erased. Through highly-technical procedures and applications, these records are ultimately recoverable and not able to be destroyed; yet the Protective Order requires that the materials be destroyed.

This concern was recently addressed in the certification of E. Kay Fuller in the instant case wherein she certified that she returned/destroyed Plaintiff's medical records. However, she also noted her inability to fully comply with the Protective Order because that information was stored on her firm's computer system. That computer system, like most computer systems used by law firms, contains a backup program which stores all of the information on the system every day. Similarly, any emails that are sent to the insurance company (or any person or party for that matter) containing medical information can never be fully destroyed, as those are likewise archived periodically. This means that there are backup discs which cannot be destroyed because it contains every file in the firm, not just the medical records for one particular plaintiff in one particular case.

In addition, as technology has advanced, so, too, has the sophistication of information found in documents stored via computer. Although we may not be able to see information stored on any particular document stored on the computer, documents nonetheless retain "metadata" which may contain the very information over which the Protective Order at issue here pertains. "Metadata" includes "text, numbers, content, data, or other information that is directly or indirectly inputted into a [n]ative [f]ile by a user and which is not typically visible to the user

viewing the output display" of the native file. Examples include spreadsheet formulas, hidden columns, externally or internally linked files (such as sound files), hyperlinks, references and fields, and database information." *Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350, 354-355 (S.D.N.Y. 2008). Thus, even if an attorney were capable of destroying or returning all physical copies of the medical records, deleting all known electronic copies, and somehow removing all of the back-up data, the issue would still not be cured, as the information may be stored as "metadata", not visible in the document viewed but still present. The only option would then be to not electronically store files, send emails, or store anything regarding a plaintiff's medical records, or analysis thereof, on the computer. Twenty-five years ago or more, it was conceivable to practice law without a computer. Today, it is not.

3. The Protective Order Unduly Intrudes On Attorneys' Ethical Obligations

A. An Attorney's Ethical Duty To Communicate With the Client and The Client's Insurer is Unduly Impaired By The Order

The Protective Order also impedes the defense attorney's fulfillment of ethical obligations by impairing his or her communication with the client and client's insurance carrier regarding medical records, summaries of records and evaluations based on plaintiffs' "medical information". Every attorney has a duty to communicate with clients in order to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information" and "*explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.*" See *West Virginia Rules of Professional Conduct*, Rule 1.4 (emphasis added).

This Court has held that an attorney violates West Virginia Rules of Professional Conduct 1.4 by failing to provide clients with sufficient information to participate in decisions and failing

to fulfill reasonable client expectations for information consistent with the client's best interests. See, *Lawyer Disciplinary Bd. v. Wheaton*, 216 W. Va. 673, 610 S.E.2d 8 (2004).

Furthermore, this Court has observed that in representing an insured defendant, defense counsel has an important duty to facilitate the relationship between the insured and insurer by making a “full and frank consultation between a client and a legal advisor . . .” *State ex re. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 371, 508 S.E.2d 75, 88 (1998) (Citing *State ex rel. USF & G v. Canady*, 194 W. Va. at 438, 460 S.E.2d at 684). The *Gaughan* Court recognized that significant information and advice must be communicated to the insurance carrier in the litigation context. In that regard, the “insurance company must have an honest and candid evaluation of a case. . . .” 203 W. Va. at 372, 508 S.E.2d at 89. The Court went on to discuss the importance of communication between counsel and the insurance company, finding that relationship to be so vital so as to create a *quasi*-attorney-client privilege. *Id.* Essentially, this Court recognized that although defense counsel may represent the insured rather than the insurance company, significant information, evaluation and advice must be communicated to the insurer during litigation. In order to provide the best legal representation to his or her client, the attorney must be able to freely communicate with the client’s insurer, including a full discussion of a plaintiff’s medical information, so that the insurer can then make a rationale decision regarding the indemnification of its insured.

Of course, as discussed above, the attorney is placed in a Catch-22 situation due to the “return or destroy” provision in the Protective Order. An attorney is not in a position to certify that documents given to the client, expert witness or insurer will be destroyed. Therefore, the only way to avoid liability is to ignore an attorney’s ethical duties to his or her client and/or insurance carrier and forgo communications about medical records that may be reasonably

necessary to permit the client or insurer to make informed decisions regarding the representation. See, *W. Va. R. Prof. Conduct*, Rule 1.4 (b). This cannot be an option.

B. The Protective Order Is Unnecessary Because It Ignores Defense Counsel's Ethical Duty to Maintain the Confidentiality of Client Files.

The Protective Order's limitation on an attorney's use of medical records is unnecessary because there is already adequate protection afforded to the confidentiality of client files. See *West Virginia Rules of Professional Conduct*, Rule 1.6. This protection has been recognized to be "more extensive than either the attorney-client privilege or work product doctrine." See *West Virginia Legal Ethics Opinion 02-01*. This Court has observed the wide scope that Rule 1.6 encompasses by noting that the lawyer's broader ethical duty of confidentiality applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. See *Lawyer Disciplinary Bd. v. McGraw*, 194 W. Va. 788, 461 S.E.2d 850 (1995). A lawyer's ethical duty of confidentiality under this rule applies to all information relating to representation of a client, protecting more than just "confidences" or "secrets" of a client. Further, the ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it. *Id.*

Once an attorney receives a medical record or other communicated medical information, it becomes part of the client's file. Every attorney, whether plaintiff or defense, is taught that it is a fundamental duty to zealously maintain the security and confidentiality of files, privileged information and work product. Thus, there is no justification for imposing additional limitations on defense counsel's retention of medical records and information contained in the attorney's own notes, reports, evaluations and communications with clients and their insurers.

4. The Protective Order Unnecessarily Exposes Attorneys To Potential Liability

Attorneys must maintain their files in accordance with the Rules of Professional Conduct, internal file retention policies and the requirements of legal malpractice insurance carriers. These files would undoubtedly include medical records, summaries, reports and evaluations. The Protective Order limits an attorney's ability to retain medical records and information to the time period set forth in *W. Va. C.S.R.* § 114-15-4.2(b). The time restriction set forth in the trial court's Protective Order is inconsistent with what is recommended or required by legal malpractice insurers, and is even more alarming when taking into account matters in which the statute of limitations are extended beyond the normal 2-year time period such as claims brought by infants, incompetents, or where the "discovery rule" would apply.

In addition, and as noted hereinabove, the trial court's Protective Order effectively shifts the burden upon defense counsel to certify the conduct of activities by third-parties, over which defense counsel has no control. Expert witnesses who would be privy to any medical records are themselves well versed in the confidentiality requirements of such documents and the potential liability for failing to keep said records confidential. Requiring an attorney to be ultimately responsible for the record management of an expert witness is unnecessary absent any specific and particular showing of fact that there is a need to do so. Likewise, insurers are well versed in the confidentiality of medical records and do not need to be reminded of the same.

Yet, the Protective Order requires defense counsel to certify that the client, the insurance carrier and any expert witness, have destroyed or returned all medical records and information regarding the plaintiff at the expiration of the time period provided by *West Virginia Code of State Rules* § 114-15-4.2(b). This unnecessary burden on defense counsel unjustifiably creates a duty in a particular matter many years after the conclusion of the attorney's work.

5. Blanket Protective Orders In All Cases Involving Medical Records Expose Attorneys To Improper Litigation Tactics.

Next, a blanket Protective Order such as the one at issue here also opens up the potential for improper litigation tactics against the defendant, thereby threatening the defendant's right to due process.¹ All persons, corporations and entities are protected by the Due Process Clause of the United States Constitution and the West Virginia Constitution. Inherent in the concept of due process is the ability to mount a defense to claims asserted against one and to have access to readily available evidence that could be used against a defendant, that could help buttress the defense, or that could contain information necessary to a defendant's case that cannot be found elsewhere.

Plaintiffs' attorneys could begin using such Protective Orders as a sword to attack a defendant's access to a defense rather than a shield to protect his/her client's privacy rights, as the defense attorney may forgo access of medical records for fear of liability under the certification requirement. Further, an expert witness, now charged with additional obligations after the conclusion of a lawsuit not otherwise imposed in other states, or fearing what type of lawsuit may be filed against him or her arising out of the enforcement of the Protective Order, may simply choose not to serve in the capacity as an expert witness, thus impeding the defendant's ability to defend the claims asserted by the plaintiff. This would give Plaintiffs' attorneys a fundamentally unfair advantage in our adversarial system of justice.

Additionally, medical records are necessary to evaluate damages and determining whether discovery depositions, responsive physical examinations or experts are necessary. In

¹ In fact, counsel for Huggins has already attempted to use the Protective Order as a sword, filing a Motion seeking sanctions against defense counsel for having included medical information in a pleading which was not filed under seal. Interestingly, the same information contained within the defendant's pleading had been contained in a pleading filed by the plaintiff, not under seal; yet, the plaintiff did not seek sanctions against his own attorney for the same conduct charged against defense counsel.

fact, the defendant generally collects medical records as the first step in evaluating the nature and extent of damages. The more stringent the conditions attached to the receipt of medical records, the more likely counsel is impaired in developing the defendant's case. This invariably leads to a drawn-out motions practice regarding the discovery issues, thus reducing the amount of time counsel has to develop the defense of the case. This Court's approval of this litigation tactic would certainly encourage similar tactics from other counsel, thus preventing the defense from forming a meaningful defense to the claims and essentially creating a system where matters are not decided or resolved on their merits but, rather, due to unfair litigation tactics.

6. The Delay Resulting From Protective Orders Also Interferes With The Goal Of Settlement and Encourages Extensive Motion Practice

The same delay tactics noted above also hinder settlement efforts. There can be little doubt that the judicial system encourages the resolution of controversies by contracts of compromise and settlements rather than by litigation. See, *F.S. & P. Coal Co. v. Inter-Mountain Coals*, 179 W. Va. 190, 366 S.E.2d 638 (1988). Disputes arising out of the production of medical records and from overly broad protective orders based upon conclusory statements lacking any factual basis prevent counsel from advising their clients and/or clients' insurers regarding case evaluations, thereby preventing the defendant or defendant's insurer from evaluating the case for settlement purposes. Further, overly broad protective orders invite disputes over medical records and medical information, thereby encouraging a drawn-out motions practice which further taxes the courts and judicial resources on issues that, in most instances, are already addressed based upon duties and obligations owed by the defense counsel and insurers.

7. “Good Cause” Pursuant to Rule 26(c) Does Not Exist In This Case.

This Court has recognized that Rule 26(c) of the West Virginia Rules of Civil Procedure is similar to its federal counterpart and cited with approval the following:

“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 therefor. 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.”

State ex rel. Shroades v. Henry, 187 W. Va. 723, 728, 421 S.E.2d 264, 269 (1992). Here, the Circuit Court entered the Protective Order without any evidence demonstrating good cause for the necessity of the Protective Order. The Circuit Court made no findings of danger that would ensue in the face of improper dissemination of medical records or information had the Protective Order not been entered.

Of course, medical records are made part of nearly every bodily injury case brought in West Virginia, be it a motor vehicle accident, medical malpractice, slip, trip and fall, or other. Should this Court endorse a general Protective Order without a particular and specific finding of good cause for the necessity of the Protective Order, then it would be expected that plaintiffs throughout the state would seek similar orders, bringing the resolution of many bodily injury cases to a grinding halt.

CONCLUSION

For all of the aforementioned reasons, the Court should grant the requested writ and prohibit the enforcement of the Protective Order entered by the trial court below.

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CERTIFICATE OF SERVICE

I, Brian D. Morrison, counsel for Defense Trial Counsel of West Virginia, do hereby certify that I have served the foregoing **Amicus Curiae Brief Submitted by the Defense Trial Counsel of West Virginia in Support of Petitioners** upon counsel of record this 18th day of June, 2012 by depositing true copies in the United States mail, postage prepaid addressed as follows:

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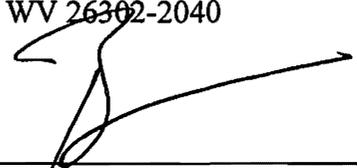
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