No. 31782 – *State of West Virginia ex rel. Richard Brooks v. The Honorable Paul Zakaib, Jr., Judge of the Circuit Court of Kanawha County*

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Starcher, J., concurring:

I agree with the majority opinion's decision to grant the requested writ of prohibition, and to send this case to Grant County for reconsideration of the propriety of an order sealing the record. I feel compelled to write separately, however, to point out the obvious: the courts of this State belong to the people of this State, and their business should be conducted in the open, not through secret, sealed proceedings. A party simply cannot wield a document in open court as the litigation moves through the process as a weapon to win a lawsuit, and then act like it's a privileged secret to be shielded by the courts and never to be seen again by human eyes. To hold otherwise would seriously impair the public's trust and confidence in the judiciary.

Rule 26(c) of the *Rules of Civil Procedure* [1998] states that only upon motion "and for good cause shown" may a court "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" A court's order limiting discovery or other access to court documents "shall specify the nature of the limitation, the duration of the limitation, and the reason for the limitation." Rule 10.03, *West Virginia Trial Court Rules* [1999]. A broadly worded protective order, based merely upon an assertion of a blanket privilege against discovery, by

a court constitutes abuse of discretion under Rule 26(c). Syllabus Point 7, *Bennett v. Warner*, 179 W.Va. 742, 372 S.E.2d 920 (1988).

Rule 26(c) mandates that litigants must make a showing of, and courts must find, "good cause" before a protective order can be entered.

> 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.

AT&T Communications of West Virginia, Inc. v. Public Service Com'n of West Virginia, 188 W.Va. 250, 253, 423 S.E.2d 859, 862 (1992) (citations and emphasis omitted).

Courts have criticized the use of judicial secrecy orders under Rule 26(c) that are entered based upon a court's desire to quickly settle a case, or a court's "potential abdication[] of judicial discretion" when litigants have stipulated to a secrecy order, without the court simultaneously giving any consideration of the public interests that are "sacrificed." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785-86 (3d Cir. 1994). So, in deciding whether "good cause" exists for a protective order concealing information under Rule 26(c), courts should balance the requesting party's need for the information against the possible injury accompanying the information's public dissemination. Factors which should be considered when determining whether "good cause" exists include: (1) whether disclosure would violate the privacy interests of the party seeking protection; (2) whether the information is being sought for a legitimate purpose; (3) whether disclosure of the

information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order is a public entity or official; and (7) whether the case involves issues important to the public. 23 F.3d at 787-91.[1]

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[1] Factors weighing in favor of the entry of an order include protecting privacy interests, encouraging settlement, avoiding production of information sought for improper purposes and preventing infliction of unnecessary or serious embarrassment, or, in the case of a corporation, monetary devastation. Circumstances weighing against protective orders exist where the information sought involves matters of public health and safety or other issues of significant and legitimate public concern. Similarly, where the party seeking the protective order is a public entity or official rather than a private individual, justification for a protective order is less compelling due to the public's countering interest.

A. Hotchkiss and D. Fleming, "Protecting and Enforcing Protective Orders: Easier Said Than Done," 71 Def.Couns.J. 161, 162 (April 2004).

When a party seeks a protective order to protect information that is "a trade secret or other confidential research, development or commercial information" under Rule 26(c)(7), this Court has set forth an additional test for "good cause." In the Syllabus to *State ex rel. Johnson v. Tsapis*, 187 W.Va. 337, 419 S.E.2d 1 (1992):

> The following six-factor test should be applied in determining whether there is "good cause" pursuant to Rule 26(c)(7) of the West Virginia Rules of Civil Procedure to issue a protective order:
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> 1. The extent to which the information is known outside of the defendant's business;
> 2. The extent to which it is known by employees and others involved in the defendant's business;
> 3. The extent of the measures taken by the defendant to guard the secrecy of the information;
> 4. The value of the information to the defendant

(continued...)

Applying these concerns to the peer review materials at issue in this case, the circumstances clearly weigh in favor of allowing petitioner Brooks and the public access to the materials. To be clear, the peer review materials at issue were placed into the public domain by the parties. The materials were introduced into evidence and examined by members of a jury in Grant County. Jury members were allowed to take notes, and the Grant County trial record indicates that jurors were told, as they were being excused from jury duty, that they could keep their trial notebooks. The parties therefore cannot claim to need a protective order to protect some privacy interest, because the materials are no longer "private" in any sense of the word.

Furthermore, an order concealing the materials will do nothing to encourage settlement between CAMC and Dr. Wahi. There is also nothing in the record to suggest that petitioner Brooks is seeking the materials for an improper purpose. The only legitimate purpose which CAMC and Dr. Wahi might be able to assert in support of a protective order limiting access to the peer review materials is to avoid serious embarrassment.

Counterbalancing CAMC's and Dr. Wahi's embarrassment are substantial public interests in health and safety. The petitioner needs the materials as a matter of

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[1](...continued)

> and competitors;
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> 5. The amount of effort or money expended by the defendant in developing the information; and
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> 6. The ease or difficulty with which the information could be properly acquired or duplicated by others.

encouraging the improvement of the public health system, an endeavor that the Legislature characterizes as "an important state interest." *W.Va. Code*, 55-7B-1 [2003] states in part:

> [I]n every human endeavor the possibility of injury or death from negligent conduct commands that protection of the public served by health care providers be recognized as an important state interest; . . . [O]ur system of litigation is an essential component of this state's interest in providing adequate and reasonable compensation to persons who suffer from injury or death as a result of professional negligence[.]

Furthermore, access to these materials facilitates public monitoring of both the judicial system and the health care system. Public access to and participation in the civil justice system guards against judicial misconduct or incompetence; public access to the materials at issue – which have already been made public – also guards against misconduct or incompetence in the provision of medical care. And allowing the petitioner access to these materials results in efficiency: CAMC and Dr. Wahi have already battled over the competency issues contained in the materials in Grant County, and it is wholly inefficient to make the petitioner re-litigate that issue in Kanawha County. Litigants should not be made to repeatedly "re-invent the wheel."

When the public is able to see fair and open decision-making in the courts, the people are inspired to have respect and confidence in the administration of justice. When documents begin disappearing under the cloak of a protective order, the opposite result is often achieved. When the parties to a lawsuit select the public, civil justice system to resolve

their disputes, it is generally improper for those parties to demand that matters aired in the courtroom be concealed from the eyes of the public.[2]

I therefore respectfully concur.

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[2]This is not to say, of course, that everything that happens in a courtroom must be exposed to public scrutiny. For instance, matters introduced in the family courts in domestic relations or domestic violence cases, or records pertaining to juveniles, are most often exceptionally private matters that have no business being exposed to public scrutiny. The embarrassment and harm to the parties that results from the revelation of materials such as these is presumed to outweigh any public interest, and the Legislature has recognized this by enacting protective legislation. *See, e.g., W.Va. Code*, 48-1-303 [2001] (in a "domestic relations action, all pleadings, exhibits or other documents, other than orders, that are contained in the court file are confidential and not open for public inspection[.]"); *Rules of Practice and Procedure for Family Court*, Rule 6 [2002] ("[a]ll pleadings, recordings, exhibits, transcripts or other documents contained in a court file are confidential, and shall not be available for public inspection[.]"); *Rules of Practice and Procedure for Domestic Violence Civil Proceedings* Rule 6 (same); *W.Va. Code* 49-5-17 [2004] ("[r]ecords of a juvenile proceeding conducted under this chapter are not public records and shall not be disclosed to anyone[.]").

It is interesting to note, however, that the Legislature requires that orders in domestic relations and domestic violence civil actions *are* public records subject to public examination. *See, e.g., W.Va. Code*, 48-1-303(a) ("All orders in domestic relations actions entered in the civil order books by circuit clerks are public records."). Hence matters entered confidentially into the record – such as the parties' incomes, their allegations of misconduct, the value of their marital property, or the names and birthdates of their children – become matters exposed to public scrutiny when the family court judge enters an order making findings of fact upon the record. What the Legislature giveth with one hand, it takes away with the other.