

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO.:

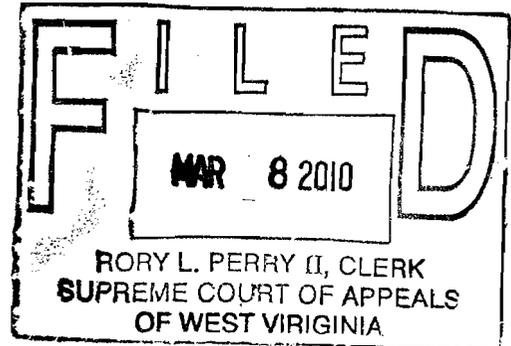
STATE EX REL. STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY;

Petitioner,

v.

THE HONORABLE THOMAS A. BEDELL,
Judge of the Circuit Court of
Harrison County, West Virginia,

Respondent.



AMICUS CURIAE BRIEF FILED ON BEHALF OF
WEST VIRGINIA MUTUAL INSURANCE CO.

Respectfully submitted,

D. C. Offutt, Jr., Esquire (WV#2773)
OFFUTT, NORD, PLLC
949 Third Avenue, Suite 300
Huntington, WV 25701
Phone (304) 529-2868
Facsimile (304) 529-2999
dcoffutt@ofnlaw.com

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I. KIND OF PROCEEDINGS AND NATURE OF RULING BELOW

In the underlying action, the plaintiff, Carla Layne Blank, individually and in her capacity as personal representative of the Estate of Lynn Robert Blank, brought a wrongful death and bodily injury action against the defendant, Lana S. Eddy Luby, as the personal representative of the Estate of Jeremy Jay Thomas, and an uninsured motorist claim against her own insurance carrier, State Farm Mutual Automobile Ins. Co., (St. Farm). During the course of the litigation, the plaintiff argued that State Farm, as the uninsured motorist carrier, was not entitled to conduct discovery because the defendant tortfeasor did not make discovery requests upon the plaintiff. The trial court disagreed and ruled that the plaintiff respond to discovery propounded by State Farm, including providing copies of requested medical records. The Court, however, ruled that all relevant medical records were to be disclosed pursuant to the terms of a protective order which provides that the records could be disclosed to the defendants' experts and insurance carrier in paper form only, and that the records could not be "scanned or stored by computerized storage, filming, photographing, microfiche or other similar method." The protective order further provides that upon the conclusion of the litigation, all medical records and medical information, including copies and summaries, either be destroyed with a certificate from Defendants' counsel that the same has been done, or returned to Plaintiff's counsel without retention by Defendants' counsel or any other person who was furnished such

materials and information. The only exception to the destruction or return provision of the protective order permits defense counsel to retain a sealed copy of the records, not to be used for any purpose except upon further order of the Court, or in response to a lawful order of another Court with jurisdiction, or upon written consent of the person whose medical records and information is protected.

II. STATEMENT OF INTEREST

Because the Mutual has claims arising in Harrison County and is being subjected to similar protective orders issued by other Harrison County Circuit Court Judges, it has a significant interest in this issue. Because these overly restrictive protective orders have a significant impact on the Mutual, the Mutual offers this *Amicus Curiae* brief to the Court and requests that this Court reverse the February 11, 2010 Order of the Circuit Court of Harrison County as being overly broad, unduly restrictive and unlikely to achieve its intended purpose.

III. STATEMENT OF FACTS

The Mutual is a West Virginia domestic, private, non-stock, nonprofit corporation, formed in 2004 in response to the state's "medical liability insurance crisis." W. Va. Code § 33-20F-1-9. The Mutual currently insures approximately 1550 of the State's physicians. The Mutual insures 60-65% of the physicians in private practice within the State who purchase insurance in the commercial market, i.e., physicians other than those who are employees of

the Federal and State government and those who are employed by federally funded clinics. The Mutual has insureds in all fifty-five counties and in all of the judicial circuits in the State. Currently the Mutual has approximately 220 open claim files. It has been adjusting claims since 2004 and has never had a known instance of breaching the confidentiality of the medical records of any claimant during that time period. Likewise, to the Mutual's knowledge, the Harrison Circuit Court one of relatively few Judicial Circuits in the State where judges have imposed the type of restrictive protective order entered by Judge Bedell in the underlying case. The most basic problem with such protective orders is the provision that prohibits the insurance carrier from storing a litigant's medical records electronically on its computer network. Another insurmountable problem is the requirement that the electronic records be destroyed at the end of the case.

In formulating the terms of the protective order, the trial court did not conduct a hearing and made no findings of fact or conclusions of law concerning any safeguards or lack thereof incorporated in the claims handling system utilized by State Farm to protect the confidentiality of confidential medical information gathered during the claims handling process. Likewise, the trial court made no findings with regard to safeguarding the interests of State Farm or the impact that compliance with the terms of the protective order would have on State Farm's claims handling process.

While the Mutual is unaware of the specific details of State Farm's claims handling process, it believes that if a record had been properly made by the trial court it would have demonstrated substantial safeguards in the system designed to protect the privacy of confidential medical information and would have demonstrated no need for the restrictive protective order. By way of illustration, in the case of the Mutual, an inquiry by the trial court, as required by West Virginia law, would have revealed a robust system designed to vigorously protect the confidentiality of medical information collected during the claims handling process. The Mutual, like most insurance companies, seeks to be as paperless as possible in its operations, including its claim handling. This creates an efficiency in its operations which benefits its insureds by reducing the company's costs and consequently reducing their insurance premiums. The Mutual uses a proprietary software program, ImageRight, to scan, organize and store electronic medical records. All of its claims files are stored and maintained electronically. Claim files are encrypted and cannot be accessed or viewed without utilizing the ImageRight software by a user with a valid login name and password. Password protection permits the Mutual to give users specified limited rights to access information from the electronic files. Users can only access portions of the electronic claim file necessary for the performance of their job responsibilities. In other words, a curious secretary or clerical office worker can not go browsing through the medical records or any other part of any claims file. Only those employees

handling claims and a few high level managerial employees have access to the claims files at all. All activity in a claims file is also audited electronically, so if a question does arise concerning whether a record has potentially been accessed improperly, the system maintains a record of all individuals who access a file, including the date of the access, the name of the person accessing the file and the identity of the specific records within the file that were accessed. All access to records is "read only." No records can be altered or deleted from the claims file by any user. The Mutual even requires computer users to log off their computers when they leave their computers for breaks so that computer screens will be blank when users leave their workstations and confidential claim information will not be viewed by passersby.

The Mutual's claim files, including medical records, are not backed up to the internet. The files are backed up to magnetic tapes and are stored offsite in case of catastrophic damage to the Mutual's computer network. The backup files are also encrypted and cannot be accessed without the ImageRight software, a valid user name and password.

These are just some of the many privacy safeguards built into the electronic claims handling systems used by the Mutual and other insurance companies. The electronic claim files as maintained by the Mutual and other insurance carriers have numerous advantages over traditional written claims files in terms of confidentiality and privacy. In the first instance, access to the records is strictly controlled and all authorized access is constantly monitored

electronically. Records can not be simply copied and carried off without the company's knowledge. Unauthorized individuals can not access the electronic files at any time. The electronic records are much more secure than written records which can be left on a desk or in an unlocked file cabinet to be viewed or copied and carried away surreptitiously. Furthermore, the electronic files can not be lost, misfiled or misplaced, which is not the case with paper files. Electronic files also promote a more efficient and cost effective claims handling process, all of which inures to the benefit of the Mutual's policyholders in the form of lower insurance premiums.

IV. ASSIGNMENTS OF ERROR

- A. The Circuit Court of Harrison County exceeded its authority by entering a protective order without a proper evidentiary foundation in violation of the provisions of West Virginia Rule of Civil Procedure 26(c).**
- B. The Circuit Court of Harrison County erred by imposing conditions in its protective order on the production of medical records which make it impossible for State Farm and other similarly situated insurance companies to comply with federal and state statutory and regulatory obligations.**

V. ARGUMENT

- A. The Protective Order Was Entered Without a Proper Evidentiary Basis Being Established by the Trial Court and Exceeds the Court's Powers**

The authority for a trial court to issue a protective order regarding discovery is contained in Rule 26(c) of the West Virginia Rules of Civil Procedure (WVRCP). WVRCP 26(c) provides that:

Upon motion by a party or by the person from whom discovery is sought, including a certification that the movant has in good faith conferred or attempted to confer with other affected parties in a effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) That the discovery not be had;
- (2) That the discovery may be had only on specified terms and conditions, including a designation of the time and place;
- (3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;
- (5) That discovery be conducted with no one present except persons designated by the court;
- (6) That a deposition after being sealed be opened only by order of the court;
- (7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- (8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

The language of WVRCP 26(c) regarding protective orders is identical to the federal rule. Because the West Virginia Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, this Court often refers to

interpretations of the Federal Rules when discussing its own rules. *See Painter v. Peavy*, 192 W.Va. 189, 192 n. 6, 451 S.E.2d 755, 758 n. 6 (1994). Because the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, this Court gives substantial weight to federal cases in determining the meaning and scope of the West Virginia Rules of Civil Procedure. *See, e.g., State v. Sutphin*, 195 W.Va. 551, 563, 466 S.E.2d 402, 414 (1995), *Keplinger v. Virginia Elec. & Power Co.*, 208 W.Va. 11, 20 n. 13, 537 S.E.2d 632, 641 n. 13 (2000).

As stated by the Supreme Court of the United States, “Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). Likewise, “the unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.” *Id.* The trial court’s broad discretion in limiting the scope of discovery under Rule 26, however, is not unfettered. *See, e.g., Marrese v. American Academy of Orthopaedic Surgeons*, 706 F.2d 1488, 1493 (7th Cir. 1983); *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir. 1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436 (10th Cir. 1977). The issuance of a broad protective order without scrutiny of each proposed area of inquiry and without giving full consideration to alternatives, more narrowly drawn, is outside the scope of the trial court’s discretion. *Bennett v. Warner*, 179 W.Va. 742, 750, 372 S.E.2d 920, 928 (1988). Therefore, just as the trial

court has an obligation not to permit discovery requests that are unduly burdensome, it also has an obligation to not place unduly burdensome restrictions on discovery through the use of a protective order. As this Court has held, a trial court “abuses its discretion when its rulings on discovery are clearly against the logic of the circumstances.” *B.F. Specialty Co. v. Charles M. Sledd Co.*, 197 W. Va. 463, 465, 475 S.E.2d 555, 557 (1996).

Rule 26(c) requires that good cause be shown for a protective order. The burden of persuasion is on the party seeking a protective order. To meet this burden, it must show good cause by demonstrating a particular need for protection. *Traynor v. Liu*, 495 F. Supp. 2d 444 (D. Del. 2007). Courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish good cause. *In re Terra Intern., Inc.*, 134 F.3d 302 (5th Cir. 1998). The existence of good cause for a protective order “is a factual matter to be determined from the nature and character of the information sought by deposition or interrogatory weighed in the balance of the factual issues involved in each action.” *Glick v. McKesson & Robbins*, 10 F.R.D. 477, 479 (W.D. Mo. 1950). Such determination must also include a consideration of relative hardship to the nonmoving party should the protective order be granted. *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204 (8th Cir. 1973), cert. denied, 414 U.S. 1162, 94 S. Ct. 926, 39 L. Ed. 2d 116 (1974).

The Circuit Court of Harrison County made no findings of fact or reasons showing good cause for the issuance of the protective order, nor did it make any findings regarding the hardship imposed on State Farm by granting the protective order. In fact, the Circuit Court's order simply sets out safeguards it apparently believes necessary to protect the confidentiality of the records without stating the particular need for the protection. Had the Court considered this required issue before making its ruling, it would likely have found that additional safeguards to protect the privacy of records to be unnecessary because West Virginia law already provides adequate safeguards to protect litigants from the improper disclosure and use of their medical records.

West Virginia courts have consistently given medical records a special status with regard to protection from disclosure and improper use. In 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 the records. *Allen v. Smith*, 179 W. Va. 360, 368 S.E.2d 924 (1988). The legal basis for the Court's ruling in *Allen* was W. Va. Code § 27-3-1, which provides that records regarding mental health patients are deemed "confidential information" and can only be released under certain enumerated circumstances. In *State ex. rel. Kitzmittler v. Henning*, the Supreme Court of Appeals prohibited ex parte communications with a patient's treating physicians and held that the West Virginia Rules of Civil Procedure

set forth the exclusive means by which an adverse party may obtain pretrial discovery of medical testimony relating to a patient's medical condition. 190 W. Va. 142, 437 S.E.2d 452 (1993). In *Morris v. Consolidation Coal Co.*, 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. In 1981, the West Virginia Legislature enacted the West Virginia Medical Records Act, W. Va. Code § 57-5-4a, to provide a mechanism to be used to obtain the release of hospital records which contain specific procedures to prevent the improper disclosure of health information obtained from hospitals. In *Keplinger v. Virginia Elec. and Power Co.*, this Court held that the failure to comply with the provisions of W. Va. Code § 57-5-4a by an attorney gives rise to a private cause of action for tortious interference with a physician/patient relationship as recognized in *Morris*. 208 W. Va. 11, 537 S.E.2d 632 (2000).

This Court has consistently recognized that an individual's medical records are classically a private matter and generally are not subject to public disclosure. See, e.g., *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986). However, this privacy right must be balanced against other interests involved. In *Cline*, this Court permitted the inspection of private psychiatric records of a school bus driver by the parents of children who rode on the bus driver's bus.

In the case of an action for personal injury or wrongful death, an individual's medical records are an indispensable piece of evidence in adjudicating the claim. Inherently the individual's right of privacy in his or her medical records will conflict with the right of the defendant, and his or her insurance company, to discover relevant medical information regarding the injury in question. The *Keplinger* opinion specifically noted that because of the highly personal and confidential nature of medical records, they should be subject to special consideration to assure that, in the process of discovery, there will be no unnecessary disclosure of medical information **that is outside the scope of the litigation.** *Keplinger* at p. 644. (emphasis added). The protective order issued by Judge Bedell does nothing to enhance or increase the degree of privacy to be accorded the plaintiff's medical records. On the other hand, it severely restricts and inhibits the due process rights of the defendant to fully and fairly litigate the claims asserted against him. It effectively inhibits the ability of the defendant to obtain and utilize one of the most important, if not the most important, evidence in evaluating and contesting the claim, the claimant's medical records.

B. The terms of the protective order make it legally impossible for the Mutual or other similarly situated insurance companies to comply with statutory, regulatory and contractual obligations regarding the maintenance of claims files.

The Mutual and other similarly situated insurance companies can not perform the duties legally imposed upon them as insurance carriers if they are

unable to maintain electronic files containing medical records of claimants. West Virginia has adopted the model National Association of Insurance Commissioners privacy rules. See 114 CSR §57-15.1. These rules require insurance companies to ensure the security and confidentiality of customer records and information. In addition, the West Virginia Insurance Commissioner requires all claim files maintained by insurance companies doing business in the State to be available for audit and inspection by the Commissioner. In September, 2009, the Insurance Commissioner issued an Informational Letter, No. 172, to explain and clarify its position on this issue. The Informational Letter, citing W. Va. Code § 33-2-9 and 114 CSR 15, reminded insurance companies of their obligation to maintain claim files and accompanying records for the calendar year in which the claim is enclosed, plus five (5) additional years. The definition of claim files includes medical records. §15-4.4(a)(1). The Informational Letter points out that if a court order requires certain medical documentation be destroyed or returned by the insurer at the conclusion of the litigation, the Office of the Insurance Commissioner is substantially hindered in carrying out its legislative mandate and it may subject insurers to penalties as a result. The trial court's protective order does not address these regulatory requirements placed on State Farm and other insurance carriers in the State, forcing companies who are subject to such order to have to choose between obeying the Court Order and being in

violation of state insurance regulations or complying with the regulations and being in violation of a Court Order.

Also, reinsurance agreements place a contractual obligation on the Mutual to make claim files available for their inspection. Without access to the reinsurance market, the Mutual would not be able to offer insurance to many physicians. In fact, the Mutual has the statutory right to refuse to insure any physician for whom it can not obtain reinsurance for part of the coverage. West Virginia Code § 33-20F-9(d)(4). It should be noted that in addition to being subject to periodic audits by the Insurance Commissioner, reinsurance companies also require claims files to be available for audit even after the claim has been resolved and the matter closed. The Mutual has taken steps to implement safeguards to protect the inadvertent or deliberate dissemination of personal health information during these required audits, whether by the Insurance Commissioner or a reinsurer. The Mutual requires that each auditor sign a confidentiality agreement and gives the auditor limited access to the claims files to be audited. The auditors must access the claims files while physically at the Mutual's office utilizing a computer that is provided by the Mutual which is attached directly to the Mutual's computer network. Remote access is not permitted and auditors are not allowed to copy or print any part of a claims file or remove it from the Mutual's premises.

The privacy of medical records is also protected by federal law, the Health Information Portability and Accountability Act (HIPAA), and federal

regulations issued pursuant to that Act known collectively as the Privacy Rule. HIPAA was enacted in 1996 in part as Congress' response to the need for the protection of the privacy of personal health information. Codified primarily in Titles 18, 29, and 42 of the U.S. Code, HIPAA focuses the computerization of health information. Congress recognized the need to maintain strict privacy protection for personal health information and therefore directed the Department of Health and Human Services to promulgate regulations known collectively as the Privacy Rule. Codified at 45 C.F.R. §§ 160 and 164, the Privacy Rule creates national standards to keep medical records and other personal health information confidential. It restricts and defines the ability of health plans, health care clearinghouses, and most health care providers to divulge patient medical records.

While the Mutual is not directly subject to HIPAA and the privacy regulations, its insured physicians are regulated by the Act and the regulations. In order for its insureds to comply with HIPAA and the privacy regulations in terms of sharing medical information with the Mutual concerning a claim or potential claim, the Mutual has entered into a contractual Business Associate Agreement with each of its insureds which requires the Mutual to comply with the provisions of HIPAA and the privacy regulations.

The Harrison Circuit Court also ignores the modern trend toward electronic medical records in the protective order. Currently most hospitals

and many physicians' offices create and maintain medical records in digital form. It is estimated that 58% of all physicians will have electronic medical records within two years and the conversion to electronic medical records will likely accelerate in the future. Business Week, March 2, 2010. For example, the American Recovery and Reinvestment Act of 2009, 42 USC §13001, provides economic incentives for healthcare providers to implement electronic medical records. Those who don't utilize electronic medical records by 2015, face financial penalties in the form of decreased Medicare reimbursements.

It is ironic that while the majority of medical records today are created and stored in an electronic format, insurance companies who are subject to these types of restrictive protective orders will be forced to collect paper copies of records that are electronic in their origin, be unable to utilize available technology to process the claim electronically, all the while the original medical records remains stored in a digital form and copies of the records exist in the form of digital backups, likely in multiple locations and in multiple formats.

The trial court failed to take into account any of these competing interests in formulating its protective order. While the plaintiff certainly has a privacy interest in her medical records, that right is not absolute and must be balanced against the need to disclose the contents of relevant medical records during litigation and the claim handling process. Insurance companies must be able to utilize modern technologies in their claim handling process to promote efficiency and cost savings. West Virginia law is robust in its

protection of the confidentiality of medical records and the protective order gives the plaintiff no additional safeguards in this regard. In fact, as demonstrated above, forcing insurance companies to utilize paper records rather than electronic claim files makes it more likely that a breach of confidentiality will occur and not be detected. The protective order does nothing to enhance the plaintiff's right to confidentiality of her records and severely shackles the insurance company, making it impossible for the insurance company to handle claims uniformly in its customary business manner, puts it in violation of federal and state laws and regulations and deprives the citizens of the State of West Virginia of the benefits of a modern and efficient claims handling process.

VI. CONCLUSION

The February 11, 2009 protective order entered by the Circuit Court of Harrison County is overly broad, unduly burdensome and does not achieve its intended purpose of protecting the confidentiality of the claimant's medical records. If it and similar orders are allowed to stand, it will place insurance companies in a "Catch 22" situation of being forced to either disobey the terms of the protective order or fail to comply with federal and state law and insurance regulations.

VII. RELIEF PRAYED FOR

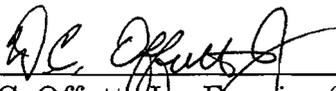
WHEREFORE, for the foregoing reasons, the West Virginia Mutual Insurance Company requests that this Court issue a rule to show cause and

grant a writ of prohibition against enforcement of the February 11, 2010 Order of the Circuit Court of Harrison County, West Virginia.

Respectfully submitted,

**WEST VIRGINIA MUTUAL
INSURANCE COMPANY**

BY COUNSEL



D. C. Offutt, Jr., Esquire (WV Bar #2773)
OFFUTT NORD, PLLC
949 Third Avenue, Suite 300
Huntington, WV 25701
Phone (304) 529-2868
Facsimile (304) 529-2999
dcoffutt@ofnlaw.com

CERTIFICATE OF SERVICE

I, D. C. Offutt, Jr., counsel for the West Virginia Mutual Insurance Company, hereby certify that I have served a true copy of the foregoing **“Amicus Curiae Brief Filed on Behalf of West Virginia Mutual Insurance Company”** upon the following individuals, by placing the same in the U.S. Mail, First Class, postage prepaid, on this the 8th day of March, 2010:

The Honorable Thomas A. Bedell, Judge
Circuit Court of Harrison County
Harrison County Courthouse
301 West Main Street
Clarksburg, WV 26301-2967

Joseph Shaffer, Esquire
Prosecuting Attorney
Harrison County Courthouse
301 West Main Street
Clarksburg, WV 26301-2967

David Romano, Esquire
Rachel E. Romano, Esquire
ROMANO LAW OFFICE
363 Washington Avenue
Clarksburg, WV 26301

Tiffany R. Durst, Esquire
PULLIN, FOWLER, FLANAGAN,
BROWN & POE, PLLC
2414 Cranberry Square
Morgantown, WV 26508

E. Kay Fuller, Esquire
Michael M. Stevens, Esquire
MARTIN & SEIBERT, L.C.
P. O. Box 1286
Martinsburg, WV 25402-1286



D. C. Offutt, Jr. (WV Bar #2773)