

No. 100272

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
At Charleston**

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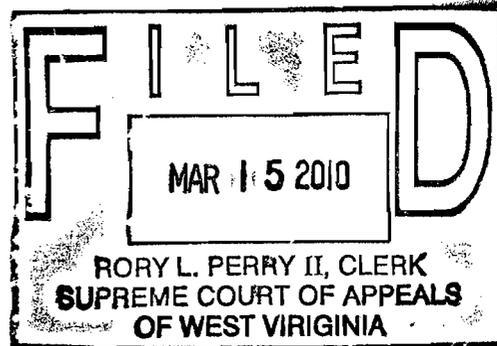
**STATE EX REL. STATE FARM MUTUAL  
AUTOMOBILE INSURANCE COMPANY,**

Petitioner,

v.

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

Respondent.



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From the Circuit Court of  
Harrison County, West Virginia  
Civil Action No. 09-C-67-2

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**RESPONDENT'S BRIEF IN RESPONSE TO STATE FARM'S  
REQUEST FOR WRIT OF PROHIBITION AND REQUEST FOR  
ATTORNEY'S FEES AND COSTS**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... -i- & -ii-

1. THE REMEDY OF PROHIBITION IS GROSSLY INAPPROPRIATE AS STATE FARM CANNOT DEMONSTRATE ANY IMMINENT HARM BY THE TRIAL COURT'S DISCRETIONARY DISCOVERY RULING WHICH ALLEGED HARM COULD NOT BE CORRECTED ON DIRECT APPEAL ... -1-

    A. State Farm Has Misrepresented Facts in Its Petition ..... -1-

    B. State Farm is Attempting to Obtain a Continuance Through the Vexatious Use of an Extraordinary Writ ..... -7-

2. STATE FARM'S MOTION FOR STAY AND PETITION ARE FRIVOLOUS AND PLAINTIFF BELOW IS ENTITLED TO ATTORNEY'S FEES AND COSTS ..... -15 -

CONCLUSION ..... -16-

## TABLE OF AUTHORITIES

### West Virginia Court Cases

<u>Board of Review of Bureau of Employment Programs v. Gatson,</u> 210 W.Va. 753, 755, 559 S.E.2d 899, 901 (2001) .....	15
<u>Cordle v. General Hugh Mercer Corp.,</u> 325 S.E.2d 111 (W.Va. 1984) .....	13
<u>Keplinger v Virginia Elec. &amp; Power Co.,</u> 537 S.E. 2d 632 (W. Va. 2000) .....	4
<u>Louk v. Cormier,</u> 622 S.E.2d 788, 794-95 (W.Va. 2005) .....	12
<u>Roach v. Harper,</u> 105 S.E.2d 564 (W.Va. 1958) .....	13
<u>Sally-Mike Properties v. Yokum,</u> 179 W.Va. 48, 365 S.E.2d 246 (1986) .....	15
<u>State ex rel Affiliated Constr. Trades Found.v. Vieweg,</u> 520 S.E.2d 854, 869 (W.Va. 1999) .....	12
<u>State ex rel Farley v. Spaulding,</u> 507 S.E.2d 376, 387-88 (W.Va. 1998) .....	12
<u>State ex rel Hoover v. Berger,</u> 483 S.E.2d 12, (W.Va. 1996) .....	8
<u>State ex rel Nationwide Mutual Ins. Co. v. Marks,</u> 223 W.Va. 452, 76 S.E.2d 156 (2009) .....	9
<u>State ex rel West Virginia National Auto Ins. Co. v Bedell,</u> 672 S.E. 2d 358 (W.Va. 2008) .....	8
<u>State ex rel. Nationwide Mut. Ins. Co. v. Kaufman,</u> 658 S.E.2d 728, 729 (W.Va. 2008) .....	8
<u>Twigg v. Hercules Corp.,</u> 406 S.E.2d 52 (W.Va. 1990) .....	13

### Cases from Other Jurisdictions

<u>AT v. State Farm Ins. Co.,</u> 989 P.2d 219 (Col. App. 1999) .....	13
<u>Brende v. Hara,</u> 153 P.3d 1109 (Hawaii 2007) .....	13

**Statutory Provisions**

W. Va. Code §33-11-4(10) ..... 12

**Rules**

W.Va. R. Civ. Proc., Rule 26 ..... 12, 14

W.Va. R. Civ. Proc., Rule 26(d)(3) ..... 5

**Other Sources**

Restatement of the Law of Torts, Section 867 ..... 13

Restatement of the Law of Torts 2d (1976) ..... 13

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**1. THE REMEDY OF PROHIBITION IS GROSSLY INAPPROPRIATE AS  
STATE FARM CANNOT DEMONSTRATE ANY IMMINENT HARM BY THE  
TRIAL COURT'S DISCRETIONARY DISCOVERY RULING WHICH  
ALLEGED HARM COULD NOT BE CORRECTED ON DIRECT APPEAL**

**A. State Farm Has Misrepresented Facts in Its Petition**

This case originates from an automobile crash that occurred on March 20,  
2008, near Buckhannon, West Virginia, where the Defendant's Decedent,<sup>1</sup> Jeremy

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<sup>1</sup> The Defendant is the Administratrix of the Estate of Jeremy Jay Thomas who  
was driving the Ford Ranger truck that went left of center killing Plaintiff's husband and

Thomas, after finishing work from 10:00 p.m. to 6:00 a.m. on an oil drilling rig, while traveling at a high rate of speed, failed to negotiate a curve, and without any apparent braking, went left of center entirely into the lane of oncoming traffic, striking Plaintiff's vehicle killing her husband who was driving and seriously injuring her. Both Mr. Thomas and his passenger tested positive for marijuana in their blood after the crash. Based upon the presence of marijuana in his bloodstream and the reckless driving, there is strong reason to believe that Mr. Thomas was impaired while driving his vehicle, as well as, violating State law by having possessed and consumed marijuana, a controlled substance.

With these facts State Farm attempted to settle the death claim of Lynn Blank prior to Carla Blank retaining counsel, and it offered Mrs. Blank the Thomas liability policy limits of \$100,000 for the wrongful death of her husband who was Chief of Health Administration Services at the Veteran's Administration Medical Center in Clarksburg, West Virginia. The Blanks' also had UIM coverage with State Farm but State Farm did not tender any of that coverage to Mrs. Blank and still has not done so. State Farm made no pre-suit offer of either the liability or the underinsured coverage to Carla Blank even though she was riding with her husband when he was fatally injured and she was seriously injured herself incurring almost \$45,000 of medical expenses. Consequently, when the Complaint was filed in this case on February 12, 2009, it included claims for the wrongful death of Lynn Blank, damages for the personal injury and emotional distress of Carla Blank, and a first party bad faith claim for State Farm's failure to tender the uncontested UIM coverage of the Blanks' State Farm policy, among other claims.

On May 15, 2009, State Farm moved to bifurcate the insurance claims and stay discovery from the automobile tort claim<sup>2</sup> which Plaintiff agreed and a stipulated Order

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injuring Plaintiff Carla Blank.

<sup>2</sup> The automobile tort claim to resolve the wrongful death and personal injury claims is set for trial to begin on March 22, 2010, with the insurance claims to be

was entered to that effect.

The Court entered a Scheduling Order on May 21, 2009, attached as "**Exhibit 1**" which provided various deadlines including a discovery cutoff of February 2, 2010, and a trial date of March 22, 2010. At no time during the discovery period did the attorney for the Defendant, Luby, engage in any discovery until it sent a Notice of Deposition for Plaintiff, Carla Blank, on January 4, 2010. State Farm on the other hand, even though the claims against it had been bifurcated, filed limited discovery on December 10, 2009, seeking information and admissions about the Blank's insurance policy and sought consent from Plaintiff for an authorization to obtain any of Plaintiff's medical records, ex parte. (See State Farm's Requests & Plaintiff's Responses attached to Petition as "Exhibit D [ Exhibit E being part of Exhibit D ").

Thus, nine months passed before any discovery was filed by the Defendants because the Defendants, including State Farm, would not agree to maintain the confidentiality of Plaintiff's medical records, including refraining from republishing them or providing them to other persons or entities without Plaintiff's written consent, or to refrain from utilizing such confidential records for purposes other than the preparation of this case. State Farm also wanted to maintain such medical records indefinitely in a scanned format on their nationwide claims computer system accessible to almost all of State Farm's 67,000 employees. Neither Defendant Luby nor Defendant State Farm sought discovery from Plaintiff or moved to compel discovery from the Plaintiff because they did not want the Trial Court to rule on the Plaintiff's entitlement to a protective order, even though Plaintiff had raised the issue on her own early in the case. (See attached as "**Exhibit 2**" 07/20/09 ltr. w/proposed Protective Order). The Defendants did nothing after receiving Plaintiff's suggested Protective Order by way of requesting discovery or seeking a hearing before the Trial Court. Leaving one to conclude that all of these current gyrations, including the \_\_\_\_\_  
determined at a later date to be set by the Court.

motion for stay of the trial, were calculated to be filed right before the trial to disrupt these proceedings. Such conduct is vexatious.

State Farm also mischaracterizes its representation that Plaintiff refused to participate in discovery. (Pet. p. 5). This is a gross mischaracterization because there was no discovery propounded to the Plaintiff by Defendant Luby and it was only when State Farm filed its discovery requests seeking a medical authorization to obtain all medical records ex parte was there any discovery by any of the Defendants. This did not occur until December 10, 2009, shortly before the discovery cutoff. (See State Farm's Requests & Plaintiff's Responses attached to Petition as "Exhibit D [Exhibit E being part of Exhibit D]"). Plaintiff timely objected as most of the discovery related to the bifurcated insurance issues and State Farm was not entitled to an ex parte medical release to obtain medical information outside the discovery process with no notice to opposing counsel and the party whose medical information is being sought. Keplinger v Virginia Elec. & Power Co., 537 S.E. 2d 632 (W. Va. 2000); however, Plaintiff agreed at all times to provide any and all relevant discovery requesting only that her medical records and medical information be maintained in a confidential manner and not be republished to persons not involved in this case. Such a request is imminently reasonable and within the Trial Court's discretion to allow.

State Farm also asserts that Plaintiff refused to provide discovery at her deposition. State Farm then tries to "cover itself" by attaching to the Petition the Plaintiff's deposition transcript but fails to reference any particular section demonstrating that Plaintiff refused to participate in discovery. The deposition attached as Exhibit C to State Farm's Petition demonstrates otherwise. Plaintiff, at her deposition, again requested that Defendant Luby and her counsel, as well as State Farm and its counsel, agree to maintain the confidentiality of Plaintiff's medical information and those Defendants refused. Both Defendants also refused an offer that the deposition be taken with all questions being

answered by the Plaintiff but that the deposition not be disseminated beyond counsel until the Trial Court ruled on the Protective Order regarding medical confidentiality as the issue had not yet been brought before the Trial Court. Specifically, Plaintiff's counsel stated as follows:

"In other words, I think the way you get around it is this, we agree that the deposition for all practical purposes will be confidential and sealed until the Court rules. If the Court rules in whoever's favor, then it becomes unsealed and you can do what you want. If the Court rules in my favor or Ms. Blank's favor, then whatever restrictions the Court puts on it will apply. That'll get us around this hurdle if everybody agrees to that at this time.

So the only people that will have the deposition are you, Ms. Durst, on behalf of your client and you, Ms. Fuller for your own purpose as an attorney, but you won't be able to provide it to anybody at State Farm or anyone else till the Court rules." (Pet. Exh. C - Blank depo. at pp. 14-15)

\* \* \* \*

"I'm just trying to give you a way to accomplish your goal, which it is to get questions and answers from Ms. Blank, which we're willing to give on all issues as long as you can agree that it will be kept confidential until the Judge rules." Id. at 20.

Both Defendant Luby and Defendant State Farm refused and **State Farm then adjourned the deposition.** Id. at 13 - 14. More importantly, however, neither Defendant Luby or State Farm ever raised this issue i.e. the suspending of Plaintiff's deposition, with the Trial Court as required by Rule 26(d)(3). Accordingly, the Defendants waived any objection they may have had regarding this issue as the Trial Court never had an opportunity to consider it.

Subsequently, as a result of Plaintiff's objection to State Farm's discovery requests, the Court entered an Order on February 11, 2010 granting Plaintiff's Protective Order protecting the confidentiality of her medical records and ordered Plaintiff to provide such medical records to the Defendants pursuant to the Protective Order. On January 28, 2010, Plaintiff delivered to both Defendants all of the medical records and medical expenses of the Decedent Lynn Blank and the Plaintiff pursuant to the Trial Court's

direction. **Amazingly, on February 22, 2010, State Farm, as well as Defendant Luby, returned those medical records and medical expenses with letters stating that they had not reviewed them.**<sup>3</sup> (See attached as "Exhibit 3" ltrs. from counsel for Defendant State Farm and Defendant Luby's). Thereafter, on February 23, 2010, State Farm filed with the Trial Court a Motion for Stay pending appeal. The Trial Court established a briefing schedule and Plaintiff responded on March 5, 2010 as directed by the Trial Court. Before State Farm's reply date arrived, State Farm filed with this Court its request for stay and its Petition for Writ of Prohibition on March 8, 2010, knowing that the Trial Court had set the final pre-trial for March 9, 2010, yet, State Farm failed to overnight, fax or e-mail a copy of its Petition for Writ of Prohibition to either Plaintiff's counsel or the Court. State Farm's counsel, Kay Fuller of Martin & Seibert and Defendant Luby's counsel hired by State Farm, Tiffany Durst of Pullin, Fowler, Flanagan, Brown & Poe then appeared the final pre-trial conference before the Trial Court and failed to advise the Court that a Petition as well as a Request for Stay had been filed with the Supreme Court before the Trial Court had even ruled on the pending Motion on the same issue.<sup>4</sup>

The Trial Court's Order denying the Defendant's Motion for Stay is very complete and analyzes the issue in detail. The Trial Court found that there is absolutely no need for a stay of the trial because a protective order was issued that has no effect on

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<sup>3</sup> Plaintiff believes that Defendant Luby copied the medical records based upon the disheveled appearance of the records upon their return and because the correspondence did not affirmatively state that the records were not copied.

<sup>4</sup> Plaintiff had been advised by a Supreme Court clerk the afternoon before the final pretrial of the filing of the Motion for Stay with this Court, so Plaintiff's counsel requested at the final pretrial hearing that the Trial Court issue an emergency ruling especially if the Trial Court was going to grant the stay as there were numerous witnesses, including doctors and a toxicologist from the Office of Chief Medical Examiner and other persons whose work schedules and time would be greatly affected if the trial was postponed at the last minute; the Trial Court then entered its "Order Denying Defendant's Motion for Stay" on March 11, 2010 which was provided to this Court by Petitioner by separate filing on March 11, 2010.

the trial of the automobile tort claim, and therefore, is not worthy of an interlocutory appeal disrupting the Trial Court's Scheduling Order at the midnight hour. If State Farm created its own problem by refusing to use the medical records ordered produced by the Trial Court, then State Farm and Defendant Luby have waived any right to relief on this issue as it relates to the trial. Quite frankly such conduct is absurd and attempts to generate a problem when there was none.<sup>5</sup> Both Defendants could have retained the medical records in paper form for review and use at the trial and then sought whatever appropriate relief deemed necessary once the trial is complete. It is even possible that a settlement could be reached making such an appeal totally unnecessary thus conserving scarce judicial resources.

**B. State Farm is Attempting to Obtain a Continuance Through the Vexatious Use of an Extraordinary Writ**

Neither Defendant State Farm nor Defendant Luby have met any of the five criteria set forth by this Court to entitle them to a rule to show cause. This Court has clearly set forth the five factors that will be examined to determine whether a writ of prohibition should be heard and concomitantly the proceedings below stayed as a result of the granting of a rule to show cause. Those five factors are as follows:

- (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;
- (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
- (3) whether the lower tribunal's order is clearly erroneous as a matter of law;

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<sup>5</sup> It is especially perplexing why Defendant Luby's counsel would refuse to use such medical records to prepare for trial when it is in the best interests of her client to do so; such implicates more of State Farm's meddling in the representation of an insured for no good reason.

- (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and,
- (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 658 S.E.2d 728, 729 (W.Va. 2008) syl. pt 1; accord, State ex rel West Virginia National Auto Ins. Co. v Bedell, 672 S.E. 2d 358 (W.Va. 2008).

This Court has held that the third factor, whether the Trial Court's Order is clearly erroneous as a matter of law, should be given "substantial weight", Kaufman at syl. pt. 1, citing State ex rel Hoover v. Berger, 483 S.E.2d 12, (W.Va. 1996). State Farm has provided no case authority that the Trial Court's Order protecting the confidentiality of Plaintiff's medical records and medical information while still providing such information to the Defendants for preparation of their defense is clearly erroneous as a matter of law. The Trial Court is vested with great discretion and latitude on fashioning protective orders, which orders can be revisited at any time or appealed by way of direct appeal to this Court. This raises another troubling question.

State Farm had ample opportunity to timely raise this issue with the Trial Court and make an adequate record. It deliberately failed to do so. It now wants this Court to intervene and nullify the Trial Court's Scheduling Order which has been in effect for almost one year and to stop the trial of this case only days before it is to begin. Such a request is outrageous.<sup>6</sup>

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<sup>6</sup> The Defendants have only identified two witnesses to be called at trial, one of them being the Representative of the Estate who is the Defendant; Plaintiff, on the other hand, because State Farm refuses to admit liability in this clear liability case, must call as witnesses various police officers, emergency room physicians, the Chief Toxicologist at the WVOCME and other various people amounting to more than 15 witnesses; these individuals have made arrangements, changed schedules and suffered substantial inconvenience to appear at a proceeding established by the orderly Rules of Court which State Farm cavalierly seeks to disrupt without any consideration of the inconvenience to these witnesses, as well as, to the Trial Court and opposing counsel.

State Farm will have ample opportunity after the trial of the automobile tort case to revisit the issue of the Trial Court's Protective Order and to make an adequate record if it so desires, and to appeal the same to this Court by way of direct appeal should it continue to disagree with the Trial Court's decision. There still remains the direct actions against State Farm which have been bifurcated which provide State Farm an additional opportunity to properly develop this issue and take whatever action it desires without disrupting this entire judicial process merely because State Farm did not get its way.

Not only does the third criteria weigh in favor of rejecting State Farm's Writ, State Farm has provided no reference to the Record below, or offered any credible argument to satisfy the other four criteria required by this Court for granting review of a writ of prohibition. Moreover, State Farm, through its counsel, Martin & Seibert, has not provided this Court with all of the relevant facts and information just as it did in the State ex rel Nationwide Mutual Ins. Co. v. Marks, 223 W.Va. 452, 76 S.E.2d 156 (2009) at fn. 10.

State Farm does have an adequate means of testing the legality and discretion of Judge Bedell's Protective Order by way of direct appeal, especially since it has to do nothing but use the records at this time for preparation of the automobile tort case and does not have to scan or otherwise do anything that will affect their disagreement concerning the indefinite storage on their nationwide computer database and republication to others.

Likewise, State Farm cannot satisfy the second criteria that "they will be damaged or prejudiced in a way that is not correctable on appeal" as a direct appeal would provide a more adequate remedy to State Farm than a piecemeal interlocutory appeal as this Court has no record upon which to weigh State Farm's unsubstantiated assertions regarding its procedures to protect Plaintiff's medical records within their corporate organization. For instance, State Farm has never provided sworn information to the Trial Court as to who will have access to Plaintiff's confidential medical records when State

Farm scans them on to their claims computer database which is accessible by the vast majority of State Farm's 67,000 employees. Plaintiff has requested such information from State Farm, in this case and in other cases, as to how such access is restricted, if there is any tracking or monitoring mechanism to detect unauthorized inspection, copying or downloading and how long such records are maintained on the this claims computer database, as well as, whether State Farm shares such records or information with any insurance clearing houses such as the INDEX , ISO, or MIB without the written consent of the Plaintiff. State Farm has never answered these questions by way of deposition or other sworn testimony.<sup>7</sup>

The fourth criteria is important as the Judges in the Circuit Court of Harrison County, beginning with former Judge Daniel L. McCarthy (deceased), routinely granted protection of a litigants medical records, whether that litigant was plaintiff or defendant, restricting the use of such medical records and information to preparation of the case in court and not permitting republication or dissemination or use for any other purpose, as well as, restricting access to those individuals who were necessary to prepare the case. State Farm has been aware of this protection for many years, and in fact, has agreed to such restrictions for more than 15 years. (See attached as "**Exhibit 4**" a pre-suit "Medical Confidentiality Agreement" signed by State Farm's authorized agent, Eric Paugh on December 17, 2001.) The name of the claimant has been redacted as it is irrelevant, but that person was a third party claimant who had been injured when a State Farm insured rear ended the claimant's vehicle. Thus, these orders have been granted numerous times,

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<sup>7</sup> Although Plaintiff cannot fully respond to each Amicus Brief, due to time constraints, this Court should be aware that this issue is being contested by West Virginia Mutual Insurance Company in another case, and a 30(b)(7) deposition was just conducted, Wednesday, March 10<sup>th</sup>, of West Virginia Mutual's designated witness to determine the accessibility, time period for maintenance of such computerized medical records and republication, so that the Trial Court could revisit the issue after having entered a Protective Order similar to the one that Judge Bedell entered in this case.

and State Farm has previously agreed to similar pre-suit confidentiality contracts. This information was not provided to this Court and State Farm has not provided any authority that would demonstrate that the Trial Court has disregarded clear law in this State, but on the contrary, it demonstrates that State Farm for some reason has decided at this time to use its economic power to reek havoc on the orderly procedures of our judicial system.<sup>8</sup>

The fifth criteria is also not satisfied as State Farm does not raise new or important issues of first impression as protective orders have been handled by trial courts since the Rules of Civil Procedure were adopted in 1960. Importantly, this particular issue has been addressed by the Judges in the Circuit Court of Harrison County, as well as other judges in other circuits, without any objection from State Farm, until recently. If State Farm desires to address the issue in detail an adequate record must be made so that this Court can consider the issue in an informed manner and not by way of an extraordinary writ that has no bearing on the automobile tort case which is ready to go to trial.

Thus, State Farm has failed to establish any basis for a stay or the granting of a rule to show cause. As for the policy arguments that State Farm makes in its Petition, the Respondent believes that they are irrelevant to this Court's determination of whether to reject the request for a stay and postpone the impending trial of the automobile tort claim. Moreover they are unsubstantiated in the Record before the Trial Court or this Court. However, in response to those substantive arguments, Plaintiff relies on its "Response to State Farm's Motion to Amend and Reply to Plaintiff's Motion to Strike" filed on February 8, 2010 and attached hereto has "**Exhibit 5.**" In addition, Plaintiff states as follows:

A) Neither the State Insurance Commissioner, nor any other executive

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<sup>8</sup> Perhaps State Farm does so because of the elimination of third party bad faith claims but such frivolous use of the extraordinary writ exhausts the precious time of this Court that is necessary for more serious matters; merely because one has the economic clout to do something does not make it right.

branch officer, has any authority regarding a circuit court's issuance of a Rule 26 protective order protecting discovery ordered produced in civil litigation; to allow such control even if by regulation, would violate the separation of powers clause of Article V, Section 1 of the West Virginia Constitution, as the Rules of Civil Procedure, as promulgated by the Supreme Court of West Virginia, have the force and effect of statutory law, and when being applied by the judicial branch in civil litigation proceedings would supersede any regulations issued by the Insurance Commissioner if there were any such regulations that attempted to control the issuance of protective orders, however there are none. Louk v. Cormier, 622 S.E.2d 788, 794-95 (W.Va. 2005), citing, State ex rel Affiliated Constr. Trades Found.v. Vieweg, 520 S.E.2d 854, 869 (W.Va. 1999) and State ex rel Farley v. Spaulding, 507 S.E.2d 376, 387-88 (W.Va. 1998); the Trial Court should obviously try to reconcile any protective order with any valid regulation affecting the same subject matter; the Insurance Commissioner's regulation relied upon by State Farm only relates to retention of claim file information so that claims data will be available for examination or review by the Insurance Commissioner's office, which change in the Protective Order was offered to State Farm and State Farm refused (see B infra); the Commissioner's Informational Letter 172 is only interpretive and to the extent it seeks to control the Trial Court's exercise of its judicial power under Rule 26 it is invalid;<sup>9</sup>

B) One of State Farm's primary arguments is that its required to maintain claim file information pursuant to the West Virginia Insurance Commissioner's regulations; although that regulation cannot control the protective order criteria in civil litigation, the regulation referred to by State Farm, 114 C.S.R. 15, Section 4.2(b), only requires retention

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<sup>9</sup> It is interesting to note that the West Virginia Insurance Commissioner has previously provided to the insurance industry an Informational Letter 149 which states that for purposes of reporting complaints as required by W. Va. Code §33-11-4(10) that civil proceedings in the Commissioner's view are not "claims", thus any other regulations should have no bearing on civil actions as asserted by State Farm.

for five calendar years or the examination cycle for the particular company which usually is less than five calendar years. (Pet. Ex. I attached to Ex. D, Informational Ltr. 172); however, State Farm never made such request to retain any such records for a limited five calendar year period and the same has been previously granted by the Circuit Court of Harrison County when so requested by State Farm; State Farm was offered such a change to the Protective Order to allow State Farm to retain the medical record information for the five calendar year period but State Farm rejected such amendment (**Exhibit 5** at pp. 8) State Farm did not advise this Court of such facts.

C) Plaintiff must have protection of her confidential medical records as any other claimant because without it such confidential information is subject to republication, wide dissemination, and other uses including maintenance on third-party databases, all of which violates a West Virginia citizen's right to privacy and confidentiality over their sensitive information. See generally, Twigg v. Hercules Corp., 406 S.E.2d 52 (W.Va. 1990) citing Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W.Va. 1984) and Roach v. Harper, 105 S.E.2d 564 (W.Va. 1958). Our Supreme Court in 1958 recognized such right as set forth in the Restatement of the Law of Torts, Section 867, which is now Section 652A of the Restatement of the Law of Torts 2d (1976); so have other Courts of the highest level. see Brende v. Hara, 153 P.3d 1109 (Hawaii 2007); State Farm does not have a very good track record in maintaining the confidentiality of claimants medical records; AT v. State Farm Ins. Co. 989 P.2d 219 (Col. App. 1999) [using claimant's confidential medical records to cross-examine same claimant when claimant appeared as expert witness in a separate unrelated civil action].

D) Apparently State Farm and the NICB (Amicus Brief)<sup>10</sup> believe that a

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<sup>10</sup> NICB stands for National Insurance Crime Bureau, which is a fancy sounding name, but it is nothing more than a computer database maintained by a legal entity funded entirely by the Insurance Industry to keep dossiers and data on people who file

drunk driver who rear-ends an innocent person requiring that person to file a claim to recover their damages, renders the victim's medical records and medical information the property of the drunk driver's insurance company. State Farm and NCIB further assert that such confidential information can then be maintained on a "1984 Orwellian database" for use by anyone who is a member and without the consent of the innocent victim; such is absurd and it is surprising that the insurance industry has gotten away with such conduct over the past years. Under State Farm's scenario, Carla Blank will never know when her medical information is being accessed by some other insurance company to deny her insurance, for use in a different claim, or perhaps even to deny her a job or a job promotion; Carla Blank will have no control over such access nor will she know whose prying eyes are looking at her confidential information at any time in the future; this is why the Trial Court required that such information be destroyed or returned once this case is concluded and that is the reasonable thing to do; Why should an innocent victim of an impaired driver's reckless driving forfeit his or her right of privacy, guaranteed under the West Virginia Constitution, in their confidential medical information merely because they must file a claim to be compensated for someone else's wrongful conduct? The obvious answer is that they should not; this is exactly why courts have the authority under Rule 26 to protect such privacy interests; detecting fraud is an appropriate goal but it should not be at the expense of innocent victims nor should the maintenance and use of such private information be at the discretion of the insurance industry which discretion could change at any time as the industry intends to keep this information indefinitely.

Judge Bedell's Protective Order did just what it was supposed to do: protect the privacy and confidentiality of the Plaintiff, Carla Blank's medical records and medical information as Carla Blank did not ask for her husband to be killed or for her to be injured

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insurance claims; it is not a governmental entity or sanctioned by any law enforcement department.

when Mr. Thomas, while driving under the influence of marijuana, went completely left of center and crashed head-on into Plaintiffs' vehicle. Just as Plaintiff Carla Blank did not ask for the devastating loss of her husband and permanent injury to herself, she did not agree to give up her right of privacy, nor can State Farm require such by the terms of an adhesion contract requiring that she waive her constitutional right to privacy to collect benefits for which she paid a premium.

**2. STATE FARM'S MOTION FOR STAY AND PETITION ARE FRIVOLOUS AND PLAINTIFF BELOW IS ENTITLED TO ATTORNEY'S FEES AND COSTS**

State Farm had no basis in fact or law to warrant seeking the extraordinary remedy of prohibition. This Court's opinions are very clear as to the basis necessary to seek such a remedy while simultaneously asking that all proceedings be stopped so that a clear error of law incapable of review on direct appeal be addressed. The major insurance carriers and the law Firm of Martin & Seibert seem to be at the forefront. Just in cases with which the undersigned has been involved, the law Firm of Martin & Seibert on behalf of major insurance carriers, Nationwide and State Farm, has sought relief from this Court in the last several years by means of interlocutory appeal seeking prohibition. Two in the Nationwide case and one in the Progressive case<sup>11</sup>, and the current case, and there have been several others regarding discovery matters in which the undersigned was not involved. (all attached as "**Exhibits 6(a), 6(b), & 6(c)**"). To knowingly use the appellate process for delay or to multiply the proceedings is improper and should result in this Court awarding Plaintiff her attorneys fees and costs incurred in responding to this matter. Board of Review of Bureau of Employment Programs v. Gatson, 210 W.Va. 753, 755, 559 S.E.2d 899, 901 (2001), [(quoting Syl. pt. 3, Sally-Mike Properties v. Yokum, 179 W.Va.

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<sup>11</sup> This was a request for re-hearing.

48, 365 S.E.2d 246 (1986)]. To do otherwise encourages litigants with great economic power to abuse the system at a cost to everyone, but especially this Court's valuable resources. This Court has a tremendous workload sufficient that it should not be augmented by repeated unnecessary filings for extraordinary relief. Such may deny other worthy appellants of their day in court while scarce judicial resources are expended on matters such as the current Motion and Petition. Such conduct should not be condoned by this Court.

**Conclusion:**

This Court should deny the request for stay and also reject the Writ and allow State Farm to proceed on direct appeal should it desire to do so at the appropriate time.

Respondent/Plaintiffs below,  
By Counsel



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David J. Romano  
W.Va. State Bar ID No. 3166  
J. Tyler Slavey  
W.Va. State Bar ID No. 10786  
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## RESPONDENT'S APPENDIX A

### EXHIBITS ATTACHED TO RESPONDENT'S BRIEF IN RESPONSE TO STATE FARM'S REQUEST FOR WRIT OF PROHIBITION AND REQUEST FOR ATTORNEY'S FEES AND COSTS

- EXHIBIT 1** Trial Court's "Pre-Trial and Scheduling Order, entered May 21, 2009
- EXHIBIT 2** Plaintiff's counsel's 07/20/09 letter to Defendants' counsel with proposed Protective Order
- EXHIBIT 3** Defendant State Farm's counsel's letter dated February 22, 2010 and Defendant Luby's counsel's letter dated February 24, 2010 returning Plaintiff's and the Decedent's medical records and medical expenses
- EXHIBIT 4** Pre-suit "Medical Confidentiality Agreement" signed by State Farm's authorized agent, Eric Paugh on December 17, 2001
- EXHIBIT 5** "Plaintiff's Response to State Farm's Motion to Amend and Reply to Plaintiff's Motion to Strike" filed in the Trial Court on February 8, 2010
- EXHIBIT 6a** Martin & Seibert's "Motion for Stay" and "Petition for Writ of Prohibition" filed November 2, 2007 in the Nationwide case (No. 073253) and Order denying the same entered January 10, 2008
- EXHIBIT 6b** Martin & Seibert's "Motion for Stay" and "Petition for Writ of Prohibition" filed October 28, 2008 in the Nationwide case (No. 34615) and Opinion Order denying the same entered January 20, 2009
- EXHIBIT 6c** Martin & Seibert's filing of "Progressive Classic Insurance Company's Limited Petition for Rehearing" filed in the Progressive case (No. 34858) on November 11, 2009 and Supreme Court's Order Refusing Progressive's Petition for Rehearing Entered November 24, 2009.

## CERTIFICATE OF SERVICE

I, David J. Romano, do hereby certify that on the 15<sup>th</sup> day of March, 2010, I served the foregoing "**Respondent's Brief in Response to State Farm's Request for Writ of Prohibition and Request for Attorney's Fees and Costs**" and "**Respondent's Appendix A**" upon the below listed counsel of record by facsimile them their office addresses:

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Counsel for State Farm Mutual Automobile Insurance

and to the following via United States Mail at their Office addresses:

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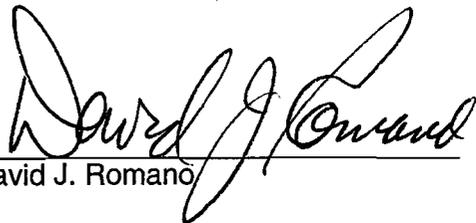
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and via hand-delivery to:

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

David J. Romano



The image shows a handwritten signature in black ink that reads "David J. Romano". The signature is written in a cursive style and is positioned above a horizontal line. Below the line, the name "David J. Romano" is printed in a standard font.

**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**