

No: 10027~~3~~ 2

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

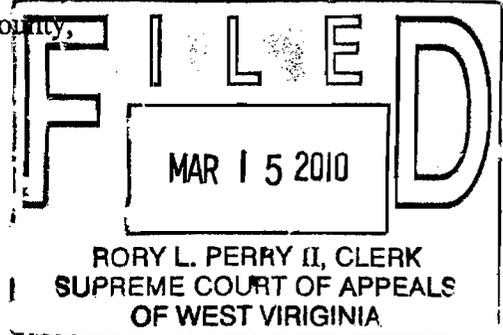
STATE EX REL. STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

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

Respondent.



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

**RESPONSE TO STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY'S PETITION FOR WRIT OF PROHIBITION AND
MOTION FOR STAY OF PROCEEDINGS PENDING APPEAL**

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as Personal Representative of the Estate of
Jeremy Jay Thomas*

**RESPONSE TO STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY'S PETITION FOR WRIT OF PROHIBITION AND
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COMES NOW the Respondent herein and Defendant below, Lana S. Eddy Luby ("Respondent") as Personal Representative of the Estate of Jeremy Jay Thomas, by counsel, Tiffany R. Durst and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, pursuant to Rule 14 (b) of the West Virginia Rules of Appellate Procedure, and hereby submits this Response to the Petition for Writ of Prohibition filed by State Farm Mutual Automobile Insurance Company.

I. Issue Presented

The Petition before the Court arises from an Order entered by the Circuit Court of Harrison County, West Virginia, with which, the underlying Co-Defendant and Petitioner herein, State Farm Mutual Automobile Insurance Company (hereinafter "State Farm"), asserts it cannot comply; a position with which this Respondent agrees.

In addition to the burdens placed on State Farm, as outlined in its Petition to this Court, the Circuit Court's Order also places burdens upon this Respondent's Counsel, with which Counsel is incapable of complying. Specifically, the Circuit Court's February 11, 2010 Order (hereinafter "Order"), (Appendix, Exhibit A) required:

2. Also, upon conclusion of the case, all medical records, and medical information, or any copies or summaries thereof, will either be destroyed **with a certificate from Defendants' counsel as an officer of the Court that the same has been done**, or all such materials will be returned to Plaintiff's counsel without retention by Defendants' counsel or any other person who was furnished such materials and information.

(Emphasis supplied). Said provision requires the certification by this Respondent's Counsel that entities over which counsel has no control have complied with the provisions of the Order. As

Counsel cannot comply with the Order, Counsel is effectively precluded from providing medical records to this Respondent's insurer.

As part of zealously and fully representing a defendant that has had the foresight to procure insurance, policy proceeds available for settlement claims are controlled by the insurance company for defendants that have had the foresight to procure insurance. To protect the client to whom the duty of zealous and full representation is owed, medical records must be provided to the client's insurance company so it can evaluate the claim.

This decision will impact all counsel hired by insurance companies to represent insured parties. Counsel will be effectively hindered in the representation of the client, which is counsel's first and foremost duty. As pointed out by the Petitioner, the Plaintiff's, "[l]egitimate interests in confidentiality of medical records are already protected under existing state and federal privacy laws, other regulation of the Insurance Commissioner, and internal policies State Farm." (*Petition for Writ of Prohibition* at pg. 7). Plaintiff's concerns are more than adequately addressed and certification by counsel for this Respondent is not necessary. Such a requirement places a restriction on the vigorous representation of clients, which this Court should not permit. Therefore, the Circuit Court's Order cannot stand as entered.

II. Proceedings and Rulings Below

This action stems from a March 20, 2008 head-on collision between the vehicle driven by Jeremy Jay Thomas ("Mr. Thomas"), who died as result of the motor vehicle accident, and the vehicle driven by Lynn Robert Blank, also killed in the motor vehicle accident, and occupied by the plaintiff, Carla Blank. Following the accident, and prior to institution of any civil action, Jeremy Jay Thomas' insurance carrier, State Farm, offered policy limits on behalf of Mr. Thomas's Estate to

Plaintiff's counsel for the claim on behalf of Lynn Robert Blank, in exchange for a full and complete release of Mr. Thomas' Estate. Said offer was not accepted by Plaintiff's Counsel.

On February 12, 2009, Plaintiff filed suit against the Estate of Jeremy Jay Thomas and State Farm, as the Plaintiff's underinsured motorist carrier. Plaintiff also alleged "bad faith" on the part of State Farm. Pursuant to Syllabus Point 9 of this Court's opinion in *State ex rel. Allstate Ins. Co. v. Karl* 190 W.Va. 176, 437 S.E. 2d. 749 (1993), counsel for the Estate of Jeremy Jay Thomas, this Respondent, and counsel for State Farm jointly agreed to cooperate in the defense of this matter, and State Farm's counsel issued formal discovery to the Plaintiff which, in part, requested Carla Blank and Lynn Robert Blank's medical records. Plaintiff's counsel refused to provide said records without the entry of an overly restrictive confidentiality agreement. State Farm and this Respondent were not willing to enter into such a restrictive agreement.

The disagreement regarding the confidentiality issue continued up to the point the Court issued the February 11, 2010 Order. This Order, pertinent to this Respondent, required this Respondent's counsel to certify as an officer of the Court that medical records were destroyed by any party to which they were provided, including Jeremy Jay Thomas's insurance carrier. This Respondent's counsel cannot certify the destruction of records or information by a party over which it asserts no control. As counsel cannot make such a certification, counsel cannot provide medical records to the Jeremy Jay Thomas's insurance carrier without knowingly violating the February 11, 2010 Order.

III. Argument

A. Counsel's Duty is to the Insured

It has long been recognized that a tripartite relationship arises when a party is sued and said party carries insurance that pursuant to the terms of the agreement provides a defense to the suit. Said defense is traditionally provided by an independent attorney hired by the insurance company to defend the insured. The tripartite relationship is an ethical mine field for defense counsel as their payment is provided by the insurance company, while the defendant is the client to whom counsel owes an unequivocal duty. This Court previously recognized:

Attorneys have long struggled with the contractual and ethical quandaries presented by the "tripartite" relationship between defense attorney, insurance company, and insured. The Supreme Court of Mississippi once observed that the "ethical dilemma thus imposed upon the carrier-employed defense attorney" by the relationship between insurer, client-insured, and insurance-company-paid defense attorney is one that "would tax Socrates." *Hartford Accident & Indemnity Co. v. Foster*, 528 So. 2d 255, 273 (Miss. 1988).

Barefield v. DPIC Cos., 215 W. Va. 544, 556 (W. Va. 2004). (See also L.E.I. No. 2005-01, *Whether An Agreement to Abide by Insurance Company Guidelines Violates the Rules of Professional Conduct?*) The *Barefield* Court further stated:

In *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75 (1998), we concluded that a defense attorney represents only the insured, and not the insurer that is paying the defense attorney's fee. While it has been argued that the attorney represents both the insurer and insured, we acknowledged that "in reality, the insurer actually hires the attorney to represent the insured." 203 W.Va. at 372, 508 S.E.2d at 89.

Barefield at 556. The *Barefield* Court further clarified the ethical duty placed on counsel hired by an insurance company, "[w]e believe that an attorney retained by an insurance company to defend an

insured is ethically required to independently and vigorously defend the interests of the insured.” *Id.* at 553.

In sum, it is oft recognized that the “tripartite” relationship presents many ethical considerations and pitfalls to counsel that are not always clear. However, what is abundantly clear is that counsel’s only client is the insured and that counsel has an unequivocal duty to independently and vigorously defend the client.

B. Delivery of Medical Records to the Defendant’s Insurer is Necessary to the Representation of a Defendant

A primary consideration of counsel for an insured defendant is whether the civil litigation can be settled within the policy limits for which the defendant has contracted, while at the same time providing a full and complete release from liability. To do so is obviously in the best interests of the insured defendant as it protects the insured’s personal assets in the event of litigation, which is one of the purposes for which an insured purchases the policy of insurance that provides for their defense.

Though counsel must act independently representing the insured, the insurance company retains control over the policy funds available for settlement and along with that control comes numerous obligations imposed upon an insurer, not the least of which is the duty to evaluate a claim against its insured and alleviate the insured of any further liability by settling a claims against the insured within policy limits if at all possible. In defining the duty of an insurance company to evaluate a claim, this Court has stated:

The insurance company must take into account the interest of its insured and give its insured’s interest at least as much consideration as it gives its own interest. What this means, as a practical matter, is that the insurance company should evaluate the chance that a jury award might be entered against the insured in excess of the policy

limits and in deciding whether to settle consider its insured's interest as well as its own interest.

Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. 585, 593 (W. Va. 1990).

Necessary to the evaluation of a potential jury award where a plaintiff alleges physical injury, as required under *Shamblin*, is the evaluation of a plaintiff's alleged injuries. As a practical matter, plaintiffs do on occasion make claims that are not supported by the medical records and available information. Therefore, it is absolutely necessary to the evaluation of the claim that the Plaintiff's medical records and information are provided to the insurer so that the insurer can perform its duty to evaluate the claim to determine the chances of a jury award in excess of the insured's policy limits. To fulfill counsel's duty to the insured, counsel for the insured must provide all available information to the insurer that may help resolve the matter within policy limits.

This Court has recognized that settlement within policy limits with a complete release is so important that it has held that refusal to do so by an insurance company is *prima facie* bad faith toward the insured:

[W]herever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to so settle and where such settlement within policy limits would release the insured from any and all personal liability, that the insurer has *prima facie* failed to act in its insured's best interest and that such failure to so settle *prima facie* constitutes bad faith towards its insured.

Shamblin, 183 W. Va. at 595. The Court's recognition of this fact supports the proposition that settlement within policy limits and release of the insured from further liability is the most desirable outcome of legitimate claims.

As noted, in order to achieve the desired result of a settlement within policy limits, it is necessary for the insurance carrier to have all available information to evaluate the claim,

including medical information. The Circuit Court's Order, however, precludes defense counsel from forwarding the medical information to the carrier for review and evaluation as it would require counsel to certify that an insurance carrier has destroyed any medical information provided to it.

C. **The Circuit Court's February 11, 2010 Order Effectively Precludes Counsel for the Insured from Providing Medical Records to this Respondent's Insurance Company**

The Circuit Court's Order does permit Respondent's counsel to provide Plaintiff's medical records to the insurance carrier, however, the insurer, in this case State Farm, must agree in writing to be bound by all terms of the Order, including non-disclosure and non-retention of the medical information. Quite obviously, based on the issues raised by State Farm in its Petition filed with this Court, it is plain that State Farm could not agree, in writing, as required by the Court's Order. Thus, Respondent's counsel could not provide any medical records of the Plaintiff to Respondent's insurance carrier. Moreover, the Circuit Court's Order also required this Respondent's counsel to certify as an officer of the court that all of the records have been destroyed. Again, this is a requirement that effectively precludes counsel from providing medical records and information to this Respondent's insurer as counsel cannot make such a certification without running afoul of counsel's duty of candor to the tribunal.

As this Court is well aware, all attorneys are bound by the Rules of Professional Conduct. Rule 3.3 of the Rules of Professional Conduct states, "a lawyer shall not knowingly...make a false statement of material fact or law to the tribunal." In addition to the duty found in Rule 3.3 of the Rules of Professional Conduct, the United State Court of Appeals for the Fourth Circuit has held that, "A general duty of candor to the court exists in connection with an attorney's role as an officer of the court." *United States v. Shaffer Equip. Co.*, 11 F.3d 450 (4th Cir. W. Va. 1993).

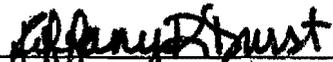
Though counsel for this Respondent has been retained by the insurance carrier, counsel has no right to control the insurance carrier or its actions. In fact, many of the ethical issues raised by the tripartite relationship, discussed *supra*, revolve around the amount of control an insurance company is perceived to retain over the actions of hired counsel. *See L.E.I. No. 2005-01*. Without the ability to control the actions of the insurance carrier, including non-disclosure, non-retention, or destruction of medical information, this Respondent's counsel cannot certify to the destruction of records in the insurance carrier's possession. To do so would be to knowingly certify to the Circuit Court that actions required by its Order have been done, when there is no way for counsel to effectuate said acts or know if, in fact, they have been done as Counsel's client in this case is the insured defendant, not the insurance company.

Conclusion

Somewhat lost in this dispute are the implications for this Respondent, Lana S. Eddy Luby, and all defendants who have had the foresight to purchase insurance that is required to defend them in a civil action and provide proceeds to settle any such action. If the certification requirements placed on counsel by the Circuit Court's Order are permitted to stand, then counsel will be hamstrung in the defense of their client, to whom their duty is owed. Counsel is placed in an impossible quandary: provide medical records and information to the insurance company, so it can evaluate the claim, as required by the jurisprudence of this state, and then later certify to the Court that the records and information have been destroyed and/or not retained, when Counsel has no way of knowing whether the same has been done; or simply not provide the records to the insurance company, which in effect precludes a breach of counsel's duty of candor to Court, but does not permit counsel to properly and represent the client, which is counsel's primary duty.

Respectfully submitted this 15th day of March, 2010.

**Respondent herein and Defendant below,
Lana S. Eddy Luby, as Personal
Representative of the Estate of Jeremy Jay
Thomas,
By Counsel:**


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CERTIFICATE OF SERVICE

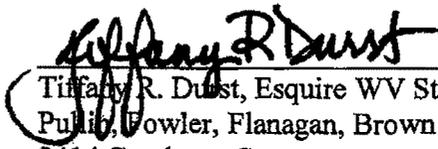
I, Tiffany R. Durst, counsel for the Respondent, Lana S. Eddy Luby, as Personal Representative of the Estate of Jeremy Jay Thomas, hereby certify that I served a true copy of the foregoing *Response To State Farm Mutual Automobile Insurance Company's Petition For Writ Of Prohibition And Motion For Stay Of Proceedings Pending Appeal* upon the following individuals, by via facsimile and by depositing the same in the U.S. Mail, First Class, postage prepaid, on this 15th day of March, 2010:

The Honorable Thomas A. Bedell
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