

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 100272

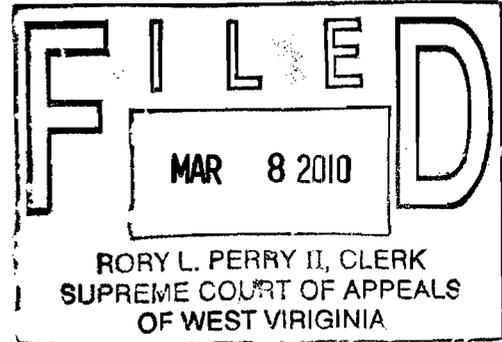
STATE EX REL. STATE FARM MUTUAL  
AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

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

Respondent.



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AMICUS CURIAE BRIEF OF WEST VIRGINIA INSURANCE COMMISSIONER

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Respectfully submitted,

Mary Jane Pickens, General Counsel (WV#2903)  
Victor A. Mullins, Associate Counsel (WV#9460)  
Offices of the West Virginia Insurance Commissioner  
1124 Smith Street  
P.O. Box 50540  
Charleston, West Virginia 25305-0540  
*Counsel for Jane L. Cline, WV Insurance Commissioner*

**TABLE OF CONTENTS**

**TABLE OF CASES AND AUTHORITIES..... ii**

**KIND OF PROCEEDING AND NATURE OF RULING BELOW .....1**

**INTERESTS OF AMICUS CURIAE .....1**

**ASSIGNMENT OF ERROR.....2**

**ARGUMENT.....3**

**A.    A Writ of Prohibition Should Be Issued Because The  
          Ordered Destruction Or Return Of Medical Records  
          Obstructs The Insurance Commissioner’s Ability To  
          Conduct A Thorough Review Of Claim Files.....3**

**B.    The Option Given To Petitioner’s Counsel To Retain A  
          Copy Of The Medical Records Does Not Ameliorate The  
          Conflict With The Record Retention Requirements .....7**

**CONCLUSION .....8**

**TABLE OF CASES AND AUTHORITIES**

**Cases:**

Syl. Pt. 2, *The West Virginia Health Care Cost Review Auth. v. Boone Memorial Hosp.*, 196 W.Va. 326, 472 S.E.2d 411 (1996) .....4

**Statutory Provisions:**

W. Va. Code §33-2-1 .....2

W. Va. Code §33-2-3(a).....1, 3

W. Va. Code §33-2-9 .....2, 3, 4

W. Va. Code §33-3-1.....2

W. Va. Code §33-6-9 .....2

W. Va. Code §33-11-4(12) .....7

W. Va. Code §33-12-1 .....2

W. Va. Code §33-20-1 .....2

W. Va. Code §33-41-8 ..... 6

W. Va. Code §53-1-1 .....3

**West Virginia Code of State Rules Provisions:**

W. Va. Code St. R. 114 CSR §14-3.....5

W. Va. Code St. R. 114 CSR §14-10.....5

W. Va. Code St. R. 114 CSR 57 .....6

W. Va. Code St. R. 114 CSR §57-1.1.....6

W. Va. Code St. R. 114 CSR §57-2.17.....6

W. Va. Code St. R. 114 CSR §57-15.1.....7

W. Va. Code St. R. 114 CSR 62.....6

**BRIEF AMICUS CURIAE OF THE WEST VIRGINIA INSURANCE  
COMMISSIONER IN SUPPORT OF PETITIONER'S  
PETITION FOR WRIT OF PROHIBITION**

**I. KIND OF PROCEEDING AND NATURE OF RULING BELOW**

Upon information and belief, Carla Layne Blank, individually and as the personal representative of the Estate of Lynn Robert Blank, Plaintiff below, has asserted various claims in the Circuit Court of Harrison County ("Circuit Court"), West Virginia, against State Farm Mutual Automobile Insurance Company, Petitioner and Defendant below, and Lana S. Eddy Luby as the personal representative of the Estate of Jeremy Jay Thomas, Defendant below. The claims stem from a head-on automobile crash involving Jeremy Thomas, Robert Blank and Carla Blank.

On or about January 14, 2010, the Plaintiff filed a "Motion to Strike Defendant's Request for Production and Requests for Admission" in the underlying proceeding after the Petitioner sought to obtain medical records of the Plaintiff to evaluate the subject insurance claim. The Petitioner filed its response to the Motion to Strike on or about January 22, 2010, and the Plaintiff replied on February 8, 2010. The Circuit Court subsequently entered an Order on February 11, 2010, whereby the Plaintiff's medical records were ordered to be disclosed to the Petitioner's counsel under certain enumerated restrictions (the "Protective Order"). A true copy of the Protective Order is attached hereto as "Exhibit 1."

**II. INTERESTS OF AMICUS CURIAE**

The Insurance Commissioner is the state agency charged by the Legislature to regulate the insurance industry and its activities in West Virginia and to otherwise enforce the provisions of the state insurance code. *See* W. Va. Code §33-2-3(a). The

Insurance Commissioner's area of regulation includes, *inter alia*, the examination and oversight of the financial status of insurers and overall authority to review any phase of the operations of an insurer in the state (*see* W. Va. Code §33-2-9); the licensing of insurers transacting insurance in this state (*see* W. Va. Code §33-3-1, *et seq.*); the approval of all forms used by an insurer in this state (*see* W. Va. Code §33-6-9); the approval of rates charged by an insurer in this state (*see* W. Va. Code §33-20-1, *et seq.*); and the licensing of insurance producers doing business in this state (*see* W. Va. Code §33-12-1, *et seq.*). The Governor appoints the Insurance Commissioner by and with the advice and consent of the Senate. *See* W. Va. Code §33-2-1.

The Insurance Commissioner submits this amicus curiae brief for the limited purpose of laying emphasis on the requirement of record retention by insurers with respect to insurance claims. It is not the intention of the Insurance Commissioner to comment upon the facts of the underlying dispute or arguments of the parties. Rather, the Insurance Commissioner wishes to inform this Honorable Court of the record retention requirements that insurance companies are obligated to follow and how those requirements relate to the state's regulatory oversight of the insurance industry. Accordingly, this brief does not contain a recitation of the underlying facts.

### **III. ASSIGNMENT OF ERROR**

The Circuit Court erred by ordering that, upon conclusion of the case, all of the subject medical records in the Petitioner's possession be destroyed or returned to Plaintiff's counsel, contradicting the record retention requirements that insurance companies must follow to ensure that the Insurance Commissioner may conduct a thorough examination of insurance claims.

#### IV. ARGUMENT

The Insurance Commissioner (“Commissioner”) is the state agency charged with regulating the insurance industry in West Virginia. *See* W. Va. Code §33-2-3(a). To achieve her regulatory responsibilities, the Commissioner may review any phase of the operations of an insurer doing business in the state. *See* W. Va. Code §33-2-9. A comprehensive review of insurance claim files is, of course, paramount to ensuring the orderly, fair and consistent application of laws enacted by the Legislature to protect the state’s consumers of insurance products and services. As set forth in more detail below, the Commissioner’s review is dependent upon record retention requirements imposed upon insurers. If claim records necessary for an adequate market conduct review are absent, the Commissioner will be unable to accomplish her legislatively mandated responsibilities.

A. **A Writ of Prohibition Should Be Issued Because The Ordered Destruction Or Return Of Medical Records Obstructs The Insurance Commissioner’s Ability To Conduct A Thorough Review Of Claim Files.**

Pursuant to W. Va. Code §53-1-1, a “writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has [no] jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” A writ of prohibition is proper in the instant matter because the Circuit Court exceeded its legitimate powers and/or abused its judicial authority when it indiscriminately ordered the return or destruction of medical records, effectively overriding the record retention requirements that the Petitioner and other licensed

insurers must follow in accord with certain rules promulgated by the Commissioner and authorized by an act of the West Virginia Legislature.<sup>1</sup>

The Circuit Court's Protective Order states:

[U]pon conclusion of this case, all medical records, and medical information, or any copies or summaries thereof, will either be destroyed with a certificate from Defendant's counsel as an officer of the Court that the same has been done, or all such material will be returned to Plaintiff's counsel without retention by Defendant's counsel or any other person who was furnished such materials and information pursuant to the terms of this Protective Order.<sup>2</sup>

See Exhibit 1, p. 5. Such a directive diametrically contradicts the record retention requirements set forth in several **legislative** rule provisions, which the Circuit Court failed to even acknowledge in its Protective Order. The effect of the pertinent rules is not in question. "Once a disputed regulation is legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight." Syl. Pt. 2, *The West Virginia Health Care Cost Review Auth. v. Boone Memorial Hosp.*, 196 W.Va. 326, 472 S.E.2d 411 (1996).

Title 114, Series 15 of the West Virginia Code of State Rules provides, in relevant part:

4.2. For the purpose of examination, analysis and review [of] activities conducted pursuant to W. Va. Code § 33-2-9 or this rule, an insurer or related entity licensed to do business in this state shall maintain its books, records and documents in a manner so that the commissioner can readily ascertain during an examination the insurer's compliance with the insurance laws and rules of this state, the standards outlined in the NAIC Financial Conditions Examiner Handbook, and with the standards

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<sup>1</sup> The medical records at issue would almost certainly be deemed pertinent to the insurance claim considering that the Protective Order directs Plaintiff's counsel to determine and disclose only those "medical records [that] are relevant to the accident, including any potentially relevant preexisting conditions[.]" See Exhibit 1, p. 4 n.2.

<sup>2</sup> The Protective Order goes on to allow defense counsel the option of retaining the subject medical records in a sealed manner and restricting future disclosure under certain conditions. This option is addressed below in Part B of the Commissioner's argument.

outlined in the NAIC Market Regulation Handbook, including, but not limited to, company operations and management, policyholder service, marketing, producer licensing, underwriting, rating, complaint/grievance handling, and claims practices.

\* \* \* \* \*

b. All insurer records within the scope of this rule must be retained for the lesser of:

1. The current calendar year plus five (5) calendar years;
2. From the closing date of the period of review for the most recent examination by the commissioner; or
3. A period otherwise specified by statute as the examination cycle for the insurer.

\* \* \* \* \*

4.4. Claim files shall be maintained as follows:

a. A claim file and accompanying records shall be maintained for the calendar year in which the claim is closed plus additional years as set forth in subdivision b, subsection 4.2 of this section. The claim file shall be maintained so as to show clearly the inception, handling and disposition of each claim. The claim files shall be sufficiently clear and specific so that pertinent events and dates of these events can be reconstructed. A claim file shall, at a minimum, include the following items:

1. For property and casualty: the file or files containing the notice of claim, claim forms, proof of loss or other form of claim submission, settlement demands, accident reports, police reports, adjustors' logs, claim investigation documentation, inspection reports, supporting bills, estimates and valuation worksheets, medical records . . .

Moreover, the Commissioner's rule on unfair trade practices requires the retention of "all notes and work papers pertaining to the claim in such detail that pertinent events and the dates of such events can be reconstructed." 114 CSR §14-3. A violation of this provision can result in a finding by the Commissioner that the insurer transacted insurance in an illegal, improper or unjust manner and, accordingly, the Commissioner may revoke, suspend or refuse to renew the license of the insurer or in lieu thereof may order the insurer to pay a penalty. *See* 114 CSR §14-10.

In essence, claim files must contain all of the insurer's documentation and records that relate to each claim in order for the Commissioner to make an accurate assessment of whether the respective claim was handled properly. It is also imperative for the Commissioner to review complete claim files to determine if a pattern exists in order to establish an unlawful business practice. Without a review of all pertinent claim records, of which medical records unquestionably fall under, the Commissioner will be unable to ascertain the existence of the initial violation.

Furthermore, record retention is an important tool in detecting fraudulent insurance claims. Insurance fraud is a serious and growing problem, which has been estimated to annually cost average American households over One Thousand Dollars (\$1,000).<sup>3</sup> Consistent maintenance of essential claim records by insurers is crucial to a comprehensive investigation of potentially fraudulent activity by the Commissioner's Insurance Fraud Unit established by W. Va. Code §33-41-8.

The Commissioner unequivocally believes that confidential medical records contained within claim files deserve considerable protection from improper maintenance or release. In response to this privacy concern, the Commissioner promulgated 114 CSR 57,<sup>4</sup> which is a legislative rule that was crafted from a model regulation of the National Association of Insurance Commissioners. The intent of the rule is to regulate "the treatment of nonpublic personal health information and nonpublic personal financial information about individuals by all licensees<sup>5</sup> of the West Virginia Insurance Commission." 114 CSR §57-1.1.

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<sup>3</sup> See [www.scattorneygeneral.org/fraud/insurancefraud/index.html](http://www.scattorneygeneral.org/fraud/insurancefraud/index.html).

<sup>4</sup> See also 114 CSR 62.

<sup>5</sup> "Licensee" is defined as "all licensed insurers, producers and other persons licensed or required to be licensed, or authorized or required to be authorized, or registered or required to be registered pursuant to chapter 33 of the West Virginia Code." 114 CSR §57-2.17.

The privacy rule directs an insurer to “not disclose nonpublic personal health information about a consumer or customer unless an authorization is obtained from the consumer or customer whose nonpublic personal health information is sought to be disclosed.” 114 CSR §57-15.1. A violation of this rule provision is deemed to be an unfair trade practice pursuant to W. Va. Code §33-11-4(12). Accordingly, an insurer is already obligated to protect against the unlawful disclosure of confidential medical records contained in its claim file. The Circuit Court’s Protective Order is thus unnecessary in addition to contradicting the record retention requirements set forth herein.

**B. The Option Given To Petitioner’s Counsel To Retain A Copy Of The Medical Records Does Not Ameliorate The Conflict With The Record Retention Requirements.**

The Circuit Court’s Protective Order permits Petitioner’s counsel to retain a copy of the medical records if she desires. *See* Exhibit 1, p. 5. If this option is chosen, counsel must maintain the subject records in a sealed manner within the case file and not use it for any other purpose except upon further order of the Circuit Court or another court with jurisdiction, in response to lawful process, or through written consent of the protected person. *Id.* While this may seem to give a nod to the concerns of the Commissioner with respect to an insurer’s duty to retain essential claim records, it is far too tenuous of a situation to allow required claim records to be held in a file possessed by defense counsel, in addition to being out of compliance with applicable insurance law.

Should this Court endorse the Protective Order, it is certainly likely that the Order will be used as a template in most, if not all, of the circuits. Defense counsel is not obligated to abide by the Commissioner’s record retention rules discussed earlier and may not be aware or appreciate the duty of an insurer to present a complete claim file to the

Commissioner for review. Again, it is defense counsel's *option* to retain the records at issue. Members of the defense bar may, therefore, routinely decline to retain a copy of the records at issue, especially given the fact that counsel's use for the records is over at the conclusion of the civil action.

Even if the records are kept by defense counsel, the subject claim may not be included in a market conduct examination for a few years after the civil action is concluded. During that time, there are multiple scenarios that may occur in which the protected records could be accidentally or voluntarily destroyed. For instance, defense counsel's firm may dissolve or move to an office having limited storage space, resulting in a purge of "closed" files.

Moreover, a significant delay in the Commissioner's examination of the subject claim would unquestionably result during the time the insurer attempts to regain possession of the medical records, thus impeding the Commissioner's ability to carry out her legislatively mandated responsibilities.

Accordingly, defense counsel's option to retain a copy of the medical records does not mollify the Commissioner's concerns about the Protective Order considering such an option fails to come close to addressing the inherent infringement upon the Commissioner's regulatory review of insurance claim files.

## V. CONCLUSION

The West Virginia Legislature clearly believes that the state's citizenry is better protected when insurers are obligated to present complete and accurate claim files to the Commissioner for review. To that end, the Legislature has authorized through passage of a bill record retention requirements that demand consistent and comprehensive maintenance of all essential claim records by insurers so the Commissioner can ensure that the laws

protecting consumers of this state are followed and that claims are properly resolved. The Legislature has also authorized the Commissioner's privacy rule requiring insurers to protect against the unlawful disclosure of confidential medical information. The Circuit Court's decree concerning the destruction or return of the subject medical records at the conclusion of the case is overreaching and in direct contravention to the unequivocal record retention requirements that all licensed insurance companies in this state must heed.

The Commissioner thus joins the Petitioner in respectfully requesting that this Honorable Court issue a writ of prohibition to prevent the Circuit Court of Harrison County from enforcing its Protective Order with regard to the destruction or return of the subject medical records by the Petitioner.

Respectfully submitted,

JANE L. CLINE, INSURANCE  
COMMISSIONER

By Counsel



Mary Jane Pickens, General Counsel (WV#2903)  
Victor A. Mullins, Associate Counsel (WV#9460)  
Offices of the West Virginia Insurance Commissioner  
1124 Smith Street  
P.O. Box 50540  
Charleston, West Virginia 25305-0540  
(304) 558-0401

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

CARLA LAYNE BLANK, individually, and  
in her capacity as the Personal Representative  
of the Estate of Lynn Robert Blank,

Plaintiff,

v.

Civil Action No. 09-C-67-2  
Thomas A. Bedell, Chief Judge

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY, a foreign corporation,  
LANA S. EDDY LUBY, as the Personal Representative  
of the Estate of Jeremy Jay Thomas,

Defendants.

**ORDER DENYING PLAINTIFF'S MOTION TO STRIKE AND ORDERING  
DISCLOSURE OF MEDICAL RECORDS SUBJECT TO TERMS OF  
CONFIDENTIALITY**

Presently Pending before the Court is Plaintiff's "Motion to Strike Defendant's Request for Production and Requests for Admission," filed on or about January 14, 2010. The Defendant filed its "Response to Plaintiff's Motion to Strike," on January 22, 2010. The Plaintiff then filed her "Response to State Farm's Motion to Amend & Reply to Plaintiff's Motion to Strike," on February 8, 2010.

The Court has reviewed the Motion, Response, Reply, the court file, and pertinent legal authority and **ORDERS** that the Motion to Strike be hereby **DENIED**. Additionally, the Court **ORDERS** that the Plaintiff disclose Carla and Lynn Blank's relevant medical records, subject to the terms of confidentiality identified herein.

The basis of Plaintiff's argument is that when a plaintiff sues their own insurer on

the basis of underinsured motorist ("UIM") coverage, the primary defense is still by the liability insurer of the defendant, and that only that primary defender may participate in discovery. The Plaintiff further argues that because the primary defender<sup>1</sup> did not offer discovery requests (having long ago offered the policy limits), the UIM defender cannot offer discovery requests. However, as the Response points out, that is not the plain reading of State ex rel. Alistate v. Karl, which follows:

A liability carrier and an underinsured motorist carrier may agree to jointly defend an action by having their respective attorneys participate together in the defense. This does not mean that they may file separate pleadings, indulge in separate discovery, or examine witnesses separately.

Syl. Pt. 9, 190 W. Va. 176, 437 S.E.2d 749 (1993). This clearly means that the liability insurer and the UIM insurer may not badger a plaintiff with double doses of similar pleadings, discovery requests, & etc. It does not mean that the UIM insurer may never file for discovery, especially when, as here, the discovery requests were timely filed and the liability insurer did not file separate requests. Karl is meant to eliminate double litigation of the same claim, not to eliminate a UIM insurer's ability to litigate.

The language of W. Va. Code, 33-6-31(d), that allows an uninsured or underinsured motorist carrier to answer a complaint in its own name is primarily designed to enable the carrier to raise policy defenses it may have against the plaintiff under its uninsured or underinsured policy.

Karl at Syl. Pt. 14. Here, State Farm is attempting to assert a policy defense based on the Plaintiff's refusal to supply medical records.

Additionally, the Plaintiff's argument that the UIM insurer here is barred from

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<sup>1</sup>Here, both the liability insurer and UIM insurer are State Farm, but both have retained separate counsel, Pullin Fowler and Flanagan for the liability coverage and Martin and Seibert for the UIM coverage.

participation in the case based on the bifurcation of the first party "bad faith" claim is without merit, based on Karl, *supra*. A review of the language of the jointly offered "Agreed Order of Bifurcation and Stay," entered herein on October 5, 2009, proves this point.

The Court further finds that the Plaintiff, **as a part of her wrongful death and bodily injury actions, asserts underinsured motorist claims** on her individual behalf and in her capacity as personal representative. . . 1. **The bodily injury and wrongful death actions . . . shall proceed forward to a final adjudication of liability and damages.** 2. **Any remaining direct allegations as to State Farm, including but not limited to any allegations of 'bad faith' shall be bifurcated and stayed.**

The Court finds that this language clearly indicates that the UIM claims are part of the ongoing case, and not part of the "bad faith" proceedings which have been stayed.

For all of the foregoing reasons, the Court **ORDERS** that the Plaintiff's Motion to Strike be hereby **DENIED**.

However, the Denial of Plaintiff's Motion to Strike alone is not dispositive of this issue, as the dispute over the confidentiality of the requested medical records remains. The Court, *sua sponte*, and especially considering the rapidly approaching trial date in this matter, hereby **ORDERS** the following, that **the Plaintiff disclose all relevant medical records, and that the records are to be disclosed following the terms of confidentiality provided below.**

The Court notes both parties arguments in their respective briefs as to confidentiality. However, State Farm does not need to keep an electronic copy of the medical records for all eternity in a computer database. Additionally, the Plaintiff, at her jury trial, will presumably testify publicly as to the nature and extent of her injuries, so her arguments as to absolute confidentiality are without merit.

Therefore, the following terms of confidentiality shall apply to Carla Blank, (Plaintiff) and Lynn Blank's (Decedent) medical records.<sup>2</sup>

1. Defendants' counsel will not disclose orally or in summary form, any of the Plaintiff's or Decedent's medical records, or medical information, to any person other than their clients, office staff, and experts necessary to assist in this case, and any such person shall be advised of this Protective Order and receive and review a copy of it and be informed that they are bound by the non-disclosure terms and the other provisions of this Protective Order if they receive such protected information. No person shall scan or store any of Plaintiff's or the Decedent's medical records or medical information by any method, including but not limited to, computerized storage, filming, photographing, microfiche or other similar method. If any such protected documents or information need to be part of any pleading, they shall be filed with such pleading under seal pursuant to this Order and also be furnished to this Court with each document marked "confidential."

Provided, however, Defendants' counsel may disclose, either orally, in writing, or by paper copies, such information to the Defendants' experts and insurance carrier, but any said expert or insurance carrier or any other person receiving said information, shall, pursuant to this Order, receive a copy of this Protective Order and agree in writing to be bound by all of the terms of this Protective Order, including the non-disclosure and non-retention of such material

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<sup>2</sup>The Plaintiff's counsel has the burden of determining which medical records are relevant to the accident, including any potentially relevant preexisting conditions, and disclosing the same under the good faith principals of the rules of discovery.

as set forth herein, and be subject to the jurisdiction of this Court for enforcement purposes; a copy of each such written agreement shall be provided to Plaintiff's counsel upon execution by any person receiving such protected information and in the event any expert receiving such medical information is an undisclosed, non-testifying expert, then in that event, the attorney who provided such information to the undisclosed non-testifying expert shall maintain in his or her office files, the executed written agreement even after the return or destruction of the protected information to Plaintiff's counsel and the final dismissal of this case.

2. Also, upon conclusion of this 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 material will be returned to Plaintiff's counsel without retention by Defendants' counsel or any other person who was furnished such materials and information pursuant to the terms of this Protective Order. Provided however should Defendants' counsel desire to retain a copy of the protected medical records produced in this case, the same shall be permitted as long as those protected medical records are maintained in a sealed manner in Defense Counsel's file and not used for any other purpose whatsoever except upon further order of this Court or in response to lawful process after notice to the protected person, or in response to a lawful order of another Court with jurisdiction, or upon written consent of the protected person whose medical records and information is protected herein.

3. Also, any medical records previously received by or on behalf of any party in this case or any other person including an employee of any insurance carrier,

even if received prior to the Court's ruling on this Protective Order, are protected regarding the confidentiality and privacy of such records in accordance with the Court's ruling herein.

Accordingly, the Court hereby **ORDERS** that the terms of Confidentiality enumerated above bind all parties receiving medical records and medical information in this case.

The Clerk of this Court is **ORDERED** to send copies of this Order to the following:

David Romano, Esq.  
Romano Law Office  
363 Washington Ave  
Clarksburg, WV 26301  
*Counsel for Plaintiff*

E. Kay Fuller, Esq.  
Martin & Seibert, L.C.  
P.O. Box 1286  
Martinsburg, WV 25402  
*Counsel for Defendant State Farm*

Tiffany R. Durst, Esq.  
Pillin, Fowler, Flanagan, Brown & Poe, PLLC  
2414 Cranberry Square  
Morgantown, WV 26508  
*Counsel for Defendant S. Eddy Luby*

ENTER: Feb 11, 2010

  
\_\_\_\_\_  
Thomas A. Bedell, Chief Judge

STATE OF WEST VIRGINIA  
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18<sup>th</sup>  
Family Court Circuit of Harrison County, West Virginia, hereby certify the  
foregoing to be a true copy of the ORDER entered in the above styled action  
on the 11 day of February, 2010.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 11 day of February, 20 10.

Donald L. Kopp II, cm  
Fifteenth Judicial Circuit & 18<sup>th</sup> Family Court  
Circuit Clerk  
Harrison County, West Virginia

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 100272

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.

**CERTIFICATE OF SERVICE**

I, Victor A. Mullins, counsel for Jane L. Cline, West Virginia Insurance Commissioner, do hereby certify that I have served a copy of the foregoing "AMICUS CURIAE BRIEF OF THE WEST VIRGINIA INSURANCE COMMISSIONER IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF PROHIBITION" upon the following by mailing a true and accurate copy of the same, by United States mail, postage prepaid, on this 8<sup>th</sup> day of March, 2010:

The Honorable Thomas A. Bedell  
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

E. Kay Fuller, Esquire  
Martin & Seibert, L.C.  
P.O. Box 1286  
Martinsburg, WV 25402  
*Counsel for State Farm Mutual Automobile Insurance Company*

David Romano, Esquire  
Romano Law Office  
363 Washington Avenue  
Clarksburg, WV 26301  
*Counsel for Carla Layne Blank*

Tiffany R. Durst, Esquire  
Pullin, Fowler, Flanagan, Brown & Poe, PLLC  
2414 Cranberry Square  
Morgantown, WV 26508  
*Counsel for Lana S. Eddy Luby*

  
Mary Jane Pickens, General Counsel (WV#2903)  
Victor A. Mullins, Associate Counsel (WV#9460)  
Offices of the West Virginia Insurance Commissioner  
1124 Smith Street  
P.O. Box 50540  
Charleston, West Virginia 25305-0540  
(304) 558-0401  
*Counsel for Jane L. Cline, WV Insurance Commissioner*