NOS. 11-238 & 11-396

IN THE

SUPREME COURT OF THE UNITED STATES

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

HONORABLE THOMAS A. BEDELL, JUDGE OF THE CIRCUIT COURT OF HARRISON COUNTY, ET AL.

Respondents

LANA S. EDDY LUBY,

Petitioner,

v.

HONORABLE THOMAS A. BEDELL, JUDGE OF THE CIRCUIT COURT OF HARRISON COUNTY, ET AL.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RESPONDENT CARLA J. BLANK'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Respondent Carla Jayne Blank accepts as accurate the description of the Parties to the Proceeding as set forth in the Petition.

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STATEMENT OF JURISDICTION

State Farm Mutual Automobile Insurance Company (hereinafter, "State Farm") premises jurisdiction in this Court upon 28 U.S.C. § 1257(a) authorizing this Court to grant a Writ of Certiorari from "Final judgments or decrees rendered by the highest court of a state in which a decision could be had...." The matter for which review is sought by State Farm is the denial of a Writ of Prohibition by the West Virginia Supreme Court of Appeals decided on April 1, 2011, and reported at 2011 WL 1486100 (W.Va.). The Writ of Prohibition having been denied by the West Virginia Supreme Court, the case was returned to the Circuit Court of Harrison County, West Virginia [Trial Court] for further proceedings, i.e. a trial on the merits, which trial has not yet taken place due to the stay granted by the West Virginia Supreme Court of Appeals for State Farm to seek a writ of certiorari to this Court.

Thus, this matter is interlocutory as the Trial Court retains full authority to modify or alter the medical Protective Order entered in this case until a final order of judgment is rendered in the Trial Court. Thus, there is no jurisdiction in this Court under § 1257 of the United States Code. *See also*, Rule 10 of the Supreme Court Rules.

Additionally, the primary federal issue raised by State Farm in its Petition relating to the free speech clause of the First Amendment was not presented to the West Virginia Courts below, including the West Virginia Supreme Court of Appeals. There is no mention of this issue in the Opinion of the West

Virginia Supreme Court of Appeals because the issue was not properly raised in State Farm's Petition for Writ of Prohibition to the West Virginia Supreme Court as there was only a scant reference to the First Amendment in one short paragraph of State Farm's State Petition. (State Farm's Petition to West Virginia Supreme Court of Appeals, pg. 10). It is the rare exception for this Court to review State Court judgments regarding an alleged federal claim unless that federal claim was either addressed by or properly presented to the State Court. *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028 (1997), *Id.* at f.n. 3; *Howe v. Mississippi*, 543 U.S. 440, 443 125 S.Ct. 856, 858 (2005). When the highest State Court is silent on an asserted federal question before this Court, the presumption is that the issue was not properly presented and State Farm would bear the burden of defeating this presumption by demonstrating that the West Virginia Supreme Court of Appeals had fair opportunity to address the federal question sought to be presented in State Farm's Petition before this Court. *Id.* at 86 – 87. In State Farm's original Petition for Writ of Prohibition before the West Virginia Supreme Court, no federal constitutional issue was identified in any of the arguments asserted by State Farm as errors of the Trial Court. Thus, comity requires that this Court deny State Farm's Writ based on its waiver for failure to raise this constitutional issue, even though

Respondent Blank[1] believes that such issue is meritless under the facts and circumstances of this case.

State Farm attempted to better develop its asserted constitutional claim in its Petition for Rehearing before the West Virginia Supreme Court, which was filed on April 29, 2011. (State Farm's Petition for Rehearing, pgs. 11 – 13). However, the West Virginia Supreme Court rejected the request for rehearing by Order entered May 25, 2011. Issues raised for the first time in a Petition for rehearing before the State Court are not considered by this Court in deciding whether to grant certiorari. *Bd of Directors of Rotary Int'l v Rotary Club of Duarte,* 481 U.S. 537, 549-50, 107 S.Ct. 1940, 1947-48 (1987). This is only common sense as the West Virginia Supreme Court addressed such issues as they were waived by State Farm in failing to properly present them.

State Farm also now seeks review for other alleged federal issues never properly presented to the West Virginia Supreme Court and never considered by

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[1] Carla J. Blank is the real party in interest in this matter as traditionally in the State of West Virginia, the Trial Judge does not respond to a rule to show cause regarding an extraordinary writ which is the procedural posture this matter found its way to the West Virginia Supreme Court of Appeals. State Farm filed a Writ of Prohibition to prevent the Trial Court from enforcing its medical Protective Order providing confidentiality and other terms for State Farm to receive Ms. Blank's and her deceased husband's personal medical records for use in this case. *See also*, September 29, 2011 letter from Harrison County Prosecuting Attorney, Joseph F. Shaffer to Clerk of this Court.

the West Virginia Supreme Court. These are discussed in more detail below but they also present grounds for denial of State Farm's request for certiorari.

STATEMENT OF THE CASE

This case originates from an automobile crash that occurred on March 20, 2008, near Buckhannon, West Virginia, where State Farm's insured, the Decedent Jeremy Thomas, after completing work on an oil drilling rig at 6:00 a.m., while traveling at a high rate of speed, failed to negotiate a curve, and without any apparent breaking, went left of center entirely into the lane of oncoming traffic, striking Carla Blank's vehicle, killing her husband who was driving and seriously injuring her. The blood of both Mr. Thomas and his passenger tested positive for marijuana after the crash. Carla Blank was also insured by State Farm for underinsured motorist coverage, and eventually, she made claims both for the liability coverage of State Farm's insured, Jeremy Thomas, as well as her own underinsured motorist coverage. State Farm refused to pay some or all of the coverages and Ms. Blank filed a civil Complaint in the Circuit Court of Harrison County on February 12, 2009. Subsequently, as part of the pre-trial procedures, the Defendants sought Carla Blank's medical records, including her historical medical history records, and she sought a medical protective order from the Trial Court seeking protection for her confidential medical records and her husband's confidential medical records preventing unauthorized disclosure if she produced them in discovery to State Farm and State Farm's counsel. State Farm had hired counsel to defend the Decedent's Estate being administered by Lana Luby. Ms. Blank

requested that the requested medical records be used only for purposes of the litigation and to be returned or destroyed once the litigation was finally concluded. Ms. Blank had already provided State Farm with a medical release and State Farm had obtained some of her medical records during the initial claim adjustment. After briefing, the Trial Court entered the requested protective order and that Order was subject to two appeals which are referred to herein as *Bedell I* and *Bedell II*.[2]

State Farm conceded before the West Virginia Supreme Court that Carla Blank's medical records and those of her deceased husband were confidential, and deserving of protection (*Bedell II* at pg. 14) ("...all of the Parties to this case have agreed and conceded that a protective order is an appropriate means of protecting the privacy interests the Blanks have in their confidential medical records."). However, State Farm resisted throughout the proceedings certain terms of the medical Protective Order eventually entered by the Trial Court because State Farm wanted to reserve the right in such order to disseminate the Blanks' medical records, without notice to Carla Blank, whenever State Farm deemed it necessary for its business interest to do so, and without obtaining the consent of Carla Blank before such dissemination. State Farm, in an effort to convince the West Virginia Courts of its need to have such leeway, has proceeded

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[2] *State ex rel. State Farm Mutual Automobile Insurance Co. v. Bedell*, 697 S.E.2d 730 (W.Va. 2010) ("*Bedell I*"); *State ex rel. State Farm Mutual Automobile Insurance Co. v. Bedell*, No. 35738, 2011 WL 1486100 (W.Va. Apr. 1, 2011) ("*Bedell II*")

to "parade the horribles" with regard to every remote possibility that Carla Blank's medical records might need to be disseminated by State Farm in response to some perceived business need or as required by law, including yet to be entered future "hold orders" similar to that discussed in the *Zubulake v. USB Warburg, LLC* case, 220 F.R.D. 212 (S.D. N.Y 2004), even though no such contingencies existed for this case. State Farm also hypothesized that it may need to disclose Carla Blank's medical records to the Federal Government for possible recovery of a Medicare or Medicaid statutory lien against any recovery of Carla Blank. However, such does not apply to this case because there is no Medicare or Medicaid lien, nor any potential for the same, yet State Farm asserts this impossible ground as a basis to reverse the West Virginia Supreme Court of Appeals and the Trial Court. Such rank speculation does not warrant the granting of certiorari by this Court under Rule 10.

ARGUMENT

I. THERE ARE NO FEDERAL CONSTITUTIONAL ISSUES PRESENTED IN THIS CASE, AND THEREFORE, CERTIORARI SHOULD BE DENIED.

State Farm relies upon an alleged violation of its First Amendment rights as its primary federal constitutional violation supporting its request for certiorari in this case. There is no First Amendment protection as asserted by State Farm and such assertion was rejected by this Court in the *Seattle Times* case many years ago. (*Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) This Court, in *Seattle*

Times found that confidential and private information required to be disclosed as part of the judicial discovery process does not implicate First Amendment prior restraint. *Id.* at 37. In so holding, this Court found that Rule 26(c) of the State of Washington Rules of Civil Procedure, similar to the federal rule and the West Virginia rule, protected privacy interests by the implicit and broad language of the rule. *Id.* at 34. It further held that States like Washington, had a substantial interest in preventing the abuse of its core processes and could restrict the use and dissemination of discovery ordered produced in a civil action by requiring that it be used only for the purposes of the litigation and that it not be disseminated or otherwise used outside of the confines of that litigation. *Id.*

Thus, the *Seattle Times* case supports the West Virginia Supreme Court's denial of State Farm's Writ of Prohibition wherein the West Virginia Supreme Court upheld the Trial Court's medical Protective Order. Nor, does State Farm find any comfort in the *Sorrell v. IMS Health, Inc.,* 131 S.Ct. 2653 (2011) case as that case does not involve pre-trial discovery and the issuance of a protective order under Rule 26, and it is totally inapplicable to the case at Bar. *Sorrell* dealt with a restrictive State statute that allowed dissemination of physicians' prescription practices to anyone for any purpose other than marketing by prescription drug companies. As this Court stated in *Sorrell*, the Vermont statute "...made prescriber identifying information available to an almost limitless audience. The explicit structure of the statute allows the information to be studied and used by all but a narrow class of disfavored speakers." *Sorrell* at 2668.

The Vermont statute only restricted the obtaining and use of such prescribing information to those speakers that the State disfavored. *Id.* at 2669. *Sorrell* does not support State Farm's assertions in this case as this Court alluded that the State of Vermont might have "addressed physician confidentiality 'through a more coherent policy'" (citations omitted) For instance, the State might have advanced its asserted privacy interest by allowing the information's sale or disclosure in only a few narrow and well-justified circumstances. *See, e.g.* Health Insurance Portability & Accountability Act of 1996, 42 U.S.C. §1320d-2; 45 C.F.R. Parts 160 & 164 (2010)[HIPAA]." *Id.* at 2668. Then perhaps the statute may have passed constitutional muster. In this case, the West Virginia Supreme Court found that HIPAA established the federal public policy to protect a person's confidential medical records even in the course of a judicial proceeding. This finding is important because it meshed with the West Virginia Supreme Court's finding that the West Virginia public policy also mandated that confidential private medical records be protected from unauthorized disclosure. (*Bedell II* at 16-17). Contrary to State Farm's argument, the West Virginia Supreme Court did not find that the disclosures for judicial and administrative proceedings under 45 C.F.R. §164.512(e) bound West Virginia courts, but only that both State Farm and Ms. Blank "acknowledge before this Court, [that] federal law requires the entry of protective orders to protect litigants whose medical records will be disclosed during the course of legal proceedings." *Id.* at 16. Further, the West Virginia Supreme Court found that "the Parties to this proceeding [Ms. Blank and State Farm] do not dispute that a protective order is appropriate under the facts and circumstances of this case to

safeguard Mr. and Mrs. Blank's privacy interests in their medical records." *Id.* at 17.[3]

With regard to that portion of the Trial Court's Protective Order upheld by the West Virginia Supreme Court that restricted dissemination and use of the confidential medical records "even if received prior to the Court's ruling on this Protective Order...", such does not present any constitutional question as the West Virginia Supreme Court may have affirmed this portion of the Trial Court's Order on dual theories, neither of which offend any First Amendment duty. The West Virginia Supreme Court may have considered the Protective Order to pertain only to those medical records received in the course of the litigation prior to the actual entry of the medical Protective Order which is entirely appropriate. Also, it may have considered the Protective Order to apply to those medical records received by State Farm during Carla Blank's claim adjustment pursuant to West Virginia insurance law relating to claims handling practices, including the privacy protections accorded such confidential documents under the public policy of West Virginia, and the requirements of State insurance laws and regulations as interpreted by the West Virginia Supreme Court. There is not one scintilla of evidence

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[3] The West Virginia Supreme Court also considers statements made by the Parties counsel at oral argument before the Court as binding representations as well as those made in the written briefs; this Court should accept the West Virginia Supreme Court's finding of concessions or agreements by State Farm set forth in its Opinion as such concessions and agreements could be made both in written briefs and in oral argument which was what occurred in this matter.

that the medical Protective Order was designed to reach documents obtained outside of the insurance claim or judicial processes as condemned in *Seattle Times* when the newspaper obtained documents from independent sources but was restrained from publishing them by the protective order entered in that case. If State Farm believed that the medical Protective Order's reach was so expansive, it should have requested clarification from the Trial Court and presented any complaints to the West Virginia Supreme Court for review, which it did not do, and therefore, State Farm cannot raise them before this Court at this time under 28 U.S.C. §1257. The West Virginia Supreme Court of Appeals, as the highest Court of last resort in West Virginia, is entitled to interpret its own Rules of Civil Procedure and West Virginia insurance law as it relates to protecting the privacy of a person's confidential medical records and medical information. Such is reserved to the States by federal law with regard to the regulation of insurance. 15 U.S.C. §1011, *et seq.* (commonly known as the McCarran-Ferguson Act).

Carla Blank concedes that truthful information obtained from sources outside the discovery process or the claims adjustment process cannot be restrained or restricted through a Rule 26 (c) protective order. However, in this case, State Farm provided no evidence to the Trial Court or the West Virginia Supreme Court that it had obtained truthful information outside of the discovery process or outside of the claim process which is a regulated process under West Virginia insurance law, and which is ultimately interpreted under recognized statutory construction by the West Virginia Supreme Court of Appeals. Along with these principles,

the West Virginia Supreme Court would naturally apply its determination of the public policy of this State and find guidance in the public policy of Congress by the enactment of HIPAA. The West Virginia Supreme Court was applying its prior case law holding that a person's medical records are inherently private and should be accorded protection so as not to deter individuals from seeking court redress. *Morris v. Consolidation Coal Co.*, 191 W.Va. 426, 431, 446 S.E.2d 648, 653 (W.Va. 1994) & *State ex rel Kitzmiller v. Henning*, 190 W.Va. 142, 144, 437 S.E.2d 452, 454 (W.Va. 1993); *see also, Keplinger v. Virginia Elec. and Power Co.*, 208 W.Va. 11, 23, 537 S.E.2d 632,644 (W.Va. 2000). However, State Farm never specifically raised the issue that truthful information was obtained by State Farm outside of the discovery process or the regulated insurance claims process to which the Trial Court's medical Protective Order would apply. Nowhere in State Farm's Petition for Writ of Prohibition before the West Virginia Supreme Court is this issue raised in a proper manner, nor did the West Virginia Supreme Court in *Bedell II* consider such issue as it was not properly presented by State Farm. State Farm has waived consideration of this issue.

Thus, State Farm's reliance on the *Seattle Times* and *Sorrell* cases is misplaced and provides no basis under §1257 for this Court to grant certiorari.

II. SHOULD THIS COURT DECIDE THAT THE MEDICAL PROTECTIVE ORDER MUST BE SCRUTINIZED UNDER THE FIRST AMENDMENT FOR ITS EFFECT ON THE RESTRAINT OF SPEECH, THE WEST VIRGINIA SUPREME COURT'S DECISION IS NARROWLY TAILORED AND FURTHERS A LEGITIMATE STATE INTEREST OF THE HIGHEST ORDER, TO WIT: PROTECTION OF THE PRIVACY AND CONFIDENTIALITY OF A PERSON'S PERSONAL MEDICAL RECORDS

Should this Court decide that the First Amendment requires either intermediate or strict scrutiny of the West Virginia Supreme Court's ruling in upholding the Trial Court's entry of a medical Protective Order, there are more than adequate grounds to demonstrate that the West Virginia Supreme Court's Opinion was narrowly tailored and necessary to further a legitimate State interest of the highest order which is to protect the privacy and confidentiality of Carla Blank's and her husband's personal medical records.

Just as HIPAA has established the public policy of the United States to require that a person's privacy rights in his or her medical records be safeguarded from unauthorized dissemination and disclosure, the West Virginia Supreme Court determined that West Virginia public policy required the same confidentiality in upholding the validity of the Trial Court's medical Protective Order. HIPAA requires a "qualified protective order" prohibiting parties from using or disclosing protected health information for any purpose

other than the litigation or proceeding for which such information was requested and requires the return to the covered entity or destruction of the protected health information (including all copies made), at the end of the litigation or proceeding. 45 C.F.R. §164.512(e)(1)(v). This Court alluded in *Sorrell* that such narrow and well justified circumstances may survive First Amendment scrutiny if a legitimate government interest is at stake. *Sorrell* at 2668. Unlike the Vermont statute in *Sorrell*, HIPPA is Congress' expression of such a narrowly tailored legitimate interest that would permit such restriction by way of a medical protective order. Even if State Farm has demonstrated that First Amendment scrutiny is required, which it has not, the West Virginia Supreme Court Opinion survives such scrutiny.

III. STATE FARM'S ABILITY TO REPORT FRAUD TO THE WEST VIRGINIA INSURANCE COMMISSIONER IS NOT HINDERED BY THE MEDICAL PROTECTIVE ORDER AND WHETHER THAT STATE STATUTE IS VIOLATED BY THE TRIAL COURT'S MEDICAL PROTECTIVE ORDER IS SOLELY A STATE LAW ISSUE TO BE DECIDED BY WEST VIRGINIA COURTS

State Farm's wild assertion that it cannot report insurance fraud unless it can disseminate private medical records obtained in the claims process or through judicial discovery without the knowledge or consent of the person, whose medical records are being disclosed, is totally inaccurate. Nothing prevents State

Farm from advising the West Virginia State Insurance Commissioner, or any state or federal law enforcement agency, that it believes fraud has been committed without State Farm also providing *ex parte* a person's confidential medical records without notice or consent of that person. To assert the contrary is absurd.

If after such notice of potential fraud, the West Virginia State Insurance Commissioner, or any state or federal law enforcement agency desires to obtain any such confidential medical records, then it may do so through lawful process such as a grand jury subpoena, a court subpoena or by the consent of the person whose records are being sought, among other means and methods. The West Virginia Insurance Commissioner has no direct authority to obtain confidential medical records from any health care provider or institution, or anyone else merely by requesting them; rather, the Commission must use valid legal process. The Insurance Commissioner's fraud unit may serve subpoenas of a court, but not issue them under its own authority. W.Va. Code §33-41-8(c)(3). Nor does the Regulation issued by the West Virginia Insurance Commissioner grant any other such authority. West Virginia Code of Regulations, § 114-71-1 *et seq.* But, even if such authority was granted in the Regulation, it would be subject to the West Virginia Supreme Court's determination of whether that authority violated the public policy of this State or the law of this State but clearly no federal issue is presented by such assertions, only State law issues.

IV. STATE FARM'S ASSERTION THAT THE MEDICARE ACT IS OFFENDED BY THE MEDICAL PROTECTIVE ORDER ENTERED IN THIS CASE IS IRRELEVANT AS CARLA BLANK HAS NOT APPLIED NOR RECEIVED ANY FEDERAL BENEFITS WHATSOEVER

State Farm did not offer, nor could it offer, any evidence to the West Virginia Supreme Court that the Medicare Secondary Payor Act, 42 U.S.C. 1395y(b)(2)(A)(ii) was involved in this case because at no time has Carla Blank received any Medicare or Medicaid benefits, nor was she eligible to receive them. A liability insurance carrier like State Farm is only required to report to Medicare if a plaintiff for whom the liability carrier is going to settle or pay funds is a Medicare or Medicaid recipient. Obviously, State Farm must first determine whether a person is a recipient of such federal benefits prior to paying any settlement to a plaintiff like Carla Blank. The obligation to furnish additional information to the CMS [Centers for Medicare and Medicaid Services] is not triggered until receipt of benefits is confirmed by the federal agency's third-party recovery agent (CMS). No evidence has been presented by State Farm that a Medicare or Medicaid lien has been or could be lodged against Carla Blank or her deceased husband in this matter. Such assertion that State Farm cannot abide by the Trial Court's medical Protective Order in view of the Medicare and Medicaid Recovery Act is rank speculation, with no basis in fact, and should not be given any consideration by this Court whatsoever as it is a "red herring." If there were such evidence, State Farm should have produced it below, and in that

instance, State Farm could have easily applied to the Trial Court for authority to disclose whatever medical records or medical information was necessary to comply with a CMS request, if in fact, CMS desired to have such information, which usually it does not, unless there is a dispute as to the amount of the lien. There is not one shred of evidence that Medicare or Medicaid, through CMS or any other entity, has requested Carla Blank's, or that of her deceased husband's medical records or medical information, and that State Farm was prohibited from providing such information due to the medical Protective Order approved in this case.

V. STATE FARM'S CLAIMS THAT IT WILL BE DENIED DUE PROCESS AND BE DENIED THE BENEFIT OF THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION IS WITHOUT ANY LEGAL BASES OR FACTUAL SUPPORT

State Farm attempts to bootstrap these constitutional arguments by grossly speculating as to what may happen if it complies with the State Court medical Protective Order. State Farm raises several issues:

a) That State Farm is put in a position of either complying with the Trial Court's medical Protective Order or the Illinois insurance law regarding record retention;

b) That State Farm, by being required to return or destroy medical records and "medical information" derived therefrom provided by a claimant

like Carla Blank, deprives it of a property interest as it has to destroy its own business records;

First, State Farm provided no evidence to the West Virginia Courts that it had been the subject of any proceeding by the Illinois Insurance Commission regarding record retention of Carla Blank's medical records, or that State Farm was required to violate the medical Protective Order to comply with Illinois law. Moreover, State Farm presented no evidence that the Illinois Department of Insurance would not comply with a valid medical protective order issued by a West Virginia Court which had jurisdiction over West Virginia residents, as in this case, relating to a tort claim occurring in West Virginia, with State Farm's only interest being that it insured one or more of the participants in the tort claim. Even if the Illinois Insurance Department was determined on requiring State Farm to retain confidential medical records permanently, which it is not, Illinois law would have little, if any, relationship with the litigants or the cause of action being adjusted or litigated in West Virginia. Illinois law is no more superior in West Virginia than West Virginia law would be in Illinois.

However, State Farm never explained to the West Virginia Courts why it cannot receive permission from the Illinois Insurance Commissioner to destroy Carla Blank's and her husband's confidential medical records as required by the medical Protective Order which permits State Farm to retain them for at least five (5) full calendar years subsequent to the conclusion of the litigation, if such permission is necessary. There is nothing in the Record before the West Virginia Courts, or this Court, indicating that State Farm has

sought such permission from the Illinois Insurance Commissioner and that the same was denied and the reasons therefore. The statute cited by State Farm does not indicate that documents, including confidential medical records, must be kept permanently by State Farm, but only that State Farm must secure permission from the Illinois Director of Insurance before destroying them. Without any evidence in the Record that State Farm has sought such permission and been denied from complying with the West Virginia medical Protective Order would a conflict arise, State Farm's claims are mere speculation and provide no basis for the granting of certiorari;

Second, State Farm misconstrues its standing regarding ownership of Ms. Blank's medical records. The records that State Farm receives from individuals like Carla Blank are not State Farm's business records, nor do they become State Farm's business records merely because they are sent to State Farm through the claims process or in judicial discovery and restricted by a medical protective order, or otherwise restricted through statutory or regulatory requirements of confidentiality and the public policy of West Virginia. State Farm has the option of not receiving such confidential medical records and instead relying on other means to review such confidential medical records. However, if State Farm decides to accept such confidential medical records then it must abide by the restrictions of a medical protective order and/or the laws of the State of West Virginia protecting the confidentiality of such personal and private materials. State Farm cannot act contrary to West Virginia law regarding what State Farm will, or will not do, with confidential medical records received

under such privacy restrictions if State Farm desires to receive them as part of its claims adjustment process or a court case. Just as HIPAA mandates rigorous privacy protections for medical records [45 CFR § 164.310-312] so can't West Virginia do the same.

Receipt of confidential records that an insurance carrier is required to return or destroy at the conclusion of a case, in which the confidential materials are disclosed, does not make them business records creating a concomitant due process property interest; merely because such confidential materials are intentionally commingled with other proprietary records of the insurance carrier does not covert them to State Farm's property. The West Virginia Supreme Court was very clear that "medical information" was synonymous with the term medical records and that State Farm would be prohibited from copying into other State Farm documents, that which it was required to return or destroy in accordance with the medical Protective Order. If State Farm finds this to be difficult, then it should not disseminate the restricted medical records by verbatim copying of medical information from the medical records into other State Farm documents which conduct is prohibited by West Virginia law unless State Farm purges such protected information as required by the medical Protective Order.

State Farm's indifference in protecting the privacy and confidentiality of medical records is part of the reason that a medical protective order is necessary to protect the privacy and confidentiality of a persons' medical records which State Farm receives in the claims and judicial processes. The West Virginia

Supreme Court recognized this anomaly. State Farm asserts that there is a sufficient layer of regulation in place to protect Carla Blank's privacy and confidentiality of her medical records, yet State Farm provides no protection from unauthorized access, downloading and copying of a person's confidential medical records, like Carla Blank, once those records are received and scanned onto State Farm's claims computer which is accessible to most of State Farm's 68,000 employees without any disclosed method of monitoring the accessibility, copying or downloading of such confidential medical records. (See Footnote 39 and Exhibit 4 of "Respondent's (Carla Blank) Rule 14(d) [now Rule 16(g)] Response to State Farm's Petition for Writ of Prohibition", filed on January 7, 2011.); *see also*, *A. T. v. State Farm Ins Co.*, 989 P.2d 219 (Colo. App. 1999) and *Brende* v *Hara*, 113 Hawaii 424, 429, 153 P.3d 1109, 1114 (Hawaii 2007). State Farm refused discovery on this issue, *i.e.* safeguards employed by State Farm to protect confidentiality of medical records received during claims adjustment or court processes, which no doubt implicitly indicated to the Trial Court that State Farm had no such safeguards. *Id.* at f.n. 10. The Trial Court ultimately denied Carla Blank's 30(b)(7) deposition to State Farm on this issue by granting State Farm's Motion to Quash the 30(b)(7) deposition because the Trial Court granted Carla Blank's Rule 26 Motion for a medical protective order based on the Record at that time indicating such discovery would be moot.

VI. CONDITIONAL CROSS - PETITION OF LANA LUBY IS FACTUALLY INACCURATE AND ALSO PRESENTS NO FEDERAL QUESTION FOR THIS COURT TO DECIDE

Ms. Luby is the Personal Representative of Jeremy Thomas, the tortfeasor in the case below. Ms. Luby is an insured of State Farm Mutual Automobile Insurance Company and State Farm hired counsel for Ms. Luby by engaging the Law Firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC and Tiffany R. Durst, one of its Members. Ms. Luby claims to be aggrieved because the medical Protective Order, while permitting her and her counsel to receive, review and utilize Carla Blank's and her deceased husband's confidential medical records for any purpose in the case before the Trial Court, were nevertheless prohibited from disseminating such medical records and required to return or destroy them within the time period set forth in the medical Protective Order. Ms. Luby somehow translates these requirements to return or destroy personal and confidential medical records into a due process violation. However, neither Ms. Luby nor her counsel, Ms. Durst, have any property interests in personal and private records that do not belong to them and that are provided only for the purpose of using them in the underlying claim, and once that claim is finally concluded, to return or destroy them. Ms. Luby asserts in her Cross-Petition that the West Virginia Supreme Court "recognized that the Protective Order prevented Ms. Luby's counsel from being able to prepare for trial or take the steps necessary to reach a settlement in the case." However, that assertion was merely the West Virginia Supreme Court's review of the argument made by Ms. Luby in briefs filed in the

Bedell I case. The West Virginia Supreme Court only held in *Bedell I* that a protective order could not require return or destruction prior to the time periods set forth in the Insurance Commissioner's Regulations regarding retention of documents until conclusion of the Insurance Commissioner's examination period.

In *Bedell II* the West Virginia Supreme Court specifically addressed the issue of return and destruction including the certification by counsel that such had been done, and held that a certification clause by counsel that he or she has complied with the Court's directive in the medical Protective Order is "commonly incorporated into protective orders" and that the "inclusion of a certification clause in a protective order, accompanied by a corresponding affirmation of good faith compliance therewith, is a widely accepted practice and is a proper provision to incorporate into a protective order to ensure the continued protection of the documents subject to its terms." *Bedell II* at 17. The West Virginia Supreme Court further held that neither State Farm nor Ms. Luby had presented any compelling reasons to invalidate that portion of the Circuit Court's Order. All that the provision requires is that Ms. Luby will not disseminate Carla Blank's medical records and only use them for purposes of preparing her case for trial, should she happen to even receive such medical records, as often times, clients do not receive that type of information. However, in the event that Ms. Luby would receive such confidential information, she is bound by the Court's Order to

protect the confidentiality of Carla Blank's medical records and to return or destroy them as directed.[4]

Ms. Luby also complains that her attorney cannot permanently maintain Carla Blank's medical records in the attorney file, and while this may be true with some medical protective orders, such was not required in the medical Protective Order at issue in this case as that medical Protective Order permits Ms. Luby's attorney to maintain such confidential documents in her attorney file as long as they are sealed and that they are not used for any other purpose or accessible to any person without the consent of Carla Blank or to respond to lawful process after notice to Carla Blank. However, even if the confidential records were required to be returned or destroyed by Ms. Luby's attorney, such would not create any constitutional issue because Ms. Luby's attorney has no constitutional right to keep documents "loaned" to her for purposes of preparing a case. The Trial Court could have refused to provide some or all of such medical records to Ms. Luby, and her counsel, and most likely, that would not generate any federal constitutional issue as long as sufficient medical information in some form necessary to prepare a defense was provided. Therefore, providing the full and complete medical records, while restricting the use and dissemination

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[4] There has been a recorded instance of a defendant placing the medical records of an individual on the internet after receiving them through the discovery process where there was no medical protective order in place to prevent such disclosure; *see* "Respondent's (Carla Blank) Rule 14(d) [now Rule 16(g)] Response to State Farm's Petition for Writ of Prohibition" at pgs. 32-33 & f.n. 11.

and establishing a time period for return or destruction raises no federal due process issues whatsoever.

Most importantly however, Ms. Luby never raised any such federal constitutional issue in her Response filed in the West Virginia Supreme Court on November 5, 2010, nor did the West Virginia Supreme Court consider any such alleged federal constitutional issues as they were not properly raised. A review of Ms. Luby's Response to State Farm's Petition for Writ of Prohibition before the West Virginia Supreme Court clearly reveals that none of the arguments by Ms. Luby included any federal constitutional issues, and in fact, Ms. Luby's Response did not cite one federal case or even refer to the United States Constitution.

CONCLUSION

The Petition and Cross-Petition presented to this Court are not entitled to review by this Court as they fail to comply with the jurisdictional requirements of 28 U.S.C. §1257 and the requirements of Rule 10. Moreover, the decision of the West Virginia Supreme Court in *Bedell II* was appropriate under the West Virginia Supreme Court's interpretation of West Virginia law and West Virginia public policy and it did not offend any constitutional principles or other federal law. Neither the FBI nor the West Virginia State Police are permitted to obtain a person's private and confidential medical records without legal process, *i.e.*, a grand jury subpoena, court subpoena, or some other legal process whereby a court would supervise the obtaining of such private information. Neither can State Farm, and if State Farm receives such confidential information, it should not be permitted to

use it as it sees fit for its business purposes. State Farm should be required to comply with West Virginia law, both during the claims process and during litigation to protect the confidentiality of a person's private medical records just as the West Virginia Supreme Court held in *Bedell II*. Anything less would grant State Farm greater authority than any other citizen, law enforcement agency, or healthcare institution in this regard, and erode the privacy protections provided by West Virginia law and as recognized by Congress in enacting HIPAA and the constitutional right to privacy. The request for certiorari by State Farm should be denied.

Respectfully submitted,

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