No. 35738 – *State of West Virginia ex rel. State Farm Mutual Automobile Insurance Company v. Honorable Thomas A. Bedell, Lana S. Eddy Luby, and Carla J. Blank*

FILED
July 22, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, J., dissenting:

I

Before us is a case of judicial *déjà vu*. As the majority noted, this is the second time these parties have been before the Court regarding the entry of a protective order by the circuit court. On our first viewing, *State Farm I*, the Court issued a writ of prohibition to prevent the circuit court from enforcing its order because the order potentially interfered with State Farm's ability to comply with West Virginia law. *State ex rel. State Farm Mutual Automobile Insurance Co. v. Bedell*, 226 W. Va. 138, ____, 697 S.E.2d 730, 738 (2010).[1] Although the second order produced by the circuit court still contains the potential for interference with West Virginia law, the Court on this second viewing, *State Farm II*, has experienced a change of heart. Because I believe this Court, by allowing enforcement of the circuit court's second order, is setting harmful precedent by sanctioning orders that may result in a direct conflict with the laws of this state, I respectfully dissent.

In *State Farm II*, the potential conflict arises between the order and W. Va. Code § 33-41-5(a), which provides,

[1]The Court also noted that the circuit court abused its authority in issuing the order because Ms. Blank failed to show good cause as required by West Virginia Rule of Civil Procedure 26(c). *State Farm I*, ____, 697 S.E.2d 730, 740.

> A person engaged in the business of insurance having knowledge or a reasonable belief that fraud or another crime related to the business of insurance is being, will be or has been committed shall provide to the [Insurance Commissioner] the information required by, and in a manner prescribed by, the commissioner.

W. Va. Code § 33-41-5(a) (2006); *see also* the Amicus Curiae brief submitted by Jane L. Cline, West Virginia Insurance Commissioner. In recognizing that the business of insurance has the potential for fraud, the West Virginia Code has given the Insurance Commissioner the important duty of investigating possible instances of fraud and prosecuting fraud. W. Va. Code § 33-41-1(b).

The language of the circuit court's order excludes the Insurance Commissioner from its list of parties to whom State Farm's counsel may disclose the medical records or medical information. Specifically, the order states,

> 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, including necessary servants, agents, and employees of their clients . . . . Defendants' counsel may disclose . . . such information to the Defendants' experts and insurance carrier . . . .

The order, by its explicit language, excludes the disclosure of the medical records or medical information to parties not listed in the order, namely the Insurance Commissioner. Should the Insurance Commissioner suspect fraudulent behavior and demand that State Farm produce information protected by this order, State Farm will be required to choose between violating statutory law or violating this order. In addition to placing State Farm "between a rock and a hard place," this protective order and others like it have the potential to frustrate the policy goals of the fraud prevention sections of the West Virginia Code.

In its opinion, the majority refuses to consider the potential conflict with § 33-41-1(b), quoting syllabus point 2, *Sands v. Security Trust Company*, 143 W. Va. 522, 102 S.E.2d 733 (1958): "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance."[2] I do not dispute that this is the law regarding *appeals*. However, this case involves a *writ of prohibition*. This Court has long recognized that "[p]rohibition lies as a matter of right in all cases of usurpation and abuse of

[2]The Court also referred to *Whitlow v. Board of Education of Kanawha County*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993) (appeal from the circuit court's finding that the plaintiff's suit was time barred); *Hanlon v. Logan County Board of Education*, 201 W. Va. 305, 315, 496 S.E.2d 447, 457 (1997) (appeal from the circuit court's finding that the defendant acted within its hiring authority); *State v. Browning*, 199 W. Va. 417, 425, 485 S.E.2d 1, 9 (1997) (appeal from the circuit court's order to uphold defendant's conviction); syl. pt. 2, *Duquesne Light Co. v. State Tax Department*, 174 W. Va. 506, 327 S.E.2d 683 (1984) (appeal from the circuit court's decision to strike down a tax on electricity generation); and syl. pt. 2, *Cameron v. Cameron*, 105 W. Va. 621, 143 S.E. 349 (1928) (appeal from the circuit court's dismissal of plaintiff's action seeking cancellation of a decree annulling marriage).

power. And a party whose rights have been so invaded need not, as a prerequisite, give the court sought to be prohibited an opportunity to pass on questions raised." *Hatfield v. Ferguson*, 115 W. Va. 519, 521, 177 S.E. 192, 193 (1934) (internal citations omitted).[3] Thus, this Court is not barred from considering the petitioners' challenge regarding § 33-41-1(b).

Upon consideration of § 33-41-1(b), it is apparent that a potential for conflict exists between it and the order granted by the circuit court and that the petitioner is entitled to a writ of prohibition. As the potential for conflict with existing law was sufficient to issue a writ of prohibition in *State Farm I*, I fail to see how the potential for conflict with existing law is now insufficient to issue a writ of prohibition in *State Farm II*.

II.

I am also troubled by the majority's findings as to the scope of the order's reach. The order states, "Also, upon conclusion of the appropriate period . . ., all medical

[3]The Court has taken the identical approach to cases involving a writ of prohibition sought for lack of jurisdiction. *See, e.g.*, *Morris v. Calhoun* 119 W. Va. 603, 609, 195 S.E. 341, 345 (1938) ("Many of the earlier cases in this state adopted the rule that a challenge to the jurisdiction of a trial court should be made in such court as a condition precedent to the right to apply to this court for the writ of prohibition. This rule has been abandoned; it never was an inflexible or arbitrary rule, but more one of judicial courtesy to the court sought to be prohibited. As the law now is, this court . . . has power to deal with questions presented to it with reference to jurisdiction . . . without regard to objection or lack of objection to such jurisdiction in the court below.") (citing, *inter alia*, *Hatfield*, 115 W. Va. 519, 177 S.E. 192).

records, and medical information, or any copies or summaries thereof, will either be destroyed . . ., or all such materials will be returned to Plaintiff's counsel." State Farm and Ms. Luby's counsel objected to this language. They argued that documents which they themselves create which include information gleaned from the medical information disclosed by Ms. Blank – information that may become part of their respective protected business records or client file – is subject to the destruction or return requirement of the order as "medical information."

The majority dismisses this concern by concluding that "medical records" and "medical information" are used interchangeably in the order to mean only "medical records." The majority refers extensively to non-controlling authority to determine first that "we look to the plain meaning of the words used in the document" in construing a court order,[4] and second, that "an order should be construed in accordance with its evident intention."[5] Even viewing these non-authoritative cases as controlling precedent in this jurisdiction, it is beyond me as to how the majority could conclude that the terms, "medical information" and "medical records," are synonymous terms meaning only "medical records."

The majority reaches its conclusion after performing "extensive research" into

[4]*In re Langenfeld*, 160 N.H. 85, 89, 958 A.2d 232, 236 (2010) (citation omitted).

[5]*In re Marriage of Brown*, 776 N.W.2d 644, 650 (Iowa 2009).

cases that include the terms at issue. It argues that these cases, again from other jurisdictions, show that the terms can be used interchangeably to refer only to medical records. However, upon reviewing the cases cited by the majority, it is apparent that none of those courts has recognized that "medical records" refers to all types of "medical information."[6] From my review of the cases cited and the circuit court's order, "medical information" refers to a broad category of information that includes various types of medical documents, statements, and summaries, including, *inter alia*, "medical records." The term "medical records" is encompassed by the term "medical information"; "medical records" describes a sub-category of "medical information".

Furthermore, equating the meaning of these terms simply does not make sense in the context of the order. The order requires destruction or return of "medical records, and medical information or any copies or summaries thereof." First, the order uses the conjunctive "and" to separate "medical records" and "medical information." By its plain terms, the circuit court's order distinguished the terms as separate and distinct from each

[6]*McCormick v. Brzezinski*, No. 08-CV-10075, 2008 WL 4965343, at *3 (E.D. Mich. Nov. 18, 2008) (using "medical information" to describe "medical records", but not using "medical records" to refer to "medical information"); *Shady Grove Psychiatric Grp. v. State of Maryland*, 128 Md. App. 163, 168, 736 A.2d 1168, 1171 (1999) (using "information" to define "medical record," but not using "medical record" interchangeably with "information"); *Ex parte Dept. of Health & Envtl. Control*, 339 S.C. 546, 549-50, 529 S.E.2d 290, 291-92 (S.C. Ct. App. 2000) (using "medical information" to describe STD records, but not using STD records to refer to "medical information").

other. Second, if the terms at issue refer to the same material, then the order is thoroughly redundant. If we are to construe this order "in accordance with its evident intention",[7] these terms cannot take on an identical meaning.

For these reasons, I respectfully dissent.

[7] *In re Marriage of Brown*, 776 N.W.2d 644, 650 (Iowa 2009).