

**No. 12-0304 - State ex rel. State Farm Mutual Automobile Insurance Company,
Petitioner v. Honorable Lewis Marks, Jr., Judge, et al. Respondents**

**No. 12-0210 - Nationwide Mutual Insurance Company, Defendant Below, Petitioner
v. Carmella J. Faris and Robert Faris, Plaintiffs Below, Respondents**

FILED

November 15, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Ketchum, Chief Justice, dissenting:

I stand by my dissent in our previous medical protective order case, *State ex rel. State Farm Mutual Automobile Insurance Company v. Bedell*, 228 W.Va. 252, 719 S.E.2d 722 (2011) (“*Bedell II*”). In the dissent, I stated that a plaintiff has no confidentiality or privacy interest in his or her medical records “when those records are lawfully distributed to an adverse party in a personal injury lawsuit.” 228 W.Va. at 274, 719 S.E.2d at 744.

However, even if I agreed with the majority, I would point out that their case-by-case medical protective order approach to protect medical records is inadequate. Requiring a plaintiff’s lawyer to go to court to obtain a medical protective order in every case is time consuming and expensive to all parties. Injured plaintiffs and insurance companies want their cases resolved quickly and inexpensively. They do not want pre-trial motions delaying the resolution of the claim. More importantly, trial courts are too busy to continually hear motions for protective orders.

To avoid the expensive, time-consuming delays caused by case-by-case hearings on medial protective orders, this Court should adopt a medical privacy rule addressing the matter. A rule (such as the following rule adopted in South Dakota) that would eliminate the majority's case-by-case approach would state:

Medical Privacy

The production of a record of a health care provider, whether in litigation or in contemplation of litigation, does not waive any privilege which exists with respect to the record, other than for the use in which it is produced. Any person or entity receiving such a record may not reproduce, distribute, or use it for any purpose other than for which it is produced.

This rule does not bar any person or entity from complying with any court order, or state or federal law or regulation authorizing disclosure of information that otherwise would be protected by this rule.

In adopting this rule, the South Dakota Supreme Court became the first court in the country to promulgate a directive restricting the dissemination of medical records produced in litigation or in contemplation of litigation. *See*, James D. Leach, *Medical Privacy: The South Dakota Supreme Court Adopts SDCL 19-2-13*, 57 S.D. L. Rev. 1 (2012) (“[T]he burden of pursuing protective orders on a case-by-case basis –

often over the strenuous opposition of defendants and their insurers – will usually outweigh the perceived benefit.”).

Accordingly, I would vote in favor of adopting such a rule in West Virginia.

Therefore, I respectfully dissent.