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

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Ketchum, J., dissenting:

I disagree with the majority's opinion, because I believe that the opinion creates several expensive, far-reaching, negative public policy implications.

1. Public policy should allow the preservation of a plaintiff's medical records.

My first and greatest concern is a public policy problem that the majority opinion has not fully considered, and it is one that affects everyone: higher insurance costs. Obviously, it will be expensive for insurance companies to catalogue the medical records collected in every lawsuit, and expensive to later make sure that every archived insurance file is scraped clean of any medical records or summaries. But I anticipate there will be even greater expenses in the future, in the form of new lawsuits: when plaintiffs' lawyers discover a copy of a medical record buried in an insurance company's archives – a record that should have been purged – there is sure to be a *new* round of lawsuits looking for more compensation.

More importantly, the insurance industry should be allowed to hold down its costs by maintaining data banks of medical records to identify malingerers and cheaters and double-dippers. Adjusters settling personal injury claims prior to a lawsuit should have

access to the claimant's complete prior medical history. Experience has taught insurance companies that a reliable data bank is quicker and more thorough than asking a claimant to produce *all* of his/her past medical history (particularly when a claimant improperly wants newly compensated for an old injury).

So long as medical records that are held by the insurance industry are not being abused, the industry should be able to honestly and thoroughly judge the value of potential lawsuits with complete information.

2. The plaintiff had no privacy interest in the medical records

There are no statutes, regulations or court decisions creating a confidentiality or privacy interest in a plaintiff's medical records, when those records are lawfully distributed to an adverse party in a personal injury lawsuit. The majority opinion partly relies on the privacy interest created by the federal Health Information and Accountability Act of 1996 (HIPAA) and court cases interpreting this act. However, that privacy interest does not extend to medical records in a personal injury lawsuit. Confidentiality or privacy under HIPAA applies only in the context of medical records maintained by a healthcare provider, not records provided to an opposing party in a lawsuit. HIPAA does not address the confidentiality of medical records that are given lawfully to an adverse party who owes no duty to the plaintiff.

3. Waiver

Even if we presume there is some statutory or regulatory authority creating a right to medical record confidentiality, I believe a plaintiff waives this right by filing a lawsuit in a public forum and delivering the records to opposing parties. Once confidential information is made public, it cannot be hidden or concealed again.

> A waiver at a *former trial* should bar a claim of the privilege at a later trial, for the original disclosure takes away once and for all the confidentiality sought to be protected by the privilege. To enforce it thereafter is to seek to preserve a privacy which exists in legal fiction only.

8 John Henry Wigmore, *Evidence*, § 2389(d)(4) at 860-61 (McNaughton Ed., 1961).

When medical records are lawfully released to other parties, at trial, or made public by the plaintiff, any privilege of confidentially is generally waived. *See, Hageman v. Southwest General Health Center*, 119 Ohio St. 3d 185, 192-93, 893 N.E.2d 153, 159-60 (2008) (O'Donnell, J., dissenting).

4. Imposition of a new duty on defense lawyers and insurance companies.

The majority opinion places a new duty on defense lawyers and insurance companies by requiring them to destroy lawfully-obtained medical records and any summaries of these records. I can find no cases placing a duty upon adverse parties to take care of or destroy an adversaries' medical records. I therefore find it disconcerting that the majority opinion has, essentially, pulled this new duty out of thin air.

5. Conclusion

In conclusion, I am always wary of creating new privileges without a full weighing and balancing of all the public policy impacts of that new privilege. I do not think that the majority opinion has fully weighed the competing public policy choices in this case. Accordingly, I respectfully dissent.