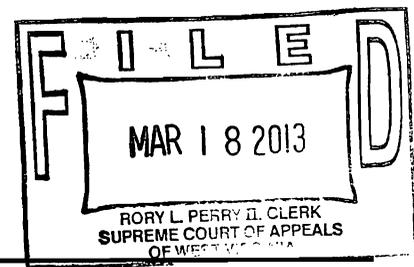


No. 13-0281



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

STATE EX REL. SELECT SPECIALTY HOSPITAL – CHARLESTON, INC., and
SELECT MEDICAL CORPORATION,

Petitioners,

v.

THE HONORABLE JUDGE JAMES C. STUCKY,
Judge of the Circuit Court of Kanawha County,
West Virginia

Respondent.

From the Circuit Court of
Kanawha County, West Virginia
Civil Action No. 10-C-1947

PETITION FOR WRIT OF PROHIBITION

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QUESTION PRESENTED

Whether the Circuit Court of Kanawha County exceeded its legitimate powers in failing to order the bifurcation of the medical negligence and negligent credentialing issues at the trial of the underlying civil action.

INTRODUCTION

Pursuant to Rule 16 of the *West Virginia Revised Rules of Appellate Procedure*, Petitioners ask this Court to issue a *Writ of Prohibition* to vacate an Order by the Honorable James C. Stucky, Judge of the Circuit Court of Kanawha County, because the Circuit Court abused its discretion and erred when it determined that the trial of the underlying civil action, which is presently set to begin on Monday, August 5, 2013, should not be bifurcated on the issues of medical negligence and negligent credentialing.

STATEMENT OF THE CASE

In this case, the plaintiff below, Donald C. Hunley, claims that his wife, Patricia R. Hunley, was negligently treated by Majester Abdul-Jalil, MD (“Dr. Abdul-Jalil”) while a patient at Select Specialty Hospital – Charleston and that she suffered injury and/or death as a result of that alleged negligence. Mr. Hunley further alleges that the hospital was negligent in its credentialing process with regard to granting hospital privileges to Dr. Abdul-Jalil by allegedly failing to properly investigate the doctor’s professional education, training, and prior employment.

This *Petition* concerns an Order of the Circuit Court of Kanawha County, the Honorable James C. Stucky, denying Petitioners *Motion for Summary Judgment or, in the Alternative, Motion to Bifurcate* and *Memorandum of Law in Support of Motion for Summary Judgment or, in the Alternative, Motion to Bifurcate* (hereinafter “*Motion to Bifurcate*”). (See App. 12).

Petitioners filed their *Motion to Bifurcate* on October 29, 2012, arguing that pursuant to Rule 42(c) of the *West Virginia Rules of Civil Procedure*, the trial of the underlying case should be bifurcated as to the issues of medical negligence and negligent credentialing, because the existence of medical negligence is a necessary element of a claim for negligent credentialing. See Davis v. Immediate Med. Services, Inc., 1995 Ohio App. LEXIS 6088 at *19 (Ohio Fifth Appellate District 1995) (holding that a case does “not become ripe as to the issue of negligent credentialing until and if medical negligence [is] found”), rev’d in part on other grounds, 684 N.E.2d 292 (Ohio 1997); (see also App. 1).

Plaintiff below filed his *Response to Select Specialty Hospital – Charleston, Inc.’s and Select Medical Corporation’s Motion to Bifurcate* arguing that the evidence presented in both the medical negligence and negligent credentialing portions of the trial would be duplicative and not promote judicial economy, thus, according to the Plaintiff below, Petitioners’ *Motion to Bifurcate* should have been denied. (See App. 46).

On January 30, 2013, the parties appeared before the Circuit Court for a hearing on Petitioners’ *Motion to Bifurcate*. At that time, the Circuit Court heard oral argument regarding Petitioners’ *Motion to Bifurcate*, and by Order dated February 11, 2013, the Circuit Court denied Petitioners’ *Motion to Bifurcate*. (See App. 126). It is from this Order that Petitioners seek the extraordinary relief of a *Writ of Prohibition* in light of the fact that the Circuit Court of Kanawha County’s February 11, 2013, Order is a clear abuse of its discretion.

SUMMARY OF THE ARGUMENT

The Circuit Court of Kanawha County abused its discretion when it denied Petitioners’ *Motion to Bifurcate*. (See App. 126). Negligent credentialing cases do not become ripe for consideration until there has been an underlying finding of medical negligence. See Davis, 1995

Ohio App. LEXIS 6088 at *19 (holding that the case “did not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of” the defendant physician). Furthermore, “bifurcation of a negligent-credentialing claim and the underlying medical-malpractice claim avoids the problems of jury confusion or prejudice that may result from admitting evidence of prior acts of malpractice in a combined trial on both claims.” Schelling v. Humphrey, 916 N.E.2d 1029, 1036 (Ohio 2009). Moreover, the clear weight of authority balances in favor of bifurcation in negligent credentialing cases, because to allow all of the medical negligence and negligent credentialing evidence to come into evidence together would create undue prejudice against Petitioners. See id. (“Evidence of prior acts of malpractice by the doctor may be relevant to a negligent-credentialing claim...but presents the risk of unfair prejudice in determining whether the doctor committed malpractice.”); Neeble v. Sepulveda, 1998 Tex. App. LEXIS 4970 at *17 (Tex. Ct. App. 1998) (“Because trying both claims simultaneously would have unduly prejudiced [the defendant physician], we hold that the trial court did not abuse its discretion in ordering a separate trial and ordering [plaintiff] not to advise the jury of the claims against [the hospital] and of previous medical malpractice lawsuits against [the defendant physician].”).

In the instant case, Plaintiff below pled his case as a medical negligence/negligent credentialing case.¹ (See App. 1). At trial, it is his intent to simultaneously present evidence of medical negligence and negligent credentialing, and the Circuit Court has ruled that it will allow Plaintiff below to do so. (See App. 46; App. 126). In support of his negligent credentialing case,

¹ The instant case was filed simultaneously with a recently settled case styled Burgess v. Abdul-Jalil, et al., bearing Kanawha County Civil Action No. 10-C-1948. The Burgess case and the case at bar contained identical allegations, and the bulk of the discovery undertaken in the two cases was under the Burgess styling. Thus, the deposition transcripts relied upon in the instant *Petition* and provided to the Court in the Appendix bear the Burgess styling. Also provided to the Court in the Appendix is a portion of Dr. Abdul-Jalil’s deposition that was taken under the Hunley styling in which counsel for Plaintiff indicates that he will not revisit Dr. Abdul-Jalil’s background information, because it had been previously put on the record under the Burgess styling. (See App. 61).

Plaintiff plans to introduce evidence and testimony that Dr. Abdul-Jalil, whose care is at issue in the underlying case failed out of the first medical school he attended (see App. 63-70); completed his residency in the bottom one percentile of his residency class (see App. 71-75); had his privileges involuntarily terminated at one hospital and left another under suspicious circumstances (see App. 6, App. 76-96); and had a history of ADHD in addition to alleging that Petitioners did not properly train their CEO, Frank Weber (“Mr. Weber”), regarding the credentialing of physicians among other facts that will be more fully set forth below (see App. 113-118, App. 120-125). Such evidence would only serve to inflame the passions of the jury against Petitioners and distract the jurors’ attention away from the essential element that before considering whether Dr. Abdul-Jalil was negligently credentialed, Plaintiff below must first prove that medical negligence, in fact, occurred as to the patient in question. Hence, allowing both the medical negligence and negligent credentialing evidence to be presented simultaneously is improper and highly prejudicial to Petitioners, because it merely serves to disparage the character and training of Dr. Abdul-Jalil in an effort to distract the jurors’ attention away from determining whether the predicate issue – medical negligence – actually occurred.

Foreseeing Plaintiff below’s intent to try the medical negligence and negligent credentialing cases simultaneously, Petitioners moved the Circuit Court to bifurcate the trial below on the issues of medical negligence and negligent credentialing in order to preserve the integrity of both claims and to allow for the medical negligence issue to be heard without evidence of Dr. Abdul-Jalil’s prior alleged bad acts, which would inflame the jury and create confusion of the issues while the jury is considering whether medical negligence, in fact, occurred. (See App. 12). As is set forth above, the clear weight of authority predominates in favor of bifurcating a case on the issues of medical negligence and negligent credentialing;

however, the Circuit Court abused its discretion by refusing to grant Petitioners *Motion to Bifurcate* and, thus, set the stage for Petitioner to suffer undue prejudice at trial. See Schelling, 916 N.E.2d at 1036 (“Evidence of prior acts of malpractice by the doctor may be relevant to a negligent-credentialing claim...but presents the risk of unfair prejudice in determining whether the doctor committed malpractice.”); Neeble, 1998 Tex. App. LEXIS 4970 at *17 (“Because trying both claims simultaneously would have unduly prejudiced [the defendant physician], we hold that the trial court did not abuse its discretion in ordering a separate trial and ordering [plaintiff] not to advise the jury of the claims against [the hospital] and of previous medical malpractice lawsuits against [the defendant physician].”); (see also App. 126). It is simply the Petitioners’ position that the question of whether Dr. Abdul-Jalil committed medical malpractice must stand on its own merits, without exposing the jury to the collateral evidence of prior “other acts” that would only become relevant if malpractice is proven and the jury were then permitted to hear evidence relating to negligent credentialing against the hospital defendants. For this reason, it is asserted here that the malpractice and negligent credentialing claims must be decoupled and tried separately via bifurcation.

Therefore, Petitioners have invoked the original jurisdiction of this Court and respectfully request that it exercise its authority and GRANT Petitioners’ *Petition for Writ of Prohibition* and prevent the Circuit Court from enforcing its February 11, 2013, Order.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary under Rule 18(a) of the *West Virginia Revised Rules of Appellate Procedure*. This case is appropriate for a Rule 19 argument as it involves an unsustainable exercise of discretion where the law governing that discretion is settled. The case would also be appropriate for a Rule 20 argument because it involves issues of first impression.

STANDARD OF REVIEW

Issuance of an extraordinary writ is not a matter of right; rather, it is a matter of discretion sparingly exercised. According to the West Virginia Supreme Court of Appeals, “[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.” Syl. Pt. 1, State ex rel. Atkins v. Burnside, 212 W. Va. 74, 569 S.E.2d 150 (2002) (per curiam) (citing Syl. Pt. 1, Crawford v. Taylor, 138 W. Va. 207, 75 S.E.2d 370 (1953)). When determining whether to grant a writ of prohibition where it is claimed that the lower court exceeded its legitimate authority, this Court has stated that it

will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Id. at Syl. Pt. 2 (citing Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996)).

Accordingly, this Court will use prohibition to correct only “substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” Syl. Pt. 1, State ex rel. DeFrances v. Bedell, 191 W. Va. 513, 446 S.E.2d 906 (1994) (quoting

Syl. Pt. 1, Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979)). For the reasons discussed *infra*, a *Writ of Prohibition* is proper in this case to remedy the clear legal error set forth in the Circuit Court of Kanawha County’s February 11, 2013, Order.

ARGUMENT

I. BIFURCATION OF THE MALPRACTICE AND NEGLIGENT CREDENTIALING CLAIMS IS ESSENTIAL IN THE UNDERLYING CASE, BECAUSE PLAINTIFF BELOW INTENDS TO OFFER PRIOR “OTHER ACTS” OF DR. ABDUL-JALIL AGAINST PETITIONERS TO CONFUSE AND DISTRACT THE JURY FROM PROPERLY DETERMINING WHETHER THE PREDICATE ISSUE OF MEDICAL NEGLIGENCE OCCURRED.

Negligent credentialing cases do “not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of” the defendant physician. Davis, 1995 Ohio App. LEXIS 6088 at *19. Furthermore, until there has been a showing that the underlying standard of care was breached by the defendant physician, a hospital cannot be held liable for negligent credentialing. Martinez v. Park, 959 N.E.2d 259, 272 (Ind. Ct. App. 2011). Although this Court has not yet ruled on this issue, a number of other jurisdictions have, and the great weight of authority predominates in favor of bifurcation in negligent credentialing cases. See Burton v. Trover Clinic Found., Inc., 2011 Ky. App. LEXIS 94 at *6 (Ky. Ct. App. 2011) (holding that “[t]he underlying medical malpractice claim must be” proven to maintain a cause of action for negligent credentialing); Martinez, 959 N.E.2d at 272 (holding that if there is no showing that the underlying standard of care was breached by the defendant physician, then a hospital cannot be held liable for negligent credentialing); Schelling, 916 N.E. at 1037 (“bifurcating the determination of whether [the defendant physician] committed medical malpractice and [the plaintiffs’] negligent-credentialing claim against the hospital would appropriately allow the fact-finder to determine whether [the defendant physician] was negligent in his medical treatment of [the plaintiff] *before* the hospital must defend against the rest of the

negligent-credentialing claim”); Stottlemeyer v. Ghramm, 597 S.E.2d 191, 194 (Va. 2004) (holding that the trial court did not abuse its discretion in bifurcating trial, because the court did not need to consider the negligent credentialing claim unless the defendant physician was, in fact, negligent); Hirons v. Scheffey, 76 S.W.3d 486, 489 (Tex. Ct. App. 2002) (“If the physician is not negligent, there is no negligent credentialing claim against the hospital.”); Neeble, 1998 Tex. App. LEXIS 4970 at *17 (“Because trying both claims simultaneously would have unduly prejudiced [the defendant physician], we hold that the trial court did not abuse its discretion in ordering a separate trial and ordering [plaintiff] not to advise the jury of the claims against [the hospital] and of previous medical malpractice lawsuits against [the defendant physician].”); Davis, 1995 Ohio App. LEXIS 6088 at *19 (holding that the case “did not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of” the defendant physician).

Evidence of prior “other acts” concerning the doctor in a negligent credentialing case, such as this, creates significant prejudice that can eclipse the core issue of whether the medical standard of care was violated and resulted in injury to the patient at issue. Typically, in a medical malpractice case, Rule 404(b) and Rule 403 of the *West Virginia Rules of Evidence* will serve as authority for the trial court to exclude evidence of prior “other acts” to prove an “action in conformity therewith.” These “other acts” can include a myriad of prejudicial evidence such as evidence of prior lawsuits against the doctor, failure to pass board certification examinations, felony convictions, substance abuse, licensure suspensions, and other allegations relating to past conduct. See Taylor v. Cabell Huntington Hosp., Inc., 208 W. Va. 128, 135-36, 538 S.E.2d 719, 726-27 (2000) (holding that a nurse’s prior substance abuse problems were not relevant to the issue of whether she committed negligence in the administration of medication).

Bifurcation is essential in the instant case due to Plaintiff below's factual contentions in support of his negligent credentialing case, which the Circuit Court will allow to be presented simultaneously with the medical negligence case. (See App. 126). With regard to medical negligence, Plaintiff below alleges that his decedent was negligently placed into fluid overload by Dr. Abdul-Jalil; that Dr. Abdul-Jalil failed to order appropriate diuretic medications to prevent fluid overload; that Dr. Abdul-Jalil failed to respond to the demands of Petitioners' nursing staff; that Dr. Abdul-Jalil failed to deal with the decedent's alleged deteriorating condition; and that all of these alleged failures led to the decedent's death. (See App. 2-3).

However, with regard to negligent credentialing, which will constitute the bulk of Plaintiff below's case, he alleges that Dr. Abdul-Jalil should never have been granted privileges to practice medicine at Petitioner's facility and was, therefore, negligently credentialed, because he failed out of medical school; completed his residency in the bottom one percentile of his residency class; failed his board examinations three times – two of which were after leaving Petitioner's facility; had his privileges involuntarily terminated at one hospital and left another under suspicious circumstances; had an argument with a physician at another hospital; sued a hospital over his privileges; and had a history of ADHD. (See App. 63-96; App. 97-102; App. 113-118).

Furthermore, Plaintiff below intends to further disparage the character of Dr. Abdul-Jalil, who is no longer a party to this case, by alleging that he assaulted a nurse, who later filed a lawsuit against him; he verbally abused a nurse after the decedent in this case had left Petitioners' facility; he sexually harassed a nurse; and the nurses generally complained that he was harming patients. (See App. 103-112). Additionally, Plaintiff below intends to introduce evidence that Petitioners did not properly train the CEO of Select Specialty Hospital –

Charleston, Inc., Mr. Weber, in the proper method of credentialing physicians. (See App. 120-125).

To allow the negligent credentialing evidence set forth above to come into evidence at the same time as the evidence of medical negligence in this case is clearly an abuse of the Circuit Court's discretion, because it creates substantial danger that all of the evidence of "other acts" on the part of the doctor will create bias and prejudice on the part of the jury against Petitioners and distract their attention from determining whether the predicate issue of medical negligence, in fact, occurred. According to the weight of authority on negligent credentialing, as is set forth above, there can be no finding of negligent credentialing until there has first been a finding of medical negligence. See Martinez, 959 N.E.2d at 272 (holding that if there is no showing that the underlying standard of care was breached by the defendant physician, then a hospital cannot be held liable for negligent credentialing).

Furthermore, if this were simply a medical negligence case, most if not all of the "other acts" evidence set forth above would be excluded from evidence, because it is not relevant to the issue of whether Dr. Abdul-Jalil committed medical negligence against this Plaintiff's decedent and would be unduly prejudicial to Dr. Abdul-Jalil's defense of the medical negligence case. See W. Va. R. Evid. 403; W. Va. R. Evid. 404(b); Taylor, 208 W. Va. at 135-36, 538 S.E.2d at 726-27 (holding that a nurse's prior substance abuse problems were not relevant to the issue of whether she committed negligence in the administration of medication). It is no different in the case below even though the case involves claims for both medical negligence and negligent credentialing, because there must first be an underlying finding of medical negligence before the case can move on to a determination on the negligent credentialing issue, and presentation of the "other acts" evidence would unduly prejudice Petitioners' defense of the predicate issue of

medical negligence. See Davis, 1995 Ohio App. LEXIS 6088 at *19 (holding that the case “did not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of” the defendant physician).

Petitioners are entitled to a fair hearing on whether medical negligence, in fact, occurred before the case moves on to the issue of negligent credentialing, and bifurcation is the mechanism through which this is accomplished, because to proceed in any other fashion would create an environment so highly prejudicial to Petitioners that they would likely not be able to overcome it, which would be uncorrectable on appeal. See Syl. Pt. 2, Atkins, 212 W. Va. 74, 569 S.E.2d 150 (holding that one of the factors to be considered by the Court in determining whether to issue a Writ of Prohibition is “whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal”); Neeble, 1998 Tex. App. LEXIS 4970 at *17 (“Because trying both claims simultaneously would have unduly prejudiced [the defendant physician], we hold that the trial court did not abuse its discretion in ordering a separate trial and ordering [plaintiff] not to advise the jury of the claims against [the hospital] and of previous medical malpractice lawsuits against [the defendant physician].”). Thus, the great weight of authority, on this issue, predominates in favor of bifurcation in negligent credentialing cases. See Burton, 2011 Ky. App. LEXIS 94 at *6 (holding that “[t]he underlying medical malpractice claim must be” proven to maintain a cause of action for negligent credentialing); Martinez, 959 N.E.2d at 272 (holding that if there is no showing that the underlying standard of care was breached by the defendant physician, then a hospital cannot be held liable for negligent credentialing); Schelling, 916 N.E. at 1037 (“bifurcating the determination of whether [the defendant physician] committed medical malpractice and [the plaintiffs’] negligent-credentialing claim against the hospital would appropriately allow the fact-finder to determine whether [the defendant physician] was negligent

in his medical treatment of [the plaintiff] *before* the hospital must defend against the rest of the negligent-credentialing claim”); Stottlemyer, 597 S.E.2d at 194 (holding that the trial court did not abuse its discretion in bifurcating trial, because the court did not need to consider the negligent credentialing claim unless the defendant physician was, in fact, negligent); Hirons, 76 S.W.3d at 489 (“If the physician is not negligent, there is no negligent credentialing claim against the hospital.”); Neeble, 1998 Tex. App. LEXIS 4970 at *17 (“Because trying both claims simultaneously would have unduly prejudiced [the defendant physician], we hold that the trial court did not abuse its discretion in ordering a separate trial and ordering [plaintiff] not to advise the jury of the claims against [the hospital] and of previous medical malpractice lawsuits against [the defendant physician].”); Davis, 1995 Ohio App. LEXIS 6088 at *19 (holding that the case “did not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of” the defendant physician).

Moreover, the Circuit Court more than simply abused its discretion in the case below; rather, it exceeded “its legitimate powers” by ordering that the case below proceed with the evidence of both medical negligence and negligent credentialing being simultaneously presented, thus, creating an environment highly prejudicial to Petitioners, which has compromised their ability to receive a fair trial on the merits of the medical negligence claim despite the clear weight of authority instructing to the contrary. Atkins, 212 W. Va. at 81, 569 S.E.2d at 157 (quoting Syl. Pt. 2, State ex rel. Kees v. Sanders, 192 W. Va. 602, 453 S.E.2d 436 (1994)) (“A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers.”); see also Burton, 2011 Ky. App. LEXIS 94 at *6 (holding that “[t]he underlying medical malpractice claim must be” proven to maintain a cause of action for

negligent credentialing); Martinez, 959 N.E.2d at 272 (holding that if there is no showing that the underlying standard of care was breached by the defendant physician, then a hospital cannot be held liable for negligent credentialing); Schelling, 916 N.E. at 1037 (“bifurcating the determination of whether [the defendant physician] committed medical malpractice and [the plaintiffs’] negligent-credentialing claim against the hospital would appropriately allow the fact-finder to determine whether [the defendant physician] was negligent in his medical treatment of [the plaintiff] *before* the hospital must defend against the rest of the negligent-credentialing claim”); Stottlemyer, 597 S.E.2d at 194 (holding that the trial court did not abuse its discretion in bifurcating trial, because the court did not need to consider the negligent credentialing claim unless the defendant physician was, in fact, negligent); Hiroms, 76 S.W.3d at 489 (“If the physician is not negligent, there is no negligent credentialing claim against the hospital.”); Neeble, 1998 Tex. App. LEXIS 4970 at *17 (“Because trying both claims simultaneously would have unduly prejudiced [the defendant physician], we hold that the trial court did not abuse its discretion in ordering a separate trial and ordering [plaintiff] not to advise the jury of the claims against [the hospital] and of previous medical malpractice lawsuits against [the defendant physician].”); Davis, 1995 Ohio App. LEXIS 6088 at *19 (holding that the case “did not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of” the defendant physician).

Therefore, in order to prevent the Circuit Court from abusing its discretion and creating an atmosphere of undue prejudice against Petitioners during the underlying trial of this case, this Court should issue a *Writ of Prohibition* to preclude the Circuit Court from enforcing its February 11, 2013, Order denying Petitioners’ *Motion to Bifurcate*.

II. BIFURCATION OF THE MALPRACTICE AND NEGLIGENT CREDENTIALING CLAIMS IN THIS CASE WILL ELIMINATE THE DANGER OF UNFAIR PREJUDICE AND JURY CONFUSION AND PROMOTE JUDICIAL ECONOMY.

Pursuant to Rule 42(c) of the *West Virginia Rules of Civil Procedure*, a “court, in furtherance of convenience or to **avoid prejudice**, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim...or of any separate issue.” (emphasis added). The underlying case, for which this *Writ of Prohibition* is being sought, is ripe for bifurcation due to the fact that it is essential to a claim of negligent credentialing that there first be a finding of medical malpractice on the part of the defendant physician, and the Circuit Court’s ruling denying Petitioners *Motion to Bifurcate* was an abuse of discretion that will create undue prejudice against Petitioners during the trial of this civil action. See Davis, 1995 Ohio App. LEXIS 6088 at *19 (holding that the case “did not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of” the defendant physician); see also W. Va. R. Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

As set forth above, a plaintiff bringing a negligent credentialing claim must first prove that there was medical malpractice committed by the defendant physician that caused harm to the plaintiff, and without that showing, a negligent credentialing claim cannot be maintained. See Burton, 2011 Ky. App. LEXIS 94 at *6 (holding that “[t]he underlying medical malpractice claim must be” proven to maintain a cause of action for negligent credentialing); Martinez, 959 N.E.2d at 272 (holding that if there is no showing that the underlying standard of care was breached by the defendant physician, then a hospital cannot be held liable for negligent

credentialing); Hirons, 76 S.W.3d at 489 (“If the physician is not negligent, there is no negligent credentialing claim against the hospital.”); Trichel v. Caire, 427 So.2d 1227, 1233 (La. Ct. App. 1983) (same).

Given the necessary prerequisite of a finding of medical negligence in a negligent credentialing case, it is essential that any claim for negligent credentialing be bifurcated, because trying both cases together would unduly prejudice Petitioners. See Neeble, 1998 Tex. App. LEXIS 4970 at *17 (“Because trying both claims simultaneously would have unduly prejudiced [the defendant physician], we hold that the trial court did not abuse its discretion in ordering a separate trial and ordering [plaintiff] not to advise the jury of the claims against [the hospital] and of previous medical malpractice lawsuits against [the defendant physician].”); see also W. Va. R. Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

Bifurcation of the claims provides the opportunity for the trial court to fairly try the issue of medical malpractice and limit the bias that would result from the jury hearing evidence at that stage, which would only be relevant in supporting the claim of negligent credentialing. If the jury finds that Dr. Abdul-Jalil committed malpractice in his treatment of Mrs. Hunley, and that such malpractice was a cause of injury to her, then evidence of prior acts may well be relevant and admissible in the negligent credentialing phase of the trial. Also, in furtherance of judicial economy, if the jury concludes that no malpractice occurred, the presentation of this evidence in the form of additional fact and expert witnesses is obviated.

The Ohio Supreme Court, in Schelling v. Humphrey, stated that “bifurcation of a

negligent-credentialing claim and the underlying medical-malpractice claim avoids the problems of jury confusion or prejudice that may result from admitting evidence of prior acts of malpractice in a combined trial on both claims. Evidence of prior acts of malpractice by the doctor may be relevant to a negligent-credentialing claim...but presents the risk of unfair prejudice in determining whether the doctor committed malpractice.” 916 N.E.2d at 1036 (internal citations omitted); see also W. Va. R. Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

Therefore, the Schelling Court held that “bifurcating the determination of whether [the defendant physician] committed medical malpractice and [the plaintiffs’] negligent-credentialing claim against the hospital would appropriately allow the fact-finder to determine whether [the defendant physician] was negligent in his medical treatment of [the plaintiff] *before* the hospital must defend against the rest of the negligent-credentialing claim,” and “[o]nly if the [plaintiffs] prevail on the issue of [the defendant physician’s] alleged malpractice should the rest of their negligent-credentialing claim against the hospital proceed.” 916 N.E.2d at 1036; see also W. Va. R. Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”); Stottlemyer, 597 S.E.2d at 194 (holding that the trial court did not abuse its discretion in bifurcating trial, because the court did not need to consider the negligent credentialing claim unless the defendant physician was, in fact, negligent); Neeble, 1998 Tex. App. LEXIS 4970 at *17 (“Because trying both claims simultaneously would have unduly

prejudiced [the defendant physician], we hold that the trial court did not abuse its discretion in ordering a separate trial and ordering [plaintiff] not to advise the jury of the claims against [the hospital] and of previous medical malpractice lawsuits against [the defendant physician].”); Davis, 1995 Ohio App. LEXIS 6088 at *19 (holding that the case “did not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of” the defendant physician).

Here, the Circuit Court denied Petitioners’ *Motion to Bifurcate* despite clear authority indicating that bifurcation is not only proper but is also required in a negligent credentialing case due to the risk of undue prejudice, particularly in light of the factual allegations Plaintiff below will make at trial, which are set forth above. See Davis, 1995 Ohio App. LEXIS 6088 at *19 (holding that the case “did not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of” the defendant physician); see also W. Va. R. Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”); (see also App. 126).

Should this case be tried pursuant to the Circuit Court’s ruling, with evidence of both medical negligence and negligent credentialing coming in at the same time, Petitioners would suffer undue prejudice, because the jury would hear evidence of medical negligence alongside evidence that Dr. Abdul-Jalil failed out of medical school, finished in the bottom one percent of his residency class, and failed his board examinations among other alleged transgressions. (See App. 63-75; App. 97-102). This evidence of alleged prior bad acts would only be relevant to the issue of negligent credentialing and would otherwise not be admissible on the issue of medical

negligence if the case were bifurcated. Thus, allowing both the evidence of medical negligence and negligent credentialing to be presented simultaneously will create undue prejudice against Petitioners and is a clear abuse of the Circuit Court's discretion. See W. Va. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); W. Va. R. Evid 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith."); see also Schelling, 916 N.E.2d at 1036 ("Evidence of prior acts of malpractice by the doctor may be relevant to a negligent-credentialing claim...but presents the risk of unfair prejudice in determining whether the doctor committed malpractice.").

It should be noted that this Court has addressed the issue of bifurcation on several occasions. See Syl. Pt. 11, Roberts v. Consolidation Coal Co., 208 W. Va. 218, 539 S.E.2d 478 (2000) (quoting Syl. Pt. 6, Bennett v. Warner, 179 W. Va. 742, 372 S.E.2d 920 (1988)) ("Parties moving for separate trials of issues pursuant to West Virginia Rule of Civil Procedure 42(c), or the court if acting *sua sponte*, must provide sufficient justification to establish for review that informed discretion could have determined that the bifurcation would promote the recognized goals of judicial economy, convenience of the parties, and the avoidance of prejudice, the overriding concern being the provision of a fair and impartial trial to all litigants."); Syl. Pt. 4, Andrews v. Reynolds Mem. Hosp., 201 W. Va. 624, 499 S.E.2d 846 (1997) (quoting Bennett, 179 W. Va. at Syl. Pt. 6, 372 S.E.2d at Syl. Pt. 6) (same); Syl. Pt. 2, State ex rel. Cavender v. McCarty, 198 W. Va. 226, 479 S.E.2d 887 (1996) (quoting Bennett, 179 W. Va. at Syl. Pt. 6, 372 S.E.2d at Syl. Pt. 6) (same); Bennett, 179 W. Va. at Syl. Pt. 6, 372 S.E.2d at Syl. Pt. 6 (same).

In fact, this Court addressed the issue of bifurcation in the context of medical negligence and negligent hiring/retention cases. See Andrews, 201 W. Va. at 628, 499 S.E.2d at 850. In Andrews, the defendants moved for bifurcation of the medical negligence and negligent hiring/retention cases on the first day of trial, and the trial court denied the defendants motion to bifurcate the case as being untimely. Id. at 628, 850. On appeal, this Court held that “[p]arties moving for separate trials of issues pursuant to West Virginia Rule of Civil Procedure 42(c), or the court if acting *sua sponte*, must provide sufficient justification to establish for review that informed discretion could have determined that the bifurcation would promote the recognized goals of judicial economy, convenience of the parties, and the avoidance of prejudice, the overriding concern being the provision of a fair and impartial trial to all litigants.” Id. at Syl. Pt. 4. Furthermore, this Court found that the defendants had waited until the jury had been selected on the first day of trial, and after the case had been pending for two years, to move the trial court for bifurcation. Id. at 634, 856. Therefore, based upon this reasoning, this Court held that the trial court was correct in its initial decision to deny the defendants’ bifurcation motion. Id. at 635, 857.

Andrews, however, is distinguishable from the instant case, because unlike the defendants in Andrews, Petitioners sought bifurcation well in advance of trial, and Petitioners sought bifurcation, because (1) Plaintiff below could not proceed on his negligent credentialing claim until he proved his underlying medical malpractice claim and (2) to allow both the medical negligence and medical malpractice cases to be tried together would result in confusion of the issues for the jury and unfair prejudice to Petitioners. W. Va. R. Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue

delay, waste of time, or needless presentation of cumulative evidence.”); Burton, 2011 Ky. App. LEXIS 94 at *6 (holding that “[t]he underlying medical malpractice claim must be” proven to maintain a cause of action for negligent credentialing); Schelling, 916 N.E. at 1037 (“bifurcating the determination of whether [the defendant physician] committed medical malpractice and [the plaintiffs’] negligent-credentialing claim against the hospital would appropriately allow the fact-finder to determine whether [the defendant physician] was negligent in his medical treatment of [the plaintiff] *before* the hospital must defend against the rest of the negligent-credentialing claim”); Stottlemyer, 597 S.E.2d at 194 (holding that the trial court did not abuse its discretion in bifurcating trial, because the court did not need to consider the negligent credentialing claim unless the defendant physician was, in fact, negligent); Hirons, 76 S.W.3d at 489 (“If the physician is not negligent, there is no negligent credentialing claim against the hospital.”); Neeble, 1998 Tex. App. LEXIS 4970 at *17 (“Because trying both claims simultaneously would have unduly prejudiced [the defendant physician], we hold that the trial court did not abuse its discretion in ordering a separate trial and ordering [plaintiff] not to advise the jury of the claims against [the hospital] and of previous medical malpractice lawsuits against [the defendant physician].”); Davis, 1995 Ohio App. LEXIS 6088 at *19 (holding that the case “did not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of” the defendant physician); (see also App. 1).

Furthermore, Plaintiff below argues that Petitioners have not set forth how bifurcation would assist with convenience or judicial economy in this case. (See App. 46). However, as is extensively set forth above, the prevailing concern weighing in favor of bifurcation in this case is the ability of Petitioners to obtain a fair trial on the merits of both the medical negligence and negligent credentialing cases, and this Court has stated that “the overriding concern” when

considering bifurcation is “the provision of a fair and impartial trial to all litigants.” Andrews, 201 W. Va. at Syl. Pt. 4, 499 S.E.2d at Syl. Pt. 4. The Circuit Court’s abuse of its discretion in denying Petitioner’s *Motion to Bifurcate* has created an atmosphere of undue prejudice against Petitioners in the underlying trial of this case, which is clearly against the weight of authority in favor of bifurcation and must be corrected by this Court to prevent the Circuit Court from exceeding “its legitimate powers.” Atkins, 212 W. Va. at 81, 569 S.E.2d at 157; see W. Va. R. Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”); Burton, 2011 Ky. App. LEXIS 94 at *6 (holding that “[t]he underlying medical malpractice claim must be” proven to maintain a cause of action for negligent credentialing); Schelling, 916 N.E. at 1037 (“bifurcating the determination of whether [the defendant physician] committed medical malpractice and [the plaintiffs’] negligent-credentialing claim against the hospital would appropriately allow the fact-finder to determine whether [the defendant physician] was negligent in his medical treatment of [the plaintiff] *before* the hospital must defend against the rest of the negligent-credentialing claim”); Stottlemeyer, 597 S.E.2d at 194 (holding that the trial court did not abuse its discretion in bifurcating trial, because the court did not need to consider the negligent credentialing claim unless the defendant physician was, in fact, negligent); Hirons, 76 S.W.3d at 489 (“If the physician is not negligent, there is no negligent credentialing claim against the hospital.”); Neeble, 1998 Tex. App. LEXIS 4970 at *17 (“Because trying both claims simultaneously would have unduly prejudiced [the defendant physician], we hold that the trial court did not abuse its discretion in ordering a separate trial and ordering [plaintiff] not to advise the jury of the claims against [the hospital] and of previous

medical malpractice lawsuits against [the defendant physician].”); Davis, 1995 Ohio App. LEXIS 6088 at *19 (holding that the case “did not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of” the defendant physician); (see also App. 126).

It is clear from the facts set forth above that judicial economy would be served by bifurcating the issues of medical negligence and negligent credentialing in the case below, because it would prevent the presentation of evidence that is arguably relevant to the negligent credentialing claim but irrelevant and unduly prejudicial to Petitioners during Plaintiff below’s presentation of his medical negligence case. Thus, if Petitioners were to prevail on the issue of medical negligence, the case would end, because there must be a finding of medical negligence before the issue of negligent credentialing can be considered, and this would prevent the needless presentation of irrelevant and unduly prejudicial evidence. See W. Va. R. Civ. P. 42(c); Davis, 1995 Ohio App. LEXIS 6088 at *19 (holding that the case “did not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of” the defendant physician).

Moreover, this Court has found bifurcation to be proper when the sole reason for bifurcating the case was to prevent the jury from being unduly influenced by extraneous evidence not relevant to the determination of the predicate issue. See Rohrbaugh v. Wal-Mart Stores, Inc., 212 W. Va. 358, 367-68, 572 S.E.2d 881, 890-91 (2002) (holding that the Circuit Court did not abuse its discretion in bifurcating the case “to prevent the jury from being influenced on the substantive claim by evidence of [the defendant’s] enormous wealth, which data would have been introduced in order to gauge the amount of punitive damages to be awarded”); State ex rel. State Farm Fire & Cas. Co. v. Madden, 192 W. Va. 155, 160, 451 S.E.2d

721, 726 (1994) (holding that “[t]he prejudice inherent in allowing the personal injury claim against [the defendant restaurant] to be tried before the same jury as the additional claims against [the defendant insurance company and the defendant restaurant], is such that the circuit court’s refusal to bifurcate was a clear abuse of discretion”).

In Rohrbaugh, this Court decided an issue directly analogous to the instant case. 212 W. Va. at 367-68, 572 S.E.2d at 890-91. The appellant brought an action against the appellee in the trial court “alleging invasion of privacy, disability discrimination, and workers’ compensation discrimination.” Id. at 360, 883. At trial, the jury rendered a verdict in favor of the appellee on his invasion of privacy claim and further found that appellant was entitled to punitive damages on the invasion of privacy claim even though it did not award compensatory damages. Id. The jury entered a verdict in favor of the appellee on the appellant’s disability discrimination and workers’ compensation discrimination claims. Id. The appellant sought a new trial on damages for his invasion of privacy claim and on both liability and damages for his disability discrimination and workers’ compensation discrimination claims. Id.

One of the appellant’s arguments on appeal was that the Circuit Court erred “by *sua sponte* bifurcating the issue of the amount of punitive damages.” Id. at 367, 890. In the underlying case, “the trial court determined that the jury would first decide liability on the underlying claims, compensatory damages, and whether punitive damages should be awarded. If each of [those] determinations were favorable to [appellant], the same jury would then hear evidence involving the amount of punitive damages to be awarded.” Id. The trial court bifurcated the case “to prevent the jury from being influenced on the substantive claim by evidence of [the appellee’s] enormous wealth, which data would have been introduced in order to gauge the amount of punitive damages to be awarded.” Id. at 368, 891. This Court held “that

the trial court's basis for granting bifurcation was consistent with its discretion under Rule 42(c)," and consequently, this Court found "no abuse of the trial court's discretion" in ordering bifurcation. Id.

The instant case is analogous to Rohrbaugh, because to allow evidence of the "other acts" of Dr. Abdul-Jalil, which are described above, would inflame the passions of the jury against Petitioners in the same way that allowing the jury to hear evidence of appellee's "enormous wealth," in Rohrbaugh, would potentially cause the jury to be biased against the appellee. Id. As indicated by this Court in Rohrbaugh, bifurcation will cure this unduly prejudicial environment and allow Petitioners to receive a fair trial on the merits of the underlying medical negligence claim prior to, and as a necessary prerequisite of, hearing the negligent credentialing claim. Id.; see also Burton, 2011 Ky. App. LEXIS 94 at *6 (holding that "[t]he underlying medical malpractice claim must be" proven to maintain a cause of action for negligent credentialing); Schelling, 916 N.E. at 1037 ("bifurcating the determination of whether [the defendant physician] committed medical malpractice and [the plaintiffs'] negligent-credentialing claim against the hospital would appropriately allow the fact-finder to determine whether [the defendant physician] was negligent in his medical treatment of [the plaintiff] *before* the hospital must defend against the rest of the negligent-credentialing claim"); Stottlemyer, 597 S.E.2d at 194 (holding that the trial court did not abuse its discretion in bifurcating trial, because the court did not need to consider the negligent credentialing claim unless the defendant physician was, in fact, negligent); Hiroms, 76 S.W.3d at 489 ("If the physician is not negligent, there is no negligent credentialing claim against the hospital."); Neeble, 1998 Tex. App. LEXIS 4970 at *17 ("Because trying both claims simultaneously would have unduly prejudiced [the defendant physician], we hold that the trial court did not abuse its discretion in ordering a separate trial and

ordering [plaintiff] not to advise the jury of the claims against [the hospital] and of previous medical malpractice lawsuits against [the defendant physician].”); Davis, 1995 Ohio App. LEXIS 6088 at *19 (holding that the case “did not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of” the defendant physician).

Therefore, in order to prevent the Circuit Court from abusing its discretion and creating an atmosphere of undue prejudice against Petitioners during the underlying trial of this case, this Court should issue a *Writ of Prohibition* to preclude the Circuit Court from enforcing its February 11, 2013, Order denying Petitioners’ *Motion to Bifurcate*.

CONCLUSION

Pursuant to Rule 42(c) of the *West Virginia Rules of Civil Procedure*, a “court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim...or of any separate issue.” (emphasis added). Bifurcation is especially warranted in negligent credentialing cases, because before a negligent credentialing case is ripe for consideration, there must be a finding of medical negligence. See Davis, 1995 Ohio App. LEXIS 6088 at *19 (holding that the case “did not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of” the defendant physician). Furthermore, “bifurcation of a negligent-credentialing claim and the underlying medical-malpractice claim avoids the problems of jury confusion or prejudice that may result from admitting evidence of prior acts of malpractice in a combined trial on both claims. Evidence of prior acts of malpractice by the doctor may be relevant to a negligent-credentialing claim...but presents the risk of unfair prejudice in determining whether the doctor committed malpractice.” Schelling, 916 N.E.2d at 1036.

Although this Court has stated that a Circuit Court’s decision “is binding ‘in the absence

of a clear showing of abuse of such discretion and in the absence of a clear showing of prejudice to any one or more of the parties,” it has been demonstrated above that the Circuit Court clearly abused its discretion in denying Petitioners’ *Motion to Bifurcate* and, thus, created an environment in which the jury’s passions could be inflamed against Petitioners and rendering their ability to receive a fair trial on the merits of both the medical negligence and negligent credentialing cases nonexistent, thus, meeting and exceeding this standard. Madden, 192 W. Va. at 160, 451 S.E.2d at 726 (quoting Holland v. Joyce, 155 W. Va. 535, 185 S.E.2d 505 (1971)). Therefore, to preserve a fair trial on the merits of both the medical negligence and negligent credentialing causes of action in the underlying case, this Court should undue the clear abuse of discretion committed by the Circuit Court in denying Petitioners’ *Motion to Bifurcate* and grant Petitioners’ *Petition for Writ of Prohibition*.

WHEREFORE, for the reasons herein set forth, the Petitioners, Select Specialty Hospital – Charleston, Inc., and Select Medical Corporation, respectfully request that this Court issue a RULE TO SHOW CAUSE pursuant to Rule 16(j) of the *West Virginia Revised Rules of Appellate Procedure*; GRANT their *Petition for Writ of Prohibition*; enter an ORDER prohibiting the Circuit Court of Kanawha County from enforcing its February 11, 2013, Order; and for such other and further relief as this Court may deem just and proper.

Respectfully Submitted,

**SELECT SPECIALTY HOSPITAL –
CHARLESTON, INC., AND SELECT
MEDICAL CORPORATION,**

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE EX REL. SELECT SPECIALTY HOSPITAL –
CHARLESTON, INC., and SELECT MEDICAL
CORPORATION,

Petitioners,

v.

Appeal No.: _____

THE HONORABLE JUDGE JAMES C. STUCKY,
Judge of the Circuit Court of Kanawha County,
West Virginia

Respondent.

CERTIFICATE OF SERVICE

I, Edward C. Martin, counsel for Petitioners, do hereby certify that **PETITIONERS’
PETITION FOR WRIT OF PROHIBITION** was served on the 18th day of March, 2013, via
hand delivery to the following counsel of record:

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Judge of the Circuit Court of Kanawha County,
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Respondent.

VERIFICATION

STATE OF WEST VIRGINIA.

COUNTY OF KANAWHA, to wit:

The undersigned, after being first duly sworn, states that the information contained in the foregoing Petition for Writ of Prohibition is true, except insofar as it is stated to be based upon information and belief. To the extent that any information is based upon information provided to me or on my behalf, it is believed to be true.



Edward C. Martin, Esq.

Taken, subscribed, and sworn to before the undersigned authority, this 13th day of March, 2013.

My commission expires: September 26, 2013

Cindy L. Melton
Notary Public

