

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 15-0558

STATE OF WEST VIRGINIA EX REL.
WHEELING HOSPITAL, INC.,

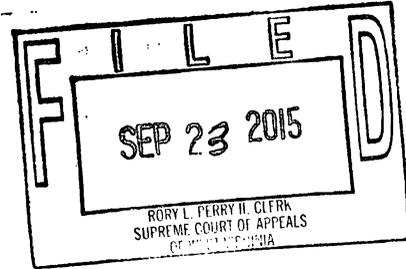
Petitioner,

CIRCUIT COURT OF OHIO COUNTY,
VIRGINIA
(Civil Action No. 13-C-338)

v.

THE HONORABLE RONALD E. WILSON,
Judge of the Circuit Court of Ohio County,
and STEPHANIE MILLS,

Respondents.



RESPONSE TO INTERVENOR-RESPONDENTS DAVID GHAPHERY, M.D.'S AND A.D.
GHAPHERY PROFESSIONAL ASSOCIATION'S RESPONSE IN SUPPORT OF PETITION
FOR WRIT OF PROHIBITION

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QUESTION PRESENTED

Whether Judge Wilson, acted without jurisdiction, exceeded his legitimate powers or clearly erred, as a matter of law, when he found, after *in camera* review, that certain original source documents in Petitioner-Defendant Wheeling Hospital, Inc.'s possession were not protected from discovery by the West Virginia "Peer Review" statute, W. Va. Code § 30-3C-3?

STATEMENT OF THE CASE

As previously set forth in Respondent-Plaintiff Stephanie Mills' Response to Wheeling Hospital's Petition for Writ of Prohibition,¹ this is a medical malpractice, informed consent, and negligent credentialing, retention and supervision case against the Petitioner-Defendant Wheeling Hospital, Inc. [hereinafter "Wheeling Hospital"], David Ghaphery, M.D., and A.D. Ghaphery Professional Association [hereinafter, collectively, "Dr. Ghaphery"]. See Petitioner's Appendix 009-020. In 2011, Stephanie Mills [hereinafter "Ms. Mills"], consulted with Dr. Ghaphery for treatment of a condition known as Graves Disease. Dr. Ghaphery recommended the surgical removal of Ms. Mills' thyroid gland. However, Dr. Ghaphery failed to inform Ms. Mills of the risks of his improperly performing the surgery, including, among other things, vocal cord paralysis together with breathing and swallowing difficulties associated with vocal cord paralysis. On October 13, 2011, Dr. Ghaphery performed a thyroidectomy on Ms. Mills at Wheeling Hospital without obtaining Ms. Mills' informed consent. Following the surgery, Ms. Mills was unable to speak and began to experience throat pain. Ms. Mills consulted with a

¹ Although his interests are aligned with Wheeling Hospital's interests regarding the issues raised in Wheeling Hospital's Petition for Writ of Prohibition, as the information ordered to be produced relates to Dr. Ghaphery's professional competency, Dr. Ghaphery did not join Wheeling Hospital's Petition for Writ of Prohibition when it was filed. Instead, he waited until after briefing closed under this Court's Scheduling Order, a Rule to Show Cause was issued and Oral Argument was scheduled to move to intervene and file a brief in support of Wheeling Hospital's position. To the extent applicable, and to avoid unnecessary repetition of factual statements and legal argument, Ms. Mills incorporates by reference her prior Response to Writ of Prohibition and only addresses matters raised in her prior filing to the extent required to adequately respond to Dr. Ghaphery's untimely brief.

specialist, who advised her that the nerves associated with the vocal cords were severed as a result of Dr. Ghaphery's surgical procedure.

In late 2013 and early 2014, Ms. Mills sought written discovery from Wheeling Hospital as to her negligent credentialing, retention and supervision claim. After reviewing Wheeling Hospital's discovery responses, which included numerous objections and/or promises of forthcoming information that remained outstanding several months later, an attempt was made to resolve any discovery issues in good faith. This attempt was of no avail. Wheeling Hospital simply ignored Ms. Mills' request. On or about June 2, 2014, after failing to receive a response from Wheeling Hospital, Ms. Mills filed a Motion to Compel additional or more detailed responses to various interrogatories, requests for admission, and requests for production of documents. *See* Petitioner's Appendix 81-97. In other words, Ms. Mills had to file a motion just to get a privilege log. Upon consideration of Ms. Mills' Motion to Compel, the Circuit Court of Ohio County, West Virginia ordered Wheeling Hospital to, *inter alia*, produce a privilege log for each interrogatory and request for production it asserted was protected by the "peer review" privilege. *See* Petitioner's Appendix 112-19.

On or about August 29, 2014, Wheeling Hospital provided the Circuit Court of Ohio County and Ms. Mills' counsel with a privilege log. *See* Petitioner's Appendix 120-85. In response, on or about October 3, 2014, Ms. Mills, by counsel, sent correspondence to the Circuit Court of Ohio County and Wheeling Hospital detailing the documents that remained in dispute. *See* Petitioner's Appendix 187-91. Thereafter, Wheeling Hospital agreed to produce certain of the documents identified by Ms. Mills' counsel as in dispute. *See* Petitioner's Appendix 192-95. Approximately three hundred fifty (350) documents remained outstanding. *See id.* Judge Wilson required that the three hundred fifty (350) documents which remained in dispute be provided to

the Circuit Court for inspection. *See* Petitioner's Appendix 196. In addition, he allowed Wheeling Hospital to submit additional argument on any or all of the documents provided. *See id.*

On or about November 26, 2014, Wheeling Hospital filed its Supplemental Response in Opposition to Plaintiff's Motion to Compel Regarding Remaining Documents in Dispute. *See* Petitioner's Appendix 197-215. Wheeling Hospital argued that the three hundred fifty (350) documents which remained in dispute were protected from disclosure by the West Virginia "Peer Review" statute and/or the HIPAA Privacy Rule and/or by West Virginia's discovery rules regarding relevancy. Judge Wilson permitted Ms. Mills to respond to Wheeling Hospital's supplemental briefing. *See* Petitioner's Appendix 196. On or about December 30, 2014, Ms. Mills filed her Reply in Support of Motion to Compel Discovery Responses from Defendant Wheeling Hospital, Inc. *See* Petitioner's Appendix 216-90. Ms. Mills argued that Wheeling Hospital had not met its burden of establishing that the documents which remained in dispute were protected from disclosure. *See id.*

After considering the parties' briefs and *after conducting an in camera inspection of all of the documents* remaining in dispute, Judge Wilson issued an order requiring Wheeling Hospital to disclose most of the disputed documents, but not all of them. *See* Petitioner's Appendix 001-008. Judge Wilson's Order was entered on or about February 27, 2015. *See id.* Wheeling Hospital did not comply with Judge Wilson's Order, but instead waited nearly four months to file a Petition for Writ of Prohibition. Wheeling Hospital's Petition for Writ of Prohibition was filed on or about June 10, 2015. Dr. Ghaphery, whose interests regarding disclosure of information relating to his professional history, including information relating to the care and treatment of Dr. Ghaphery's other patients and/or other medical procedures performed by Dr. Ghaphery, are

aligned with Wheeling Hospital's interests in attempting to prevent disclosure of such information, did not join in Wheeling Hospital's Petition for Writ of Prohibition. However, Wheeling Hospital did serve him with the Petition for Writ of Prohibition. In accordance with this Court's Scheduling Order, Ms. Mills filed her response to Wheeling Hospital's Petition on or about July 8, 2015.

Dr. Ghaphery did not file any form of responsive pleading on July 8, 2015. Instead, he waited until September 9, 2015, three (3) weeks after this Court issued its Rule to Show Cause and four (4) days after this case was noticed for oral argument, to take any action. On September 9, 2015, Dr. Ghaphery filed with this Court his Motion to Intervene and a Response in Support of Wheeling Hospital's Petition for Writ of Prohibition. Dr. Ghaphery's Motion to Intervene was granted on September 10, 2015, well before the ten (10) day time period set forth in Rule 32 of the Rules of Appellate Procedure had expired and Ms. Mills had an opportunity to oppose the motion.² In anticipation of the October 7, 2015 oral argument before this Court, Ms. Mills now submits her Response to Dr. Ghaphery's Response in Support of Wheeling Hospital's Petition for Writ of Prohibition.

SUMMARY OF THE ARGUMENT

Judge Wilson did not act without jurisdiction, exceed his legitimate powers or clearly err, as a matter of law, when he found, after *in camera* review, that certain "original source" documents in Wheeling Hospital's possession were not protected from discovery by the West Virginia "Peer Review" statute. The documents at issue are not "records of a review organization," but are, rather, documents gathered in the ordinary course of business and later used by a review organization, among other hospital departments. As such, they should not be afforded the protection of the "Peer Review" statute.

² Ms. Mills received a copy of this Court's Order granting Dr. Ghaphery's motion on or about October 16, 2015.

In making his determination, Judge Wilson correctly interpreted and applied the “Peer Review” statute to the documents at issue. First, Judge Wilson correctly found that the documents are not “records of a review organization” within the meaning of the statute. Dr. Ghaphery misconstrues Judge Wilson’s Order and argues that the Circuit Court of Ohio County inappropriately limited application of the “peer review” privilege to only documents created “solely for” Wheeling Hospital’s credentialing committee. However, as this Court’s precedent makes clear, documents “created solely for consideration by a hospital credentialing committee” in determining whether to issue or renew staff privileges or credentials will be afforded the protection of the “peer review” privilege in a negligent credentialing case. Syl. pt. 8 *State ex rel. Charles Town General Hospital v. Sanders*, 210 W. Va. 118, 556 S.E.2d 85 (2001). Thus, Judge Wilson did not err in considering whether the documents at issue were created “solely for” the Hospital’s credentialing committee. However, it was not his only consideration. He also considered whether the documents at issue were “otherwise available from original sources.”

The language of West Virginia’s “Peer Review” statute grants a privilege to all records and proceedings of a review organization as long as that information is not “otherwise available from original sources.” As Ms. Mills demonstrated, and Judge Wilson correctly determined, the documents at issue appear to be documents gathered by Wheeling Hospital in the ordinary course of business and later used by a review organization. Thus, they are not “records of a review organization,” but are, rather, “otherwise available from original sources.” Dr. Ghaphery argues that these documents are not “otherwise available from original sources” because they were generated *within* Wheeling Hospital. Dr. Ghaphery’s argument attempts to expand the statutory definition of a “review organization” to include the Hospital itself. However, Dr. Ghaphery’s arguments are not supported by the “Peer Review” statute itself nor relevant case law.

Finally, in further support of Judge Wilson's Order, it should be reiterated that Wheeling Hospital has failed to meet its burden of proving that the "peer review" privilege applies to the documents ordered to be produced. Three (3) months ago, in *State ex rel. HCR ManorCare, LLC v. Stucky*, -- W.Va. --, -- S.E.2d --, 2015 W.L. 3649772 (June 9, 2015), this Court made clear that more than mere assertions of peer review privilege are required and that the party asserting the privilege has the burden of proving the documents requested meet all requirements of the "Peer Review" statute. Wheeling Hospital failed to make any evidentiary showing whatsoever regarding the nature or use of the documents at issue. It relied completely on its lawyers' assertions in the briefing, without any evidentiary support. By contrast, Ms. Mills specifically submitted sworn testimony establishing that the documents were used outside the peer review process and outside the credentialing process, to establish their discoverability.

For these reasons, Judge Wilson did not act without jurisdiction, exceed his legitimate powers or clearly err, as a matter of law, in finding that certain documents in Wheeling Hospital's possession were not protected from discovery by the West Virginia "Peer Review" statute. Accordingly, a Writ of Prohibition should not be issued.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the Court's Rule to Show Cause, this matter is scheduled for oral argument on or about October 7, 2015.

ARGUMENT

To the extent applicable and to avoid unnecessary repetition, Ms. Mills incorporates by reference the arguments previously set forth in her Response to Wheeling Hospital's Petition for Writ of Prohibition.³ Accordingly, the arguments submitted herein are in direct response to Dr. Ghaphery's Response in Support of Wheeling Hospital's Petition for Writ of Prohibition. Under established West Virginia law, a Writ of Prohibition will "only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977); syl. pt. 1, *State ex rel. York v. West Virginia Real Estate Appraiser Licensing and Certification Board*, -- W.Va. --, 760 S.E.2d 856 (2014). In order to find that the Circuit Court of Ohio County exceeded its legitimate powers, this Court must find "that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate." Syl. pt. 2, *Woodall v. Laurtia*, 156 W.Va. 707, 195 S.E.2d 717 (1973); syl. pt. 3, *SER York*.

In syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), this Court explained the exacting standards which must be met for issuance of a Writ of Prohibition:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court 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

³ See, footnote 1, *supra*.

be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *SER Hoover*, 199 W.Va. 12, 483 S.E.2d 12. The instant Petition for Writ of Prohibition should be rejected because these exacting standards have not been met by either Wheeling Hospital or Dr. Ghaphery.

I. The Circuit Court of Ohio County did not err, as a matter of law, in its interpretation and application of the West Virginia “Peer Review” statute.

In his Memorandum Order directing Wheeling Hospital to produce most, but not all, of the documents at issue, Judge Wilson explained:

The nucleus of the court’s decision to permit the disclosure of many of the[] documents [at issue] was an acceptance of the plaintiff’s legal argument that the documents now ordered to be disclosed were not created solely for Wheeling Hospitals crediting [sic] committee but are otherwise available from original sources extraneous to that committee and these documents contain information that the hospital gathers in the ordinary course of its business, or pursuant to regulations, that the crediting [sic] committee then uses in its work. The peer review statute does make the specific point that the information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action merely because they were presented during proceedings of such organization. The court accepts as correct the plaintiff’s argument that “the language of the statute grants a privilege to the proceedings and records of a review organization, but only if that information is not “otherwise available from original sources.” *State ex rel. Shroades v. Henry*, 180 W. Va. 723, 728, 420 S.E.2d 264, 269 (1992).

Petitioner’s Appendix 003-004. Dr. Ghaphery argues that Judge Wilson erred, as a matter of law, in his interpretation and application of the West Virginia “Peer Review” statute. Dr. Ghaphery contends that Judge Wilson erroneously limited application of the “peer review” privilege to “only documents created ‘solely for’ Wheeling Hospital’s credentialing committee.” *See* Response in Support 7-12. In addition, since the documents at issue were generated within Wheeling Hospital, they cannot be considered “original sources” under West Virginia’s “Peer Review” statute. *See id.* 12-13. Dr. Ghaphery’s arguments are contrary to this Court’s recent

decision in *ManorCare*, a case that Dr. Ghaphery does not acknowledge.

In *ManorCare*, this Court recently addressed the discovery of documents that a health care provider claims are protected from disclosure by the Health Care Peer Review Protection Act, W. Va. Code § 30-3C-1, *et seq.* (2004), the “Peer Review” statute at issue herein. *ManorCare*, -- W.Va. --, -- S.E.2d --, 2015 W.L. 3649772 (June 9, 2015). In *ManorCare*, the defendant nursing home, *ManorCare*, challenged a circuit court’s order directing that it disclose certain nurse consultant reports known as Center Visit Summaries, arguing the materials were protected from disclosure by the statutory peer review privilege found in the Health Care Peer Review and Protection Act. *ManorCare*, 2015 W.L. 3649772, *2. The Center Visit Summaries at issue were prepared by visiting nurse consultants for use in ManorCare’s Quality Assurance and Performance Evaluation Program. *Id.* at *3. According to ManorCare, the Center Visit Summaries at issue were only given to individuals permitted to be a part of the quality assurance, or peer review, committee and, therefore, were protected from disclosure by the statutory peer review privilege. *Id.* at *4. The circuit court found that the Center Visit Summaries were conducted by nurses who were not a part of any quality assurance committee and were also given to supervisors who were not a part of any quality assurance committee. *Id.* Finding the Center Visit Summaries to be documents sought from non-review organization or “original source,” the circuit court ordered production. *Id.* Under the facts presented to it in *ManorCare*, this Court declined to extensively address whether the documents at issue were “original source” documents, noting that the evidence presented was “less than certain” that the Center Visit Summaries were generated “exclusively for peer review purposes.” *Id.* at 9.

Just as the nursing home in *ManorCare* could not demonstrate that the Center Visit Summaries at issue were created solely for use by the peer review organization and were not

“original source” documents, neither Wheeling Hospital nor Dr. Ghaphery can meet their burden of providing that information relating to the care and treatment of Dr. Ghaphery’s other patients and/or other medical procedures performed by Dr. Ghaphery created and/or utilized by departments or committees independent of Wheeling Hospital’s credentialing committee are protected from discovery by the “Peer Review” statute. *See, State ex. rel. Charles Town General Hospital v. Sanders*, 210 W. Va. 118, 556 S.E.2d 85 (W. Va. 2001); syl. pt. 3, *State ex rel. Shroades v. Henry*, 180 W. Va. 723, 420 S.E.2d 264 (1992); *Lee Medical Inc. v. Beecher*, 312 S.W.3d 515, 536 (Tenn. 2010); *Pastore v. Samsone, M.D.*, 900 A.2d 1067 (R.I. 2006); *Large v. Heartland-Lansing*, 995 N.E.2d 873 (Ohio Ct. App. 2013).

a. The Circuit Court of Ohio County correctly determined that the remaining documents at issue are not “records of a review organization.”

In support of Wheeling Hospital’s Petition for Writ of Prohibition, Dr. Ghaphery argues that Judge Wilson erred, as a matter of law, in finding that the peer review privilege extends only to records generated “solely for” a hospital’s credentialing committee: “The trial court’s acceptance of [Ms. Mills’] argument that only documents created ‘solely for’ Wheeling Hospital’s credentialing committee merit the protection of [the “Peer Review” statute] ignores the clear language and intent of the law.” Response in Support 7. Dr. Ghaphery further argues that, by its ruling, “the trial court mistakenly accepted [Ms. Mills’] implied argument that a hospital’s ‘peer review’ of its physicians only occurs during the credentialing and re-credentialing process.” *Id.*

Ms. Mills has never disputed, explicitly or implicitly, that Wheeling Hospital’s credentialing committee is but one example of a “review organization,” as defined by W. Va. Code § 30-3C-1, engaged in “peer review.” Rather, Ms. Mills argues that, because the remaining documents at issue do not appear to be “records of a review organization,” but are instead

documents gathered in the ordinary course of business and *later used by a review organization*, among other hospital departments, they are not protected by the peer review privilege.

The West Virginia “Peer Review” statute states, in pertinent part, that:

[t]he proceedings and records of a review organization shall be confidential and privileged and shall not be subject to subpoena or discovery proceedings . . . : Provided, That information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action merely because they were presented during proceedings of such organization[.]

W. Va. Code § 30-3C-3 (1980).

As this Court made clear in syllabus point 3 of *SER Shroadess*, “[t]he language of the statute grants a privilege to all records and proceedings of review organization, but no privilege attaches to information, documents, or records considered by a review organization if the material is ‘otherwise available from original sources.’” *SER Shroadess*, 180 W.Va. at 724, 420 S.E.2d at 265. Stated differently, material that originates in the review organization is privileged, even if later held by a non-review organization, but material that does not originate in the organization *does not become privileged after presentation to the review organization*. *Id* at 728, 420 S.E.2d at 269 (emphasis added). Thus, the origin of the document determines whether or not it is privileged, not its content or later use.⁴ *See id.*

In *SER Charles Town General Hospital*, this Court considered whether hospital records concerning the credentialing and/or re-credentialing of a staff physician were privileged under the “Peer Review” statute. Therein, this Court stated, “To the extent that the contested documents are available from original sources extraneous to the medical credentialing process,

⁴ Dr. Ghaphery states that, for purposes of determining the applicability of the “peer review” privilege, “[t]he only consideration is not ‘for whom’ the documents were generated but ‘why?’” *See* Response in Support 11-12 (“If the documents were generated by Wheeling Hospital for the purpose of ‘evaluating and improving the quality of health care rendered’ by Dr. Ghaphery or other physicians . . . then the privilege applies regardless whether or not they were for the sole use of the credentialing committee.). However, Dr. Ghaphery makes no attempt to support his statement—which directly contravenes this Court’s prior precedent—with *any* authority. *See id.*

they are not privileged and are subject to discovery.” *SER Charles Town General Hospital*, 210 W.Va. at 121, 556 S.E.2d at 88. Documents that were generated “as part and parcel” of the credentialing process, such as a physician’s application for staff privileges, were found by this Court to be privileged, but only because those documents were “created *solely* for consideration by a hospital credentialing committee.” *Id.* at 127, 556 S.E.2d at 94 (emphasis added).

This Court’s decisions in *SER Shroades* and *SER Charles Town General Hospital* are consistent with decisions in other jurisdictions addressing these issues under that jurisdictions respective “peer review” statute. For example, in *Lee Medical Inc. v. Beecher*, 312 S.W.3d 515 (Tenn. 2010), the Tennessee Supreme Court found that before information maintained by a hospital committee or organization becomes subject to privilege under Tennessee’s “peer review” statute, the committee where the information is generated must be performing a peer review function, *i.e.* “conducting a proceeding involving a physician’s professional conduct, competence, or ability to practice medicine.” *Lee Medical*, 312 S.W.3d at 536. The statutory “peer review” privilege “does not apply to records in the custody of original sources who did not prepare the record for use by a peer review committee in a peer review proceeding.” *Id.* Similarly, in *Large v. Heartland-Lansing*, 995 N.E.2d 873 (Ohio Ct. App. 2013), the Ohio Court of Appeals for the Seventh District explained:

The records and proceedings of the peer review committee are not coextensive with all of the records of the facility in which the committee operates. The fact that copies of certain material may have been provided to a committee does not extend the protection afforded committee proceedings, and committee generated records, to material generated outside of the committee. . . . we conclude that documents sought from a health care entity are peer review records if the health care entity proves that those documents were created by and/or exclusively for a peer review committee. If a health care entity itself is the original source, it cannot shield documents from disclosure just by circulating them during peer review proceedings.

Where “information, documents, or records” are otherwise available from original

sources, which may include the records of the facility itself, they are not to be construed as being unavailable for discovery or for use in any civil action merely because they were produced or presented during proceedings of a peer review committee.

Large, 995 N.E.2d at 883-84 (internal quotations and citations omitted).

Extremely relevant to the issue currently before this Court is the Rhode Island Supreme Court's decision in *Pastore v. Samsone, M.D.*, 900 A.2d 1067, 1082-83 (R.I. 2006), wherein the Rhode Island Supreme Court held that a patient asserting a negligent credentialing type claim is entitled to discovery of patient complaints, even when those complaints lead to peer review proceedings. In so finding, the Rhode Island Court recognized information generated relative to another hospital committee proceeding does not become protected by the peer review privilege when later submitted to the credentialing committee for consideration in determining whether credentials should be maintained or restricted. *Pastore*, 900 A.2d at 1079-1080. Just as in *Pastore*, information generated by a Wheeling Hospital department or committee relating to Dr. Ghaphery's performance does not become protected from discovery by the "Peer Review" statute simply because it was submitted to the credentialing committee. When determining whether a document is an "original source" document in a negligent credentialing case, the relevant inquiry is whether the document was generated within the credentialing committee. If it was not, it is discoverable as an "original source" document, even if that "original source" is another committee or department of the defendant hospital. See, *ManorCare, Lee Medical*, 312 S.W.3d at 536; *Large*, 995 N.E.2d at 883-84; *Pastore*, 900 A.2d at 1079-1080.

In summary, this Court's precedent holds that documents that are available from original sources extraneous to a review organization are not protected by the peer review privilege. Syl. pt. 3, *SER Shroades*, 180 W. Va. at 723, 724, 420 S.E.2d at 265. However, "to the extent that applications for admission to a hospital's staff are created solely for use by the hospital's

credentialing committee in determining whether to issue or renew staff privileges or credentials, such applications enjoy the peer review privilege.” *SER Charles Town General Hospital*, 210 W. Va. at 128, 556 S.E.2d at 95. As Ms. Mills demonstrated, and Judge Wilson correctly determined, the remaining documents at issue were not created “solely” for Wheeling Hospital’s credentialing committee and are “otherwise available from original sources.” Wheeling Hospital maintains and records such documents in the ordinary course of business for use outside the credentialing process and for use in other hospital departments and endeavors. *See* Petitioner’s Appendix 260-81. Accordingly, the remaining documents at issue are not protected from disclosure by the “peer review” privilege.

b. The Circuit Court of Ohio County correctly determined that the remaining documents at issue are “otherwise available from original sources.”

In addition to the above argument, Dr. Ghaphery contends that Judge Wilson erred, as a matter of law, in finding that the remaining documents at issue are “otherwise available from original sources.” Response in Support 12-13. Dr. Ghaphery argues that “[t]he clear intent of the ‘original source’ exception . . . is to prevent health care providers, such as Wheeling Hospital, from asserting, as privileged, documents gathered from third-parties or sources outside the hospital.”⁵ *See id.* 12. Thus, “[i]f the plaintiff or the public-at-large can gain access to the disputed records from such ‘outside sources’ then the mere fact that the records were gathered by a ‘review committee’ will not shield them from discovery.” *See id.* 12-13. This Court, however, has never adopted such an interpretation of “original source” and Dr. Ghaphery’s argument is directly contradicted by *ManorCare*, *Lee Medical*, *Pastore* and *Large*.⁶

The documents at issue in the instant litigation were identified by committee. However,

⁵ Again, Dr. Ghaphery and A.D. Ghaphery Professional Association make no attempt to support their argument with any authority.

⁶ It should be noted that the term “original source” is not defined by the “Peer Review” statute. *See* W. Va. Code § 30-3C-1 (2012).

because the documents ordered to be produced were generated within Wheeling Hospital, Dr. Ghaphery argues that Wheeling Hospital cannot be considered an “original source.” *See* Response in Support 13. Dr. Ghaphery contends that a hospital is a “review organization” as defined by W. Va. Code § 30-3C-1. *See id.* Thus, any documents generated within Wheeling Hospital are “records of a review organization” and not “otherwise available from original sources.” *See id.*

West Virginia’s “Peer Review” statute does not support Dr. Ghaphery’s classification of Wheeling Hospital as a “review organization.” The statute defines a “review organization” as:

any committee or organization engaging in peer review, including a hospital utilization review committee, a hospital tissue committee, a medical audit committee, a health insurance review committee, a health maintenance organization review committee, hospital, medical, dental and health service corporation review committee, a hospital plan corporation review committee, a professional health service plan review committee or organization, a dental review committee, a physicians' advisory committee, a podiatry advisory committee, a nursing advisory committee, any committee or organization established pursuant to a medical assistance program, the joint commission on accreditation of health care organizations or similar accrediting body or any entity established by such accrediting body or to fulfill the requirements of such accrediting body, any entity established pursuant to state or federal law for peer review purposes, and any committee established by one or more state or local professional societies or institutes, to gather and review information relating to the care and treatment of patients for the purposes of: (i) Evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care. It shall also mean any hospital board committee or organization reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto, and any professional standards review organizations established or required under state or federal statutes or regulations.

W. Va. Code § 30-3C-1. This definition does not list the term “hospital” as a “committee or organization engaging in peer review.” Rather, great pains were taken to list the specific subparts of a hospital which engage in peer review—i.e., “a hospital utilization review committee,” “a hospital tissue committee,” “a medical audit committee,” “a health insurance review committee,” “a health maintenance organization review committee,” “hospital, medical, dental and health

service corporation review committee,” “a hospital plan corporation review committee,” “a professional health service plan review committee or organization,” “a physicians' advisory committee,” “a podiatry advisory committee,” “a nursing advisory committee,” “any committee or organization established pursuant to a medical assistance program.” Furthermore, *ManorCare*, *Lee Medical*, *Pastore* and *Large* make clear that a committee, organization or department of a defendant hospital which is separate and distinct from the defendant hospital’s credentialing committee constitutes an “original source” for “peer review” privilege purposes in a negligent credentialing action.

More importantly, though, negligently giving “privileges” or “credentials” to, and thereafter failing to monitor, a physician is a cognizable tort in West Virginia against a hospital. *See, generally, Roberts v. Stevens Clinic Hospital, Inc.*, 176 W.Va. 492, 498, 345 S.E.2d 791, 797 (1986) (“Whether the hospital allowed a known incompetent to continue to enjoy hospital privileges was a major point to be decided in determining the hospital's negligence.”). If a hospital were considered a “review organization” within the meaning of the “Peer Review” statute, this tort would be completely eviscerated. Plaintiffs would no longer be able to rely on the discovery process to obtain information that the hospital alone knows and possess in order to support their claim.

Here, the Circuit Court of Ohio County correctly determined that the documents which remain in dispute are “otherwise available from original sources.” Although the documents were generated within Wheeling Hospital, Wheeling Hospital is not a “review organization” as defined by W. Va. Code § 30-3C-1. As such, they are not protected from disclosure by the “peer review” privilege.

II. Wheeling Hospital failed to meet its burden of proof that the “peer review” privilege applies to the remaining documents at issue. Accordingly, a Writ of Prohibition should not be issued.

In *ManorCare*, this Court emphasized that more than mere assertions of peer review privilege are required and the party asserting the privilege has the burden of proving the documents requested meet all requirements of the “Peer Review” statute. *ManorCare*, -- W.Va. -, -- S.E.2d --, 2015 W.L. 3649772 at *8. Thus, the proponent must prove both the existence of a peer review organization and that the documents are not “original source” documents exempt from the privilege. *Id.* at *8-9. Neither Wheeling Hospital nor Dr. Ghaphery have made any attempt to satisfy this burden. To the contrary, as previously explained, *all* evidence submitted to the Circuit Court of Ohio County demonstrates that the documents at issue herein were generated by original sources not engaged in peer review activities. As such, neither Wheeling Hospital nor Dr. Ghaphery can meet their burden of proving that the “peer review” privilege applies. Accordingly, the Circuit Court of Ohio County did not err when ordering the documents be produced, and, therefore, a Writ of Prohibition should not be issued.

CONCLUSION

The Circuit Court of Ohio County acted within its jurisdiction and legitimate powers when it determined that certain documents in Wheeling Hospital’s possession were not protected from discovery by the West Virginia “Peer Review” statute. In making this finding, Judge Wilson correctly interpreted and applied West Virginia’s “Peer Review” statute to the remaining documents at issue. Accordingly, Judge Wilson did not clearly err as a matter of law. Furthermore, Wheeling Hospital and Dr. Ghaphery have failed to meet their burden of proof that the “peer review” privilege applies to the documents at issue. Accordingly, Wheeling Hospital’s Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service of the foregoing *Response to Intervenor-Respondents David Ghaphery, M.D.'s and A.D. Ghaphery Professional Association's Response in Support of Petition for Writ of Prohibition* was had upon counsel of record herein by mailing a true and exact copy thereof, by regular United States Mail, postage prepaid, this 22nd day of September, 2015 as follows:

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