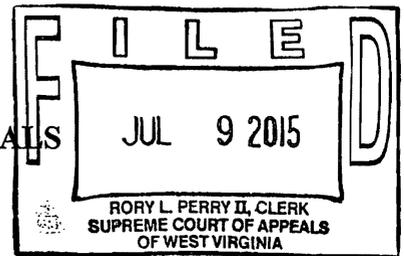


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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.

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RESPONSE TO 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 "Peer Review" statute, W. Va. Code § 30-3C-3 (2012), and/or the HIPPA Privacy Rule, 45 CFR § 164.512?

### **STATEMENT OF THE CASE**

This is a medical malpractice, informed consent, and negligent credentialing, retention and supervision case against the Petitioner-Defendant Wheeling Hospital, Inc. [hereinafter "Wheeling Hospital"] and David Ghaphery, MD. *See* Petitioner's Appendix 009-020. In 2011, the Respondent-Plaintiff, Stephanie Mills, consulted with the 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 specialist, who advised her that the nerves associated with the vocal cords were severed as a result of Dr. Ghaphery's surgical procedure.

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.”). Issues to be explored in such a case include: (1) the hospital’s duty to the plaintiff to exercise reasonable care in selection (and/or supervising) the physician; (2) the physician’s competence and track record; (3) the hospital’s care or lack thereof in appointing or reappointing (and/or failing to supervise) the physician; (4) the physician’s negligence in treating the plaintiff; and (5) damages. Ms. Mills bears the burden of proof as to her negligent credentialing, retention and supervision claim against Wheeling Hospital, but, in doing so, she may rely on the discovery process to obtain information that Wheeling Hospital alone knows and possesses.

In late 2013 and early 2014, Ms. Mills sought written discovery from Wheeling Hospital on the above issues. 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 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 HIPPA 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 the order, but instead waited nearly four months to file the instant Petition, on or about June 10, 2015.

### SUMMARY OF THE ARGUMENT

Judge Wilson did not exceed his legitimate powers and did not clearly err, as a matter of law, in ordering the disclosure of the documents, as they are not protected from discovery by the “Peer Review” privilege. Under West Virginia Rule of Civil Procedure 26, the party seeking to assert a privilege has the burden of establishing that the privilege applies. *See State ex rel. U.S. Fid. & Guar. Co. v. Canady*, 194 W. Va. 431, 438, 460 S.E.2d 677, 684 (1995). Despite ample opportunity to do so, Wheeling Hospital has presented no evidence to support its position that the “Peer Review” privilege applies. It merely asserts that the documents in dispute are protected from disclosure because they “are used by the Hospital for quality assurance, monitoring and control and are considered by the Department of Medical Affairs/Credentialing for appointment/reappointment purposes.” *See* Petition 13. However, “[m]ore than mere assertions are required to establish the peer review privilege under the *Health Care Peer Review Organization Protection Act*.” *State ex rel. HCR Manorcare, LLC v. Stucky*, No. 15-0094, 2015 WL 3649772 (W. Va. June 9, 2015).

Moreover, Ms. Mills has offered ample evidence—including the testimony of Wheeling Hospital’s own corporate representatives—to show that the documents in dispute are not protected by the “Peer Review” privilege. The documents which were ordered to be produced were not created “solely” for Wheeling Hospital’s credentialing committee and are otherwise available from original sources extraneous to the medical credentialing process. Wheeling Hospital maintains such records in the ordinary course of business for use outside the credentialing process and for use in other hospital departments and endeavors. As this Court reiterated in *State ex. rel. Charles*

*Town General Hospital v. Sanders*, 210 W. Va. 118, 556 S.E.2d 85 (W. Va. 2001), “[t]o the extent the contested documents are available from original sources extraneous to the medical credentialing process, they are not privileged and are subject to discovery.” *Id.* at 121, 556 S.E.2d at 88. Wheeling Hospital has therefore failed to meet its burden of establishing that the “Peer Review” privilege applies.

In further support of this argument, it should be emphasized that the Circuit Court of Ohio County strictly adhered to the procedure involved with the discovery of allegedly privileged documents this Court articulated in *State ex rel. Nationwide Mutual Insurance Company v. Kaufman*, 222 W. Va. 37, 658 S.E.2d 728 (2008). It was only *after* considering the parties’ supplemental briefs and conducting an in camera inspection of *all* of the documents identified as in dispute that Judge Wilson found the “Peer Review” privilege did not apply and ordered Wheeling Hospital to produce such documents.

Judge Wilson also did not exceed his legitimate powers and did not clearly err, as a matter of law, in ordering Wheeling Hospital to disclose information protected by the HIPPA Privacy Rule. Although Wheeling Hospital contends otherwise, the HIPPA Privacy Rules does in fact permit the disclosure of protected health information in certain situations. *See* 45 CFR § 164.512. Section (e) of § 164.512 specifically permits the disclosure of protected health information “in the course of any judicial or administrative proceeding: (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order” *see* 45 CFR § 164.512(e). The Circuit Court of Ohio County was therefore permitted, pursuant to the HIPPA Privacy Rule, to order Wheeling Hospital to disclose such information. Carefully protecting the privacy rights of other patients, Judge Wilson required that the names of Dr. Ghaphery’s other patients be *redacted* from any

documents to be disclosed. Wheeling Hospital argues that such redactions would be “burdensome.” However, Wheeling Hospital has an obligation to show why the request is burdensome. *See* syl. pt. 5, *State ex rel. Allstate Ins. Co. v. Gaughan*, 220 W. Va. 113, 640 S.E.2d 176 (2006). Medical records are routinely redacted and Wheeling Hospital made no effort to meet its burden in this area either.

Finally, Judge Wilson did not exceed its legitimate powers and did not clearly err, as a matter of law, in ordering Wheeling Hospital to disclose information which relates to the care and treatment of Dr. Ghaphery’s other patients and/or other medical procedures performed by Dr. Ghaphery. Judge Wilson correctly applied West Virginia’s discovery rules regarding relevancy to find that such information is relevant to Ms. Mills’ negligent credentialing, retention and supervision claim against Wheeling Hospital. Information relating to the care and treatment of Dr. Ghaphery’s other patients and/or other medical procedures performed by Dr. Ghaphery will establish what Wheeling Hospital knew or should have known at the time it appointed and/or reappointed Dr. Ghaphery to its hospital staff. Furthermore, the Circuit Court of Ohio County correctly limited the disclosure to information relating to Dr. Ghaphery’s *prior* patients and/or *prior* medical procedures performed by Dr. Ghaphery so as to meet West Virginia’s evidentiary relevancy requirements.

West Virginia law is clear regarding a writ of prohibition. 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). Further, a writ of prohibition will not issue in absence of a clear error, as a matter of law. *See* Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12,

483 S.E.2d 12 (1996). Finally, a writ of prohibition will not issue where it is alleged that the circuit court exceeded its legitimate powers unless this Court finds “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. Laurita*, 156 W.Va. 707, 195 S.E.2d 717 (1973); syl. pt. 3, *SER York*. As these exacting standards have not been met, a writ of prohibition should not issue against the Circuit Court of Ohio County and its February 27, 2015 Order should remain in full force and effect.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Ms. Mills does not request oral argument in this matter. The Circuit Court of Ohio County correctly applied well-established state and federal law to find that certain documents in Wheeling Hospital’s possession were not protected from discovery by the West Virginia “Peer Review” statute and/or the HIPPA Privacy Rules and were relevant to Ms. Mills’ negligent credentialing, retention and supervision claim against Wheeling Hospital. Wheeling Hospital simply failed to even attempt to meet its burden of proof, and therefore no complex question warranting argument is presented.

### **ARGUMENT**

#### **I. The documents at issue are not protected from disclosure by the West Virginia “Peer Review” statute.**

Throughout the argument in this matter, it is crucial to keep in mind that Wheeling Hospital failed to make any evidentiary showing whatsoever regarding the nature or uses 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.

**a. Overview of the Credentialing Process at Wheeling Hospital**

To evaluate the “Peer Review” privilege claim Wheeling Hospital is making, it is imperative to understand the Hospital’s credentialing process. The Medical Executive Committee (MEC) at Wheeling Hospital is responsible for credentialing and re-credentialing physicians at the Hospital. *See* Petitioner’s Appendix 244:8-10. Below is an overview of the credentialing process for first-time applicants and applicants seeking re-credentialing at Wheeling Hospital.

**i. Applicants Applying for First-Time Privileges**

A physician applying for first-time privileges at Wheeling Hospital is required to complete the hospital’s standard credentialing packet, which includes a standardized West Virginia credentialing form along with other documents. *See* Petitioner’s Appendix 244:15-20. After the applicant returns their completed credentialing packet to the hospital, the Director of Medical Affairs at Wheeling Hospital, Diane Patt, will then verify the applicant’s information. *See* Petitioner’s Appendix 244:21-245:2. This requires Ms. Patt to complete various “checks,” including, but not limited to, a background check, a databank check, a check of hospital affiliations, a license check, a check of licenses in other states, a primary source check, and a school check. *See* Petitioner’s Appendix 244:21-245:2.

Once Ms. Patt has completed her “checks,” she then transfers the physician’s application, along with the information she has gathered, to the department chair of the physician’s specialty. *See* Petitioner’s Appendix 245:5-8. The department chair reviews the applicant’s information, and then decides whether to: (1) sign the privilege sheet giving the physician the privileges he requested; (2) sign the privilege sheet not giving the physician the privileges he requested; or (3) not sign the privilege sheet altogether, which thereby terminates review of the physician’s application. *See* Petitioner’s Appendix 245:9-13. If the department chair signs the privilege sheet,

the physician's application is then transferred to the MEC for review. *See* Petitioner's Appendix 245:15-16.

The MEC completes a thorough review of the physician's application, including a review of the verifications Ms. Patt completed. *See* Petitioner's Appendix 245:15-20. After reviewing the physician's application, the committee then votes whether to approve the physician as a member of the hospital. *See* Petitioner's Appendix 245:15-20. If the MEC votes in favor of approving the physician as member of the hospital, the physician's application is then transferred to Wheeling Hospital's board of directors for broad approval. *See* Petitioner's Appendix 245:22. Based on the vote of the board of directors, the physician is either credentialed to practice at Wheeling Hospital or not. *See* Petitioner's Appendix 246:6-8.

#### **ii. Applicants Seeking Re-credentialing**

Re-credentialing occurs every two years at Wheeling Hospital. *See* Petitioner's Appendix 246:20-21. Similar to the credentialing process for first-time applicants, physicians seeking re-credentialing are required to complete the standardized West Virginia credentialing form, after which another "check" of the physician's license is completed along with a databank check and an OIG GSA check. *See* Petitioner's Appendix 246:21-23. In addition to this information, the Hospital gathers the physician's "quality information" for the last twenty-four (24) months,<sup>1</sup> which is tracked independently of the re-credentialing process and can be queried at any time. *See* Petitioner's Appendix 246:23-247:2, 252:18-23, 260-81. The "quality information" considered by the credentialing committee includes:

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<sup>1</sup>The "quality information" considered by the credentialing committee is gathered from data independently collected by Wheeling Hospital's Quality Management Department and Medical Affairs Department. *See* Petitioner's Appendix 247:4-8.

- i. Patient complaints<sup>2</sup>
- ii. Core measures<sup>3</sup> (Core measures are required to be tracked by all Medicare-approved hospitals<sup>4</sup>)
- iii. HCAPs<sup>5</sup> (HCAPs, or patient satisfaction, are required to be tracked by all Medicare-approved hospitals<sup>6</sup>)
- iv. The physician's hospital report card<sup>7</sup>

Critically, none of these four categories of documents are records *of the credentialing committee*. Rather, they are information Wheeling Hospital gathers either in the ordinary course of its business, or pursuant to regulations, that the credentialing committee, among other hospital departments, uses in its work. Once the above information is gathered, the physician's application and "quality information" is then transferred to their department chair for review. *See* Petitioner's Appendix 251:21-252:2. The department chair determines whether to continue or discontinue the physician's privileges at Wheeling Hospital. *See* Petitioner's Appendix 252:3-5.

**b. The documents at issue were not created "solely" for Wheeling Hospital's credentialing committee and are otherwise available from original sources extraneous to the medical credentialing process.**

Wheeling Hospital held many documents back as privileged by claiming that those documents are protected from disclosure by the West Virginia "Peer Review" statute. 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 (2012).

<sup>2</sup> *See* Petitioner's Appendix 247:4-12. Patient complaints are tracked through an internal software program called Incident Tracker.

<sup>3</sup> *See* Petitioner's Appendix 247:13-248:12.

<sup>4</sup> *See* Petitioner's Appendix 247:13-248:12.

<sup>5</sup> *See* Petitioner's Appendix 247:9-15.

<sup>6</sup> *See* Petitioner's Appendix 248:20-24.

<sup>7</sup> *See* Petitioner's Appendix 250:13-18.

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*, 187 W. Va. 723, 728, 421 S.E.2d 264, 269 (1992). Stated differently, material that originates in a review organization is privileged, even if later held by a non-review organization, but material that originates in a non-review organization *does not become privileged after presentation to a review organization. Id.* Thus, the origin of the document determines whether or not it is privileged, not its content or later use. *See id.*

In *State ex. rel. Charles Town General Hospital v. Sanders*, 210 W. Va. 118, 556 S.E.2d 85 (W. Va. 2001), this Court considered whether hospital records concerning the credentialing and/or re-credentialing of a staff physician were privileged under the “Peer Review” statute. This Court stated, “To the extent that the contested documents are available from original sources extraneous to the medical credentialing process, they are not privileged and are subject to discovery.” *Id.* 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).

Unlike in *Charles Town General Hospital*, the remaining documents at issue in this litigation were not created “solely” for Wheeling Hospital’s credentialing committee,<sup>8</sup> and are otherwise available from original sources extraneous to the medical credentialing process. 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*

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<sup>8</sup> *See also supra* subpart (a) of Part I for a discussion of the credentialing process and the information consider for first-time applicants and applicants seeking re-credentialing at Wheeling Hospital.

Petitioner's Appendix 260-81.

**i. Wheeling Hospital Medical/Dental Staff Reappointment Profiles  
(Documents Numbers 168-170, 297-298, 650-651, 817)**

The Wheeling Hospital Medical/Dental Staff Reappointment Profiles at the above-referenced document numbers contain a clinical profile of Dr. Ghaphery, and include such information as clinical quality, medical records and patient safety, mortality, service quality, risk management and utilization management. *See* Petition 14. Such information is used for reappointment purposes. *See id.* However, the information contained in the Wheeling Hospital Medical/Dental Staff Reappointment Profiles was not created solely for Wheeling Hospital's credentialing committee. *See* Petitioner's Appendix 260-81. Wheeling Hospital is required by law to maintain and report such information to its regulatory body, the Joint Commission. *See* Petitioner's Appendix 279:8-280:14. In addition, such information is also reported to the state medical board for physician licensing. *See* Petitioner's Appendix 280:4-14. Finally, the hospital uses statistics gathered from this information to make business decisions and to allocate resources within the hospital. *See* Petitioner's Appendix 264:9-265:14-19. Therefore, such information is used and maintained independently of the credentialing/re-credentialing process.

Pursuant to the Court's reasoning in *Shroad* and *Charles Town General Hospital*, the Wheeling Hospital Medical/Dental Staff Reappointment Profiles at the above-referenced document numbers are not privileged and are subject to discovery.

**ii. Summary Reports (Document Numbers 171-173)**

The Summary Reports at the above-referenced document numbers contain information relating to "various procedures and actions" performed by Dr. Ghaphery and are used for quality control purposes. *See* Petitioner's Appendix 203. It is unlikely that such information was created solely for Wheeling Hospital's credentialing committee; such information is likely otherwise

available from original sources extraneous to the medical credentialing process. *See* Petitioner's Appendix 260-81. However, the information given on the privilege log and presumably the document itself are insufficient to carry the burden of proof on the proponent of the privilege that it exists and the objections should therefore be overruled under *Canady*.

West Virginia Rule of Civil Procedure 26(c) requires that good cause be shown and *Shroades put that burden on Wheeling Hospital. State ex rel. Shroades v. Henry*, 187 W. Va. 723, 728, 421 S.E.2d 264, 269 (1992). By vaguely describing the information contained in the Summary Reports as relating to "various procedures and actions," Wheeling Hospital has failed to meet its burden of establishing that good cause exists to protect such information from discovery.

**iii. Procedure Totals by Physician (Document Numbers 176-208, 302-337, 432-460, 517-541)**

The Procedure Totals by Physician at the above-referenced document numbers include a summary of operating room, ORC, and endoscopy procedure totals by physician and include reference to Dr. Ghaphery. *See* Petition 14. Wheeling Hospital maintains that such information is used for quality assurance and quality control purposes, as well as for reappointment purposes. *See* Petitioner's Appendix 203. Thus, by Wheeling Hospital's own admission, the information contained in the Procedure Totals by Physician was *not created solely for the hospital's credentialing committee*, so as to qualify under *Charles Town General Hospital*.<sup>9</sup> Wheeling Hospital maintains such information independent of the credentialing/re-credentialing process and reports such information as required by law. *See* Petitioner's Appendix 260-81. Such information is therefore otherwise available from original sources. Pursuant to the Court's reasoning in *Shroades* and *Charles Town General Hospital*, the Procedure Totals by Physician at the above-

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<sup>9</sup> *See also supra* subpart (a) of Part I for a discussion of the credentialing process and the information consider for first-time applicants and applicants seeking credentialing at Wheeling Hospital.

referenced document numbers are not privileged and are subject to discovery.<sup>10</sup>

**iv. General Surgery Interventions (Document Numbers 209-210)**

The General Surgery Interventions at the above-referenced document numbers summarize general surgery interventions for Dr. Ghaphery and are used for quality control purposes. *See* Petition 14; *see also* Petitioner’s Appendix 204. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the General Surgery Interventions at the above-referenced document numbers are not privileged and are subject to discovery.

**v. Physician Specific Reports (Document Numbers 211, 339)**

The Physician Specific Reports at the above-referenced document numbers “detail various physicians, departments, procedures, events and incidents” and is used for quality control purposes. *See* Petition 14; *see also* Petitioner’s Appendix 204. It is unlikely that such information was created solely for Wheeling Hospital’s credentialing committee; such information is likely otherwise available from original sources extraneous to the medical credentialing process. *See* Petitioner’s Appendix 260-81. However, the information given on the privilege log and presumably the document itself are insufficient to carry the burden of proof on the proponent of the privilege that it exists and the objections should therefore be overruled under *Canady*.

For the same reasons described in Part I, subpart (b)(ii), on pp. 12-13, Wheeling Hospital has failed to meet its burden of establishing that good cause exists to protect such information from discovery. As such, the Physician Specific Reports at the above-referenced document numbers are not privileged and are subject to discovery.

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<sup>10</sup> Concerns relating to information contained in the documents at issue which refer to physicians other than Dr. Ghaphery are easily alleviated by requiring only the information pertaining to Dr. Ghaphery be produced.

**vi. Physician Specific SSI Rates and Quarterly Line Lists (Document Numbers 215, 216-217, 340-346, 348-349, 464-470, 544)**

The Physician Specific SSI Rates and Quarterly Line Lists at the above-referenced document numbers include quarterly information regarding surgical focus and outcome and are used for quality control purposes. *See* Petition 14; *see also* Petitioner's Appendix 205. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the Physician Specific SSI Rates and Quarterly Line Lists at the above-referenced document numbers are not privileged and are subject to discovery.

**vii. Department of General Surgery Quality Monitoring (Document Numbers 214, 224-225, 226-227, 234-242, 347, 350-365, 471-485, 546, 550-552)**

The Department of General Surgery Quality Monitoring at the above-referenced document numbers contains information relating to complications, readmissions, unplanned and unscheduled returns to the OR, noncocomial surgical site infections, readmissions with fifteen (15) days of discharge, and mortality and morbidity rate for Dr. Ghaphery and other physicians. *See* Petition 14. Such information is used for quality monitoring purposes. *See* Petitioner's Appendix 205. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the Department of General Surgery Quality Monitoring at the above-referenced document numbers is not privileged and is subject to discovery.

**viii. Quality Assurance Report (Document Numbers 218-219)**

The Quality Assurance Report at the above-referenced document numbers contains information relating to patient transfers post-surgery for Dr. Ghaphery and other physicians. *See* Petition 14. Such information is used for quality assurance purposes. *See* Petitioner's Appendix 206. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the Quality Assurance

Report at the above-referenced document numbers is not privileged and is subject to discovery.

**ix. Wheeling Hospital Medical Record Review Summaries (Document Numbers 229-233, 366-370, 545, 679-688, 775-777)**

The Wheeling Hospital Medical Record Review Summaries at the above-referenced document numbers include information setting forth physician names, number of cases reviewed, number of deficient cases, and the percentage of excellence for various physicians including Dr. Ghaphery. *See* Petition 15. Such information is used for quality control purposes, “to determine the completeness of medical records.” *See id.* For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the Wheeling Hospital Medical Record Review Summaries at the above-referenced document numbers are not privileged and are subject to discovery.

**x. Summary Report (Document Number 338)**

The Summary Report at the above-referenced document number includes information relating to procedures performed by Dr. Ghaphery and is used for quality assurance purposes. *See* Petition 15; *see also* Petitioner’s Appendix 207. Such information is used “to monitor the completeness of medical records.” *See* Petitioner’s Appendix 207. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the Summary Report at the above-referenced document number is not privileged and is subject to discovery.

**xi. Medical Record Deficiencies by Medical Service (Document Numbers 461-463, 542-543, 755-756)**

The Medical Record Deficiencies by Medical Service at the above-referenced document numbers includes information relating to the number of delinquent medical record deficiencies for Dr. Ghaphery and other physicians and is used for quality assurance purposes. *See* Petition 15; *see also* Petitioner’s Appendix 207. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the Medical Record Deficiencies by Medical Service at the above-referenced document

numbers are not privileged and are subject to discovery.

**xii. Moderate Sedation Reports (Document Numbers 486-487)**

The Moderate Sedation Reports at the above-referenced document numbers contain information relating to moderate sedation procedures for Dr. Ghaphery and other physicians and are used for quality control purposes. *See* Petition 15; *see also* Petitioner's Appendix 208. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the Moderate Sedation Reports at the above-referenced document numbers are not privileged and are subject to discovery.

**xiii. Denials (Acute) Report (Document Number 488)**

The Denials (Acute) Report at the above-referenced document number contains information relating to acute denials by insurance company for treatment performed by Dr. Ghaphery and other physicians. *See* Petition 15. Such information is used for quality control purposes. *See* Petitioner's Appendix 208. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the Denials (Acute) Report at the above-referenced document numbers is not privileged and is subject to discovery.

**xiv. SCIP for Colon Procedures (Document Numbers 489-490)**

The SCIP for Colon Procedures at the above-referenced document numbers contains information relating to the Surgical Care Improvement Project (a Joint Commission National Quality Core Measure) for colon procedures performed by Dr. Ghaphery, and is used for quality control purposes. *See* Petition 15; *see also* Petitioner's Appendix 208. Wheeling Hospital is likely required by law to maintain and report such information to the Joint Commission regulatory body, which means that such information is otherwise available from original sources extraneous to the medical credentialing process. *See generally* Petitioner's Appendix 260-90. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the SCIP for Colon Procedures at the above-referenced document numbers is not privileged and is subject to discovery.

**xv. Procedure Statistics for Surgeon (Document Numbers 500-503, 515-516, 661-674, 739-752)**

The Procedure Statistics for Surgeon at the above-referenced documents numbers contains information relating to procedure statistics for Dr. Ghaphery and is used for quality control purposes. *See* Petition 15; *see also* Petitioner's Appendix 209. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the Procedure Statistics for Surgeon at the above-referenced document numbers is not privileged and is subject to discovery.

**xvi. Gastric Bypass Inpatients (Document Numbers 505)**

The Gastric Bypass Inpatients at the above-referenced document numbers contains a summary of gastric bypass surgeries performed by Dr. Ghaphery and is used for quality control purposes. *See* Petition 15; *see also* Petitioner's Appendix 209. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the Gastric Bypass Inpatients at the above-referenced document numbers is not privileged and is subject to discovery.

**xvii. Denials and Responsibility of Denied Days (Document Number 553)**

The Denials and Responsibility of Denied Days at the above-referenced document number includes information relating to reason for denial and responsibility of denied days for Dr. Ghaphery and other physicians. *See* Petition 16. Such information is used for quality control purposes. *See* Petitioner's Appendix 210. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the Denials and Responsibility of Denied Days at the above-referenced document numbers is not privileged and is subject to discovery.

**xviii. Physician Specific Report Relating to Surgical Intervention Prevention – Colon Surgery (Document 554-556)**

The Physician Specific Report Relating to Surgical Intervention Prevention (Colon Surgery) at the above-referenced document numbers includes information relating to surgical

infection prevention for colon surgery for Dr. Ghaphery and other physicians, including total cases, numerator cases, and rate for all attending physicians. *See* Petition 16. Such information is used for quality control purposes. *See* Petitioner's Appendix 210. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the Physician Specific Report Relating to Surgical Intervention Prevention at the above-referenced document numbers is not privileged and is subject to discovery.

**xix. Quarterly Surgical Objective and File SSIs (Document Numbers 675-678, 753)**

The Quarterly Surgical Objective and File SSIs at the above-referenced document numbers contain information relating to surgical site infections for Dr. Ghaphery and other physicians, and are categorized based on surgery, infection unit and infection date. *See* Petition 16. Such information is used for quality control purposes. *See* Petitioner's Appendix 210. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the Quarterly Surgical Objective and File SSIs at the above-referenced document numbers are not privileged and are subject to discovery.

**xx. OR Returns by Date (Document Numbers 689, 778)**

The OR Returns by Date at the above-referenced document numbers contain information relating to patients of Dr. Ghaphery and other patients who required a return to the operating room after their initial surgery. *See* Petition 16. Such information is used for quality control purposes. *See* Petitioner's Appendix 211. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the OR Returns by Date at the above-referenced document numbers is not privileged and is subject to discovery.

**xxi. All Admissions File, Line Listing: Fourth Quarter, 2001  
(Document 754)**

The All Admissions File, Line Listing: Fourth Quarter, 2001 at the above-referenced document number is a report containing all admissions based upon infection date for Dr. Ghaphery and other physicians and is used for quality control purposes. *See* Petition 16; *see also* Petitioner's Appendix 211. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the All Admissions File, Line Listing: Fourth Quarter, 2001 at the above-referenced document number is not privileged and is subject to discovery.

**xxii. Complication, Mortality, and Readmission Comparison  
(Document Numbers 1000, 1001, 1002)**

The Complication, Mortality, and Readmission Comparison for complete thyroidectomies at the above-referenced document numbers is used for quality control and review purposes and is not a record of the credentialing committee. *See* Petition 16. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the Complication, Mortality, and Readmission Comparison at the above-referenced document numbers is not privileged and is subject to discovery.

**xxiii. Complaint Tracker Reports (Document Numbers 1003-1010)**

The Complaint Tracker Reports at the above-referenced document numbers are reports prepared by Wheeling Hospital's Department of Quality Management. *See* Petition 17; *see also* Petitioner's Appendix 247:9-15, 249:1-13. These reports were not created solely for Wheeling Hospital's credentialing committee. *See* Petitioner's Appendix 247:9-15, 249:1-13. For the same reasons described in Part I, subpart (b)(iii), on pp. 13-14, the Complaint Tracker Reports at the above-referenced document numbers are not privileged and are subject to discovery.

**II. The documents ordered disclosed did not originate in Wheeling Hospital's Peer Review Committee and therefore, are not privileged for reasons similar to those described in Part I(b)(iii).**

Wheeling Hospital claims that the documents at issue are used by the Hospital for quality assurance, monitoring and control and are considered by the MEC for credentialing/re-credentialing purposes. *See* Petition 13. Wheeling Hospital does not claim that any information contained in the documents at issue originated in the Hospital's Peer Review Committee. However, even if it had, the documents at issue would not be privileged under the "Peer Review" statute for reasons similar to those described in Part II, subpart (b)(iii), on pp. 13-14.

Wheeling Hospital has an "ad hoc" peer review committee; the type of event determines the type of peer review that occurs. *See* Petitioner's Appendix 282:15-21. There are two types of events at Wheeling Hospital:

i. Sentinel Events

A sentinel event is any event where the hospital has posed harm to the patient.<sup>11</sup> The Joint Commission has created a specific list of events it deems to be a sentinel event.<sup>12</sup> In addition, any event that occurs on two or more occasions is considered by Wheeling Hospital to also be a sentinel event.<sup>13</sup> When a sentinel event occurs, Wheeling Hospital convenes a multi-disciplinary peer review committee to review "the issue"<sup>14</sup> and conduct a root cause analysis.<sup>15</sup> The outcome of the investigation is reported to the Joint Commission.<sup>16</sup>

ii. Non-sentinel Events

A non-sentinel event is any event that is not considered to be a sentinel event.<sup>17</sup> When a non-sentinel event occurs, Wheeling Hospital convenes a less interdisciplinary peer review committee (as

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<sup>11</sup> *See* Petitioner's Appendix 280:21-281:5.

<sup>12</sup> *See* Petitioner's Appendix 281:2-3.

<sup>13</sup> *See* Petitioner's Appendix 288:4-15.

<sup>14</sup> *See* Petitioner's Appendix 288: 14.

<sup>15</sup> *See* Petitioner's Appendix 283:16-18.

<sup>16</sup> *See* Petitioner's Appendix 283:18-20.

<sup>17</sup> *See* Petitioner's Appendix 283:21-23.

compared with a sentinel event) to conduct an intense analysis of the event.<sup>18</sup>

If a sentinel event or non-sentinel event occurs,<sup>19</sup> Wheeling Hospital's Quality Management Department conducts an initial review in order to "pull[] together" additional information needed to investigate the event. *See* Petitioner's Appendix 284:8-17, 285:2-19. This may require interviewing the nurses, physicians, and/or family members involved. *See* Petitioner's Appendix 286:14-24. Once the Quality Management Department conducts an initial review of the event and gathers any additional information, the Director of the Quality Management Department makes a determination as to "next step[s]." *See* Petitioner's Appendix 287:17-23. That next step may or may not include convening an official peer review committee. *See* Petitioner's Appendix 284:17-288:15. If an official peer review committee is convened, an action plan is created based upon the peer review committee's investigation. *See* Petitioner's Appendix 289:13-22. The Director of Quality Management is then charged with ensuring that the action plan is implemented and adhered to in the future. *See* Petitioner's Appendix 289:23-290:2.

Again, Wheeling Hospital does not argue that information contained in the documents at issue originated in the Hospital's Peer Review Committee. Even if it had though, Wheeling Hospital's argument would fail as a matter of law for the following reasons: First, the information contained in the remaining documents in dispute was not created solely for the Hospital's Peer Review Committee—*i.e.* they are not a "record of a review organization" as opposed to a record that a review organization might consider. Second, Wheeling Hospital maintains such information in the ordinary course of business—*independent of the peer review process*—and reports such

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<sup>18</sup> *See* Petitioner's Appendix 283:21-284:6.

<sup>19</sup> 99.9% of these events are reported through the Wheeling Hospital Incident Tracker. *See* Petitioner's Appendix 284:24-285:1. The other 0.1% is reported by family members through their patient advocate. *See* Petitioner's Appendix 284:20-285:11.

information as required by law. *See* Petitioner’s Appendix 260-81. Such information is therefore otherwise available from original sources. Pursuant to this Court’s reasoning in *Shroad*, the remaining documents in dispute are not privileged and are subject to discovery.

**III. The documents ordered disclosed are not protected from disclosure by the HIPPA Privacy Rule.**

Wheeling Hospital also held the documents at issue back by claiming that the HIPPA Privacy Rule protects those documents from disclosure. However, the HIPPA Privacy Rule provides for the disclosure of protected health information in certain situations. *See* 45 CFR § 164.512. Section (e) of § 164.512 states:

A covered entity may disclose protected health information in the course of any judicial or administrative proceeding: (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if: (A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or (B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

Under Section (e) of § 164.512, the disputed documents which contain identifying information of other patients at Wheeling Hospital could be produced pursuant to a court order or through a protective order. Absent that, Wheeling Hospital could, under Judge Wilson’s order, redact any and all identifiable health information protected by the HIPPA Privacy Rule before producing the remaining documents in dispute.

Wheeling Hospital argues it would be “unduly burdensome in terms of time and cost” for the Hospital to comply with Judge Wilson’s Order—namely, to redact the names of Dr.

Ghaphery's prior patients. *See* Petition 18. It also argues "there would be virtually no substantive information remaining following any such HIPPA redaction." *See id.* It is hard to imagine that there would be no substantive information remaining following the redaction of only the names of Dr. Ghaphery's prior patients. Nonetheless, Wheeling Hospital has the burden of showing why the request is burdensome. *See generally* syl. pt. 5, *State ex rel. Allstate Ins. Co. v. Gaughan*, 220 W. Va. 113, 640 S.E.2d 176 (2006), syl. pt. 3, *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992). Wheeling Hospital has offered no explanation as to why the request is burdensome and has therefore failed to meet its burden. *See id.*

**IV. Information contained in the documents at issue relating to Dr. Ghaphery's prior patients and/or to Dr. Ghaphery's prior medical procedures is relevant to Ms. Mills' negligent credentialing, retention and supervision claim against Wheeling Hospital.**

Although not a claim of privilege, Wheeling Hospital argues that several of the documents at issue contain information relating to Dr. Ghaphery's prior patients and/or to prior medical procedures performed by Dr. Ghaphery and are, therefore, irrelevant. *See* Petition 19-21. However, "[r]elevance in the context of discovery means that the information sought is admissible evidence or is 'reasonably calculated to lead to the discovery of admissible evidence.'" *State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone*, 218 W. Va. 593, 597, 625 S.E.2d 355, 359 (2005). The West Virginia Rules of Civil Procedure "generally provide for broad discovery to ferret out evidence which is in some degree relevant to the contested issue." *Policarpio v. Kaufman*, 183 W. Va. 258, 261, 395 S.E.2d 502, 505 (1990).

In support of its argument, Wheeling Hospital cites the West Virginia Supreme Court of Appeals case *Young v. Saldanha*, 189 W. Va. 330, 431 S.E.2d 669 (1993). The plaintiff in that case brought a medical malpractice action against an orthopedic surgeon. *See id.* During the discovery stage of the proceeding, the plaintiff obtained, through undisclosed means, records

submitted in connection with a peer review investigation of the defendant-surgeon—which had been filed under seal—that pertained to complaints regarding the care and treatment of other patients whose medical conditions and surgical procedures were unrelated to those of the plaintiff. *Id.* at 332, 431 S.E.2d at 671. The plaintiff sought discovery of and evidentiary use of those records. *Id.* This Court held that the peer review documents were not relevant to the underlying civil action, which was whether the defendant-surgeon was negligent in his treatment of the plaintiff, and therefore would not be admissible at trial. *See id.* at 336, 431 S.E.2d at 675. Accordingly, the Court did not allow further discovery of the peer review documents.

*Young* is distinguishable from this matter on two grounds. First, Ms. Mills is not seeking discovery of records filed under seal. Ms. Mills is seeking discovery of records that Wheeling Hospital keeps in the ordinary course of business. Second, the underlying civil action in this case is not whether Wheeling Hospital was negligent in its treatment of Ms. Mills; it is whether Wheeling Hospital was negligent in giving “privileges” or “credentials” to, and thereafter monitoring, Dr. Ghaphery. Information relating to the care and treatment of Dr. Ghaphery’s prior patients and information relating to prior medical procedures performed by Dr. Ghaphery is of the utmost relevance to Ms. Mills’ claim against Wheeling Hospital for negligently giving “privileges” or “credentials” to, and thereafter monitoring, Dr. Ghaphery. Such information establishes what Wheeling Hospital knew or should have known at the time it appointed and/or reappointed Dr. Ghaphery to its hospital staff.

**V. The Circuit Court of Ohio County, West Virginia acted within its legitimate powers and did not clearly err, as a matter of law. Accordingly, a Writ of Prohibition should not be issued.**

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; syl. pt. 1, *State ex rel. York v. W. Virginia Real Estate Appraiser Licensing & Certification Bd.*, -- W.Va. --, 760 S.E.2d 856. In order to find the Circuit Court of Ohio County, West Virginia 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. Laurita*, 156 W.Va. 707, 195 S.E.2d 717; 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 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. 4. The instant Petition for Writ of Prohibition should be rejected because Wheeling Hospital has not met these exacting standards.

As demonstrated above, the Circuit Court of Ohio County did not clearly err, as a matter of law, in finding that certain documents in the Wheeling Hospital’s possession were not protected from discovery by the “Peer Review” statute and/or the HIPPA Privacy Rule and were relevant to Ms. Mills’ negligent credentialing, retention and supervision claim against Wheeling Hospital. In *State ex rel. Nationwide Mutual Insurance Company v. Kaufman*, 222 W. Va. 37, 658 S.E.2d 728

(2008), this Court articulated the general procedure involved with the discovery of allegedly privileged documents:

(1) the party seeking the documents must do so in accordance with the reasonable particularity requirement of Rule 34(b) of the West Virginia Rules of Civil Procedure; (2) if the responding party asserts a privilege to any of the specific documents requested, the responding party shall file a privilege log that identifies the document for which a privilege is claimed by name, date, custodian, source and the basis for the claim of privilege; (3) the privilege log should be provided to the requesting party and the trial court; and (4) if the party seeking documents for which a privilege is claimed files a motion to compel, or the responding party files a motion for a protective order, the trial court must hold an in camera proceeding and make an independent determination of the status of each communication the responding party seeks to shield from discovery.

*Id.* at syl. pt. 2. The procedure articulated in *Kaufman* was strictly adhered to in the present case: It was only *after* considering the parties' supplemental briefs and conducting an in camera inspection of *all* of the documents identified as in dispute that Judge Wilson found the documents at issue to be discoverable. In addition, Judge Wilson's decision is consistent with this Court's previous decisions in *Shroadess*, *Young*, and *Charles Town General Hospital*.

As this Court made clear in *Crawford v. Taylor*, 138 W. Va. 207, 207, 75 S.E.2d 370, 370 (1953), "[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.*" *Id.* at syl. pt. 1 (emphasis added). Here, Wheeling Hospital does not argue that Judge Wilson applied the wrong law, or that his analysis was legally incorrect but, rather, that he reached a result that Wheeling Hospital does not like. This is exactly the kind of case *Crawford* warns against. If Wheeling Hospital is unhappy with Judge Wilson's result, then the law already provides a full and complete remedy—appeal. Prohibition is unavailable.

## 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 and/or the HIPPA Privacy Rules and were relevant to Ms. Mills' negligent credentialing, retention and supervision claim against Wheeling Hospital. In making this finding, Judge Wilson correctly applied West Virginia's "Peer Review" statute, the HIPPA Privacy Rule, and West Virginia's discovery rules regarding relevancy. Accordingly, Judge Wilson did not clearly err as a matter of law. Nor did he abuse his powers in a flagrant violation of Wheeling Hospital's rights. Because Wheeling Hospital has not met the exacting standards for issuance of a writ of prohibition, its Petition should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

Service of the foregoing *Response to 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 8<sup>th</sup> day of July, 2015 as follows:

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