

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 15-0094

STATE OF WEST VIRGINIA ex rel.
HCR MANORCARE, LLC; HCR
MANORCARE, INC.; MC OPERATIONS
INVESTMENTS, INC.; HCRMC OPERATIONS, LLC;
HCR MANORCARE OPERATIONS II, LLC;
HCR MANORCARE HEARTLAND, LLC;
MANOR CARE, INC.; HCR HEALTHCARE, LLC;
HCR MANOR CARE SERVICES, INC.;
HEALTH CARE and RETIREMENT CORPORATION
OF AMERICA, LLC; HEARTLAND EMPLOYMENT
SERVICES, LLC; JOSEPH DONCHATZ; JOHN DOES
1 THROUGH 10; and UNIDENTIFIED ENTITIES 1
THROUGH 10 (as to Heartland of Charleston),

Petitioners,

Civil Action No. 13-C-1137
(Circuit Court of Kanawha County)

v.

THE HONORABLE JAMES STUCKY, Judge, Circuit
Court of Kanawha County, West Virginia; and TOM
HANNA, individually and on behalf of the estate and
wrongful death beneficiaries of SHARON HANNA,

Respondents.

PETITION FOR WRIT OF PROHIBITION

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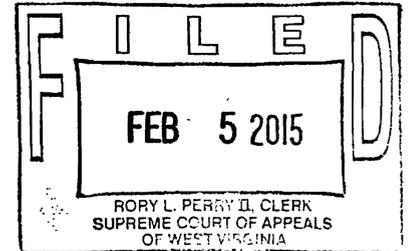


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QUESTIONS PRESENTED

- (1) Whether the Circuit Court exceeded its legitimate powers by granting Respondent Hanna's *Motion to Compel Compliance With Court's Order on First Interrogatories and Requests for Production* and then denying Petitioners' *Motion to Alter or Amend the Court's Order Granting [Respondent Tom Hanna's] Motion to Compel Compliance With Court's Order on First Interrogatories and Requests for Production* without first conducting an in camera review to determine whether certain documents were, in fact, privileged?
- (2) Whether the procedure set forth in Syl. Pt. 2, *State ex rel. Nationwide Mutual Insurance Company v. Kaufman*, 222 W. Va. 37, 658 S.E.2d 728 (2008), applies to the discovery of privileged documents where the peer review and/or quality assurance privilege has been asserted?
- (3) Whether the Circuit Court exceeded its legitimate powers by not conducting an in camera review to determine whether the Center Visit Summaries were, in fact, privileged under the analysis set forth in *State ex rel. Nationwide Mutual Insurance Company v. Kaufman*, 222 W. Va. 37, 658 S.E.2d 728 (2008), given the circumstances surrounding this case?
- (4) Whether an in camera review of the Center Visit Summaries could have satisfied Petitioners' burden, if any, in demonstrating that Center Visit Summaries originated from a review organization, as defined by West Virginia Code § 30-3C-1?
- (5) Whether the Center Visit Summaries originated in a review organization, as defined by West Virginia Code § 30-3C-1?
- (6) Whether an agent of, or independent third party acting at the request of, a review organization, as defined by West Virginia Code § 30-3C-1, is considered an "original

source” for the purpose of triggering the “original source” exception found in West Virginia Code § 30-3C-3?

- (7) Whether the Circuit Court exceeded its legitimate powers by not conducting an in camera review to determine whether the Center Visit Summaries were, in fact, privileged under the analysis set forth in *State ex rel. Shroades v. Henry*, 187 W. Va. 723, 421 S.E.2d 264 (1992), given the circumstances surrounding this case?
- (8) Whether the Circuit Court exceeded its legitimate powers by not conducting an in camera review to determine whether the documents withheld by Petitioners in Response to Respondent Hanna’s Corporate Requests for Production & Corporate II Requests for Production were, in fact, attorney-client privileged under the analysis set forth in *State ex rel. Nationwide Mutual Insurance Company v. Kaufman*, 222 W. Va. 37, 658 S.E.2d 728 (2008), given the circumstances surrounding this case?

STATEMENT OF THE CASE

Heartland of Charleston was a skilled nursing facility located in Charleston, West Virginia.¹ Respondent Tom Hanna’s mother, Sharon Hanna (“Decedent”), was an intermittent resident of Heartland of Charleston for three months between July and September of 2011. (App. 00048-00100). Respondent Hanna (Plaintiff in the underlying action) alleges that Petitioners (Defendants in the underlying action) caused Decedent injury due to the provision, or lack thereof, of health care services during Decedent’s residency at Heartland of Charleston. (App. 00048). Respondent Hanna commenced the underlying action on June 14, 2013, in the Circuit Court of Kanawha County. (App. 00048).

¹ The facility formerly known as Heartland of Charleston is still in operation, but is now owned and operated by an entity not a party to this litigation and unrelated to the parties in this litigation.

A. Documents Withheld on the Basis of Peer Review/Quality Assurance Privilege.

On June 24, 2013, Respondent Hanna served his first discovery requests for the production of documents. (App. 0807). Specifically, the two discovery requests from this set of discovery that are at issue in the present case state as follows:

REQUEST FOR PRODUCTION NO. 16: All reports, correspondence or other writings generated by or on behalf of any management company of, or consultant to, the facility concerning the care and treatment of residents during Sharon Hanna's residency.

* * *

REQUEST FOR PRODUCTION NO. 26: All documentation and reports from any consultant or management personnel at the facility at anytime during Sharon Hanna's residency. This request includes, but is not limited to any ongoing or periodic report, study evaluation or assessment generated by the following consultants or employees of the facility:

- a. R.N. Nurse Consultant;
- b. Pharmaceutical Consultant;
- c. Registered Dietician Consultant;
- d. Quality Assurance Staff;
- e. Medical Records Consultant; or
- f. Any other health or medical consultant brought in or employed to evaluate or study the adequacy of care. Further this request includes any minutes from all meetings conducted by any of the above consultants or employees during the aforementioned time frame.

(App. 00801; 00803) (hereinafter collectively known as "Requests 16 and 26").

Petitioners responded to these two requests by asserting that after "having made a reasonable inquiry," they were "unaware of the existence of, and [did] not have in their possession, information sufficient to formulate a response" to these requests. (App. 00828; 00838). More importantly, Petitioners also specifically asserted that, even if documents responsive to these requests did exist, these documents would be protected from discovery because they are "subject to

the peer review privilege and/or quality assurance privilege set forth in West Virginia Code §§ 30-3C-1, *et seq.*, and 16-5C-2(h), and also 42 C.F.R. § 483.75(o).” (App. 00828; 00838).

On February 14, 2014, Respondent Hanna filed a Motion to Compel Petitioners to supplement their responses to Respondent Hanna’s discovery requests, including supplementation to the two discovery requests at issue *sub judice*. (App. 00230-00259). Petitioners responded to this Motion to Compel by stating, in relevant part, that they would supplement their discovery responses to Requests 16 and 26 but would not produce protected or privileged information. (App. 00264).

On March 26, 2014, the Circuit Court held a hearing on Respondent Hanna’s Motion to Compel. (App. 00007). On April 25, 2014, Respondent Hanna submitted a proposed Order to the Circuit Court pertaining to the March 26, 2014 hearing. This proposed Order, among other things, required Petitioners to supplement their responses to Requests 16 and 26, provided that the identity of other residents would be redacted and that any attempt to assert a quality assurance privilege should be properly documented in a privilege log “**for the [Circuit] Court’s review.**” (App. 00016) (emphasis added). Specifically, the proposed (and eventually entered) Order instructed that “[i]f [Petitioners] are going to attempt to assert a quality assurance privilege to any document responsive to this ordered production, they must file a privilege log identifying when said document was created, who created said document by name and position in the facility, the title of the document, and a general description of the type of information contained in the document for the Court’s review.” (App. 00016).

Notably, the proposed Order relating to the March 26, 2014 hearing also instructed Petitioners to supplement the discovery responses addressed therein “within 30 days from the date of the hearing of this matter.” (App. 00018). However, Respondent Hanna’s proposed Order

was inherently flawed because it was not submitted to the Court for entry until the thirtieth (30th) day following the March 26, 2014 hearing. Moreover, the Circuit Court did not enter Respondent Hanna's proposed Order until May 12, 2014. (App. 00018). Hence, it was impossible under the circumstances for Petitioners to comply with the time restraints imposed by this Order.

On May 29, 2014, Respondent Hanna filed a Motion to Compel Compliance with the Circuit Court's Order of May 12, 2014. (App. 00301-00302). This Motion to Compel Compliance, however, failed to specify which specific discovery responses that Respondent Hanna wished to be supplemented. (App. 00301-00302). On July 21, 2014, counsel for Respondent Hanna eventually provided Petitioners' counsel with a letter requesting the supplementation of specific discovery responses addressed in the Circuit Court's Order of May 12, 2014. (App. 00374). This correspondence included requests for supplementation to Requests 16 and 26. (App. 00375).

Accordingly, on August 27, 2014, Petitioners supplemented their responses to all discovery requests referenced in the aforementioned letter from Respondent Hanna's counsel. (App. 00905-00943). The only potentially responsive documents that Petitioners did not produce concerned Requests 16 and 26. These documents related to consultant reports, called "Center Visit Summaries", which are documents protected by the peer review and/or quality assurance privilege. (App. 00941-00942). Petitioners withheld production of these Center Visit Summaries by reasserting the peer review privilege and providing a privilege log for these documents, as was explicitly instructed and permitted by the Circuit Court's Order of May 12, 2014. (App. 00016).

The potential existence of any written report responsive to either Request 16 or 26 (*i.e.*, Center Visit Summaries) first came to light on June 11, 2014, when, in a separate lawsuit filed

against HCR ManorCare, LLC, *et al.*, Debra Blair, a former Quality Assurance Consultant assigned to certain Heartland facilities in West Virginia, testified that written, as opposed to oral, reports were sometimes provided to individuals involved in the quality assurance program. (App. 00462).

These Center Visit Summaries (also called consultant reports) were created by quality assurance consultants exclusively for Petitioners' Quality Assurance and Performance Improvement Program ("QAPI Program"), as part of Heartland of Charleston's quality assurance process, described in the QAPI Guide. These Center Visit Summaries were distributed in accordance with the quality assurance process and were only given to specific individuals permitted to be part of Heartland of Charleston's quality assurance committee, as defined by the QAPI Program. (App. 00567-00569).

Following the deposition of Ms. Blair, counsel for Petitioners conducted an investigation to determine whether any written Center Visit Summaries were created for Heartland of Charleston during Decedent's residency and, if so, whether they were responsive to either Request 16 or Request 26. (App. 00462-00463). After these documents were located, a privilege log was created, per the Circuit Court's Order of May 12, 2014, and supplemental discovery responses were provided on August 27, 2014, properly objecting to the production of these documents on privilege grounds. (App. 00941-00942).

On September 4, 2014, the Court held a hearing on, *inter alia*, Respondent Hanna's Motion to Compel Compliance filed on May 29, 2014. (App. 01183). At this hearing, counsel for Respondent Hanna argued that Petitioners had waived any peer review and/or quality assurance privilege because Petitioners failed to provide a privilege log for the Center Visit Summaries within the thirty (30) day time frame specified in the Circuit Court's Order of May

12, 2014. (App. 01198-01199). Respondent Hanna's counsel also argued that Petitioners had not presented any evidence to "prove" the existence of a peer review and/or quality assurance privilege, or that a quality assurance committee even existed. (App. 01201). Petitioners responded by requesting the Circuit Court to perform an in camera review of the Center Visit Summaries to determine whether a privilege applied, and offered to present supporting affidavits and documentation to further establish their quality assurance process and privilege. (App. 01202). The Circuit Court summarily granted Respondent Hanna's May 29, 2014 Motion to Compel Compliance at the September 4, 2014 hearing. The Court did so: (1) without articulating or providing any analysis or reasoning whatsoever for its ruling at the hearing; (2) without reviewing the privilege log of Petitioners that was provided at the hearing; and (3) without ever addressing Petitioners' request for an in-camera review of the Center Visit Summaries. (App. 001205). To say that the issue of privilege, which all will acknowledge to be one of paramount importance, was given short shrift, is putting it mildly. Indeed, the issue was virtually ignored by the court below.

On November 7, 2014, the Circuit Court entered, without alteration, the Order prepared by Respondent Hanna's counsel pertaining to the hearing held on September 4, 2014, which overruled Petitioners' assertions of quality assurance/peer review privilege. (App. 00006-00012). How the court below could so rule, without so much as even glancing at the privileged documents, is, frankly, inconceivable. Furthermore, this Order was entered over the objections of Petitioners and included numerous misstatements and rulings on issues not addressed by the parties or the court at the September 4, 2014 hearing in this matter. (App. 00414-00457).

In an effort to allow the Circuit Court to correct its clear error, on November 14, 2014, Petitioners filed a Motion to Alter or Amend the Circuit Court's Order of November 7, 2014

(hereinafter “Motion to Alter or Amend”), as it pertained to the production of Requests 16 and 26. (App. 00458-00569). In particular, Petitioners asserted that (1) they had properly asserted that the Center Visit Summaries, which may be responsive to Requests 16 and 26, were privileged; (2) that these assertions of privilege were recorded and preserved in a privilege log, per the Circuit Court’s explicit instruction in its May 12, 2014 Order; and (3) that the Circuit Court, pursuant to West Virginia case law, had committed a clear error of law by failing to conduct an in camera review of the Center Visit Summaries to determine whether they were privileged.² (App. 00458-00569). Respondent Hanna responded to this Motion on December 22, 2014, shifting the Circuit Court’s attention away from any case law except for his analysis of *Shroades*, in which he provided, without any citations in support thereof, an erroneous interpretation of the “original source”³ exception. (App. 00570-00579). A hearing was held on the issue on December 30, 2014. (App. 01207-01232).

At the December 30, 2014 hearing, Petitioners again requested the Circuit Court to conduct an in camera review of the Center Visit Summaries identified in the privilege log provided to Respondents. (App. 01220). Petitioners, at the hearing, were also prepared to proffer documents concerning the quality assurance committee, including the structure and purpose of Petitioners’ quality assurance program, **for the Circuit Court’s review.** (App. 01211-01212; 01215-01216). In particular, Petitioners were prepared to produce the QAPI Practice Guide, which describes the implementation, structure, and processes of Petitioners’ quality assurance

² In addition to other cases, Petitioners specifically cited to *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 222 W. Va. 37, 658 S.E.2d 728 (2008) and *State ex rel. Shroades v. Henry*, 187 W. Va. 723, 421 S.E.2d 264 (1992).

³ How the “original source” exception to the peer review privilege under W. Va. CODE § 30-3C-1 *et seq.*, is to be interpreted and defined, at least in the context currently before this Court, is a matter of first impression in West Virginia.

program.⁴ In response, counsel for Respondent Hanna argued that, since the clinical services consultants who created the Center Visit Summaries provided such services to various HCR ManorCare facilities, and were not confined to or employed exclusively at Heartland of Charleston, those reports were not protected under the peer review privilege because they were obtainable from the original source—the clinical services consultants.⁵ (App. 01218; 01222).

Moreover, before issuing his ruling, Respondent Judge Stucky asked Attorney Michael Fuller, counsel for Respondent Hanna, whether he agreed with Petitioners' argument that an in camera review of the subject documents was necessary. (App. 01225). Mr. Fuller stated that he did not. (App. 01225). A moment later, and once again with no analysis or explanation whatsoever, the Circuit Court doubled down and summarily denied Petitioners' Motion to Alter or Amend. (App. 01226). On or about February 2, 2015, the Court entered its Order Denying [Petitioners'] Motion to Alter or Amend the Court's Order Granting [Respondent Tom Hanna's] Motion to Compel Compliance With Court's Order on First Interrogatories and Requests for Production.

Pursuant to West Virginia Rule of Appellate Procedure 16, Petitioners now seek the issuance of a rule compelling Respondents to show cause, if any, as to why Respondent Judge

⁴ This document is the subject of a contemporaneously-filed Motion for Leave to Include Documents Not Contained in the Record, pursuant to West Virginia Rule of Appellate Procedure 16(e)(5).

⁵ Clinical services consultants, sometimes referred to as nurse consultants or quality assurance consultants, provide quality assurance services to HCR ManorCare skilled nursing facilities, including Heartland of Charleston. These consultants, as agents of the quality assurance committee, conduct a quality assurance review of a HCR ManorCare facility's procedures and policies in relation to the treatment and care provided. A report (*i.e.*, Center Visit Summary) is then generated for the exclusive purpose of being utilized by the applicable quality assurance committee, pursuant to Petitioners' Quality Assurance and Performance Improvement quality assurance program. This report is provided to members of the quality assurance committees at the facility, regional, and divisional level. The clinical services consultants do not provide their reports to any individual that is not a member of a quality assurance committee, nor are these reports generated for any other reason except for quality assurance purposes. (App. 00567-00569; 00632-00652).

Stucky's Orders of November 7, 2014 and February 2, 2015 should not be set aside. Petitioners further seek the issuance of a Writ of Prohibition from this Honorable Court to prevent the Circuit Court from compelling Petitioners to comply with the aforementioned Orders in this matter, which would force them to produce clearly privileged documents without any court or tribunal ever even bothering to look at them first.

B. Documents Withheld on the Basis of Attorney-Client and Other Privileges.

On or about December 19, 2013, Respondent Hanna served, *inter alia*, his Corporate Requests for Production upon Petitioners. Petitioners provided responses to the same on or about January 17, 2014. (App. 00960-00967). Respondent Hanna served his Corporate II Requests for Production on or about July 21, 2014 and Petitioners provided responses to the same on or about August 20, 2014 (App. 01095-01123). Importantly, as part of these responses, Petitioners provided privilege logs for documents withheld on the basis of attorney-client and other privileges as mandated under West Virginia law. (App. 01115-01122).⁶ These privilege logs provided, for each document withheld, the name of the document, the date of the document, the document custodian, the document source, and the privilege asserted. (App. 01115-01122; 01133; 01146; 01180-01181).

On or about August 26, 2014, Respondent Hanna filed Motions to Compel his Corporate and Corporate II Requests for Production (hereinafter collectively known as "Motions to Compel Corporate Responses"). (App. 00653-00673). These Motions focused upon five (5) specific discovery requests. Respondent Hanna's Motion to Compel his Corporate Requests for Production sought, *inter alia*, additional responses to the two (2) following discovery requests:

REQUEST NO. 7: Any and all reports and other documents received by the Board of Directors of each separate Defendant pertaining to the facility

⁶ Petitioners also provided a separate privilege log for the Center Visit Summaries discussed herein in response to Respondent Hanna's Corporate II Requests for Production as well.

either individually or on a consolidated basis, during any portion of Sharon Hanna's residency.

REQUEST NO. 8: Any and all reports and other documents received by the Board of Directors of each separate Defendant pertaining to the Defendants' West Virginia operations either individually or on a consolidated basis, during any portion of Sharon Hanna's residency.

(App. 00657-00660). Respondent Hanna's Motion to Compel his Corporate II Requests for Production sought, *inter alia*, additional responses to the three (3) following discovery requests:

REQUEST FOR PRODUCTION NO. 3: Any and all reports and other documents received by the Board of Directors of each separate Defendant pertaining to the facility either individually or on a consolidated basis for 2010 through 2012.

REQUEST FOR PRODUCTION NO. 4: Any and all reports and other documents received by the Board of Directors of each separate Defendant pertaining to the Defendants' West Virginia operations either individually or on a consolidated basis for 2010 through 2012.

REQUEST FOR PRODUCTION NO. 6: Copies of any and all Board of Director meeting minutes for any of the separate Defendants for 2010 through 2012.

(App. 00667-00671). Importantly, Petitioners had previously provided privilege logs for the documents potentially responsive to these requests, as noted above. (App. 01036-01038; 01115-01122). Petitioners provided a Memorandum in Opposition to Respondent Hanna's Motions to Compel Corporate Responses arguing, *inter alia*, that the requests sought documents that were privileged; therefore, an in camera review of these documents was required prior to any production. (App. 00674-00693).⁷

On or about September 4, 2014, the Circuit Court held a hearing on Respondent Hanna's Motions to Compel Corporate Responses. (App. 01183-01206). The Court entered an Order on

⁷ Respondents also argued that these requests sought documents that contained irrelevant, confidential, proprietary, and trade secret information, and sought documents containing financial information and that were covered by the peer review/quality assurance privilege. (App. 00674-00693).

the same on or about November 7, 2014 granting the motions. (App. 00020-00026). On the issue of the documents for which Respondents asserted attorney-client privilege, the Court's Order provided that "the Court is ordering that the Defendants redact only that portion of the Board of Director Meeting Minutes labeled as 'Legal Reports' which provides legal advice." (App. 00024). However, this language in the Order only addresses the privilege log documents listed in response to Corporate II Request for Production Number 6 and completely ignores the attorney-client privilege objections asserted to the other discovery requests at issue in Respondent Hanna's Motion to Compel Corporate Responses." (App. 00020-00026).⁸ Importantly, the Court's aforementioned Order completely ignored the attorney-client privilege objections asserted in response to the other four (4) discovery requests at issue and ordered the wholesale production of all documents responsive to those requests to Respondent Hanna's counsel without an in camera review. (App. 00020-00026).

After the entry of the aforementioned Order, Petitioners provided several supplementations of the discovery responses at issue and provided the redacted Board of Directors Meeting Minutes, as ordered by the Court. (App. 01058-01087; 01124-01182). Nonetheless, on or about January 5, 2015, Respondent Hanna filed a Second Motion to Compel Compliance with Court's Order on Corporate Requests for Production and Corporate II Requests for Production.⁹ Petitioners responded to this Motion and asserted that they had provided the Board of Directors Meeting Minutes ordered to be produced in the Court's November 7, 2014

⁸ This Order also implies that Petitioners did not preserve the argument that the Circuit Court should have conducted an in camera review of the documents at issue. (App. 00020-00026). This is erroneous, as Petitioners have repeatedly asserted that the *Kaufman* review procedure should be followed for these documents. (App. 00037).

⁹ Respondent Hanna filed a previous Motion to Compel Compliance with Court's Order on Corporate Requests for Production and Corporate II Requests for Production and set the same for a hearing. However, Respondent Hanna cancelled the hearing on this Motion after receiving one of Petitioners' supplementations to the discovery requests at issue. (App. 00749).

Order and that they had provided proper supplemental privilege logs for the other documents potentially responsive to the four (4) remaining discovery requests. (App. 00775-00779).

On or about January 21, 2015, the Court held a hearing on Respondent Hanna's Second Motion to Compel Compliance with Court's Order on Corporate Requests for Production and Corporate II Requests for Production. At this hearing, Petitioners reiterated that they had provided a proper privilege log and otherwise preserved the attorney-client privilege concerning these documents and requested that the Circuit Court perform an in camera review of the same. (App. 00038). At the conclusion of the January 21, 2015 hearing, the Court, once again without addressing any of Petitioners' arguments concerning the privileged nature of the documents at issue, delivered déjà vu all over again and ordered that the remaining documents be provided directly to opposing counsel within fifteen (15) days of the date of the hearing (by Thursday, February 5, 2015). (App. 00043). This ruling forms the basis of Petitioners' Petition for Writ of Prohibition, pursuant to W. Va. R. App. P. 16(e)(1).

Pursuant to West Virginia Rule of Appellate Procedure 16, Petitioners now seek the issuance of a rule compelling Respondents to show cause, if any, as to why Respondent Judge Stucky's Order of November 7, 2014 on Respondent Hanna's Motions to Compel Corporate Responses and his ruling at the January 21, 2015 hearing in this matter on Respondent Hanna's Second Motion to Compel Compliance with Court's Order on Corporate Requests for Production and Corporate II Requests for Production should not be set aside. Petitioners further seek the issuance of a Writ of Prohibition from this Honorable Court to prevent the Circuit Court from compelling Petitioners to comply with the aforementioned rulings which would vitiate, denigrate, and ultimately, abrogate the attorney-client privilege in this state.

SUMMARY OF ARGUMENT

The Circuit Court exceeded its legitimate powers by compelling Petitioners to produce documents which Petitioners have repeatedly opposed based on the peer review and/or quality assurance privilege under West Virginia Code § 30-3C-1, *et seq.* Specifically, the Circuit Court granted Respondent Hanna's Motion compelling production of the Center Visit Summaries, notwithstanding their existence being exclusively for the QAPI Program's quality assurance process. Compelling Petitioners to produce these documents would not only violate the intent and purpose of West Virginia Code § 30-3C-1, *et seq.*, but it would also permit the improper use of discovery under Rule 26 of the West Virginia Rules of Civil Procedure.

Petitioners have continuously asserted that the peer review and/or quality assurance privilege protects the Center Visit Summaries from discovery. During litigation at the circuit court level, Petitioners made numerous requests for the Circuit Court to conduct an *in camera* review of the Center Visit Summaries and other supporting documentation, before making any ruling concerning the production of these consultant reports. The Circuit Court never conducted an *in camera* review of the Center Visit Summaries or any other document that Petitioners proffered to establish the existence of the peer review and/or quality assurance privilege. As such, the Circuit Court exceeded its legitimate powers by not conducting an *in camera* review.

Further, the Center Visit Summaries are privileged documents because they are documents originating in a § 30-3C-1 "review organization." Although this Court has never specifically addressed the interplay between documents created by a review organization's agent and the "original source" exception to the peer review privilege under West Virginia Code § 30-3C-3, jurisdictions with similar statutes have addressed this issue and have held that documents created by an agent of a review organization for the exclusive use in the organization's quality

assurance process are still privileged and are not discoverable. Accordingly, the “original source” exception argument raised by Respondents is without merit and goes against the very principles establishing the peer review privilege.

Simply put, Petitioners repeatedly attempted to resolve this issue at the lower court level through filings, argument at hearings, and multiple requests to the Circuit Court to conduct an in camera review in order to make an independent determination of whether the documents submitted by Petitioners established the validity of their asserted privilege. Following the Circuit Court’s Orders of November 7, 2014 and February 2, 2015, Petitioners were left with no other recourse but to petition to the sound judgment of this Honorable Court.

Similarly, the Circuit Court has ordered the wholesale production of documents potentially responsive to Respondent Hanna’s Corporate Requests for Production and Corporate II Requests for Production that Petitioners have always asserted are protected by the attorney-client and other privileges, without conducting the mandatory in camera review of these documents established in the case of *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 222 W. Va. 37, 658 S.E.2d 728 (2008). On numerous occasions Petitioners have objected to the production of these documents on privilege grounds, have presented the Circuit Court with copies of the privilege logs provided in response to requests for these documents, and have requested an in camera review of these documents for privilege. However, the Circuit Court has summarily and dismissively denied those requests routinely. As with the Circuit Court’s rulings concerning the Center Visit Summaries, the Circuit Court’s Order entered on November 7, 2014 concerning Respondent Hanna’s Motions to Compel Corporate Responses and the Circuit Court’s recent rulings at the January 21, 2015 hearing on Respondent Hanna’s Second Motion to Compel Compliance With Court’s Order on Corporate Requests for Production and Corporate II

Requests for Production, have left Petitioners no recourse but to petition the sound judgment of this Honorable Court on this issue as well.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure, Petitioners submit that oral argument is necessary. *See* W. Va. R. App. P. 18(a).

This case contains issues proper for a Rule 20 argument because this case presents (1) issues of first impression, (2) issues with significant public policy implications, and (3) an inconsistency among the decisions of West Virginia's lower tribunals. *See* W. Va. R. App. P. 20(a). The issue of first impression for this Honorable Court to consider is whether an agent of, or independent third party acting at the request of a review organization as defined by West Virginia Code § 30-3C-1, is considered an "original source" for the purpose of triggering the "original source" exception to the peer review privilege in West Virginia Code § 30-3C-3. The "original source" exception to the peer review privilege essentially allows for the discovery of quality assurance documents that were not created by a peer review organization itself.¹⁰ This case also contains Rule 20 public policy implications because the peer review and/or quality assurance privilege provided for in West Virginia Code § 30-3C-1, *et seq.*, is deeply rooted in the provision of quality health care to the citizens of West Virginia. *See Young v. Saldanha*, 189 W. Va. 330, 334, 431 S.E.2d 669, 673 (1993) (citing the analysis of the Honorable Charles E. King, Judge, Kanawha County Circuit Court of West Virginia). Lastly, there are, to a degree, conflicting analyses between *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 222 W. Va. 37, 658 S.E.2d 728 (2008) and *State ex rel. Shroades v. Henry*, 187 W. Va. 723, 421 S.E.2d 264

¹⁰ The "original source" exception is discussed more fully at *infra* p. 26-29.

(1992), as they pertain to the discovery of privileged documents when the peer review and/or quality assurance privilege is asserted.

This case also involves claims of unjustifiable exercise of discretion where the law governing that discretion is settled, suitable for argument under Rule 19. *See* W. Va. R. App. P. 19(a). It is well-settled law that a circuit court must conduct an in camera review when a party asserts that certain discovery is privileged. *E.g.*, *State ex rel. Marshall County Comm'n v. Carter*, 225 W. Va. 68, 73, 689 S.E.2d 796, 801 (2010) (referencing Cleckley, Davis & Palmer, *Litigation Handbook*, § 26(b)(1), 697 (2d ed. 2006) (citing *Shroades*, 187 W. Va. 723, 421 S.E.2d 264)).

This Court should hear oral arguments due to the public policy implications that could result from failing to clarify the issues and questions identified herein. “The purpose of [peer review] legislation is not to facilitate the prosecution of malpractice cases,” and this Court should seize this opportunity to issue an opinion so that the peer review and/or quality assurance privilege will continue to safeguard and improve the quality of patient care in West Virginia. *Shroades*, 187 W. Va. at 727, 421 S.E.2d at 268 (quoting *Jenkins v. Wu*, 468 N.E.2d 1162, 1168 (1984)).

STANDARD OF REVIEW

The foregoing Petition for Writ of Prohibition is filed pursuant to article VIII, section 3 of the West Virginia Constitution, which grants this Court original jurisdiction for proceedings in prohibition. W. VA. CONST. art. VIII, § 3. A writ of prohibition “shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” W. VA. CODE § 53-1-1.

In *State ex rel. Hoover v. Berger*, this Court held:

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.

Syl. Pt. 4, 199 W. Va. 12, 483 S.E.2d 12 (1996); *see also* Syl. Pt. 2, *State ex rel. Adkins v. Burnside*, 212 W. Va. 74, 569 S.E.2d 150 (2002).

In the case presently before the Court, Petitioners have no other adequate means to obtain the desired relief. Respondent Judge Stucky has ruled that Petitioners must produce the documents requested by Respondent Hanna in his First Request for Production and in his Corporate Requests for Production and Corporate II Requests for Production. (App. 00011-00012; 00025-00026). Compliance with these Orders and rulings will damage Petitioners in a way that cannot be corrected upon appeal, as it forces Petitioners to produce to their adversary documents that are clearly within the purview of the peer review privilege under West Virginia Code § 30-3C-1, *et seq.* and the attorney-client privilege. Once such production occurs, it cannot be undone. Further, this Petition presents an issue of first impression. This Court has not yet ruled on whether the principal or the agent is the “original source,” under West Virginia Code §

30-3C-1, *et seq.*, for documents generated by an agent of a quality assurance committee/program and for the exclusive use of that committee/program.

Recently, this Court reiterated the following standard regarding whether to issue a rule to show cause upon a petition for a writ of prohibition:

‘In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.’

Syl. Pt. 2, *State ex rel. Tucker County Solid Waste Auth. v. West Virginia Div. of Labor*, 222 W. Va. 588, 668 S.E.2d 217 (2008) (quoting Syl. Pt. 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979)).

As previously stated, Petitioners have no other adequate remedy to correct the harm that will occur if forced to comply with the Circuit Court’s Orders of November 7, 2014 and February 2, 2015 and the Circuit Court’s rulings at the recent January 21, 2015 hearing. Specifically, Petitioners will be forced to disregard and violate the very essence of the privileges and protections contemplated in West Virginia Code § 30-3C-1, *et seq.* and forced to violate the policies and protections which are the underpinnings of attorney-client privilege if they are required to produce these documents without at least an in camera inspection by the Circuit Court. In other words, compelling production of these Center Visit Summaries will facilitate the prosecution of malpractice cases in direct contravention of the purpose of this state’s peer review legislation—improving the quality of medical care in West Virginia. *See, e.g., Shroadess*, 187 W.

Va. at 727, 421 S.E.2d at 268. Furthermore, Petitioners will be forced to produce documents violative of attorney-client privilege, which is **the** paramount and sacrosanct litigation privilege. *State ex rel. Montpelier US Ins. Co. v. Bloom*, ___ W.Va. ___, 757 S.E.2d 788, 796 (W.Va. 2014) (*per curiam*) (“[T]he primary purpose of the attorney-client privilege [is] to facilitate the uninhibited flow of information between a lawyer and client so as to lead to an accurate ascertainment and enforcement of rights.”).

Considering the substantial protections provided for quality assurance programs and committees under West Virginia’s peer review statute, and the strong public policy against disclosure of confidential attorney-client communications, Respondent Judge Stucky’s Orders of November 7, 2014 and February 2, 2015, in his rulings at the January 21, 2015 hearing, are clearly erroneous. Additionally, Respondent Judge Stucky’s Orders and rulings at issue herein are inherently flawed because they exceed the limitations on discovery set forth in the West Virginia Rules of Civil Procedure. For these reasons, which are more fully set forth in the arguments below, this Court should issue a writ of prohibition which: (1) prevents the enforcement of Respondent Judge Stucky’s Orders of November 7, 2014 and February 2, 2015; (2) prevents the enforcement of Judge Stucky’s rulings at the January 21, 2015 hearing; (3) prevents the Center Visit Summaries from being disclosed to Respondent Hanna, at least without an in camera inspection first occurring; and (4) prevents the production of the documents objected to on the basis of attorney-client privilege until the Circuit Court conducts an in camera review of the attorney-client privileged documents.

ARGUMENT

A. **The Circuit Court exceeded its authority by failing and refusing to conduct an in camera review to determine whether the subject discovery responses were quality assurance privileged.**

1. **This Court's analysis in *Kaufman* sets forth the procedure which a trial court must follow when the discovery of allegedly privileged documents is at issue.**

In *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, the West Virginia Supreme Court of Appeals set forth the general procedure that **must** be followed with respect to 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.

Syl. Pt. 2, 222 W. Va. 37, 658 S.E.2d 728 (2008) (emphasis added).

The *Kaufman* Court also emphasized that this discovery procedure applies to claims of privilege in all types of cases. *Id.* at 42, 658 S.E.2d at 734 (“[T]his procedure should have a general application to discovery of privileged communication in any context.”). Yet, the Circuit Court’s Orders of November 7, 2014 and February 2, 2015 erroneously limit *Kaufman* to issues regarding claims of the attorney-client privilege. (App. 00001-12). Specifically, the Order states

that since the Center Visit Summaries do not involve the attorney-client privilege, “there would be no need to conduct an *in camera* review of the communications to discover if the substance was ‘legal advice’ from the client’s attorney.” (App. 00003) (emphasis in original). This is an erroneous (and frankly inexplicable) limitation on the application of *Kaufman*. In fact, subsequent opinions from this Court have confirmed that *Kaufman* should be applied to issues concerning the “**discovery of privileged communication in any context.**” See, e.g., *State ex rel. Marshall County Comm’n v. Carter*, 225 W. Va. 68, 73, 689 S.E.2d 796, 801 (2010) (quoting, and following the holding in, *Kaufman*, 222 W. Va. 37, 42, 658 S.E.2d 728, 734) (emphasis added)); *State ex rel. Nationwide Mut. Ins. Co. v. Marks*, 223 W. Va. 452, 460, 676 S.E.2d 156, 164 (2009) (indicating that the *Kaufman* opinion applies to discovery disputes not involving the attorney-client privilege or work-product doctrine).

2. Petitioners fully complied with the requirements set forth in *Kaufman*, which should have triggered the Circuit Court to conduct an *in camera* review of the subject documents.

The circumstances surrounding the Center Visit Summaries should have triggered an *in camera* review by the Circuit Court to determine whether those documents were privileged. In asserting and preserving the peer review and/or quality assurance privilege for the Center Visit Summaries, Petitioners fully complied with the required procedure outlined in *Kaufman*. Specifically, Petitioners provided a privilege log to Respondents that identified the privileged documents by name, date, custodian, source, and the applicable privilege. Compare *Kaufman*, 222 W. Va. at 42, 658 S.E.2d at 734 (establishing procedure for determining whether documents are privileged) with (App. 00941-00942) (demonstrating that the subject privilege log complies with the second procedural step identified in *Kaufman*) and (App. 00905-00942; 01200) (indicating that the subject privilege log was provided to both Respondents). In this case, once

Petitioners asserted the peer review/quality assurance privilege over the Center Visit Summaries, the Circuit Court, pursuant to *Kaufman*, was required to hold an in camera review and make an independent determination of the status of each document that Petitioners sought to shield from discovery. *See Kaufman*, 222 W. Va. at 42, 658 S.E.2d at 734. This in camera review was never conducted despite Petitioners' numerous requests.

It is also important to note that the holding of the West Virginia Supreme Court of Appeals in *Kaufman* is **not discretionary**. Hence, the Circuit Court **must** conduct an in camera review to determine whether privileged documents are protected from discovery upon a proper assertion of privilege. *Id.* After all, "the foremost authority on the West Virginia Rules of Civil Procedure provides that "[w]hen a party asserts that a communication is privileged the trial court should examine the requested materials in an in camera hearing." *Marshall County Comm'n*, 225 W. Va. at 73, 689 S.E.2d at 801 (quoting Cleckley, Davis & Palmer, *Litigation Handbook*, § 26(b)(1), 697 (2d ed. 2006) (citation omitted)). As such, the Circuit Court committed reversible error when overruling Petitioners' assertions of privilege with respect to the Center Visit Summaries, without first conducting an in camera review to determine whether the asserted privilege applied to the documents that Petitioners sought to shield from discovery. For these reasons, this Court should grant Petitioners' Petition for Writ of Prohibition.

B. The required in camera review would have established that the peer review and/or quality assurance privilege applied and shielded the Center Visit Summaries from discovery.

The peer review privilege was generally recognized at common law and has now been codified in all fifty states. *Young v. Saldanha*, 189 W. Va. 330, 334, 431 S.E.2d 669, 673 n.7 (1993) (citing 3 Miles J. Zaremski & Louis S. Goldstein, *Medical and Hospital Negligence*, § 44A:07 n.1 (Callaghan 1990)). "In general, the [peer review] privilege prohibits all records

pertaining to peer review proceedings from disclosure, discovery, and use as evidence in a non-peer review setting.” *Id.*

The purpose of the privilege is to promote candor and confidentiality in the peer review process, and to foster aggressive critiquing of medical care and qualifications by peers.¹¹ The West Virginia Supreme Court of Appeals has consistently held that “the enactment of [West Virginia] Code § 30-3C-1 to -3 (1993) clearly evinces a public policy encouraging health care professionals to monitor the competency and professional conduct of their peers in order to safeguard and improve the quality of patient care.” Syl. Pt. 6, *State ex rel. Charles Town Gen. Hosp. v. Sanders*, 210 W. Va. 118, 556 S.E.2d 85 (2001) (quoting Syl. Pt. 2, *Saldanha*, 189 W. Va. 330, 431 S.E.2d 669). The statutory privilege arises from the belief that without an assurance of confidentiality, “physicians [will be] reluctant to sit on peer review committees and engage in frank evaluations of their colleagues.” *Saldanha*, 189 W. Va. at 334, 431 S.E.2d at 673 (quoting *Daily Gazette Co.*, 177 W. Va. at 322, 352 S.E.2d at 72 (1986) (internal quotation marks and citation omitted)).

West Virginia Code § 30-3C-3 grants a statutory privilege to peer review activities, protecting such activities from discovery in any civil action. In pertinent part, the statute provides that:

The proceedings and record of a review organization shall be confidential and privileged and shall not be subject to subpoena or discovery proceedings or be admitted as evidence in any civil action arising out of the matters which are subject to evaluation and review by such organization 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

¹¹ E.g., *Saldanha*, 189 W. Va. 330, 431 S.E.2d 669; *Daily Gazette Co. v. W. Va. Bd. of Med.*, 177 W. Va. 317, 322 S.E.2d 66, 71 (1986); *Mahmodian v. United Hosp. Ctr., Inc.*, 185 W. Va. 59, 404 S.E.2d 750, 756 (1991); *Jenkins v. Wu*, 468 N.E.2d 1162 (Ill. 1984); *Cruger v. Love*, 599 So.2d 11 (Fla. 1992).

W. VA. CODE § 30-3C-3. Furthermore, “peer review” is defined as “the procedure for evaluation by health care professionals of the quality and efficiency of services ordered or performed by other health care professionals.” W. VA. CODE § 30-3C-1.

1. Petitioners have satisfied their burden in demonstrating that the Center Visit Summaries are privileged.

In *Shroades*, this Court was asked to determine the scope of the peer review privilege under West Virginia Code § 30-3C-1, *et seq.*, after a health care organization asserted the privilege in an effort to prohibit the discovery of certain information, records, and proceedings of its various review committees that had investigated an alleged wrongful death incident. 187 W. Va. 723, 724-25, 421 S.E.2d 264, 265-66 (1992).¹²

A party asserting a privilege under West Virginia Code § 30-3C-1, *et seq.*, has the burden of demonstrating that the privilege applies. *Id.* at 728-29, 421 S.E.2d at 269-70 (citations omitted). This can be done by the circuit court examining any relevant by-laws to determine whether a committee, in fact, exists as defined in West Virginia Code § 30-3C-1. *Id.* “However when the by-laws do not clearly indicate that peer review is a function of the committee, the party asserting the privilege has the burden of presenting additional information.” *Id.* at 729, 421 S.E.2d at 270.

Petitioners have satisfied this burden by repeatedly attempting to produce various documents to the Circuit Court. Petitioners made repeated requests to the Circuit Court for permission to demonstrate that the relevant by-laws created a valid quality assurance program that meets the requirements of a “review organization” under West Virginia Code § 30-3C-1.

¹² In *Shroades*, the plaintiff requested the discovery of a number of documents from the hospital, including (1) evaluation reports, (2) reports from the quality assurance committee, (3) minutes of any special meeting investigating the incident, and (4) the results of in-house investigations concerning drug administration. *Id.*

(App. 01202; 01215-01216). Further, at the hearing held on December 30, 2014, Petitioners requested that additional information beyond the Center Visit Summaries be reviewed in camera before a decision was made. (App. 01215-01216). In particular, counsel for Petitioners was prepared to produce the QAPI Guide, which again, details the purpose, structure, and processes of Heartland of Charleston's quality assurance program. Since the Court ignored this request, Petitioners have now provided the QAPI Guide for this Honorable Court's review.¹³ (App. 00632-00652).

Aside from Petitioners attempt to produce the QAPI Guide for review by the Circuit Court, along with an in camera review of the Center Visit Summaries, Petitioners provided the Circuit Court with the affidavit of Martha Blankenship, the former Director of Nursing at Heartland of Charleston, to its Motion to Alter or Amend. (App. 00471; 00567-00569). Ms. Blankenship's affidavit mirrors the information contained in the QAPI Guide and details how the Heartland of Charleston quality assurance committee operates. (App. 00567-00569). Moreover, a simple review of the Center Visit Summaries would have also revealed that the quality assurance committee was functioning as a "review organization" under West Virginia Code § 30-3C-1. *See Shroadess*, 187 W. Va. at 729, 421 S.E.2d at 270 (indicating that committees exercising peer review functions can be a "review organization" under West Virginia Code § 30-3C-1). Thus, Petitioners have satisfied their burden, or at least attempted to do so, by proffering to the Circuit Court various sources of information showing that peer review is a function of the quality assurance committees within the QAPI Program.

¹³ Pursuant to W. Va. App. R. 16(e)(5), Petitioners have filed a Motion for leave to include documents not contained in the record contemporaneously herewith.

In the face of Respondent Hanna’s counsel’s vociferous resistance to objective review of the privileged documents by an impartial tribunal, and in the face of benign neglect by the same impartial tribunal, Petitioners were left with no recourse but to petition to this Honorable Court.

2. The Center Visit Summaries originated in a review organization.

The *Shroades* Court also discussed the “original source” exception to the peer review/quality assurance privilege, stating that “[t]he language of the statute grants a privilege to all the records and proceedings of a 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.**” *Id.* at Syl. Pt. 3 (internal quotation marks and citation omitted) (emphasis added). While clarifying, the *Shroades* Court stated:

Material that originates in a review organization remains privileged even if held by a non-review organization and material that originates in a non-review organization does not become privileged after presentation to a review organization. Therefore, material sought from a review organization is privileged; however if material is sought from a non-review organization, the origin of the document determines if it is privileged.

Id. at 728, 421 S.E.2d at 269. Respondents stand fast in their assertion that the Center Visit Summaries are not privileged because they were generated by consultants “not part of the quality assurance committee” and were provided to the “staff at Heartland of Charleston” and the consultant’s “supervisor.” (App. 00003). However, case law, in conjunction with the QAPI Guide, demonstrates that the Center Visit Summaries originated in a review organization—the QAPI Program.

West Virginia case law is silent on the issue of whether documents created by an agent of a review organization are documents that originated in the review organization, as opposed to those that originate in a non-review organization. Fortunately, the Tennessee Supreme Court has

analyzed this issue pursuant to a similar “original source” exception and can offer guidance to this Court.

In *Powell v. Community Health Systems, Inc.*, the Tennessee Supreme Court had to determine “whether an agent of a peer review committee or an independent third party action at the request of a peer review committee is likewise an ‘original source’ for the purpose of applying the ‘original source’ exception” to Tennessee’s peer review privilege.¹⁴ 312 S.W.3d 496, 510 (Tenn. 2010). The statute at issue in *Powell*, Tenn. Code § 63-6-219(e), exempted “from the peer review privilege ‘records otherwise available from original sources’ that have been presented to a peer review committee ‘during the proceedings of such committee.’” *Id.* at 509 (quoting Tenn. Code § 63-6-219(e)). The Tennessee Supreme Court held that “persons acting on behalf of or at the request or direction of a peer review committee performing its peer review functions are not ‘original sources’ from whom the information prepared for the committee’s use can be discovered.” *Id.* In other words, “documents created at the request of a peer review committee exercising its peer review functions or documents that owe their existence to the peer review process are not discoverable.” *Id.*¹⁵ Thus, in the case *sub judice*, the Center Visit Summaries are documents that owe their existence to the peer review process. As a result, they are not discoverable pursuant to the peer review and/or quality assurance privilege.¹⁶

¹⁴ The statute analyzed under *Powell*, Tenn. Code § 63-6-219(e), has since been repealed and replaced by the Tennessee Patient Safety and Quality Improvement Act of 2011. However, the holding in *Powell* is still positive law, as the new Act does not contravene the *Powell* Court’s analysis on this particular issue.

¹⁵ Other courts have reached a similar analysis. *E.g.*, *In re Osteopath Med. Ct. of Tex.*, 16 S.W.3d 881, 886 (Tex. App. 2000); *Riverside Hosp., Inc., v. Johnson*, 272 Va. 518, 636 S.E.2d 416, 424-25 (2006); *Grande v. Lahey Clinic Hosp.*, 725 N.E.2d 1083 (Mass. App. Ct. 2000).

¹⁶ This argument was made, to no avail, at the hearing held on December 30, 2014. (App. 01212).

The QAPI Guide and Ms. Blankenship’s affidavit collectively demonstrate that the purpose and function of Heartland of Charleston’s quality assurance committee is comparable to the very by-laws that the *Shroades* Court discussed and held to satisfy the definition of a “review organization” under W. Va. Code § 30-3C-1. (Compare App. 00641) (responsible for the “[i]nvestigation of unusual occurrences or trigger events” and to “[m]ake recommendations for action steps”) *with Shroades*, 187 W. Va. at 729, 421 S.E.2d at 270 (holding a hospital had a review organization with by-laws stating that data regarding adverse patient outcomes would be collected and that corrective action requests may be initiated)).

Respondents also believe that the Center Visit Summaries are not privileged because the clinical services consultant provided them to Heartland of Charleston “staff” and to the consultant’s “supervisor.” (App. 00003). The implication that the consultants provided the Center Visit Summaries to mere “staff” employees and not exclusively to the quality assurance committee members comes close to, if, indeed, it does not cross over, the boundary of blatant misrepresentation. The “staff” that were provided copies of the Center Visit Summaries were the facility’s upper-level management and members of the quality assurance committee—the Administrator and the Director of Nursing. (App. 00523-00525). Furthermore, the consultant’s “supervisor,” the divisional director of clinical services, was also given a copy of the Center Visit Summary. (App. 00525). However, this does not waive or adversely affect the privilege in any way because those Center Visit Summaries owe their existence to the QAPI Program’s quality assurance process, for which the divisional Director of Clinical Services plays a role in ensuring that the QAPI Program is utilized (App. 00650). Therefore, the Center Visit Summaries are privileged documents protected by the peer review statutes under West Virginia Code § 30-3C-1, *et. seq.*

3. *Shroades* still stands for the requirement that alleged privileged documents must undergo an in camera review before Petitioners can be compelled to produce them.

Regardless of whether the Center Visit Summaries originated in a review organization, the *Shroades* Court still held that “[w]hen discovery is sought by identifying . . . documents held by a non-review organization, the party claiming the document is privileged should identify the document by name, date, custodian, source and reason for creation.” *Shroades*, 187 W. Va. at 729, 421 S.E.2d at 270. This is because documents held by a non-review organization may still contain privileged material, which would require those documents to be identified in a privilege log and be submitted for an in camera review for an independent determination of whether the asserted privilege applies. *Id.* at 729-30, 421 S.E.2d at 270-71. As such, an in camera review was required by the Circuit Court pursuant to both *Kaufman* and *Shroades*, regardless of whether the Center Visit Summaries were created at the behest of the QAPI Program.

C. The Circuit Court exceeded its authority by failing and refusing to conduct an in camera review of the documents withheld on the basis of attorney-client privilege.

1. The *Kaufman* procedure applies to the documents withheld in response to Respondent Hanna’s Corporate Requests for Production & Corporate II Requests for Production.

As stated above, in *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, the West Virginia Supreme Court of Appeals set forth the general procedure that **must** be followed with respect to the discovery of allegedly privileged documents. Syl. Pt. 2, 222 W. Va. 37, 658 S.E.2d 728 (2008) (emphasis added); *see also* p. 21, *supra*.

This Court recently reviewed this standard as it applied to a request involving coverage opinion letters from outside counsel for an insurance company. *State ex rel. Montpelier US Insurance v. Bloom*, ___ W.Va. ___; 757 S.E.2d 788 (W. Va. 2014) (*per curiam*). In that case, the petitioner insurance company argued that copies of opinion letters from outside counsel

regarding whether certain claims were covered should be protected by the attorney-client privilege. *Id.* However, the discovery commissioner assigned to the case found that privilege had been waived because the insurance company had sent other letters to third-party insureds which communicated their underlying opinion. *Id.* Specifically, the respondents claimed that because the underlying opinion was discussed in a communication to the insureds, “the attorney-client privilege was lost as to the actual coverage opinion letters.” *Id.* at 795.

In reviewing the facts, this Court started with the blunt and simple premise that “[c]onfidential communications made by a client or an attorney to one another are protected by the attorney-client privilege.” *Id.* at 794 (citing Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 26(b)(1), at 693 (4th ed. 2012)). Important to the facts of the present action, this Court also noted that “[t]he fact that the client is a corporation does not vitiate the attorney-client privilege.” *Id.* (citing *Southeastern Pennsylvania Transp. Auth. v. Caremarkpcs Health*, 254 F.R.D. 253, 257 (E.D. Pa. 2008)). Thereafter, this Court applied the three elements outlined in *Burton* to the documents at issue and found the privilege had not been waived. *Id.* While the Court’s analysis revolved principally around the manner of documents involved (coverage letters) and existing case law on such documents, this Court also noted a California appellate court’s opinion finding that:

[A]n insurance company should be **free to seek legal advice** in cases where coverage is unclear **without fearing that the communications necessary to obtain that advice will later become available** to an insured who is dissatisfied with a decision to deny coverage. . . .

Id. at 796 (citing *Aetna Casualty & Surety Co. v. Superior Court*, 153 Cal. App. 3d 467 (1984) (emphasis added)). The case law in this area is clear that the fact that many of the Petitioners herein are corporations does not diminish the propriety of attorney-client privilege objections.

Because corporations are afforded the same attorney-client privilege protections as individuals, the *Kaufman* procedures clearly apply to Petitioners' assertions of attorney-client privilege.

2. Petitioners fully complied with the requirements set forth in *Kaufman*, which should have triggered the Circuit Court to conduct an in camera review of the documents withheld on the basis of attorney-client privilege.

In the instant case, Petitioners took the steps necessary to assert and preserve the claimed privileges with respect to documents potentially responsive to Respondent Hanna's Corporate and Corporate II Requests for Production. Specifically, Petitioners timely provided appropriate privilege logs that identified the documents claimed to be privileged by name, date, custodian, source, and the basis for the claim of privilege. (App. 01115-01122). In addition, the privilege logs were provided to Respondent Hanna's counsel with Petitioners' discovery responses. (App. 01115-01122; 01133; 01146; 01180-01181).

Per the *Kaufman* requirements, the Circuit Court *must* hold an in camera proceeding and make an independent determination of the status of each document the responding party seeks to shield from discovery. *Id.* It is important to note that the holding of this Court in *Kaufman* is *not discretionary*. It requires that upon the proper assertion of privilege, the trial court must conduct an in camera review to determine whether privileged documents are protected from discovery. Thus, the Circuit Court committed error when overruling Petitioners' assertion of privilege with respect to documents which may be responsive to Respondent Hanna's Corporate and Corporate II Requests for Production, without first conducting an in camera review to make an independent determination of the privileged status of each document Petitioners sought to shield from discovery.

Importantly, the Circuit Court's aforementioned Order of February 2, 2015 concerning the Center Visit Summaries essentially attempts to narrow *Kaufman* to issues regarding claims of

the attorney-client privilege. (App. 00002-00003). Specifically, the Order states that since the Center Visit Summaries do not involve the attorney-client privilege, “there would be no need to conduct an *in camera* review of the communications to discover if the substance was ‘legal advice’ from the client’s attorney.” (App. 00003) (emphasis in original). Inexplicably, the Circuit Court acknowledges in its February 2, 2015 Order that an *in camera* review is necessary when a party asserts an attorney-client privilege in response to a request; yet completely refuses to do so by ignoring the attorney-client privilege objections asserted in response to the documents listed in response to Respondent Hanna’s Corporate Requests for Production Numbers 7 and 8 and Corporate II Requests for Production Numbers 3 and 4. The Circuit Court’s recognition of the necessity of conducting an *in camera* review in response to the assertion of attorney-client privilege and then ordering the wholesale production of documents sought to be protected from disclosure on the basis of attorney-client privilege without conducting the required *in camera* review is a clear error of law and grounds for the issuance of a Writ of Prohibition.

CONCLUSION

For the reasons set forth above, this Honorable Court should grant Petitioners the relief they request. The Circuit Court’s Orders entered by Respondent Judge Stucky on November 7, 2014 and February 2, 2015 and his ruling at the January 21, 2015 hearing in the case *sub judice* contravene the peer review and/or quality assurance privilege set forth in West Virginia Code § 30-3C-1, *et seq.*, and the attorney-client privilege and permit the improper use of discovery under Rule 26 of the West Virginia Rules of Civil Procedure. As such, this Honorable Court should issue a Writ of Prohibition preventing the enforcement of the subject Orders, and should issue a

rule compelling Respondents to show cause, if any, as to why Respondent Judge Stucky's rulings on these issues should not be set aside.

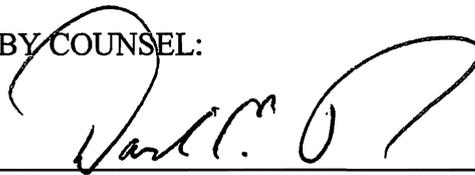
WHEREFORE, for all of the foregoing reasons, Petitioners respectfully request that this Honorable Court grant the following relief:

1. **STAY** any and all proceedings in the underlying action pending this Court's ruling on this Petition for Writ of Prohibition;
2. **ORDER** the Respondents named herein to appear and show cause as to why Respondent Judge Stucky's Orders regarding the production of the Center Visit Summaries and the aforementioned documents sought to be protected on attorney-client privilege grounds should not be set aside;
3. **ORDER** the Respondents named herein to appear and show cause as to why a Writ of Prohibition should not issue to prohibit the Circuit Court from compelling Petitioners to produce the Center Visit Summaries and the aforementioned documents sought to be protected on quality assurance and attorney-client privilege grounds without first conducting an in camera proceeding to determine whether the asserted privileges apply; and
4. **GRANT** this Petition and **ISSUE** an **ORDER** vacating the November 7, 2014 Orders and the February 2, 2015 Order of the Circuit Court of Kanawha County and the rulings of the Court at the January 21, 2015 hearing in this matter, and further directing the Circuit Court to deny Respondent Hanna's Motion to Compel and Compel Compliance as they relate to the Center Visit Summaries.

Respectfully submitted,

HCR ManorCare, LLC; HCR ManorCare, Inc.; MC Operations Investments, Inc.; HCRMC Operations, LLC; HCR ManorCare Operations II, LLC; HCR ManorCare Heartland, LLC; Manor Care, Inc.; HCR Healthcare, LLC; HCR Manor Care Services, Inc.; Health Care and Retirement Corporation of America, LLC; Heartland Employment Services, LLC; and Joseph Donchatz

BY COUNSEL:



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Counsel for Petitioners

VERIFICATION

**STATE OF WEST VIRGINIA,
COUNTY OF CABELL, to-wit:**

I, David E. Rich, counsel for Petitioners, being duly sworn, say that I have read the foregoing *Petition for Writ of Prohibition* and believe the factual information contained therein to be true and accurate to the best of my information, knowledge, and belief.



David E. Rich (WV Bar #9141)

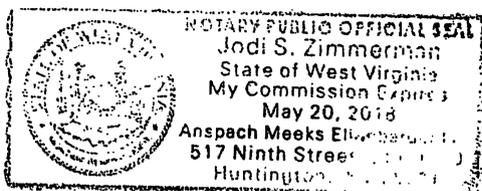
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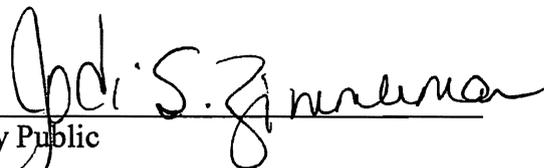
Date

**STATE OF WEST VIRGINIA
COUNTY OF CABELL, to-wit:**

I, Jodi Zimmerman, a notary public in and for said state, do hereby certify that David E. Rich, who signed the writing above, bearing the date of February 5th, 2015, for Petitioners, has this day acknowledged before me the said writing to be true and accurate to be best of his information, knowledge, and belief.

Given under my hand this 5th day of February, 2015.





Notary Public

My Commission expires: May 20, 2018

MEMORANDUM OF PERSONS TO BE SERVED

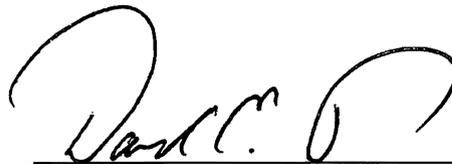
Persons to be served the Rule to Show Cause should this Court grant the relief requested in this "*Petition for Writ of Prohibition*" are as follows:

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209 Capitol Street
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David E. Rich (WV Bar #9141)

CERTIFICATE OF SERVICE

I, David E. Rich, hereby certify that on the 5th day of February, 2015, I served the foregoing *“Petition for Writ of Prohibition,”* and *“Memorandum of Service for Rule to Show Cause,”* along with copies of the Appendix, by hand-delivering true copies thereof to the following counsel of record:

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