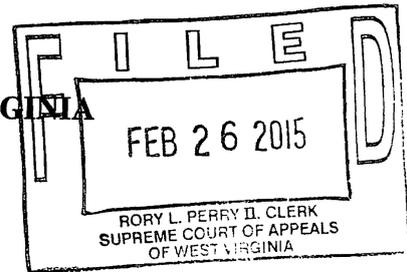


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 HEARLTHCARE, 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,

v.

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

**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.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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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 (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 (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-1?
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 (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 (2008)?

STATEMENT OF THE CASE

This lawsuit arises from the numerous personal injuries Sharon Hanna suffered while she was a resident of Heartland of Charleston, a nursing home facility owned, operated, and managed by the Petitioners. The instant petition, however, arises from a discovery dispute. At issue are two different sets of documents, nurse consultant reports and HCR Manor Care, Inc. Board of Directors Briefing Packets. Petitioners have brought the instant petition under the allegation that the trial court has exceeded its legitimate authority in entering discovery orders in this matter. Simply, Petitioners repeatedly failed to establish the privilege they asserted. The material they have withheld is discoverable and has been ordered as such. The circumstances leading up to the instant petition are as follows:

Nurse Consultant Reports

Respondent, Plaintiff below, propounded his First Requests for Production on Petitioners on June 26, 2013. Requests for Production Numbers sixteen (16) and twenty-six (26) sought reports from consultants concerning the care and treatment of residents during Sharon Hanna's residency at Heartland of Charleston. Two and a half months later, Petitioners responded, and in regards to these particular requests, asserted that quality assurance privilege shielded these documents from discovery, citing *State ex rel. Shroades v. Henry*, 187 W.Va. 723 (1992) as support. (App. 1283; 1294).

Accordingly, in February of 2014, Plaintiff filed a Motion to Compel responses to these requests and a hearing was held on March 26, 2014. (App. 0230; 1319). At that hearing, Petitioners agreed to the entry of an Order mandating the production of the nurse consultant reports responsive to Requests 16 and 26. (App. 1326). No argument was made regarding the applicability of quality assurance privilege or even regarding the nurse consultant reports

themselves. Pursuant to the trial court's instructions, Plaintiff's counsel was to draft the order. (App. 1327). Plaintiff sent a draft of the order to Petitioners on March 31, 2014 and April 7, 2014 asking for objections or amendments to the proposed order. (App. 1331-1338; 1339). Hearing no response upon each of these attempted communications, on April 25, 2014, Plaintiff finally sent the proposed order to the trial court. (App. 1320-1347). The Order was entered on May 12, 2014. (App. 00013). Specifically, the Order required the production of the nurse consultant reports within thirty days of the hearing and noted that if Petitioners had any objection based on quality assurance privilege they were to file a privilege log. (App. 00016; 00018). Petitioners never objected or otherwise responded to the Order. Perhaps more importantly, Petitioners never timely supplemented their discovery responses with the ordered nurse consultant reports or any privilege log.

On May 28, 2014, Plaintiff was forced to file a Motion to Compel Compliance with the trial court's order as no supplementation to the discovery at issue had been made. (App. 00301-00302). On July 21, 2014, Plaintiff sent Petitioners a detailed letter outlining all of the outstanding discovery that had been previously ordered but not yet produced. (App. 1348-1349). Regarding the nurse consultant reports, Plaintiff reminded the Petitioners that these documents existed based on deposition testimony elicited in a different case involving these same defendants and plaintiff's counsel in June of 2014. (App. 1349).

Finally, after Plaintiff's Motion to Compel Compliance had been set for hearing, Petitioners supplemented their discovery responses with a privilege log for the nurse consultant reports just a week before the hearing. (App. 1386-1387). The hearing occurred on September 4, 2014. Respondent argued that Petitioners failed to meet their burden to establish quality assurance privilege as they had presented no evidence that a review organization existed. (App.

01200-01201). Without first establishing that a review organization even existed, Petitioners could not qualify for the protections of quality assurance privilege. (App. 01201). Respondent further argued that even assuming *arguendo* that a review organization existed, the nurse consultants were not part of it, and therefore, the original source exception applied. (App. 01200-01201). Additionally, Respondent pointed out that the nurse consultants gave their reports to individuals who were not involved with any alleged review organization. (App. 1200). Petitioners acknowledged that the next step was for them to prove the quality assurance privilege existed. (App. 01202). However, Petitioners offered no evidence or even argument regarding the existence of a review organization, but instead merely asked the trial court for additional time to meet this burden. Notably, Petitioners had been alleging quality assurance privilege since their original discovery response on September 10, 2013, and yet a year later they once again were not prepared to establish the quality assurance privilege they claimed. (App. 01202; App. 01204).

Petitioners' failure to meet their burden was highlighted by the inconsistencies that developed in their explanation of the processes they had undertaken in searching for responsive documents and supplementing their discovery responses. The trial court's Order entered on November 6, 2014, noted several of these inconsistencies in the Petitioners' assertion of privilege. Specifically, the trial court highlighted that "it was not until five months after the initial hearing on this matter and eight (8) days before the hearing [of September 4, 2014 on Plaintiff's Motion to Compel Compliance] do the Defendants file a privilege log," despite their assertion of quality assurance privilege in their initial September 2013 discovery response. (App. 00009). The Petitioners explained their lack of timeliness by noting that "before, frankly we were arguing quality assurance privilege over documents that we weren't sure existed, and we – at the time, we did not believe they existed." (App. 00009-00010). The Petitioners'

assertion of privilege over documents that were not even believed to be in existence was a troubling inconsistency for the trial court. (App. 00010). Furthermore, Petitioners informed the trial court that they did not learn that these reports existed until Respondent's counsel deposed Petitioners' current nurse consultants in another case, indicating that Petitioners' counsel had not even asked their current employees whether these reports existed. Notably, Petitioners never asked the trial court for an in camera review of the nurse consultant reports.

The trial court also expressed concern regarding Petitioners' representations that their delay in finding these documents was a result of the fact that these reports were on the nurse consultants' computers which were difficult to locate. The trial court noted that this assertion was inconsistent with the privilege log Petitioners' eventually filed that identified the document custodian as Health Care Retirement Corporation of America, located at Petitioners' corporate headquarters in Toledo.

On November 14, 2014, Petitioners filed a Motion to Alter or Amend the November 6, 2014 Order arguing for the first time that an in camera review should have been done prior to the trial court finding that Petitioners had failed to meet their burden to establish quality assurance privilege. Prior to the Motion to Alter or Amend, Petitioners never explicitly asked the trial court to conduct an in camera review nor did they ever argue that *State ex rel. Shroades v. Henry*, 187 W.Va. 723 (1992) was inapplicable. Additionally, Petitioners attached new evidence in the form of an affidavit to their Motion to Alter or Amend the November 6, 2014 Order. Petitioners' motion was heard by the trial court on December 30, 2014. The trial court denied Petitioners' motion finding in its February 2, 2015 Order that both *Shroades* and *State ex rel. Nationwide Mut. Ins. v. Kaufman*, set forth the applicable law. The trial court also found that Petitioners had not established the existence of a review organization qualified under W.Va. Code § 30-3C-1 and

so there was no need for an in camera review. (App. 00003). The trial court further found that the nurse consultant reports were being sought from a non-review organization i.e. an original source, just as it had previously found in its prior Orders. (App. 00004).

Petitioners now ask this Court to intervene and grant them extraordinary relief because in their estimation it was clearly erroneous for the trial court to fail to conduct an in camera review of the nurse consultant reports despite the fact that they never established the documents originated in a review organization and their request for an in camera review was not made until months after their production was ordered.

Board of Director Briefing Packets

Respondent also sought in discovery any reports received by the Board of Directors of the parent company, HCR Manor Care, Inc., during the residency of Sharon Hanna in order to rebut that entity's defense that it is only a holding company that did not operate or manage any nursing homes.¹ Petitioners responded to this request by filing a privilege log identifying thirteen (13) separate Briefing Packets that were provided to the Board of Directors and asserting that they were protected from discovery by attorney client and work product privileges. (App. 1411-1413).

Respondent filed a Motion to Compel these Briefing Packets on August 26, 2014. The matter was heard on September 4, 2014 wherein Petitioners argued that this type of corporate discovery was premature and asked the trial court generally to deny the motion to compel and grant their motion to structure discovery into particular phases. Petitioners never addressed attorney client or work product privilege other than generally mentioning that "privileges pertain to many of these documents." (App. 01197). In fact, Petitioners explained that they were "not

¹ Though the requests for these reports are actually found in two separate discovery requests, Corporate Request for Production and Corporate II Request for Production, they differ only in time frame. For clarity, the Briefing Packets will be discussed as a single request where possible.

asking the Court today that things are privileged. It's too early for that in this case." (App. 01197) Notably, Petitioners never asked the trial court to conduct an in camera review of the Briefing Packets. The trial court denied the Motion for Structured Discovery noting that a scheduling order had already been entered and granted the Motion to Compel Corporate Request for Production and Corporate II Request for Production.

On November 4, 2014, Petitioners filed Second Supplemental Objections and Responses to Plaintiff's Corporate II Requests for Production. This time they attached a different privilege log. Rather than including the thirteen (13) Briefing Packets they had previously identified, Petitioners only included one document, "Excerpt General Counsel Report," and again asserted attorney client, work product privileges. (App. 00792).

On January 5, 2015, Respondent filed a Second Motion to Compel Compliance. This motion came for hearing before the trial court on January 21, 2015. Petitioners explained at that hearing that the first privilege log was prepared in response to the discovery requests at issue. "In response to his [Respondent's] request, we did prepare this privilege log, which regard—which covers all of the Board packets concerning the periods of time that he talks about." (App. 00035). Petitioners then went on to explain that while "[w]e believe that all these [briefing packets] are privileged. That does not mean that everything in there is responsive." (App. 00035). Respondent asserted that such an argument was illogical as certainly the Petitioners would have not been able to file the initial privilege log had they not already reviewed the Briefing Packets and deemed them responsive. (App. 00030).

The trial court entered an Order regarding Respondent's Second Motion to Compel Compliance on February 12, 2015. (App. 1418). The trial court noted Petitioners' argument that the documents they previously identified were not actually responsive to the discovery requests

and the trial court should only consider the second and third privilege logs. (App. 1419-1420). However, the trial court explained that the issue before it was not whether the documents were responsive but “whether the Defendants have complied with this Court’s order of November 7, 2014 related to Plaintiff’s Corporate Requests for Production Nos. 7 and 8 and Corporate II Request for Production 3 and 4.” (App. 1420). This Order specifically accounted for Petitioners’ assertion that the documents contained privileged attorney client work product information by acknowledging that “in an abundance of caution, the Court is ordering that the Defendants redact only that portion of the documents that qualify as legal advice of counsel pursuant to attorney client privileges as well as any attorney work product contained in these documents.” (App. 1420). Petitioners have now filed the instant writ alleging that it was clearly erroneous for the trial court to fail to conduct an in camera review of the Briefing Packets in order to determine which communications are privileged based on attorney client or work product privilege.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent contends that no issue exists in this case on which to base a finding that the Circuit Court exceeded its legitimate powers and/or substantially abused its discretion, and accordingly, the Petition should be denied. If, however, this Court grants the Petition, Respondent respectfully requests the opportunity to present oral argument in accordance with Rule 20.

SUMMARY OF ARGUMENT

Petitioners seek to utilize a procedural vehicle designed to apply only where extraordinary relief is warranted to continue to thwart the “fundamental principle that ‘the

public...has a right to every man's evidence.'" *United States v. Bryan*, 339 U.S. 323, 331 (1950). The Petitioners were ordered to produce nurse consultant reports almost a year ago. They admit, as will be explained in further detail below, that they asserted quality assurance/peer review privilege before they even knew if these documents existed. Thus, rather than seeking to abide by the honest discovery procedures required by West Virginia law in order to reach a fair resolution of this matter, Petitioners asserted privilege without knowing if there was an actual basis to do so. These false representations can only be seen as an attempt to hide relevant evidence from discovery under the guise of privilege in clear contravention of the Rules of Civil Procedure. Petitioners have now taken their attempts to withhold this evidence to such great lengths that they are inappropriately trying to involve this Court by asking for extraordinary relief to help them thwart the discovery procedures mandated by the laws of this State.

Petitioners' arguments regarding the Briefing Packets similarly lack merit. They complain of the trial court's failure to conduct an in camera review of the allegedly privileged documents and yet the trial court's Order on this matter specifically allows them to redact any attorney client communication or any information that would be covered under the work product privilege. This Order protects any of their claimed privileges and, thus, no real controversy exists as to the Briefing Packets. Petitioners' request for an in camera review, therefore, is moot.

Most importantly, the Writ of Prohibition should be denied in this case as Petitioners have attempted to create error in the trial court's Orders where none exists. They have failed to establish that the trial court's actions were clearly erroneous under any circumstance or that the trial court acted in excess of its legitimate authority. Accordingly, their petition for extraordinary relief must be denied.

I. THE EXTRAORDINARY WRIT OF PROHIBITION DOES NOT LIE IN THIS CASE

The extraordinary writ of prohibition does not lie in this case. The matter is clear: Petitioners failed to meet their burden to establish privilege in a way that would shield the withheld documents from discovery and are now seeking to bypass the appellate rules by filing a writ of prohibition. “Prohibition is a drastic, tightly circumscribed, remedy which should be invoked only in extraordinary situations.” *State ex rel. W. Virginia Nat. Auto Ins. Co. v. Bedell*, 223 W. Va. 222, 228, 672 S.E.2d 358, 364 (2008); *Health Management v. Lindell*, 207 W.Va. 68, 72, 528 S.E.2d 762, 766 (1999); *State ex rel. Frazier v. Hrko*, 203 W.Va. 652, 657, 510 S.E.2d 486, 491 (1998); *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 37, 454 S.E.2d 77, 82 (1994) (Cleckley, J., concurring); 72A C.J.S. *Prohibition* § 11 (2004).

In *State ex rel W. Virginia Nat. Auto Ins. Co. v. Bedell*, 223 W.Va. 222, 229 (2008), this Court explained that “while there is no specific time frame for filing a writ of prohibition, extraordinary remedies are, by their very nature, to be considered upon a case-by-case basis.” In that case, this Court, considering a petition filed nine (9) months after the entry of an order and three (3) months after the order denying the motion to reconsider, determined that the writ of prohibition should have been filed promptly, and therefore, failed to consider it. *Id.* Here, the Petitioners have similarly delayed in seeking an extraordinary remedy in this case as their petition was filed nine (9) months after the Order and three (3) months from the Order on Plaintiff’s Motion to Compel Compliance. This Court should find as it did in *Bedell* that Petitioners have been too dilatory to take advantage of the extraordinary remedy of a writ of prohibition.

Even if this Court considers this untimely petition, the factors considered in determining whether prohibition should issue strongly weigh against the discretionary grant of a writ in this case. *See* Syl. Pt. 1, *State ex rel. Weirton Med. Ctr v. Mazzone*, 214 W. Va. 146 (2002). This

Court, in *State ex rel. Hoover v. Berger*, 199 W.Va. 12 (1996), explained the factors to be considered in deciding whether to entertain and issue a 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. They are as follows:

(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.

Id. Specifically, this Court noted that “[a]lthough 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.* The trial court did not err in denying Petitioners’ Motion to Alter or Amend. Their motion was procedurally deficient and inappropriately alleged new arguments and offered new evidence to the trial court. Additionally, the Motion to Alter or Amend did not raise any clear error of law as the trial court’s previous Orders were consistent with both *Shroades* and *Kaufman*. Surely, these circumstances fall short of the “most serious and critical ills” for which the writ of prohibition’s “strong medicine” is “sparingly employed” to remedy. *U.S. v. Boe*, 543 F.2d 151, 158 (1976). Thus, the instant petition fails on its merits.

II. NO CLEAR ERROR EXISTS IN THE TRIAL COURT’S DENIAL OF PETITIONER’S MOTION TO ALTER OR AMEND DUE TO THEIR PROCEDURAL DEFICIENCIES

Petitioners seek the instant writ based on what they allege is clear error on the part of the trial court in denying their Motion to Alter or Amend. Petitioners have failed to point out, however, that their motion was procedurally deficient and did not comply with West Virginia

Rules of Civil Procedure. The trial court properly denied Petitioners' Motion to Alter or Amend. As no error was committed and certainly no clear error, the instant petition must be denied.

Petitioners filed their Motion to Alter or Amend on November 14, 2014 and, for the first time, argued that an in camera review should have been done of the nurse consultant reports prior to determining whether quality assurance privilege applies. Petitioners also attached new evidence to their motion, the affidavit of a current employee.

Rule 59(e) of the West Virginia Rules of Civil Procedure provides the procedure for a party who seeks to change or revise a judgment. "A Rule 59(e) motion may be used to correct manifest errors of law or fact, or to present newly discovered evidence." *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W.Va. 48, 56 (W.Va. 2011). "A motion under Rule 59(e) is not appropriate for presenting new legal arguments, factual contentions, or claims that could have been previously argued." *Id.* (referencing *Freeman v. Busch*, 349 F.3d 582 (8th Cir.2003) ("Arguments and evidence which could, and should, have been raised at an earlier time in the proceedings cannot be presented in a Rule 59(e) motion."); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605–606 (4th Cir.1999) (issue presented for first time in Rule 59(e) motion is not timely raised); *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir.1998) (Rule 59(e) motion cannot raise arguments that were not raised prior to judgment); *Santiago v. Canon U.S.A., Inc.*, 138 F.3d 1, 3–4 (1st Cir.1998) (new legal theory as to liability may not be raised in motion for reconsideration); *Global Network Techs., Inc. v. Regional Airport Auth.*, 122 F.3d 661, 665–666 (8th Cir.1997) (evidence that could have been introduced prior to judgment may not be offered through Rule 59(e) motion). In their Motion to Alter or

Amend, Petitioners violated two of these procedural requirements by making a new argument that could have been previously raised and by offering evidence that was previously available.²

A. PETITIONERS IMPROPERLY RAISED A NEW ARGUMENT PREVIOUSLY AVAILABLE IN THEIR MOTION TO ALTER OR AMEND

Petitioners premised their Motion to Alter or Amend on the fact that the trial court erred in not conducting an in camera review of the nurse consultant reports prior to determining whether quality assurance privilege applied. They based this argument on *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 222 W.Va. 37 (2008). Despite the fact that Petitioners had been asserting quality assurance privilege for more than a year, this was the first time this argument was raised. Petitioners have not, and Respondent submits they cannot, account for their improper presentation of this argument for the first time in their Motion to Alter or Amend. There was no intervening change in the controlling law. In fact, *Kaufman* was decided in 2008. Further, until this November 14, 2014 motion, Petitioners had directed the trial court to *State ex rel. Shroades v. Henry*, 187 W. Va. 723 (1992) as the controlling law on quality assurance privilege. (App. 1283; 1294).

In addition to the various written pleadings and discovery responses filed during the year and a half that Petitioners asserted quality assurance privilege prior to filing the instant petition, there were also two hearings during which Petitioners could have raised this argument before the trial court in a way that would have been procedurally proper. But they failed to do so. “Under Rule 59(e), the reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.” *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W.Va. 48, 56 (W.Va.

² Petitioners have continued to inappropriately submit new evidence to a reviewing court when it is procedurally improper to do so. The QAPI practice guide, which has been submitted for the first time upon petition to this Court, should have been available to the trial court at the hearing of Plaintiff’s Motion to Compel on March 26, 2014, but was never presented to the court below.

2011); *see also Palmer v. Champion Mortgage*, 465 F.3d 24, 29 (1st Cir. 2006); *Templet v. HydroChem, Inc.*, 367 F.3d 473, 479 (5th Cir. 2004); *Pacific Ins. Co. v. Amer. Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998).

Petitioners' failure to raise this argument in a timely fashion before the trial court did not warrant the extraordinary relief they sought in their Motion to Alter or Amend, just as it does not warrant the extraordinary relief they now seek from this Court. The procedural insufficiency of their argument for in camera review eliminates the possibility that the trial court committed clear error in denying their motion.

B. PETITIONERS IMPROPERLY ATTACHED NEW EVIDENCE PREVIOUSLY AVAILABLE TO THEIR MOTION TO ALTER OR AMEND

A Rule 59(e) motion should only be granted based on new evidence when the new evidence was not previously available. A party who relies on newly discovered evidence "must produce a legitimate justification for not presenting the evidence during the earlier proceeding." *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W.Va. 48, 57 (W.Va. 2011); *Small v. Hunt*, 98 F.3d 789, 798 (4th Cir. 1996). "The great weight of authority is that failure to file documents in an original motion does not convert the late filed documents into "newly discovered evidence." *Powderidge Unit Owners Ass'n v. Highlands Properties, Ltd.*, 196 W.Va. 692, 706 (W. Va. 1996). This Court has explained that where a litigant offers no explanation of why the evidence could not have been offered prior to the entry of judgment, the failure to file the evidence previously does not make it "new evidence" for the purposes of Rule 59(e). *See Mey*, 228 W.Va. 48 at 58.

Petitioners attached an affidavit of their current employee, the former Director of Nursing at Heartland of Charleston, in an untimely attempt to meet their burden to establish quality assurance privilege after failing to do so at two prior hearings. This employee was known to

them throughout the course of this discovery dispute. Petitioners never explained to the trial court why they could not present this evidence earlier. They merely asserted that they were caught by surprise that these nurse consultant reports existed, despite the fact that their original discovery response asserted these reports were privileged documents, not that no such requested document existed.³ Indeed, other than seeking additional time to prove their burden to establish quality assurance privilege, Petitioners never even mentioned the availability of an affidavit of an employee to the trial court. This evidence was never properly before the trial court for review. It was inappropriate for Petitioners to attempt to utilize a Motion to Alter or Amend as a means to obtain yet another chance to meet their burden after they had already failed to do so twice before. The trial court could not have erred in failing to consider this improperly submitted evidence.

III. THE TRIAL COURT CORRECTLY APPLIED WEST VIRGINIA LAW TO THE INSTANT DISCOVERY DISPUTE REGARDING THE NURSE CONSULTANT REPORTS

Petitioners have alleged that it was clear error for the trial court to fail to apply *Kaufman*, and only *Kaufman*, in determining whether quality assurance privilege exists. However, Petitioners have failed to articulate any error on the part of the trial court. Assuming *arguendo* that Petitioners' failure to raise this argument until their Motion to Alter or Amend nine months after the Order was entered does not bar its consideration on the merits, Petitioners' argument still fails for several reasons. First, *Shroades* remains good law and is not inconsistent with *Kaufman*. Second, Petitioners have grossly misstated the trial court's findings regarding the applicability of *Kaufman* and *Shroades* to their claims of privilege.

A. THE TRIAL COURT PROPERLY FOUND THAT BOTH KAUFMAN AND SHROADES APPLY TO THE DETERMINATION OF WHETHER QUALITY ASSURANCE PRIVILEGE EXISTS

³ This assertion is inconsistent with testimony elicited in 2012 during a deposition involving these same Petitioners and their counsel where the existence of these reports was confirmed. (App. 1428;1432).

In *Kaufman*, this Court set forth the “general procedure involved with discovery of allegedly privileged documents.” Syl. Pt. 2, *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 22 W.Va. 37 (2008). Petitioners’ argument that this general procedure is somehow the exclusive procedure to be utilized by West Virginia courts is wholly unsupported by law. In *Kaufman*, this Court held that a party could not protect materials from discovery merely by asserting privilege. Rather, the party asserting privilege must allege the privilege with specificity by filing a privilege log, and then, confirm the validity of the privilege asserted through an in camera review. *Id.* at 41-42. Thus, this Court established a higher burden for a litigant to meet in asserting privilege finding that more than mere assertions are required to establish privilege.

Confusingly, Petitioners attempt to rely on *Kaufman* for the premise that the trial court in an in camera review must do the work of meeting a litigant’s burden for them. *See* Petition for Writ of Prohibition, pg. 22-23. West Virginia law has never supported such a premise. Petitioners, however, want to read *Kaufman* in a way that only requires that they file a privilege log in order to meet their burden to establish any privilege. In doing so, they seek to encumber the trial court with examining potentially voluminous documents, not to determine which parts are privileged, but to determine whether the privilege applies in the first place. Such a time consuming judicial exercise may not even provide the trial court with the necessary evidence to establish the existence of a privilege as often extrinsic evidence is required. For example, an in camera review of allegedly privileged documents will not necessarily establish whether an attorney client relationship existed between two parties, or as in this instance, whether a quality review organization exists. The manner in which Petitioners attempt to rely on *Kaufman* is misplaced. Rather, as explained above, *Kaufman* requires that an in camera review be done to

confirm that a litigant's claims of privilege are in fact substantiated by the substance of the documents in a way that warrants the normal discovery procedures be limited.

Importantly, *Kaufman's* holding was not inconsistent with *Shroades*. Again, this Court's decision in *Shroades* arose from a defendant's empty and unsupported claim of privilege that had not been tested through in camera review by the trial court. The specific privilege asserted in *Shroades* was quality assurance or peer review. While *Kaufman* sets forth the general procedures regarding the assertion of privilege, quality assurance peer review privilege is created by statute. W.Va. Code § 30-3C-3 [1980] provides in part that "the proceedings and records of a review organization shall be confidential and privileged..." (emphasis added). Thus, the *Shroades* Court began with the plain language of the statute and explained that "which materials are privileged under W.Va. Code § 30-3C-3 [1980] is essentially a factual question and the party asserting the privilege has the burden of demonstrating that the privilege applies." *Id.* at 728. The Court went on to explain that because "[t]he language of the statute grants a privilege to all the records and proceedings of a review organization...the circuit court should first determine from whom the material is sought and then if necessary the origin of the material." *Id.* After the trial court has determined that the document or material originated in a review organization as defined by the statute, the party claiming privilege should then identify the material in a privilege log and submit the material for in camera review. *Id.* at 729.

In its February 2, 2015 Order, the trial court explicitly found that "both the general procedure outlined in *Kaufman* as well as the specific peer review quality assurance privilege factors as set forth in *State ex rel. Shroades v. Henry*, 187 W.Va. 723 (1992)" provide the appropriate standard for determining the application of peer review quality assurance privilege. (App. 00002). The trial court went on to explain that *Shroades* and *Kaufman* were not

inconsistent. Where *Shroades* engaged in an analysis of whether the quality assurance privilege applied prior to ordering a privilege log or in camera review, in *Kaufman*, the applicability of the asserted privilege was not in question. There, the attorney client privilege was raised and there was no question as to whether an attorney client relationship existed between the parties engaged in the allegedly privileged communication. The only question was which materials and communications should be withheld based on that claim of privilege. *Kaufman*, 22 W.Va. at 42. Thus, the in camera review was the necessary next step to confirm that only materials that did in fact contain privilege communications were shielded from discovery.

The trial court used the facts of the *Kaufman* case as an example to highlight the consistent holdings of the *Shroades* and *Kaufman* opinions in its February 2, 2015 Order. If there would have been a question in *Kaufman* about the existence of a valid attorney client relationship, the in camera review would have been premature and unnecessary. In explanation of this analogy, the trial court noted that “if no attorney client relationship ever existed, there would be no need to conduct an in camera review of the communications to discover if that communication was privileged as legal advice.” (App. 00003). Similarly, in this case, the trial court found that where there has been no demonstration that a review organization exists, there can be no need for an in camera review as that is a necessary prerequisite, just as an attorney client relationship is for that corresponding privilege.

Petitioners have grossly misstated the trial court’s findings in this regard. Petitioners assert that the trial court held that *Kaufman* only applied to claims of attorney client privilege. This is a misrepresentation as the trial court expressly stated that both *Kaufman* and *Shroades* set forth the applicable standard for determining quality assurance or peer review privilege.

Petitioners have misrepresented the findings of the trial court in an attempt to establish clear error where none exists.

IV. PETITIONERS FAILED TO MEET THEIR BURDEN TO ESTABLISH THAT QUALITY ASSURANCE PRIVILEGE SHIELDED THE NURSE CONSULTANT REPORTS FROM DISCOVERY

It is well established that the party seeking to stay discovery has the burden of proof on that issue. *State ex rel. Shroades v. Henry*, 187 W.Va. 723, 728 (1992). Petitioners argue that because they filed a privilege log, they complied with the general procedure set forth in *Kaufman*, and therefore, met their burden to establish quality assurance privilege applied to the nurse consultant reports. Petitioners assert that *Kaufman* stands for the proposition that in any assertion of privilege by a litigant, the only burden a litigant has is to file a privilege log. They similarly argue that in filing their privilege log a year after their initial assertion of privilege, they adequately met whatever burden they had. This argument is confusing in light of the fact that, as explained above, quality assurance privilege is specifically created by statute. *Kaufman*, while setting forth general procedures applicable to all claims of privilege, never interpreted or even mentioned the statutory requirements of quality assurance peer review privilege. As explained above, W.Va. Code, 30-3C-3 provides that only proceedings and records of a review organization are privileged. Thus, the first step in establishing quality assurance privilege is establishing that a review organization exists. *Shroades* explains that to establish the existence of a review organization the trial court should examine the committee's by-laws. "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." *Shroades*, 187 W.Va. at 729.

At the March 26, 2014 and the September 4, 2014 hearing, no evidence was provided to the trial court that would establish the existence of a review organization, by presenting by-laws or otherwise. At the September 4, 2014 hearing, Petitioners actually admitted that they carried the burden to establish quality assurance privilege. Counsel for Petitioners at the September 4, 2014 hearing explained “I believe the next step is for us to determine -- demonstrate to you that we have a Quality Assurance Committee, that we’re following the Quality Assurance By-laws in terms of that, that these documents are handled in such a manner that they’re protected by the Quality Assurance Privilege.” (App. 01202). However, rather than providing any evidence to meet this burden, Petitioners asked the trial court for a continuance to gather such evidence despite the fact that they had already asserted this privilege for the past year.

To support their argument for a continuance, Petitioners argued that they were unaware of the existence of the nurse consultant reports and “so that’s kind of the reason why we didn’t properly or appropriately raise all of these issues in terms of proving the quality assurance privilege, because frankly, we just haven’t had the time.” (App 01204). Petitioners made much of the fact that they only learned of these nurse consultant reports from a deposition taken in another case. However, as Respondent’s counsel indicated at the hearing, the deposition in which the existence of these reports was confirmed was with one of the Petitioners’ current employees, a nurse consultant. (App. 01199). This means that not only did Petitioners’ counsel assert privilege without knowing if such documents existed, but they never even inquired of their client whether these reports existed. Additionally, Respondent pointed out to the trial court that in a deposition conducted in 2012 in a lawsuit involving these same defendants and counsel, Heartland of Charleston’s Director of Nursing had testified that these reports existed. (App.

01200; App. 1428; App. 1432). These disingenuous discovery tactics used by Petitioners should not be validated by this Court through awarding the extraordinary relief they seek.

Petitioners assert that they have satisfied their burden by “repeatedly attempting to produce various documents” to meet their burden and demonstrate the existence of a quality review organization. *See* Petition for Writ of Prohibition, pg. 25. Again, Petitioners have misrepresented the facts of this case. They assert that they made “repeated requests to demonstrate the relevant by-laws.” *Id.* These “repeated requests” actually consisted of one request for a two week continuance at the September 4, 2014 hearing. They never represented to the trial court that they had by-laws ready to be offered and never presented any affidavit or testimony as evidence of the existence of a review organization at the September 4, 2014 hearing. Rather, Petitioners asked the trial court for a two week extension in order to “provide an affidavit or whatever we need to.” (App. 01202) Similarly, despite their representation that they were “prepared to produce the QAPI report” at the December hearing, Petitioners never put on the record that the QAPI report existed or that they were prepared to offer it at that time. Petitioners did not repeatedly attempt to produce evidence to the trial court. In fact, no evidence was ever offered until it was procedurally improper to do so.

As this Court well knows, the need for judicial economy and the requirements of fundamental fairness mandate that litigants not be given limitless bites at the apple. Petitioners were under an obligation to prove the quality assurance privilege they asserted. They initially asserted this privilege in September 2013 in their Objections and Responses to Plaintiff’s First Requests for Production. They did not meet their burden to establish that such privilege existed at the March 26, 2014 hearing. At the September 4, 2014 hearing, Petitioners again failed to meet their burden. In fact, they offered no evidence to the trial court that a review organization even

existed. The fact that Petitioners have even asked this Court for review of this discovery dispute is shocking given their failure to diligently litigate this case. Petitioners' utter disregard for procedural requirements is made even more apparent through their attempt to offer new evidence for the first time to this Court. The QAPI guide which has been provisionally included in the record upon motion of the Petitioners was never offered to the trial court for its consideration. Petitioners' approach to discovery throughout the entirety of this matter has been improper. Their dilatory and disingenuous tactics should not be rewarded by this Court's consideration of the instant petition.

V. PETITIONERS HAVE FAILED TO RAISE A NEW OR IMPORTANT ISSUE OF LAW OF FIRST IMPRESSION REGARDING THE NURSE CONSULTANT REPORTS

Again in an attempt to overshadow their failure to meet their burden and nevertheless obtain extraordinary relief, Petitioners have attempted to raise an issue of law of first impression. However, the issue they identify – whether an agent of a review organization constitutes an original source under the statute – was never decided at the trial court level. Petitioners never established through the submission of any evidence that there was a review organization at Heartland of Charleston. Nor did they establish that the nurse consultants were in fact agents of such an organization. Thus, Petitioners' issue of law of first impression was never before the trial court and the underlying facts upon which the issue relies were never even established. Accordingly, this issue cannot be properly before this Court now as the trial court could not have exceeded its legitimate authority or committed clear error where it was never given the opportunity.

At the December 30, 2014 hearing on Petitioners' Motion to Alter or Amend, Petitioners merely presented the trial court with the theoretical question of whether an agent who was not a

“per se” member of the quality assurance committee is an original source. (App. 01213). This question was not properly before the trial court on Petitioners’ Motion to Alter or Amend. Furthermore, this argument assumes that Petitioners have somehow retrospectively met their burden to establish that such a quality assurance review organization exists. The trial court never exceeded its legitimate authority on this issue of law because it was never given an appropriate opportunity to make such a determination. Answering this question as presented by the Petitioners is not the appropriate use of a writ of prohibition. Accordingly, the instant petition should be denied.

VI. NO CLEAR ERROR EXISTS IN THE TRIAL COURT’S ORDER REGARDING THE BOARD OF DIRECTOR BRIEFING PACKETS

Petitioners attempt to establish that the trial court exceeded its legitimate authority by ordering the production of the Board of Director Briefing Packets without first conducting an in camera review to determine what materials were protected by privilege. Petitioners have alleged that the attorney client or work product privilege shields portions of these documents from discovery. Confusingly, Petitioners filed multiple privilege logs regarding the Briefing packets. The initial privilege log identified thirteen packets provided to the board and alleged that they were protected from discovery by attorney client privilege. A subsequent privilege log was later filed and only identified one document provided to the board entitled “Excerpt General Counsel Report” and again alleged attorney client privilege.

At the January 21, 2015 hearing on Plaintiff’s Second Motion to Compel Compliance with the trial court’s November 6, 2014 Order requiring production of the thirteen identified briefing packets, Petitioners acknowledged their drastically amended privilege log. As an explanation for the change, Petitioners argued that they filed their initial privilege log and then

upon actually reviewing the documents determined that they contained nothing responsive to the discovery requests. (App. 00035-00036).

This Court has explained that “the purpose of preparing a privilege log is to assist the Court and the parties in performing the careful analysis that a privilege or immunities evaluation demands...the very act of preparing a privilege log has a salutary effect on the discovery process by requiring the attorney claiming privilege to actually think about the merits of the assertion before it is made, and to determine whether such a claim is truly appropriate.” *State ex. rel. Nationwide Mut. Ins. Co. v. Kaufman*, 22 W.Va. 37, 42-43 (2008). Petitioners have abused the use of a privilege log in this case. They admittedly filed a privilege log without first reviewing the documents to confirm and substantiate that such a claim of privilege is warranted. Such empty claims of privilege are an “unfair discovery tactic that increases the delay in the resolution of lawsuits, fosters excessive motion practice, increases the costs of litigation, and greatly increases the work of the court.” *Id.*

Petitioners have admittedly attempted to hide behind empty, unsubstantiated claims of privilege in an attempt to thwart the normal discovery procedures guaranteed to litigants by West Virginia law. More surprisingly, despite these contradictory and empty assertions of privilege, Petitioners still seek extraordinary relief from this Court. Notwithstanding their clear violation of discovery procedures, the relief Petitioners now seek is to have the trial court conduct an in camera review of the Briefing Packets to make an independent determination of the privileged status of each documents they have withheld from discovery.

The Order entered by the trial court on February 12, 2015 specifically addressed Petitioners’ claims of privilege. In fact, the trial court allowed Petitioners to redact from the Briefing Packets any portion of the documents that qualify as “legal advice of counsel pursuant

to attorney client privilege as well as any attorney work product.” (App. 1420). Thus, the trial court actually surpassed Petitioners’ requests and has thoroughly ensured that any communication they allege to be privileged may be adequately protected from discovery. Accordingly, the relief Petitioners now seek is moot.

CONCLUSION

For the reasons set forth above, this Honorable Court should deny Petitioners the extraordinary relief they seek. The trial court did not err in entering any of its Orders at issue in this petition, and accordingly, did not exceed its legitimate authority. Petitioners have failed to meet their burden to establish privilege, have violated discovery procedures, and have been Ordered to produce documents in discovery consistent with West Virginia law. This Honorable Court should see through the instant petition as a thinly veiled attempt to avoid compliance with the required discovery procedures applicable to all litigants in this state. As such, this Honorable Court should deny the instant Petition for Writ of Prohibition.

Respectfully Submitted,

Tom Hanna, Individually and on behalf
of the Estate and Wrongful Death
Beneficiaries of Sharon Hanna,

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VERIFICATION

I, Michael J. Fuller, counsel for Petitioners, being duly sworn, say that I have read the foregoing Response to 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.



Michael J. Fuller, WV Bar No. 10150

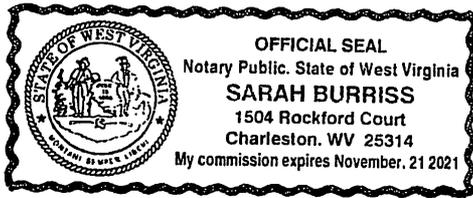
2-26-15

Date

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, to-wit:

I, Sarah Burriss, a notary public in and for said state, do hereby certify that Michael J. Fuller, who signed the writing above, bearing the date of February 26th, 2015, for Respondents, has this day acknowledged before me the said writing to be true and accurate to the best of his information, knowledge, and belief.

Given under my hand this the 26th day of February, 2015.



Sarah Burriss
Notary Public

My Commission expires: November 21, 2021

CERTIFICATE OF SERVICE

I, Michael J. Fuller, Jr., hereby certify that on the 26th day of February, 2015, I served the foregoing "Response to Petition for Writ of Prohibition," along with copies of the Appendix via hand delivery to the following counsel of record:

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