

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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

No. *15-0558*

Petitioner,

**CIRCUIT COURT OF OHIO COUNTY, WEST
VIRGINIA**

(Civil Action No. 13-C-338)

v.

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

Respondents.

PETITION FOR WRIT OF PROHIBITION

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QUESTION PRESENTED

1. Whether the Circuit Court clearly erred as a matter of law in granting Plaintiff's Motion to Compel and ordering Petitioner-Defendant, Wheeling Hospital, Inc., to produce certain documents from the credentialing file of David A. Ghaphery, M.D., which are protected from discovery by the peer review protections set forth in W. VA. Code § 30-3C-3 (2012) and the HIPAA Privacy Law set forth at 42 C.F.R. 164 (2013) *et seq.*, are irrelevant to the instant matter, and not reasonably calculated to lead to the discovery of admissible evidence.

STATEMENT OF THE CASE

The instant medical professional liability action was initiated by the filing of a Complaint on or about October 2, 2013. Plaintiff, Stephanie Mills, alleges that Defendant, David Ghaphery, M.D., *inter alia*, improperly performed a thyroidectomy which resulted in paralysis of the vocal cords and/or injury to the laryngeal nerves. *See* Appendix at pg. 009-020. The sole allegation against Petitioner-Defendant, Wheeling Hospital, Inc. (hereinafter "Petitioner-Defendant" or "Wheeling Hospital") is that it negligently credentialed Defendant Ghaphery as a surgeon with privileges to practice medicine at Wheeling Hospital. *See id.*

At the time of service of the Complaint, Plaintiff served Petitioner-Defendant with Plaintiff's First Set of Interrogatories, Requests for Admission and Requests for Production of Documents to Defendant Wheeling Hospital. Petitioner-Defendant served Plaintiff with Answers to Plaintiff's First Set of Interrogatories, Response to Requests for Admission and Requests for Production of Documents to Defendant, Wheeling Hospital on or about November 21, 2013. *See* Appendix at pg. 036-075. Thereafter, Plaintiff served Petitioner-Defendant with Plaintiff's Second Set of Interrogatories and Requests for Production of Documents, to Defendant Wheeling Hospital. On or about January 31, 2014, Petitioner-Defendant served Plaintiff with Answers to Plaintiff's Second Set of Interrogatories, and Requests for Production of Documents. *See* Appendix at pgs. 076-080.

On June 2, 2014, Plaintiff filed a Motion to Compel additional or more detailed responses to various Interrogatories and Requests, specifically including the credentialing and personnel file of Defendant Ghaphery. *See* Appendix at pgs. 081-097. Petitioner-Defendant filed a Response in Opposition on about June 27, 2014. *See* Appendix at

pgs. 098-111. On July 3, 2014, upon considering Plaintiff's Motion to Compel and Defendant Wheeling Hospital's Response in Opposition, this Honorable Court ordered by Letter Opinion Defendant Wheeling Hospital to, *inter alia*, produce a privilege log for each Interrogatory and/or Request for Production to which Defendant asserted was protected by the peer review privilege. *See Appendix at pgs. 112-119.*

On August 29, 2014, Petitioner-Defendant submitted the log, detailing privileged documents within Defendant Ghaphery's over 20-year credentialing/personnel file. *See Appendix at pgs. 126-185.* The credentialing/personnel file contains approximately 1,000 pages of documents. In response, on or about October 3, 2014, Plaintiff's counsel sent correspondence to the Court and Petitioner-Defendant's counsel identifying the documents that remained in dispute. *See Appendix at pgs. 187-191.*

In an effort to comply with Judge Wilson's Letter Opinion, Wheeling Hospital produced 650 pages of documents. These documents included, *inter alia*, Dr. Ghaphery's annual West Virginia Board of Medical Licensee Detail, which includes information regarding licenses, malpractice actions and disciplinary actions; query responses from the National Practitioner Data Bank; Dr. Ghaphery's West Virginia Board of Medicine licenses, American Board of Surgery certifications, American Medical Association physician profiles and Curriculum Vitae; information, data and correspondence regarding annual recommendations and reappointment for staff privileges at Wheeling Hospital, including those privileges for which Dr. Ghaphery applied and those which were approved; and class profiles, diplomas and certificates of completion for continuing medical education courses. Thereafter, approximately 350 pages of documents remained in controversy. *See Appendix at pgs. 192-195.*

The Circuit Court requested supplemental argument on the remaining documents. *See* Appendix at pg.196. On November 26, 2014, Petitioner-Defendant filed its Supplemental Response in Opposition to Plaintiff's Motion to Compel Regarding Remaining Documents in Dispute. *See* Appendix at pgs.197-215. On December 30, 2014, Plaintiff served her Reply in Support of Motion to Compel Discovery Responses From Defendant Wheeling Hospital, Inc. *See* Appendix at pgs. 216-290.

On February 27, 2015, the Honorable Ronald E. Wilson of the Circuit Court of Ohio County, West Virginia, issued an order requiring Petitioner-Defendant Wheeling Hospital to produce to Plaintiff **all** documents in the credentialing file, with the exception of six which the court found to be irrelevant. *See* Appendix at pgs. 001-008.

Discovery in this matter is to be completed by August 31, 2015. *See* Appendix at pg. 291. This case is scheduled to commence trial on February 16, 2016. *See id.*

SUMMARY OF THE ARGUMENT

The Honorable Ronald E. Wilson, of the Circuit Court of Ohio County, West Virginia improperly found that nearly all documents of the credentialing and/or personnel file of Defendant, Dr. Ghaphery kept by the Department of Medical Affairs/Credentialing of Petitioner-Defendant, Wheeling Hospital were not protected by the peer review privilege contained in W. VA. Code § 30-3C-3 (2012).

The documents at issue are peer review documents, as defined by W. VA. Code § 30-3C-3 (2012) and relevant case law, and do not fall under the exception of “original source” materials. *See* W. VA. Code § 30-3C-3 (2012). These documents must be protected from discovery.

Furthermore, Judge Wilson erroneously required Wheeling Hospital to produce, with burdensome and substantial redactions, documents that are clearly protected and prohibited from disclosure by the HIPAA Privacy Law set forth at 42 C.F.R. § 164 (2013) *et seq.*

Lastly, although not a claim of privilege, Wheeling Hospital has been ordered to produce documents that are wholly irrelevant to this matter, including documents involving completely unrelated procedures, patients, physicians and time periods.

Each of these three categories of documents must be protected from disclosure pursuant to West Virginia state law and the applicable federal law. The Trial Court’s Order requiring disclosure of these documents was erroneous as a matter of law and must be reversed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure. This matter involves assignments of error in the application of settled law and should be set for oral argument pursuant to West Virginia Rule of Appellate Procedure 19.

Plaintiff's only claim against Petitioner-Defendant is for the alleged negligent credentialing of Defendant Ghaphery as a surgeon with privileges to practice medicine at Wheeling Hospital. It has become routine for plaintiffs to assert such claims in medical malpractice cases where the alleged negligence of a healthcare provider (*i.e.*, a physician) cannot be attributed to a hospital pursuant to the West Virginia Medical Professional Liability Act – W. VA. Code § 55-7B-1 (2012) *et seq.* Essentially, a plaintiff utilizes the “negligent credentialing” claim as a method to circumvent the MPLA. To support their claim, plaintiffs demand the production of the confidential credentialing and personnel files kept by the hospital of the particular physician at issue. The peer review argument is then unavoidable. A memorandum decision would provide the necessary guidance from the Court on this often litigated issue for which there is minimal case law direction.

ARGUMENT

I. **THE CIRCUIT COURT CLEARLY ERRED AS A MATTER OF LAW IN GRANTING PLAINTIFF'S MOTION TO COMPEL AND REQUIRING PETITIONER-DEFENDANT, WHEELING HOSPITAL, INC., TO PRODUCE CERTAIN DOCUMENTS FROM THE CREDENTIALING FILE OF DAVID A. GHAPHERY, M.D. WHICH ARE PROTECTED FROM DISCOVERY BY THE PEER REVIEW PROTECTIONS SET FORTH IN W. VA. CODE § 30-3C-3, BY THE HIPAA PRIVACY LAW SET FORTH AT 42 C.F.R. 164 ET SEQ., THAT ARE IRRELEVANT TO THE INSTANT MATTER, AND NOT REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE.**

A. **Standard for Issuance of a Writ of Prohibition.**

A writ of prohibition, an extraordinary remedy, is appropriate in circumstances where the trial court either has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code. § 53-1-1 (2012); *State ex rel. Suriano v. Gaughan*, 198 W. Va. 339, 345, 480 S.E.2d 548, 554 (1996); Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977).

In the case of a discovery matter, a writ of prohibition is an appropriate avenue of challenge where the discovery involved relates to the potential disclosure of possibly privileged information. *State ex rel. Charles Town Gen. Hosp. v. Sanders*, 210 W. Va. 118, 123, 556 S.E.2d 85, 90 (2001), citing Syl. Pt. 2, *State ex rel. v. United Hosp. Ctr., Inc. v. Bedell*, 199 W. Va. 316, 484 S.Ed. 2d 199 (1997).

This Court has consistently held that in determining whether to entertain and issue a writ of prohibition, for cases not involving the absence of jurisdiction, but where the lower Court exceeded its legitimate powers, it will look to five factors: (1) whether the Petitioner has no other adequate means to obtain relief; (2) whether the Petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower Court Order is clearly erroneous as a matter of law; (4) whether the lower Court Order

contains an oft repeated error or a persistent disregard for either procedural or substantive law; and (5) whether the lower Court's Order raises new or important problems or issues of first impression. In addition, this Court has repeatedly held that the issue of the existence of a clear error as a matter of law should be given substantial weight. Syl. Pt. 1, *State ex rel. the Tucker County Solid Waste Authority v. West Virginia Division of Labor*, 668 S.E.2d 217 (2008). West Virginia law does not require that all five (5) factors above be present and instead gives substantial weight to the third factor – the existence of clear error as a matter of law. *State ex rel. Charles Town Gen. Hosp. v. Sanders*.

In determining whether to issue 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 and to the overall economy of effort and money among litigants, lawyers and courts. The substantial, clear-cut legal errors for which this Court will use prohibition may be resolved independently of any disputed facts and where there is a high probability that the trial court will be completely reversed if the error is not corrected in advance. Syl. Pt. 2, *Tucker County*.

B. The Trial Court's Order Improperly Requires Wheeling Hospital to Produce Privileged, Protected and Irrelevant Information.

The Trial Court improperly ordered Defendant-Petitioner Wheeling Hospital to disclose documents protected from discovery by the peer review protections as set forth in W. VA. Code § 30-3C-3, as well as by the HIPAA Privacy Law set forth at 42 C.F.R. 164 (2013) *et seq.* Furthermore, although not a claim of privilege, several of the documents to which Plaintiff-Respondent disputed Wheeling Hospital's claim of privilege, and which the Trial Court required Petitioner to produce, involve unrelated procedures and/or unrelated patients. Accordingly, these documents are irrelevant and not reasonably calculated to

lead to the discovery of admissible evidence. The Trial Court erred in requiring Wheeling Hospital to produce the above-referenced documents.

1. **The Trial Court Clearly Erred As A Matter of Law In Ordering Wheeling Hospital to Produce Peer Review Protected Documents.**
 - a. **Disclosure of the Documents as Ordered by the Trial Court Would Be Contrary to the Clear Intent and Purpose of the Peer Review Statute.**

The Trial Court's order is clearly erroneous as a matter of law. The documents that the Trial Court has ordered Wheeling Hospital to produce require the disclosure of information protected from discovery by the West Virginia peer review protections, as set forth in W. VA. Code § 30-3C-3 (2012). The documents at issue involve confidential information from Dr. Ghaphery's credentialing file. Wheeling Hospital has produced many of the documents originally requested by Plaintiff and has completed an extensive privilege log pertaining to the documents it did not produce. *See* Appendix at pgs. 126-185.

Nevertheless, Wheeling Hospital was ultimately ordered to produce Dr. Ghaphery's **entire** credentialing file and documents which relate to credentialing, privileges, complication rates and other personnel matters, all of which are protected from discovery under W. VA. Code § 30-3C-3 (2012):

The proceedings and records 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 an 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 litigation merely because they were presented during proceedings of such organization

The purpose of the West Virginia peer review statute is "not to facilitate the prosecution of medical malpractice cases." *Young v. Saldanha*, 431 S.E.2d 669, 673 (W. Va.

1993) (internal citation omitted). Rather, it is to “ensure the effectiveness of professional self-evaluation by members of the medical profession” and to encourage “health care professionals to monitor the competency and professional conduct of their peers in order to safeguard and improve the quality of patient care.” *Id.*

The privilege is intended to prohibit the “chilling effect” of potential public disclosure of peer review documents and/or proceedings. *See id.* Indeed, “the Act is premised on the belief that absent the statutory peer review privilege, physicians would be reluctant to sit on peer review committees and engage in frank evaluations of their colleagues.” *Id.*

Pursuant to *State ex. Rel. Charles Town Gen. Hosp. v. Sanders*, 210 W. Va. 118, 125-26, 556 S.E.2d 85, 92-93 (W. Va. 2001), documents satisfying the above statutory definition, and which are considered or generated by a hospital’s credentialing committee or a group which evaluates application/renewal of a physician’s privileges, are protected from discovery under the peer review protections afforded by W. VA. Code § 30-3C-3 (2012). The protection extends to documents, such as application/re-applications for staff privileges, which, although completed by the individual physicians seeking privileges, are generated for and submitted to a credentialing committee or group. *See* Syl. pt. 8, *State ex rel. Charles Town Gen. Hosp., supra*.

In *State ex. Rel. Charles Town Gen. Hosp.*, the Court reasoned that such documents must remain privileged in order to effectuate the purposes of the Act as articulated in *Young*. *See* 556 S.E.2d at 93, citing Syl. Pt. 2, *Young*, 431 S.E.2d at 673 (purpose of the Act is to encourage hospitals to conduct the monitoring of the competency and professional conduct of its peers in order to safeguard and improve the quality of patient care).

Furthermore, similar to credentialing and privileges, complication rate tracking is a quality control measure. Hospitals will be dissuaded from tracking such rates if the information were made discoverable. The documents that Wheeling Hospital has been ordered to produce would require the disclosure of privileged matter. Such disclosure would run afoul of the clear purpose of the peer review statute.

b. The Documents in Dr. Ghaphery's Credentialing File are Protected Pursuant to this Court's Reasoning in Charles Town.

In its Order, the Trial Court observed that:

The nucleus of the court's decision to permit the disclosure of many of these documents was an acceptance of the plaintiff's legal argument that the documents now ordered to be disclosed were not created solely for Wheeling Hospital's crediting [sic] committee but are otherwise available from original sources extraneous to that committee and these documents contain information that the hospital gathers in the ordinary course of its business or pursuant to regulations, that the crediting [sic] committee then uses in its work.

See Appendix at pgs. 003-004.

In reaching this conclusion, the Trial Court cited *State ex rel. Shroades v. Henry*, 187 W. Va. 723, 728, 421 S.E.2d 264, 269 (1992), for the proposition that the peer review statute grants a privilege to the proceedings and records of a review organization "but only if that information is not 'otherwise available from original sources.'" See Appendix at pg. 004. The Trial Court, however, failed to acknowledge this Honorable Court's later decision in *Charles Town, supra*, which further addresses the contours of original source documents, and which is more factually analogous to the instant case.

In *Charles Town*, much like in this matter, the Court was asked to analyze the issue of "documents that are utilized by a hospital's credentialing committee, but that have not

originated solely within that committee's proceedings." *See Charles Town*, 556 S.E.2d at 93.

Such documents can include, *inter alia*, applications for initial staff privileges and for the renewal thereof. *See id.* The Court observed that documents such as these:

[A]re problematic because they do not fit neatly within the rubric of the peer review privilege: technically, the origin of these documents is with the individual, who has applied for staff admission, but these records would not have been created were it not for the hospital's review organization charged with considering the applications and issuing such credentials, whose original records are, in fact, entitled to the statutory privilege.

Id.

The *Charles Town* Court went on to note that applications for staff privileges are "as integral a part of the hospital review organization's proceedings *as are those generated exclusively during the committee's consideration of the subject documents* and indeed, *perhaps even more crucial* since the applications themselves often provide the starting point for the committee's deliberations." *Id.* (emphasis added). Accordingly, the Court in *Charles Town* held that such applications are protected by the peer review statute. The Court noted that "[o]ur decision in this regard is further buttressed by our commitment to uphold the legislative intent of a statutory provision where a literal application of the same would not achieve this goal." *Id.* at 94.

The Court's reasoning in *Charles Town* is analogous and applicable to the instant appeal and the documents in Dr. Ghaphery's credentialing file. Much like in *Charles Town*, the documents in the credentialing file, as part of Dr. Ghaphery's application for staff privileges, and renewal thereof over the past several years, were reviewed by the Department of Medical Affairs/Credentialing. As the Court in *Charles Town* observed, even though these documents may not have originated solely within the Department's

proceedings, they are protected. They are equally, if not more crucial than those documents generated exclusively by the Department, as they likely provided a starting point for the Department's deliberations. Here, the Circuit Court's interpretation of the peer review statute and original source documents is too literal, as the Court in *Charles Town* warned against, is contrary to the legislative intent of the statute, and cannot be affirmed.

c. Description of Categories of Documents Protected by the Peer Review Privilege.¹

The documents at issue are protected by the West Virginia Peer Review privilege. The documents, as listed below, are used by the Hospital for quality assurance, monitoring and control and are considered by the Department of Medical Affairs/Credentialing for appointment/reappointment purposes. Each category of documents is reviewed by the Hospital's Department of Medical Affairs/Credentialing or the Department of Quality Management to "ensure the effectiveness of professional self-evaluation by members of the medical profession" and to encourage "health care professionals to monitor the competency and professional conduct of their peers in order to safeguard and improve the quality of patient care." *Young v. Saldanha, supra*.

The first 20 categories of documents contain data and statistics on various topics (more specifically detailed in each bullet point below) that are compiled by either the Department of Medical Affairs/Credentialing or the Department of Quality Management and are **solely** used for determining a physician's quality of care. These data and statistics are evaluated by the Department of Medical Affairs/Credentialing in order to determine

¹ If the Court wishes to review any or all of the disputed documents addressed herein, copies will be promptly provided by Petitioner.

whether a physician is awarded continuing credentials to practice medicine at Wheeling Hospital:

- **Wheeling Hospital Medical/Dental Staff Reappointment Profiles (Document Numbers 168-170; 297-298; 650-651; 817).** The documents contain a clinical profile of Dr. Ghaphery and data regarding various items for purposes of determining reappointment of his privileges. The documents include data regarding clinical quality, medical records/patient safety, mortality, service quality, risk management and utilization management.
- **Procedure Totals by Physician (Document Numbers 176-208, 302-337, 432-460, 517-541).** The Procedure Totals by Physician is a report that includes a summary of Operating Room, Operating Room Center, and Endoscopy procedure totals, and reference Dr. Ghaphery and other physicians.
- **General Surgery Interventions (Document Numbers 209-210).** The General Surgery Interventions summarize general surgery interventions for Dr. Ghaphery, and also contain reference to other physicians.
- **Physician Specific Report (Document Numbers 211; 339).** The Physician Specific Reports detail physicians, departments, procedures, events and incidents. The documents include information not only for Dr. Ghaphery but also for other physicians.
- **Physician Specific SSI Rates and Quarterly Line Lists (Document Numbers 216-217, 340-346, 348-349, 464-470; 215; 544).** The Physician Specific SSI Rates and Quarterly Line Lists include quarterly data regarding surgical focus and outcome.
- **Department of General Surgery Quality Monitoring (Document Numbers 214, 224-225, 226-227, 234-242, 347, 350-365, 471-485, 546, 550-552).** The Department of General Surgery Quality Monitoring reports, which were marked by the Hospital as Peer Review Privileged, contain information regarding surgical complications, readmissions, unplanned/unscheduled returns to the operating room, noncocomial surgical site infections, readmissions within 15 days of discharge, and mortality/morbidity rates for Dr. Ghaphery as well as for other physicians at Wheeling Hospital.
- **Quality Assurance Report (Document Numbers 218-219).** The Quality Assurance Report include information regarding patient transfers to other healthcare facilities post-surgery for Dr. Ghaphery's patients, along with patients of other physicians.

- **Wheeling Hospital Medical Record Review Summaries (Document Numbers 229-233; 366-370; 545; 679-688; 775-777).** The Wheeling Hospital Medical Record Review Summaries set forth physician names, number of cases that were reviewed, number of cases containing medical record deficiencies and percentage of excellence in meeting documentation requirements for various physicians, including Dr. Ghaphery. The summaries are used for quality control purposes, to determine completeness of medical records.
- **Summary Report (Document Number 338).** The Summary Report includes data identifying the completeness of medical records relating to various procedures performed by Dr. Ghaphery.
- **Medical Record Deficiencies by Medical Service (Document Numbers 461-463; 542-543; 755-756).** The Medical Record Deficiencies by Medical Service include the number of delinquent medical record deficiencies for Dr. Ghaphery and other physicians.
- **Moderate Sedation Reports (Document Numbers 486-487).** The Moderate Sedation Reports contain information regarding moderate sedation procedures, including events and incidences occurring in relation to those procedures as performed by Dr. Ghaphery, along with other physicians.
- **Denials (Acute) (Document Number 488).** The Denials (Acute) report contains data regarding acute denials by insurance companies relating to patient care by Dr. Ghaphery and other doctors.
- **SCIP for Colon Procedures (Document Number 489-490).** The SCIP for Colon Procedures contains data regarding the Surgical Care Improvement Project, a Joint Commission National Quality Core Measure, for colon procedures performed by Dr. Ghaphery. Notably, the procedure at issue in this case is a thyroidectomy and not a colon procedure.
- **Procedure Statistics for Surgeon (500-503, 515-516, 661-674, 739-752).** The Procedures Statistics for Surgeon at document numbers 500-503 details procedure statistics for Dr. Ghaphery, including type and number of laparoscopic gastric bypass surgeries. The remaining documents, 515-516, 661-674 and 739-752 also include information regarding procedure statistics for Dr. Ghaphery including type and number of surgeries.
- **Gastric Bypass Inpatients (Document Number 505).** The Gastric Bypass Inpatients document is a summary of gastric bypass surgeries performed by Dr. Ghaphery. Again, the surgery at issue in this matter is a thyroidectomy and not a gastric bypass.

- **Denials and Responsibility of Denied Days (Document Number 553).**² Document 553 includes information regarding reason for denial and responsibility of denied days for Dr. Ghaphery and other physicians.
- **Physician Specific Report Relating to Surgical Intervention Prevention – Colon Surgery (Document Numbers 554-556).** Document numbers 554-556 include information regarding total cases, numerator cases and rate for all attending physicians, including Dr. Ghaphery and other physicians, related to surgical infection prevention for colon surgery. As stated above, colon surgery is not at issue in this case.
- **Quarterly Surgical Objective and File SSIs (Document Numbers 675-678; 753).** The Quarterly Surgical Objective SSIs and File SSIs contain data on surgical site infections for Dr. Ghaphery and other physicians and are categorized based on surgery, infection unit and infection date.
- **OR Returns by Date (Document Numbers 689; 778).** The OR Returns by Date documents at numbers 689 and 778 contain information regarding patients of Dr. Ghaphery and other physicians who required a return to the operating room after their initial surgery.
- **All Admissions File, Line Listing: Fourth Quarter, 2001 (Document Number 754).** Document number 754 is a report containing all admissions for the fourth quarter of year 2001 (more than 10 years prior to the incident at issue in this case) based upon infection date and applies to Dr. Ghaphery along with other physicians.

See Appendix at 126-185.

The next type of document at issue is the **Complication, Mortality and Readmission Comparison at document numbers 1000, 1001, 1002).** The Complication, Mortality and Readmission Comparison rates for Wheeling Hospital for complete thyroidectomies are used solely for quality control and review purposes. Such data are strictly used for the improvement of the quality of health care at Wheeling Hospital and to monitor patient care. Mandated disclosure of such information could result in a chilling effect on collecting such statistics. Further, disclosure of such information will

² The Trial Court did not require Document 553 to be disclosed in its entirety, but required the information relating to “reason for denial” and “responsibility for denied days” to be furnished in a separate document to Plaintiff’s counsel.

no doubt lengthen any trial on these matters, as testimony from witnesses and experts as to how to interpret such statistics will be required in order for a fact finder to understand these documents.

See Appendix at pgs. 184-85.

Complaint Tracker Reports at document numbers 1003-1010 are reports prepared by members of Wheeling Hospital's Department of Quality Management documenting patient/family complaints, none of which are related to this incident or to Plaintiff. These documents are not only peer review protected, but also not likely to lead to the discovery of admissible evidence.

See Appendix at pg. 185.

2. The Trial Court Clearly Erred As A Matter of Law in Ordering Wheeling Hospital to Produce Documents Protected by HIPAA.

The Trial Court ordered Wheeling Hospital to redact and produce several documents that contained identifying information of other patients of the Hospital. Pursuant to the HIPAA Privacy Rule, 45 C.F.R. 164 (2013)*et seq.*, however, these documents should be protected from disclosure altogether, rather than produced with redactions.

HIPAA defines "health information" as:

[A]ny information, including genetic information, whether oral or recorded in any form or medium, that:

(1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

(2) Relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

45. C.F.R. 160.103 (2013).

The Privacy Rule protects individually identifiable health information of patients held by health care providers like Wheeling Hospital. Individually identifiable health information may include, *inter alia*, names; all geographic subdivisions smaller than a State; all elements of dates directly related to an individual; telephone numbers; fax numbers; electronic mail addresses; social security numbers; medical record numbers; health plan beneficiary numbers; and account numbers. See 45 C.F.R. 164.514(b)(2)(i) (2013). Because several of the documents include references to the particulars of the care of other patients, and contain individually identifiable health information of those patients, Wheeling Hospital is prohibited from disclosing such documents pursuant to the HIPAA Privacy Rule. Not only would it be unduly burdensome in terms of time and cost for Wheeling Hospital to redact all HIPAA information as the Trial Court ordered, but also there would be virtually no substantive information remaining following any such HIPAA redaction.

a. Description of Categories of Documents Protected by the HIPAA Privacy Rule.

In addition to being protected by the peer review statute, as discussed *supra*, the following documents also contain identifying information of other patients, which is prohibited from disclosure pursuant to the HIPAA Privacy Rule, 45 C.F.R. 164 (2013) *et seq.*

- **Wheeling Hospital Medical/Dental Staff Reappointment Profile (Document Numbers 168-170; 297-298; 650-651; 817).**
- **Physician Specific SSI Rates and Quarterly Line Lists (Document Numbers 216-217, 340-346, 348-349, 464-470; 215; 544).**
- **Department of General Surgery Quality Monitoring (Document Numbers 214, 224-225, 226-227, 234-242, 347, 350-365, 471-485, 546, 550-552).**
- **Quality Assurance Report (Document Numbers 218-219).**

- **Denials (Acute) (Document Number 488).**
- **Gastric Bypass Inpatients (Document Number 505).**
- **Denials and Responsibility of Denied Days (Document Number 553).**
- **Quarterly Surgical Objective and File SSIs (Document Numbers 675-678; 753).**
- **OR Returns by Date (Document Numbers 689; 778).**
- **All Admissions File, Line Listing: Fourth Quarter, 2001 (Document Number 754).**
- **Complaint Tracker Reports (Document Numbers 1003-1010).**

The above-listed documents were previously described in detail in Section 1(c) above; *see also* Appendix at pgs. 126-185.

3. The Trial Court Clearly Erred As A Matter of Law in Ordering Wheeling Hospital to Produce Documents Wholly Irrelevant to This Matter.

Finally, the Trial Court ordered Wheeling Hospital to produce several documents that are irrelevant to this matter and thus, not reasonably calculated to lead to the discovery admissible evidence. The documents include information relating to the care and treatment of other patients and data relating to medical procedures, other than the one at issue here. Indeed, the Trial Court even noted in its Order that “[m]any of the documents appear only to be *marginally relevant*.” *See* Appendix at pg. 002.

In *Young, supra*, the plaintiff sought peer review documents, including, *inter alia*, “complaints regarding care and treatment of patients other than [plaintiff] whose medical conditions and surgical procedures [were] wholly unrelated to those of [plaintiff].” 431 S.E.2d at 671. The court held that those documents were not relevant to whether the defendant-doctor was negligent in his treatment of the plaintiff. *See id.* at 675. Because the

documents did not meet “the axiomatic requirement of relevancy” pursuant to W. Va. R. Evid. 401, they would not have been admissible.

a. Description of Categories of Documents that are Irrelevant and Not Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

In addition to being protected by the peer review statute, the following documents are irrelevant to this matter and are not reasonably calculated to lead to the discovery of admissible evidence.

- **Procedure Totals by Physician (Document Numbers 176-208, 302-337, 432-460, 517-541).** The Procedure Totals by Physician include reference to Dr. Ghaphery and to *other* physicians. Furthermore, document numbers 200 through 208, 302 through 337, 432 through 460 and 517 through 541 relate to time frames prior to the date of the alleged incident. The documents also include references to unrelated procedures and unrelated physicians, which further render these documents irrelevant pursuant to *Young, supra*.
- **Department of General Surgery Quality Monitoring (Document Numbers 214, 224-225, 226-227, 234-242, 347, 350-365, 471-485, 546, 550-552).** The Department of General Surgery Quality Monitoring reports contain certain documents that are outside of the relevant date range of this case. Document No. 214 is for the January 2013 time period, which is well after the date of this incident and therefore irrelevant. Similarly, document numbers 347 and 546 include information for time periods prior to the date of the incident.
- **Wheeling Hospital Medical Record Review Summaries (Document Numbers 229-233; 366-370; 545; 679-688; 775-777).** Document numbers 229-223 refer to a date range after the date of the incident in this matter. Similarly, document number 544 relates to a time period in 2005, which is well before this alleged incident occurred. These untimely documents are clearly irrelevant to this matter and are not likely to lead to the discovery of admissible evidence.
- **Summary Report (Document Number 338).** The Summary Report covers the time period of July 1, 2009 through June 30, 2011, which precedes the date of the incident at issue in this matter.
- **Moderate Sedation Reports (Document Numbers 486-487).** Plaintiff's procedure in this matter did not involve moderate sedation, and therefore, these documents are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

- **Procedure Statistics for Surgeon (500-503, 515-516, 661-674, 739-752).** The Procedures Statistics for Surgeon at document numbers 500-503 details procedure statistics for Dr. Ghaphery, including type and number of laparoscopic gastric bypass surgeries. Furthermore, because the nature of the procedures (laparoscopic gastric bypass surgeries) is wholly unrelated to the procedure at issue in this matter, this document is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence pursuant to the court's reasoning in *Young, supra*. The remaining documents, 515-516, 661-674 and 739-752 include information regarding procedure statistics for Dr. Ghaphery including type and number of surgeries. Those documents contain information from the years 2001-2003, 2003-2005 and 2005, time periods well before the date of this incident. The documents are irrelevant and not likely to lead to the discovery of admissible evidence pursuant to the West Virginia Rules of Civil Procedure.
- **Gastric Bypass Inpatients (Document Number 505).** The Gastric Bypass Inpatients document is a summary of gastric bypass surgeries performed by Dr. Ghaphery. Because the nature of the procedures (gastric bypass surgeries) is wholly unrelated to the procedure at issue in this matter, this document is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.
- **Quarterly Surgical Objective and File SSIs (Document Numbers 675-678; 753).** The Quarterly Surgical Objective SSIs and File SSIs contain information on surgical site infections for Dr. Ghaphery and *other* physicians and are categorized based on surgery, infection unit and infection date. Plaintiff in this matter did not experience a surgical site infection. The records are entirely irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.
- **All Admissions File, Line Listing: Fourth Quarter, 2001 (Document Number 754).** Document number 754 is a report containing all admissions based upon infection date and applies to Dr. Ghaphery along with *other* physicians. This report sets forth information from 2001, nearly 10 years before the date of the incident at issue in this matter. The information is irrelevant and not likely to lead to the discovery of admissible evidence.
- **Complaint Tracker Reports (Document Numbers 1003-1010).** The above referenced documents are reports prepared by members of Wheeling Hospital's Department of Quality Management documenting patient/family complaints, none of which are related to this incident or to Plaintiff. Moreover, because the documents relate to other patients, they are irrelevant and not likely to lead to the discovery of admissible evidence pursuant to the court's rationale in *Young, supra*. Finally, the complaints are not related to the procedure performed on the Plaintiff in this matter.

CONCLUSION

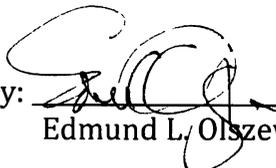
The court ordered production of an entire credentialing file not only abrogates the protections meant to be provided by the West Virginia Peer Act but also defeats its purpose by henceforth inhibiting hospitals and institutions from compiling and analyzing information to improve the quality and safety of patient care. Furthermore, the Circuit Court's Order will establish a precedent, albeit non-binding, that would provide a basis for plaintiffs to pursue this result in every subsequent medical professional liability action. Petitioner-Defendant Wheeling Hospital, Inc. respectfully requests that this Court issue a Writ of Prohibition against the Respondent to prevent the enforcement of its Order of February 26, 2015.

WHEREFORE, Petitioner-Defendant prays that this Honorable Court:

- (1) Issue a Rule to Show Cause to Respondents to demonstrate why Petitioner's relief should not be granted;
- (2) Order Oral Argument before the Court pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure;
- (3) Prohibit the enforcement of the Circuit Court's February 26, 2015 Order as it relates to requiring Petitioner to produce the documents referenced in the order; and
- (4) Any further relief this Court deems just and proper.

Respectfully submitted,

DICKIE, McCAMEY & CHILCOTE, L.C.

By:  _____
Edmund L. Olszewski, Jr., Esq.

*Counsel for Petitioner-Defendant,
Wheeling Hospital, Inc.*

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA EX. REL. No.
WHEELING HOSPITAL, INC.,

Petitioner,

v.

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

Respondents.

VERIFICATION

STATE OF WEST VIRGINIA)
COUNTY OF _____)

The undersigned, Bruce A. Archer, Vice President of Wheeling Hospital, Inc., upon his oath, being duly sworn, says that the facts and statements contained in the attached Petition for Writ of Prohibition are true insofar as they are based upon information he believes to be true.

Bruce A. Archer
Bruce A. Archer

Sworn to and subscribed before me this 9th day of June, 2015

Dana Enix
Notary Public

My Commission Expires:



IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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

Petitioner,

v.

No.

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

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

Respondents.

CERTIFICATE OF SERVICE

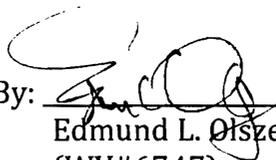
I, Edmund L. Olszewski, Jr., Esquire hereby certify that on June 10, 2015, a true and correct copy of the PETITION FOR WRIT OF PROHIBITION and APPENDIX RECORD was served upon all counsel of record and all parties to whom a rule to “show cause” should also be served, via U.S. Mail, postage prepaid, and addressed as follows:

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