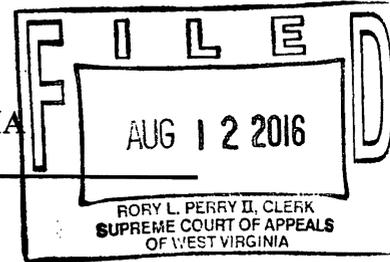


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 16-0752

STATE OF WEST VIRGINIA *ex rel.* RALEIGH GENERAL HOSPITAL, LLC;  
DONALD KENNETH GLASER, M.D.; LIFEPOINT HOSPITALS, INC.; LIFEPOINT  
HEALTH, INC.; and LIFEPOINT WV HOLDINGS, INC.,

*Petitioners,*

v.

The HONORABLE H. L. KIRKPATRICK, Judge of the Circuit Court of Raleigh County;  
and EARL DOUGLAS JOHNSON,

*Respondents.*

PETITION FOR A WRIT OF PROHIBITION

On Petition for a Writ of Prohibition to the  
Circuit Court of Raleigh County, West Virginia (Civil Action No. 15-C-143-K)

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**TO: THE HONORABLE CHIEF JUSTICE AND  
THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS**

The Petitioners, Raleigh General Hospital, LLC; Donald Kenneth Glaser, M.D. (“Dr. Glaser”), LifePoint Hospitals, Inc.; LifePoint Health, Inc., and LifePoint WV Holdings, Inc., petition this Honorable Court to issue a Writ of Prohibition against Respondents, The Honorable H. L. Kirkpatrick, in his official capacity as Judge of the Circuit Court of Raleigh County, and Plaintiff, Earl Douglas Johnson (“Mr. Johnson”), which prohibits the Circuit Court of Raleigh County from taking further action in the underlying case and prohibiting enforcement of its order requiring the disclosure of a document protected from civil discovery by the West Virginia health care peer review privilege, West Virginia Code § 30-3C-1, *et seq.*

**I. QUESTIONS PRESENTED**

- A. Whether the Circuit Court erred in determining that the West Virginia health care peer review privilege, West Virginia Code § 30-3C-1, *et seq.*, does not protect from discovery a physician’s letter to a hospital’s CEO raising quality and patient safety concerns about another physician staff member’s care and treatment.
- B. Whether a document created by a medical staff member to initiate the quality review of another medical staff member’s care and treatment originates within the peer review process under West Virginia Code § 30-3C-1, *et seq.*, as set forth in State ex rel. Wheeling Hosp., Inc v. Wilson, 2016 W. Va. LEXIS 59, 782 S.E.2d 622 (W. Va. 2016).
- C. Whether the Circuit Court erred in ordering production of a document asserted to be peer review by the health care entity without conducting an *in camera* review.

**II. STATEMENT OF THE CASE**

**A. Introduction and Parties**

This is a medical professional liability action filed in Circuit Court of Raleigh County, West Virginia, by Mr. Johnson. In 2011, Mr. Johnson underwent cardiac treatment at Defendant

hospital, Raleigh General Hospital (“RGH”) in Beckley, West Virginia. He alleges that Defendant, Dr. Glaser, his treating interventional cardiologist, performed a medically unnecessary angioplasty and inserted cardiac stents that were not medically necessary. He also alleges that RGH and other Defendants, LifePoint Hospitals, Inc., LifePoint Health, Inc., and LifePoint WV Holdings, Inc., the parent corporations of RGH, were negligent with regard to Dr. Glaser’s care, negligently hired and/or retained Dr. Glaser, negligently credentialed Dr. Glaser, and misrepresented their knowledge of Dr. Glaser’s alleged negligent acts. Mr. Johnson is one of approximately 80 patients who have filed similar individual claims.

### **B. Factual Background**

Dr. Glaser and Marcis Sodums, M.D. (“Dr. Sodums”) are cardiologists who were formerly employed by RGH. Dr. Glaser worked at RGH from 2009 to 2013 and Dr. Sodums worked there from 2010 to 2015. Both practiced interventional cardiology, a branch of cardiology focused on catheter-based treatment of heart disease – for example, managing blockages in coronary blood vessels. They performed cardiac catheterizations, angioplasties, and coronary stenting in the RGH cardiac catheterization lab.

During their tenures at RGH, Dr. Glaser and Dr. Sodums participated in RGH’s peer review process,<sup>1</sup> the process by which health care services are evaluated for quality, patient safety, and compliance with standards of care. The primary peer review organizations at RGH are the Medical Executive Committee and the Quality Improvement / Peer Review Committee, although other RGH committees participate in the process, as do qualified individuals who may be consulted for input. For example, during Dr. Sodums’ deposition on April 11, 2016, he

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<sup>1</sup> As will be discussed in more detail herein, both doctors were also bound by the Bylaws of the RGH Medical Staff. The Bylaws set forth numerous physician responsibilities relating to monitoring and review of the medical care provided by colleagues.

testified that he participated in the peer review process by commenting on peer reviews of Dr. Glaser's cases at the behest of the Quality Improvement / Peer Review Committee. (Deposition of M. Sodums, M.D., taken April 11, 2016, at App. 474-475).

Dr. Sodums also testified that RGH's former Chief Executive Officer, Alan Peters ("CEO Peters"),<sup>2</sup> asked Dr. Sodums to bring quality concerns about Dr. Glaser's cases to his attention. Dr. Sodums considered these requests to be a facet of his and CEO Peters' involvement in the peer review process. (Deposition of M. Sodums, M.D., taken April 11, 2016, at App. 476-477). In addition, Dr. Sodums, as a member of the RGH medical staff, had responsibilities set forth in the Bylaws for the RGH Medical Staff, which included active, ongoing involvement in the evaluation of care and treatment provided by other members of the RGH medical staff. (Bylaws of the Medical Staff of RGH, April 2011, App. at 617-618).

It is within this peer review context that the document in question, a letter dated March 29, 2012, that Dr. Sodums delivered to CEO Peters, ("The Sodums Letter" or "the Letter"), arose. According to Dr. Sodums, the purpose of his Letter was to cause CEO Peters to take steps to ensure the quality of Dr. Glaser's patient care and to communicate patient safety concerns relative to Dr. Glaser's patients. (Deposition of M. Sodums, M.D., taken April 11, 2016, at App. 476 and App. 573). On receipt, CEO Peters, in turn, treated the letter as confidential and part of the peer review process under the purview of the Quality Improvement / Peer Review Committee and Medical Executive Committee. (Affidavit of A. Peters, dated April 28, 2016, at App. 653).

### **C. Procedural History**

In response to Plaintiff's written discovery requests, RGH identified the Sodums Letter on its privilege log, asserting that the document was privileged and protected from disclosure

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<sup>2</sup> CEO Peters was a member of RGH's Quality Improvement / Peer Review Committee and *ex officio* member of the Medical Executive Committee.

pursuant to the West Virginia health care peer review privilege, West Virginia Code § 30-3C-1, *et seq.*<sup>3</sup> After Dr. Sodums' deposition, on April 27, 2016, Plaintiff filed a Motion to Compel the production of the Letter, arguing that the Letter is not subject to peer review protection (App. 408). RGH submitted its response to the Motion to Compel on May 25, 2016 (App. 429).

On May 31, 2016, the Honorable H.L. Kirkpatrick of the Circuit Court of Raleigh County, West Virginia, heard oral arguments on Plaintiff's Motion to Compel (App. 782). The Circuit Court granted Plaintiff's Motion to Compel for the following reasons:

- Dr. Sodums testified that he did not prepare the March 29, 2012, letter to Allen Peters as part of a peer review investigation.
- Dr. Sodums testified that he prepared the subject letter because he was concerned about Dr. Glaser's patients' safety and was concerned about being implicated in the alleged fraudulent activity involving Dr. Glaser.
- Dr. Sodums testified that he was not a member of the medical executive committee, the Board of Trustees, or a peer review committee at Raleigh General Hospital.

(Order of the Raleigh County Circuit Court, entered on July 5, 2016, at App. 1-2).

This Petition challenges the Circuit Court's Order compelling RGH to produce the Sodums Letter to Plaintiff. At issue is the application of the West Virginia Code § 30-3C-1, *et seq.*, particularly in light of State ex rel. Wheeling Hosp., Inc. v. Wilson, 2016 W. Va. LEXIS 59, 782 S.E.2d 622 (2016), to the Sodums Letter. A Writ of Prohibition is necessary to correct the Circuit Court's clear legal error and provide guidance as to the application of the health care peer review privilege.

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<sup>3</sup> RGH also submitted a Motion for Protective Order (App. 3) corresponding to the categories of documents on its privilege log, including the category of documents that includes the Sodums Letter. This Motion has not been ruled upon; however, Plaintiff specified the Sodums Letter and made it the subject of a Motion to Compel.

### III. SUMMARY OF ARGUMENT

As this Court has recognized, West Virginia Code § 30-3C-1, *et seq.*, “very clearly evinces a public policy encouraging health care professionals to monitor the competency and professional conduct of their peers in order to safeguard and improve the quality of patient care.” Wheeling, 782 S.E.2d 622 at 629-30. Further, based upon this compelling public interest, the Legislature decided that a privilege is necessary because, “absent the statutory peer review privilege, physicians would be reluctant to sit on peer review committees and engage in frank evaluations of their colleagues.” Daily Gazette Co. v. W. Va. Bd. of Med., 117 W. Va. 316, 322, 352 S.E.2d 66, 72 (1986) (citation omitted). However, because health care providers encounter myriad scenarios that involve evaluation of the quality of patient care, the precise parameters of this privilege are “tinged with many, many shades of gray uncertainty.” Wheeling, 782 S.E.2d 622 at 631. Considerable effort has been taken by this Court to craft a privilege that accounts for both the Legislative purpose of the statute and the realities of health care.

Respectfully, RGH believes that Judge Kirkpatrick did not properly apply the peer review privilege, which was codified to encourage physicians, like Dr. Sodums, to do exactly what he did: express concerns about patient care (in writing) to CEO Peters (particularly when faced with CEO Peters’ requests) in an effort to improve patient care. Because the Sodums Letter is an archetypical “peer review” document, the Circuit Court’s order, which deemed the Letter discoverable, manifests clear legal error – and was issued without the benefit of an *in camera* review.

This Court has an invaluable opportunity to correct the Circuit Court’s error and provide further guidance to the circuit courts on the important boundaries of the health care peer review privilege.

#### IV. STATEMENT RESPECTING ORAL ARGUMENT AND DECISION

Oral argument is appropriate pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure to aid in this Court's consideration of this case. Argument is proper pursuant to Rule 19 because this case involved, *inter alia*, assignments of error in the application of settled law, an exercise of discretion that is unsustainable, and a narrow issue of law. See W. VA. R. APP. P. 19(a)(1), (2), (4).

#### V. ARGUMENT

##### A. A Writ of Prohibition is the Proper Remedy.

A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of discretion in regard to discovery orders. Also, when a discovery order involves the probable invasion of confidential materials that are exempted from discovery under West Virginia Rule of Civil Procedure 26(b), the exercise of the Supreme Court of Appeals of West Virginia's original jurisdiction is appropriate. State ex rel. Med. Assur. of West Virginia, Inc. v. Recht, 213 W. Va. 457, 583 S.E.2d 80 (2003). This Court has outlined five factors for determining whether to issue a writ of prohibition:

- (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.

State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12, Syl. Pt. 4 (1996). Although all five factors need not be satisfied, the clear error factor should be given substantial weight. Id. The majority of this Petition addresses the Circuit Court's clear legal error. However, all five factors weigh in favor of issuing the requested Writ of Prohibition.

First, RGH has no other adequate means, such as direct appeal, to obtain the desired relief of preventing dissemination of the document in question. This Court has acknowledged, “[i]n the area of communication privileges, ‘once the cat is out of the bag, it cannot be put back in.’” State ex rel. United States Fid. & Guar. Co. v. Canady, 194 W. Va. 431, 460 S.E.2d 677, n. 8 (1995). Aside from seeking a Writ of Prohibition, the only other alternative RGH has is to disobey the Circuit Court's order and to suffer a contempt citation or other sanctions. Id. This is not an adequate or acceptable alternative.

Second, this Court has held that when the order being challenged involves, as in this case, a ruling granting discovery that could lead to an invasion of confidential materials that are exempted from discovery, this Court's original jurisdiction is appropriate. See Canady. As stated in State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone, 218 W. Va. 593, 595, 625 S.E.2d 355, 357 (2005), “[t]his is so because the harm resulting from the disclosure of such information is often not correctable on appeal.” Id. RGH contends that the Circuit Court's order is erroneous as a matter of law and, as a result, a privileged document will be disclosed and will affect litigation from the disclosure forward. By the time a final judgment is obtained, RGH will already have been prejudiced and damaged in ways not correctable on appeal.

Third, the Circuit Court's Order is clearly erroneous as a matter of law. This “clear error” factor “should be given substantial weight.” State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12, Syl. Pt. 4 (1996). The clear error standard contemplates this Court's power to correct

errors of law, including those that affect so-called mixed findings of law and fact predicated on a misunderstanding of the governing rule of law. Brown v. Gobble, 196 W. Va. 559, 569, 474 S.E.2d 489, 499 (1996). This Court’s traditional deference to a circuit court may evaporate when the circuit court (1) fails to consider a relevant factor that should have been given significant weight; (2) commits an error of judgment even when weighing all proper factors, and no improper factors; and (3) fails to exercise any discretion at all in issuing its decision. Id. Accordingly, the majority of this Petition concerns RGH’s position as to the clear errors manifest in the Circuit Court’s ruling. The Court is directed to Part B herein, and its subparts.

Fourth, only months ago, in Wheeling, this Court recognized “an urgent need for more precise guidelines as to which documents are protected and which documents are subject to disclosure.” Wheeling, 782 S.E.2d 622 at 631-32. This is because the interpretation of a statutory peer review privilege is particularly complicated in the health care setting, where documents may be generated or considered in myriad scenarios and the applicability of the privilege is uncertain. Here, the Circuit Court’s Order reflects that the guidelines set forth in the Wheeling opinion were not employed. The Order further confirms the ongoing need for more precise guidance from this Court.

Fifth, Wheeling announced clarifications and changes to this Court’s interpretation of the West Virginia health care peer review privilege analysis. The instant Petition raises new and important questions as to how the framework set forth in that opinion should be applied by circuit courts.

For these reasons, and to correct the Circuit Court’s clear legal error described below, this Court should issue a Writ of Prohibition.

**B. The Circuit Court's Order Requiring Disclosure of the Letter was a Clear Legal Error.**

Had the Circuit Court tailored its analysis to serve the purposes of West Virginia Code § 30-3C-1, *et seq.*, and properly weighed factors pertinent to the Letter's peer review process "origin," it would have concluded that the Sodums Letter was subject to the peer review privilege mandated by West Virginia Code § 30-3C-1, *et seq.* Interpreting the statute in Wheeling, this Court set forth its most direct statement on the boundaries of the health care peer review privilege:

*Documents that have been created exclusively by or for a review organization, or that originate therein, and that are used solely by that entity in the peer review process are privileged.* However, documents that either (1) are not created exclusively by or for a review organization, (2) originate outside the peer review process, or (3) are used outside the peer review process are not privileged. We further hold that, where documents sought to be discovered are used in the peer review process but either the document, itself, or the information contained therein, is available from an original source extraneous to the peer review process, such material is discoverable from the original source, itself, but not from the review organization that has used it in its deliberations.

Wheeling, 782 S.E.2d 622 at 635 (emphasis supplied). This Court plainly recognized that, by assuring confidentiality, the privilege is intended to encourage the creation of documents which conduct "peer review" within the exclusive scope of review organizations and which originate within the peer review process. Here, the Circuit Court failed to abide by this principle and attempted to identify the most "black and white" factors available, resulting in an unreasonably narrow view of the privilege.

This Court should issue a Writ of Prohibition instructing the Circuit Court to conduct a more proper analysis comparing the purpose of the Letter to the purpose of the privilege and affording significant weight to facts most pertinent to the Letter's peer review process origins, as

required by Wheeling. In the alternative, the Court should remand with instructions that the Circuit Court review the Letter *in camera*.

**1. The Circuit Court Failed to Afford Weight to the “Peer Review” Purposes of the Letter, which Establish that it was Created Exclusively for a Review Organization.**

In West Virginia Code § 30-3C-1, the Legislature guided the application of the privilege by defining “peer review:”

[T]he procedure for evaluation by health care professionals<sup>4</sup> of the quality and efficiency of services ordered or performed by other health care professionals, including practice analysis, inpatient hospital and extended care facility utilization review, medical audit, ambulatory care review, claims review and patient safety review.

W. VA. CODE § 30-3C-1 (2004). The Legislature codified this definition to encourage “peer review,” as that term is statutorily defined. Circuit courts must be guided by this definition and afford significant weight to facts establishing whether the document in question meets it.

Here, application of the statutory definition demonstrates that Dr. Sodums’ Letter was written for two enumerated “peer review” purposes. First, Dr. Sodums testified that the purpose of the Letter was to cause CEO Peters to *implement the quality review process* as to Dr. Glaser:

- Q: Dr. Sodums, the reason you wrote the letter to Mr. Peters was you wanted him to implement quality review?  
A: **Yes. I wanted him to ensure quality, yes.**  
Q: Quality of care –  
A: **Right.**  
Q: -- to patients –  
A: **Right.**  
Q: -- in the cardiac cath lab?  
A: **Right.**

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<sup>4</sup> “Health care professionals” means individuals who are licensed to practice in any health care field and individuals, who, because of their education, experience or training participate as members of or consultants to a review organization. W. VA. CODE § 30-3C-1. Dr. Sodums clearly qualifies as a “health care professional.”

(Deposition of M. Sodums, M.D., taken April 11, 2016, at App. 573). Second, Dr. Sodums testified that he wrote the Letter to bring attention to his concerns about *patient safety*:

Q: Okay. You prepared that letter because you were concerned with respect to patient safety?

A: Yes.

(Deposition of M. Sodums, M.D., taken April 11, 2016, at App. 476). These facts demonstrate that, in writing the Letter, Dr. Sodums was acting in furtherance of the Legislature’s specified health care peer review goals.

Indeed, the Circuit Court found that Dr. Sodums wrote the Letter “because he was concerned about Dr. Glaser’s patients’ safety.”<sup>5</sup> However, the Court failed to recognize that “patient safety review” is part of the statutory definition of peer review and failed to acknowledge that Dr. Sodums also testified that he wrote the Letter for quality review purposes. These failures highlight the Circuit Court’s erroneous interpretation of the peer review privilege – and constitute clear legal error. Because the Sodums Letter was created for “peer review” purposes within the statutory definition, the purpose of the privilege will and must be served by protecting the Letter from discovery.

Moreover, whether a document has a “peer review” purpose is critical evidence as to its “peer review” origins – a subject of required inquiry according to Wheeling, where this Court directed circuit courts to interpret the “origin” inquiry to require a showing that the document “is a record within the scope of a peer review committee.” Id. at 634 (quoting, Bailey v. Manor Care of Mayfield Heights, 4 N.E.3d 1071, 1078-79 (Ohio. App. 2013)). A document created for the statutorily-defined “peer review” purposes of implementing and ensuring quality and patient safety review is squarely “within the scope of a peer review committee.” Accordingly, the Circuit Court should have concluded that Letter’s purpose favors a determination that it was

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<sup>5</sup> Order of the Raleigh County Circuit Court, entered July 5, 2016, at App. 1.

created exclusively by or for a review organization, originated in a review organization, or originated within the peer review process. Wheeling, 782 S.E.2d 622 at 635.

**2. The Circuit Court Failed to Afford Weight to Facts Establishing the Letter’s Peer Review Process Origins.**

Under Wheeling, a key peer review privilege question is whether the document in issue was created exclusively by or for a review organization, originated in a review organization, or originated within the peer review process. Wheeling, 782 S.E.2d 622 at 635. This standard must be flexible enough to account for the “myriad scenarios in which peer review documents may be generated or considered.” Wheeling, 782 S.E.2d 622 at 632. In contrast, the Circuit Court applied a rigid, black and white analysis – relying upon testimony that the Letter was not connected to a specific peer review investigation or written by a sitting member of a review organization.

The Circuit Court’s limited view does not adequately apply the statutory peer review privilege. The privilege must encompass the ongoing, systemic process that invites the participation of health care providers like Dr. Sodums and promises confidentiality to them when they raise concerns within the peer review process. If West Virginia’s peer review privilege does not function this way, it is ineffectual.

To vindicate the purpose of the privilege, the Circuit Court should have afforded significant weight to three facts, discussed in detail below, that establish the Letter’s peer review process origins. First, Dr. Sodums was regularly involved in RGH’s peer review process related to Dr. Glaser’s care and treatment. Second, before writing his Letter, Dr. Sodums had been asked to bring concerns about Dr. Glaser’s care and treatment to the attention of CEO Peters, who was a member of the Quality Improvement / Peer Review Committee and *ex officio* member

of the Medical Executive Committee. Third, as a member of the RGH medical staff, Dr. Sodums had a standing responsibility, if not a clear duty, – set forth in the RGH Medical Staff Bylaws – to actively review medical care provided by his colleagues. The Circuit Court’s Order mentions none of these facts.

a. **Dr. Sodums’ Regular and Ongoing Participation in Peer Review of Dr. Glaser’s Care and Treatment Should have been Given Significant Weight.**

Dr. Sodums testified that he was consulted from time to time by the Quality Improvement / Peer Review Committee to participate in the peer review of Dr. Glaser’s care and treatment:

Q: Okay. Were you ever asked to participate in a peer review of Dr. Glaser?

A: Yes.

Q: And without telling me what you provided, what was your role? Don’t tell me information. Tell me what role you had.

A: **Periodically, the hospital would send out cases for review, and they would come back and the director of risk management sometimes asked me to read the comments of the review and comment on those comments.**

(Deposition of M. Sodums, M.D., taken April 11, 2016, at App. 474-475).<sup>6</sup>

Dr. Sodums’ regular participation in systemic peer review of Dr. Glaser’s care and treatment should have been given significant weight. This factor establishes that Dr. Sodums’ quality and patient safety concerns originated, even if only partially, in the course of these interactions. It also establishes Dr. Sodums’ familiarity with the peer review process and personnel involved (i.e., CEO Peters).

Moreover, the Legislature did not want circuit courts to turn blind eyes to the relationship between a document’s creator and the peer review process. This is why the statute’s “original source” exception only extends to “sources extraneous to the peer review process.” Wheeling,

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<sup>6</sup> For the Court’s clarity, Dr. Sodums’ comment about cases being “sen[t] out” for review refers to RGH’s practice of retaining expert external peer reviewer consultants to evaluate cases. RGH’s Privilege Log (App. 201) in this matter shows that this occurred dozens of times relative to Dr. Glaser’s cases.

782 S.E.2d 622 at 632 (W. Va. 2016). Dr. Sodums was *integral* to RGH's peer review process – particularly as to Dr. Glaser's care and treatment. Dr. Sodums was the only other interventional cardiologist practicing at RGH when the Letter was written, and therefore, was the only physician on RGH's Medical Staff who could comment on the quality of Dr. Glaser's interventional cardiology care and treatment. This fact weighs in favor of finding that his Letter originated within the peer review process, was created exclusively for a review organization, and is protected from disclosure.

**b. The Fact that Dr. Sodums had Previously been Asked to Bring Quality Concerns regarding Dr. Glaser's Care and Treatment to CEO Peters should have been Given Significant Weight.**

Before writing his March 29, 2012, Letter to Allen Peters, Dr. Sodums was directly and repeatedly asked to bring quality concerns about Dr. Glaser's care and treatment to CEO Peters. These requests were made by CEO Peters himself, a member of RGH's Quality Improvement / Peer Review Committee and *ex officio* member of the Medical Executive Committee:

Q: Were you asked to participate in any other way with regard to the peer review of Dr. Glaser, other than what you've described?

A: **Mr. Peters once asked me to bring suspicious or unusual cases to his attention.**

Q: Okay.

A: **Actually several times.**

(Deposition of M. Sodums, M.D., taken April 11, 2016, at App. 476).

Q: When Mr. Peters asked you to provide him with any unusual cases, was it after you sent that letter to him?

A: **That was before.**

(Deposition of M. Sodums, M.D., taken April 11, 2016, at App. 477).

Dr. Sodums' answer to the question excerpted above reveals that he considered CEO Peters' requests to be direct solicitations of his further involvement in peer review of Dr.

Glaser's care and treatment. Dr. Sodums knew that quality and patient safety concerns would be addressed in a peer review process and knew that CEO Peters was his direct outlet for such concerns. Indeed, if the Letter was not intended to serve peer review purposes, why would Dr. Sodums direct it to the individual who had asked to be advised of quality concerns? In light of this fact, it is only by error and misapplication of the law that Dr. Sodums' Letter to CEO Peters escapes peer review privilege protection.

The Circuit Court's error is again highlighted by its contravention of the Legislature's intention to encourage health care professionals to monitor the competency and professional conduct of their peers. As this Court has stated –

Both commentators and courts alike agree that without the self-evaluation which the peer review privilege both permits and encourages, complaints involving medical care and treatment could not be fully investigated in the preferred manner of voluntary and forthright participation due to the lurking fears of reprisal and repercussion.

Young v. Saldanha, 189 W. Va. 330, 335, 431 S.E.2d 669, 674 (1993). CEO Peters acted in furtherance of this intent by directly requesting Dr. Sodums' input. The peer review privilege should encourage such conduct; hospital CEOs should not hesitate to solicit quality review by medical staff members. Moreover, physicians should be encouraged to raise their concerns by appropriate means whenever they arise. This Petition presents the Court an opportunity to bolster these messages.

Failing to appreciate that the Letter was written in the context of CEO Peters' standing request to be apprised of Dr. Sodums' quality concerns about Dr. Glaser's care and treatment was clear error on the part of the Circuit Court. This fact should have been given significant weight, as it establishes that the Letter was created exclusively by or for a review organization, or originated within the peer review process.

c. **Dr. Sodums' Standing Responsibilities Set Forth in the Bylaws of the RGH Medical Staff Should have been Given Significant Weight.**

Dr. Sodums was bound by the Bylaws of the RGH Medical Staff. These Bylaws set forth a number of physician responsibilities, including an active role in the ongoing review of the care and treatment provided by their colleagues. Nevertheless, the Circuit Court afforded no weight to the import of the Bylaws. This was clear error.

The Preamble of the April 2011 Bylaws of the Medical Staff of RGH states that “it is recognized that the Medical Staff is responsible for the quality of medical care in the Hospital and must accept and discharge this responsibility ... and that the cooperative efforts of the Medical Staff, the Chief Executive Officer, and the Governing Body are necessary to fulfill this Hospital’s obligations to its patients[.]” (Bylaws of the Medical Staff of RGH, April 2011, at App. 616). When the Legislature enacted the health care peer review privilege, its purpose was to encourage hospitals to shoulder physicians with such responsibilities by promising them confidentiality if they should raise concerns regarding their colleagues.

These standing responsibilities are set forth in Article II-B, Section 1, of the Bylaws:

In order for the medical staff to carry out its responsibility, each Medical Staff member should accept and adequately discharge a leadership responsibility:

1. Responsibility to the Patient ... The process for ongoing professional practice evaluation includes ... the review of the medical assessment and treatment of patients ... the review of the use of operative and other procedures ... appropriateness of clinical practice patterns ... patient safety data [...]
2. Responsibility to the Medical Staff ... While Medical Staff Members are responsible for their own professional activities by accepting the staff appointment, it becomes their duty to assist in the promotion and maintenance of high standards of professional medical care ... to review the efficiency of clinical practice patterns, and to review the significant departures from established patterns of clinical practice.

[...]

4. Accounting for the quality, appropriateness and cost effectiveness of patient care rendered by all practitioners and [allied health practitioners] authorized to practice in the Hospital, by taking action to:

(5) Initiate and pursue corrective action with respect to practitioners ... when warranted ...

(7) Review and evaluate the quality of patient care through a valid and reliable care monitoring procedure, including identification and resolution of important problems in patient care and treatment.

(Bylaws of the Medical Staff of RGH, April 2011, at App. 617-618). Of particular note is the requirement that physicians account for the quality and appropriateness of patient care rendered by all practitioners “by taking action to” initiate and pursue corrective action and “review and evaluate the quality of patient care through a valid and reliable care monitoring procedure, including identification and resolution of important problems in patient care and treatment.” This language echoes West Virginia Code § 30-3C-1’s definition of “peer review.”

The Bylaws provide important context as to the “origin” of the Letter. The Bylaws establish a peer review process that pre-dates the Letter and Dr. Sodums’ awareness that the peer review process would be the outlet for quality and patient safety concerns. The Letter did not come from “out of the blue” or from outside of the peer review process, it came from a physician who had agreed to actively monitor his colleagues and initiate review. Moreover, the Affidavit of CEO Peters states that Dr. Sodums communicated medical care and quality issues to him pursuant to the Bylaws and knew that any such issues would be referred to the Quality Improvement / Peer Review Committee of which CEO Peters was a member. (Affidavit of A. Peters, dated April 28, 2016, at App. 653).

The Circuit Court did not consider the impact of the RGH Medical Staff Bylaws upon its analysis of the Letter’s “origin.” Because this fact should have been given significant weight, the Circuit Court’s Order manifests clear error. When physicians seek to raise quality and

patient safety concerns, they should not be forced to choose between violating their Bylaws and having their concerns publicly disclosed.

**3. The Circuit Court Committed Clear Error by Affording Undue Weight to Factors that are not Dispositive of the West Virginia Health Care Peer Review Privilege Question at Hand.**

Not only did the Circuit Court overlook important factors set forth above, it also focused upon factors that are not important to the peer review privilege question at hand. Namely, the Circuit Court highlighted three facts that arose during discovery:

- Dr. Sodums testified that he did not write the Letter as part of a peer review investigation
- Dr. Sodums testified that the Letter was prepared to express concerns about patient safety and potential implication in alleged fraud; and
- Dr. Sodums was not a sitting member of a review organization.

(Order of the Raleigh County Circuit Court, entered July 5, 2016, at App. 1-2). These facts were afforded unmerited significance. By affording them undue weight, the Circuit Court committed clear error. See Brown v. Gobble, 196 W. Va. 559, 569, 474 S.E.2d 489, 499 (1996).

First, as discussed above, the Circuit Court's finding that Dr. Sodums "testified he did not prepare the March 29, 2012, Letter to Allen Peters as part of a peer review investigation" should have been of comparatively little consequence. The Letter may not have been written in regards to the investigation of a specific case, but that is not the inquiry. The Wheeling inquiry is whether the Letter was created exclusively by or for a review organization, originated therein, or originated within the peer review process. Wheeling, 782 S.E.2d 622 at 635. Multiple facts set forth above establish that, even if Dr. Sodums' Letter was not tied to a specific investigation, it originated within the scope of RGH's peer review process. The Legislature's purpose in

enacting the privilege is thwarted unless it encourages physicians to appropriately raise concerns whenever they arise.

Second, the Circuit Court found that Dr. Sodums wrote the Letter to express patient safety concerns<sup>7</sup> and to raise concerns “about being implicated in the alleged fraudulent activity involving Dr. Glaser.” (Order of the Raleigh County Circuit Court, entered July 5, 2016, at App. 1-2). The Circuit Court misjudged the import of the latter, apparently determining that this testimony establishes that the Letter was not “peer review.” The opposite is true. Addressing allegations of fraudulent physician services generally *would* require peer review by a review organization – e.g., assessment of physician documentation. Raising this concern to CEO Peters was an ideal way for Dr. Sodums to engage such a peer review. Indeed, this allegation is an example of one of the “myriad scenarios in which peer review documents may be generated or considered.” Wheeling, 782 S.E.2d 622 at 632. A Writ of Prohibition is appropriate to correct the Circuit Court’s error in judgment.

Third, the Circuit Court also afforded undue weight to the fact that Dr. Sodums was “not a member of the Medical Executive Committee, the Board of Trustees, or a peer review committee at Raleigh General Hospital.” (Order of the Raleigh County Circuit Court, entered July 5, 2016, at App. 2). It is unclear why the Circuit Court specifically relied upon this fact. West Virginia’s health care peer review privilege is not restricted to documents created by sitting members of review organizations. State ex rel. Charles Town Hosp. v. Sanders, 210 W. Va. 118, 556 S.E.2d 85 (2001) (application for privileges prepared by physician was protected from discovery as a document prepared for peer review). The narrow construction applied by the Circuit Court does not reflect the statutory mandate and directly obstructs the purpose of the

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<sup>7</sup> As discussed above, the Circuit Court overlooked the fact that “patient safety review” is part of the West Virginia Code 30-3C-1 definition of “peer review.”

health care peer review privilege. All physicians on a medical staff – especially at RGH, where Bylaws dictate as much – should be encouraged to participate in colleague review.<sup>8</sup> The circuit courts should not rely upon whether the creator of a document is a sitting member of a review organization as a requisite for peer review privilege protection.

A Writ of Prohibition provides this Court an opportunity to correct these errors and instruct circuit courts not to rely upon the factors listed in the Circuit Court’s Order in this action.

**4. The Circuit Court’s Finding as to the “Use” of the Letter Favors a Determination that the Letter is Privileged.**

Dr. Sodums’ Letter was solely addressed to CEO Peters, who stated by Affidavit that he kept the Letter confidential and directed it to the Quality Improvement / Peer Review Committee, of which he was a member. (Affidavit of A. Peters, dated April 28, 2016, at App. 652-653). Under Wheeling, “a medical peer review committee may have obtained and reviewed a copy from a letter from a physician, but that document is not thereby clothed with a privilege if its author or recipient shared it with individuals or entities that do not come under the [peer review privilege].” Wheeling, at 633, (quoting Irving Healthcare Sys. v. Brooks, 927 S.W.2d 12, 18 (Tex. 1996)). In this case, Dr. Sodums shared his Letter with CEO Peters only.<sup>9</sup> And, as recognized by the Circuit Court, the Letter was “used during a peer review proceeding.” (Order of the Raleigh County Circuit Court, entered July 5, 2016, at App. 2).

Of course, because the Circuit Court determined the Letter did not have a peer review “origin,” it afforded little weight to its “use” finding – despite the fact that a document’s “use”

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<sup>8</sup> This is why West Virginia Code § 30-3C-1 defines “peer review” as the “procedure for evaluation by health care professionals” and defines “health care professionals” to include physicians and “consultants to a review organization.”

<sup>9</sup> After Dr. Glaser’s departure from RGH, the Sodums Letter was also obtained by the U.S. Department of Justice as part of an inquiry following LifePoint’s and RGH’s disclosure of developments concerning Dr. Glaser’s interventional cardiology practice.

certainly sheds light upon its “origin.” The Circuit Court’s finding that the Letter was used in a peer review proceeding, along with the evidence, outlined above, that it was intended for peer review, requires the application of the peer review privilege.

**5. The Circuit Court Committed Clear Error by Failing to Review the Letter *In Camera*.**

Just as blanket *assertions* of privilege are insufficient, blanket *rejections* of a privilege should be disfavored. In its Response to Plaintiff’s Motion to Compel, RGH proposed to submit the Letter under seal for *in camera* review, but the Circuit Court did not review the document. This was clear error.

For twenty-five years, with regard to the health care peer review privilege, this Court has urged trial courts to conduct *in camera* review. In State ex rel. Shroades v. Henry, 187 W. Va. 723, 421 S.E.2d 264 (1992), the Court – after identifying other jurisdictions that require *in camera* review – held circuit courts “should examine the requested materials in an *in camera* hearing” as contemplated by West Virginia Rule of Civil Procedure 26(c). Shroades, 187 W. Va. at 728, 421 S.E.2d at 268-269. A decade later, the foremost authority on the West Virginia Rules of Civil Procedure stated, “[w]hen a party asserts that a communication is privileged the trial court should examine the requested materials in an *in camera* hearing.” FRANKLIN D. CLECKLEY, ROBIN J. DAVIS & LOUIS J. PALMER, JR., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE, § 26(b)(1), 697 (2d ed. 2006).

A direct mandate of *in camera* review of health care peer review documents is overdue in light of State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 222 W. Va. 37, 658 S.E.2d 728 (2008). In Kaufman, this Court outlined the “general procedure involved with discovery of allegedly privileged documents.” Id. at Syl. Pt. 4. While Kaufman looked at the procedure

involved with the production of documents protected by the attorney-client privilege and work product doctrine, Kaufman did not specifically address health care peer review documents. However, within the general procedure set forth in Kaufman, the Court held that if a motion is filed to compel alleged privileged information, “the trial court *must* hold an *in camera* proceeding and make an independent determination of the status of each communication the responding party seeks to shield from discovery.” Id. Moreover, mandatory *in camera* review is consistent with jurisdictions across the nation. See State ex rel. HCR ManorCare, LLC v. Stucky, 235 W. Va. 677, 691, 776 S.E.2d 271, 285-86 (2015) (Davis, J., concurring in part, dissenting in part) (compiling 18 opinions supporting the position that the “requirement of an *in camera* review of documents allegedly protected by a statutory health care privilege is consistent with the law around the country.”). See e.g., FRANKLIN D. CLECKLEY, ROBIN JEAN DAVIS & LOUIS J. PALMER, JR., HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS (5th ed. 2012). The instant Petition provides the Court an opportunity to clarify *in camera* review requirements in regards to health care peer review privileged documents.<sup>10</sup>

*In camera* review preserves any privilege’s strength and merit, but is especially critical when assessing a privilege “tinged with many, many shades of gray uncertainty.” Wheeling, 782 S.E.2d 622 at 632. Reviewing documents *in camera* allows the trial court to grasp those gray areas and ascertain whether the document is one that the Legislature intended to encourage and protect from discovery. Because the Circuit Court did not review the Letter *in camera* despite

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<sup>10</sup> The Court has also mandated *in camera* review of documents claimed to be protected from discovery by the attorney-client privilege. See State ex rel. Allstate Ins. Co. v. Madden, 215 W. Va. 705, 720, 601 S.E.2d 25, 40 (2004) (“If the party seeking testimony for which a privilege is claimed files a motion to compel, or the responding party files a motion for a protective order, the trial court must hold an *in camera* proceeding and make an independent determination of the status of each communication the responding party seeking to shield from discovery.”).

substantial evidence indicating the peer review privilege's applicability, its Order was clearly erroneous and a Writ of Prohibition should issue.

**6. The Circuit Court's Order will have a "Chilling Effect" on the Peer Review Process in the Future**

In Young v. Saldanha, this Court recognized the "chilling effect" that narrowly construing the West Virginia peer review statute would have "on the process of peer review in institutions throughout the State of West Virginia which would be a detriment ultimately to the health care of the citizens of the State." Young, at 335, 674. Here, such a "chilling effect" would result from the disclosure of the Sodums Letter because of the harm caused to Dr. Glaser, the exposure of Dr. Sodums and his internal concerns, and the direct undermining of the statute's waiver provision. These are "real world" ramifications that would eviscerate the effect of the privilege across the state.

First, the resulting harm to Dr. Glaser would cause a "chilling effect." As stated above, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996) provides a number of factors that this Court considers when deciding whether to issue a writ of prohibition. One of these is "whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal." Id. at 21, 21. Here, the reputational and economic damage and prejudice to Dr. Glaser that would be caused by the disclosure of the Sodums Letter cannot be understated. Indeed, these effects exemplify the type of harm that the Legislature intended to prevent by enacting West Virginia Code § 30-3C-1, *et seq.*

West Virginia Code § 30-3C-1, *et seq.* contains protections designed to facilitate candid internal reviews regarding the quality of the medical care provided in hospitals and other healthcare facilities throughout the State. These protections include confidentiality and

immunity to those providing information to a peer review organization, as well as confidentiality for those practitioners being reviewed. Such practitioners, like Dr. Glaser here, are within the scope of protections offered by the privilege, which prevents them from being publically subjected to unsubstantiated charges of malfeasance or misfeasance. Dr. Glaser has a right to the protections afforded to him by the West Virginia peer review privilege to protect his reputational and economic interests. The purpose of the privilege is to encourage internal discussions for the purpose of improving the quality of patient care in West Virginia, not to create a litigation tool for medical malpractice plaintiffs. Shroades, 726, 268 (“The purpose of this legislation is not to facilitate the prosecution of malpractice cases.”). Disclosure of the Letter does not benefit Dr. Glaser, Dr. Sodums, or the health of peer review confidentiality in this state – it only benefits the plaintiffs who are suing Dr. Glaser.

If the Sodums Letter is disclosed as part of this litigation, the result is the publication of unproven allegations of wrongful conduct issued – internally within RGH as described above – by one physician concerning another. Dr. Glaser cannot now effectively defend himself against the allegations contained in Sodums’ Letter because the protections offered by the peer review process are gone – i.e., an internal procedure for Dr. Glaser to be apprised of and respond to the allegations in the Letter. In effect, Dr. Glaser is in the impossible position of defending himself against scandalous headlines appearing in a tabloid journal. Moreover, once the allegations become public, Dr. Glaser’s reputation is tarnished to a degree akin to a presumption of guilt within the medical community and the community at large.

In the event that a physician develops concerns about the medical care provided by a colleague physician and seeks to express them in the manner Dr. Sodums did here, such a physician would be given pause if he or she expected that a letter would be publicized. This is

especially true in situations where the concerned physician is a personal friend, recipient of referrals, or longtime colleague of the physician under review – or, in a situation where the concerned physician truly does not wish to inflict such substantial harm as the Sodums Letter would inflict upon Dr. Glaser. And yet, the statute is designed to encourage this hypothetical concerned physician to write his or her letter. This Court should not place physicians in the position of making this choice.

Second, the exposure of Dr. Sodums and his concerns would cause a “chilling effect.” West Virginia Code § 30-3C-1, *et seq.* “seeks to encourage the free flow of information through the peer review process by preserving the confidentiality of information and to some extent the anonymity of individuals involved in the peer review process.” Young, at 335, 674. As this Court recognized, “doctors seem to be reluctant to engage in strict peer review due to a number of apprehensions: loss of referrals, respect, and friends, possible retaliations, vulnerability to torts, and fear of malpractice actions in which the records of the peer review proceedings might be used.” Id. (citation omitted). Health care providers are more open, honest, and forthright in their criticisms of other physicians when they know their criticisms are confidential.

Perhaps Dr. Sodums did not feel this concern here, but his personal preference as to the discoverability of the Letter should not be permitted to mandate an upheaval of West Virginia health care peer review law. Furthermore, maintaining the confidentiality of the Letter protects the physician who writes a letter bringing quality concerns into a hospital’s peer review process, like Dr. Sodums did, from potential litigation. If this Court concurs with the Circuit Court, Dr. Sodums could not avail himself of the civil immunity afforded under West Virginia Code § 30-3C-2, should Dr. Glaser choose to bring an action for damages against Dr. Sodums. And, if such a letter is not peer review, any physician writing a letter to a hospital administrator concerning a

colleague's quality of care would also likely be subject to subpoena for both a deposition and trial in medical malpractice actions, which, in itself, would have a significant "chilling effect" on physicians' willingness to report such concerns. As this Court has recognized, "[b]oth commentators and courts alike agree that without the self-evaluation which the peer review privilege both permits and encourages, complaints involving medical care and treatment could not be fully investigated in the preferred manner of voluntary and forthright participation due to the lurking fears of reprisal and repercussion." *Id.* This is exactly the situation the Legislature sought to avoid by enacting the peer review statute.

Finally, if this Court concurs with the Circuit Court, it will essentially stamp its imprimatur on an unreasonable enlargement of the waiver provision of West Virginia Code § 30-3C-3. That provision states that ". . . an individual may execute a valid waiver authorizing the release of the contents of his file pertaining to his own acts and admissions, and such waiver shall remove the confidentiality and privilege of said contents otherwise provided by this section." W. VA. CODE § 30-3C-3. This means that the only statutory provision allowing for waiver of the peer review privilege belongs to the individual being subjected to peer review. The effect of this provision is "chilled" if this Court enlarges it.

In this case, the privilege belongs to Dr. Glaser. Dr. Glaser has not waived his peer review privilege. Nevertheless, the Circuit Court's order essentially allows Dr. Sodums to waive Dr. Glaser's privilege by testifying that he did not write his Letter as part of a specific peer review investigation and otherwise did not consider his Letter to be a matter of peer review.<sup>11</sup> This Court cannot place the viability of the privilege on such "thin ice." Waiving the privilege is not and cannot be so simple a matter as giving testimony like Dr. Sodums' in this case. The

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<sup>11</sup> As discussed in preceding sections, Dr. Sodums' deposition testimony as to his perception of the Letter's peer review status not only contradicts the manner by which he originally presented the Letter, but is also not dispositive of the question at hand.

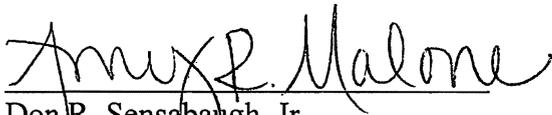
potency of the privilege is significantly limited if this Court holds that a physician – who may be motivated by professional animosity or other reasons not rooted in concerns for quality patient care – can create a letter damaging to another physician, deliver the letter in a manner consistent with a peer review process, then later strip the letter of privilege status simply by testifying that he or she does not consider the document a matter of peer review.

## VI. CONCLUSION

For the foregoing reasons, this Court should issue a Writ of Prohibition to prevent the Circuit Court of Raleigh County from ordering disclosure of the Sodums Letter, as it is protected from civil discovery by the West Virginia health care peer review privilege, set forth at West Virginia Code § 30-3C-1, *et seq.*

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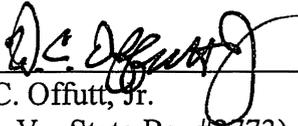


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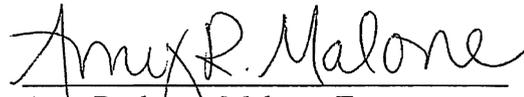
*Counsel for Petitioner, Donald Kenneth Glaser, M.D.*

**VERIFICATION**

**STATE OF WEST VIRGINIA.**

**COUNTY OF KANAWHA, to wit:**

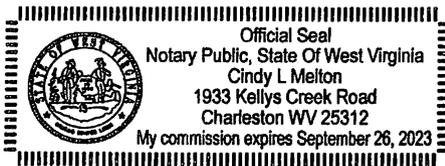
I, Amy Rothman Malone, Esq., counsel for Petitioner, Raleigh General Hospital, LLC, being first duly sworn, state that I have read the foregoing PETITION FOR A WRIT OF PROHIBITION; that the factual representations contained therein are true, except so far as they are stated to be on information and belief; and that insofar as they are stated to be on information and belief, I believe them to be true.

  
\_\_\_\_\_  
Amy Rothman Malone, Esq.  
W. Va. State Bar #10266

Taken, subscribed, and sworn to before the undersigned authority, this 12th day of August, 2016.

My commission expires: 9/26/2023.

  
\_\_\_\_\_  
Notary Public



**CERTIFICATE OF SERVICE**

I, Amy Rothman Malone, Esq., do hereby certify that I served this “PETITION FOR A WRIT OF PROHIBITION” and this “APPENDIX TO PETITION FOR A WRIT OF PROHIBITION” on August 12, 2016, by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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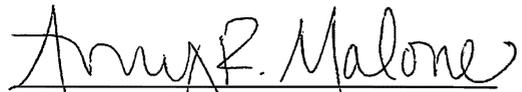
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