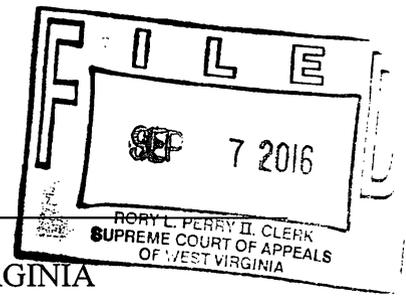


No. 16-0752



---

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

---

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.

---

From the Circuit Court of Raleigh County  
Civil Action No. 15-C-143-K

---

**RESPONSE TO PETITION FOR A WRIT OF PROHIBITION**

Ben Salango (WVSB #7790)  
PRESTON & SALANGO, P.L.L.C.  
P.O. Box 3084  
Charleston, WV 25331  
Telephone: (304) 342-0512  
Fax: (304) 342-0513  
[bsalango@wvlawyer.com](mailto:bsalango@wvlawyer.com)

*Counsel for Earl Douglas Johnson, Plaintiff below*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE.....1

SUMMARY OF THE ARGUMENT..... 6

STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....7

ARGUMENT.....7

I. Standard of Review..... 7

II. The Peer Review Privilege Is Not Applicable To The Sodums Letter ..... 8

    A. The Origin Of The Sodums Letter Precludes Any Finding Of “Peer Review Privilege” ..... 9

    B. The Privilege Was Not Triggered By The Recipient’s Subsequent Placement Of The Letter In A Peer Review File ..... 15

III. *In Camera* Review Of The Sodums Letter Was Not Required ..... 17

IV. The Circuit Court’s Order Reflects A Proper Application Of The Legislative Purpose Of W.Va. Code § 30-3C-3 ..... 18

CONCLUSION..... 20

CERTIFICATE OF SERVICE ..... 22

**TABLE OF AUTHORITIES**

**CASES**

Accord, Daily Gazette Co., Inc. v. West Virginia Bd. of Med.,  
177 W.Va. 316, 352 S.E.2d 66 (1986)..... 18

Bailey v. Manor Care of Mayfield Heights,  
4 N.E.3d 1071 (Ohio Ct. App. 2013)..... 14

Powell v. Community Health Sys., Inc.,  
312 S.W.3d 496, 510 (Tenn. 2010).....9, 19

State ex rel. HCR Manorcare, LLC v. Stucky,  
235 W. Va. 677, 776 S.E.2d 271 (2015)..... 17

State ex rel. Hoover v. Berger,  
199 W.Va. 12, 483 S.E.2d 12 (1996).....8

State ex rel. Shroades v. Henry,  
421 S.E.2d 264, 187 W. Va. 723 (1992).....9, 18

State ex rel. Suriano v. Gaughan,  
198 W.Va. 339, 480 S.E.2d 548 (1996).....7

State ex rel. Wheeling Hosp., Inc. v. Wilson,  
236 W.Va. 560, 782 S.E.2d 622 (2016) .....*passim*

**STATUTES**

W.Va. Code § 30-3C-1 .....*passim*

W.Va. Code § 30-3C-3 .....*passim*

W. Va. R. App. P. 19(a)(1), (2), (4).....7

## STATEMENT OF THE CASE

Between November 2009 and May 2013, Defendants Raleigh General Hospital, LLC, Donald Kenneth Glaser, M.D., LifePoint Hospitals, Inc., LifePoint Health, Inc., and LifePoint WV Holdings, Inc. (referred to collectively as the “Defendants”), perpetrated a massive fraud upon patients in Southern West Virginia. For the sole purpose of making money, Defendants subjected hundreds of patients to unnecessary cardiac procedures such as catheterizations, angioplasties and stents. In some instances, patients were seriously injured and even killed during the course of the fraud.

Plaintiff/Respondent Earl Douglas Johnson (“Plaintiff” or “Johnson”) is an 89 year old World War II veteran who was a victim of Defendants’ fraudulent scheme. He is one of approximately 88 patients who have filed claims against Petitioners/Defendants for injuries resulting from the performance of medically unnecessary procedures conducted by Donald Kenneth Glaser, M.D. In 2011, Johnson underwent cardiac treatment at Defendant Raleigh General Hospital’s (“RGH”) facility located in Beckley, West Virginia. While being treated at the Hospital for complaints of back, chest and shoulder pain, Defendant Donald Kenneth Glaser, M.D. (“Dr. Glaser”), performed medically unnecessary angioplasty and inserted cardiac stents that were not medically necessary, all of which have caused injury and damage to Johnson. Johnson has asserted claims against Defendants for fraud, medical negligence, negligent hiring and/or retention, negligent and reckless credentialing, and outrageous tortious conduct entitling him to compensatory and punitive damages.

In response to written discovery requests served by Plaintiff, Defendants identified thousands of pages of documents for which they claimed protection from disclosure pursuant to the peer review privilege provided by West Virginia’s Health Care Peer Review Organization Act, W.Va. Code § 30-3C-1 *et. seq.* (*See e.g.* App. 37). RGH included within its privilege log a

letter dated March 29, 2012, authored by Marcis Sodums, M.D. (“Dr. Sodums”), a cardiologist employed at the time by RGH, and delivered to Alan Peters, RGH’s former Chief Executive Officer (“Peters”).<sup>1</sup> RGH asserted that the March 29, 2012, letter (the “Sodums Letter” or the “Letter”) was privileged and protected from disclosure pursuant to the peer review privilege provided by W.Va. Code § 30-3C-1 *et. seq.* At a hearing before the circuit court on March 22, 2016, for the purpose of considering other motions, Defendants urged the Court to delay the deposition of Dr. Sodums until after the peer review privilege issues were decided by the Court. Over Defendants’ objection, the court permitted Plaintiff to take the deposition of Dr. Sodums in Ithaca, New York on April 11, 2016. There, with respect to Dr. Glaser, Dr. Sodums testified as follows:

Q. You indicated that you would – you became concerned in 2010 because the -- Dr. Glaser would mischaracterize the severity of chest pain in his reports?

A. Yes.

Q. He would mischaracterize the circumstances that brought on the chest pain?

A. Yes.

Q. The quality of the chest pain?

A. Yes.

Q. He would mischaracterize the duration of symptoms?

---

<sup>1</sup> Marcis Sodums, M.D. is a board-certified interventional cardiologist. He received his medical degree from the prestigious University of Chicago School of Medicine. *See Depo. of Marcis Sodums at 15.* He performed his internship and residency at University of California – San Diego. *Id.* He completed a fellowship at the University of Texas in San Antonio. *Id.* Dr. Sodums worked at Raleigh General Hospital from February 2010 to February 2015. *Id.* at 21. For three years, he worked with Dr. Glaser at Raleigh General Hospital. They were the only two interventional cardiologists at Raleigh General Hospital from February 2010 until approximately May 2013. They routinely covered patients for one another during this period of time.

A. Yes.

Q. And he would mischaracterize the timing of the symptoms?

A. Yes.

Q. And it was your opinion that he did that so that he could perform cardiac catheterizations?

A. Yes.

Q. Was it also your opinion, if he was mischaracterizing the symptoms, the pain, the duration, those things we just discussed...was it your opinion that he was falsifying the medical chart?

A. Yes.

Q. Was it your opinion, if he was falsifying the chart and mischaracterizing the symptoms in order to perform cardiac catheterizations that were not indicated, that he was committing fraud?

A. Yes.

Q. Same question with respect to stents. There were times, and I understand at many times, when you believed that the -- there was a mischaracterization as to the degree of stenosis?

A. Yes.

Q. And it's your opinion that he did that so he could implant stents that were not medically indicated?

A. Yes.

Q. And was it your opinion that he was falsifying the chart in order to insert stents that were not medically indicated?

A. Yes.

Q. And it was your opinion that he was committing fraud?

A. Yes.

(App. 442, 492-494).

At no time was Dr. Sodums a member of a peer review committee at RGH. He was neither asked to participate in peer review process nor take part in any committee investigating

Dr. Glaser:

Q. At any point while you were at Raleigh General Hospital were you ever part of a peer review committee?

A. No.

Q. At any point while you were employed at Raleigh General Hospital were you ever asked to prepare documents for a peer review committee?

A. No.

Q. Did you ever prepare documents for a peer review committee?

A. No.

Q. Were you ever a member of the medical executive committee?

A. No.

Q. Were you ever a member of the board of trustees?

A. No.

Q. Were you ever asked to participate in a peer review?

A. No.

(App. 442, 473-474).

With respect to the Sodums Letter in particular, Dr. Sodums testified:

Q. On March 29, 2012, you prepared a letter to Mr. Peters; do you recall that letter?

A. I do.

Q. Okay. Do you still have a copy of the letter?

A. I do.

Q. Did anyone ask you to prepare that letter for peer review purposes?

A. No.

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

A. Yes.

Q. You prepared that letter because you were concerned about potentially any implication that you might be involved?

A. Yes.

Q. Any other reason that you prepared that letter?

A. No.

Q. You were not asked to prepare it?

A. No.

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.

Q. It was before. But your letter to him was not in response to his request to give him unusual cases, was it?

A. No.

(App. 442, 476-477).

Subsequent to Dr. Sodums' deposition, Plaintiff filed a "Motion to Compel Defendants to Produce March 29, 2012 Letter Authored by Dr. Sodums" seeking production of the Sodums Letter. (App. 408). After briefing on the issue by the parties (App. 408, 429, 657), on May 31, 2016, the Honorable H.L. Kirkpatrick of the Circuit Court of Raleigh County, heard oral arguments on Plaintiff's Motion to Compel. (App. 782). After consideration of the parties' briefs and argument, the circuit court entered an Order dated July 5, 2016, granting Plaintiff's Motion to Compel and directing RGH to produce the Sodums Letter to Plaintiff. (App. 1). In so ordering, the court found as follows:

- Dr. Sodums testified that he did not prepare the March 29, 2012 Letter as part of a peer review investigation.

- Dr. Sodums testified that he prepared the Letter because he was concerned about Dr. Glaser's patient 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.
- The Sodums Letter was not part of the peer review process at RGH.
- Merely because the Letter was used during the peer review process does not mean the Letter is subject to the peer review privilege.

(App. 1-2). The circuit court's Order dated July 5, 2016, is the subject of Defendants' Petition.

### **SUMMARY OF THE ARGUMENT**

Defendants contend that the extraordinary remedy of prohibition is proper here on the ground that the circuit court committed clear error in granting Plaintiff's Motion to Compel. In particular, Defendants erroneously contend that the peer review privilege which has been adopted by statute in this State as W.Va. Code § 30-3C-3 shields the Sodums Letter from disclosure.

The evidence establishes that the Letter was not authored by Dr. Sodums as part of any "procedure" conducted by any "review organization" for the evaluation of Dr. Glaser. W.Va. Code § 30-3C-3. Given the origin of the Letter and the fact that it was not prepared by or for the use of the hospital's medical review committee or any peer review committee, Defendants cannot meet their burden of establishing that the Letter is subject to peer review privilege pursuant to W.Va. Code § 30-3C-3. Accordingly, the circuit court properly ruled that the Letter must be provided to Plaintiffs.

Defendants' contention that prohibition is proper to direct an *in camera* review of the Sodums Letter is equally without merit. Review of the Letter is not required, is unnecessary and would not provide assistance in determining whether the privilege applies. The circuit court was presented with and considered sworn deposition testimony, a sworn affidavit, and documentary

evidence from the parties regarding the circumstances under which the Sodums Letter originated and its subsequent use. The content of the Letter is not relevant to a determination of the applicability of the peer review privilege. *State ex rel. Wheeling Hosp., Inc. v. Wilson*, 236 W.Va. 560, 782 S.E.2d 622, 632-633 (2016). Having properly considered the evidence presented with respect to the Sodums Letter’s origin and use, and, based upon the same, determined that the Letter did not arise from any peer review proceeding, an *in camera* review of the Letter was not required or necessary.

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

Plaintiff submits that oral argument is appropriate pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure in that Defendants’ Petition alleges assignments of error that involve claimed error in the application of settled law, an exercise of discretion that is purportedly unsustainable, and a narrow issue of law. *See* W.Va. R. App. P. 19(a)(1), (2), (4).

### **ARGUMENT**

#### **I. STANDARD OF REVIEW**

Issuance of a writ of prohibition is not a matter of right; rather, it is an “extraordinary remedy” that is reserved “for exceptional cases.” *State ex rel. Wheeling Hosp., Inc. v. Wilson*, 236 W.Va. 560, 782 S.E.2d 622, 628 (2016), *citing*, *State ex rel. Suriano v. Gaughan*, 198 W.Va. 339, 345, 480 S.E.2d 548, 554 (1996). This Court has previously recognized that, when ruling on a petition for a writ of prohibition where the lower court is claimed to have exceeded its authority, the following five factors are to be examined: “(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s

order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. *Id.* at 628-629, *quoting*, Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). All five factors need not be satisfied, however, the "third factor, the existence of clear error as a matter of law, should be given substantial weight." *Id.* at 629.

For the reasons discussed, herein, a writ of prohibition is unnecessary here, where the rulings made by the circuit court in the July 5, 2016, Order are not clearly erroneous as a matter of law.

## **II. THE PEER REVIEW PRIVILEGE IS NOT APPLICABLE TO THE SODUMS LETTER**

The issue before this Court is whether the Sodums Letter is subject to disclosure as ordered by the circuit court or protected by the peer review privilege. This privilege, which attaches to the records of a peer review organization, has been adopted by statute in this State as W.Va. Code § 30-3C-3. That statute provides in pertinent part:

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 organization and no person who was in attendance at a meeting of such organization shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such organization or as to any findings, recommendations, evaluations, opinions or other actions of such organization or any members thereof: Provided, That information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action merely because they were presented during proceedings of such organization, nor should any person who testifies before such organization or who is a member of such organization be prevented from testifying as to matters within his knowledge, but the witness shall not be asked about his testimony before such an organization or opinions formed by him as a result of said organization hearings ...

W.Va. Code § 30-3C-3. More succinctly, the “language of the statute grants a privilege to all the records and proceedings of a review organization, but no privilege attaches to information, documents or records considered by a review organization if the material is “otherwise available from original sources.” Syl. pt. 3, *State ex rel. Shroades v. Henry*, 421 S.E.2d 264, 187 W. Va. 723 (1992). As the parties asserting the privilege, Defendants have the burden of establishing its application to the Sodums Letter. See e.g. Syl. Pt. 3, *Wheeling Hosp.*, 782 S.E.2d 622.

In *Wheeling Hosp.*, this Court directed that “the test to apply to determine whether the peer review privilege shields a particular document from disclosure is whether the document was created exclusively by or solely for a review organization.” *Wheeling Hosp.*, 782 S.E.2d at 633.

As recognized there,

The peer review privilege ... applies to information that was created at the behest of a peer review committee. It covers information gathered or prepared by the members of the committee and information gathered or prepared by others at the committee’s request. However, for the privilege to apply, the information must be used for peer review purposes. If it originated outside the peer review process, it is not privileged.

*Id.* at 633, quoting, *Powell v. Community Health Sys., Inc.*, 312 S.W.3d 496, 510 (Tenn. 2010) (citations omitted). Conversely, the privilege is inapplicable where “the peer review committee merely uses information that has been generated or supplied by a source external to the committee ...” *Id.* (citations omitted).

Here, both the origin and use of the Sodums Letter negate any finding that the Letter is protected by the peer review privilege provided by W.Va. Code § 30-3C-3.

**A. THE ORIGIN OF THE SODUMS LETTER PRECLUDES ANY FINDING OF “PEER REVIEW PRIVILEGE”**

The Sodums Letter was authored by Dr. Sodums on March, 29, 2012. As recognized by this Court, “the origin of the document determines if it is privileged.” *Wheeling Hosp.*, 782 S.E.2d at 632, quoting, *Shroades*, 187 W.Va. at 728, 421 S.E.2d at 269. Here, the Sodums’

Letter's origin negates any finding that the Letter is subject to the peer review privilege provided by W. Va. Code, § 30-3C-3.

Importantly, the Sodums Letter was not prepared as a result of a peer review investigation or at the request of any peer review committee. Nor was the Letter prepared in response to any request of Dr. Sodums by Peters as suggested by Defendants. *See* Petition, p. 12. According to Dr. Sodums, he prepared the letter because he witnessed Dr. Glaser injure and kill patients as a result of fraudulent medical procedures. (App. 442, 476-477, 492-494). As Dr. Sodums testified at his deposition taken in this matter:

Q. Did anyone ask you to prepare that letter for peer review purposes?

A. No.

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

A. Yes.

Q. You prepared that letter because you were concerned about potentially any implication that you might be involved?

A. Yes.

Q. Any other reason that you prepared that letter?

A. No.

Q. You were not asked to prepare it?

A. No.

\*\*\*\*\*

Q. ...But your letter to him [Peters] was not in response to his request to give him unusual cases, was it?

A. No.

(App. 442, 476-477).

Further, Dr. Sodums was neither part of the Medical Executive Committee nor any peer review committee or the board of trustees:

Q. At any point while you were at Raleigh General Hospital were you ever part of a peer review committee?

A. No.

Q. At any point while you were employed at Raleigh General Hospital were you ever asked to prepare documents for a peer review committee?

A. No.

Q. Did you ever prepare documents for a peer review committee?

A. No.

Q. Were you ever a member of the medical executive committee?

A. No.

Q. Were you ever a member of the board of trustees?

A. No.

Q. Were you ever asked to participate in a peer review?

A. No.

(App. 442, 473-474).

Defendants' sweeping assertion that the Sodums Letter should be withheld as privileged on the grounds that the content of the letter included information regarding patient care and had a supposed "peer review purpose" in that "Dr. Sodums was acting *in furtherance of* the Legislature's specified health care peer review *goals*" in authoring the Letter is without merit. *See* Petition, p. 11 (emphasis added). As this Court has recognized, it is the origin of the Letter, not the content, which triggers the peer review privilege:

In order to determine whether the [peer review] privilege ... applies to a particular circumstance, the courts must determine whether the records sought to be discovered arose from a peer review proceeding to which the privilege applies ... Thus,

[i]n determining whether a medical peer review privilege applies in a particular circumstance, we look to the way in which a document was created and the purpose for which it was used, **not ... its content ...**

*Wheeling Hosp.*, 782 S.E.2d at 632-633 (internal citations and quotations omitted). Indeed, the peer review privilege provided by W. Va. Code, § 30-3C-3 is specifically limited to “documents created exclusively by or for a review organization, or that originate therein, and that are used solely by that entity in peer review process ...” Syl. Pt. 1, *Wheeling Hosp.*, 782 S.E.2d 622. Here, as evidenced by the sworn testimony of the author of the Sodums Letter, no such facts exist. (See e.g. App. 442, 473-474, 476-477, 492-494). For these same reasons, Defendants’ suggestion that the privilege applies because Dr. Sodums occasionally provided comments to the Director of Risk Management on specific cases is equally without basis. See Petition, pp. 12-13. Dr. Sodums clearly testified that his Letter was not written in response to or in connection with any peer review investigation. (App. 442, 476-477).

Moreover, the Court places an emphasis in looking at “the way in which a document was created,” specifically holding that:

Documents that may be provided to a peer review committee, but were not originally prepared exclusively for the committee and are also accessible to staff of the facility in their capacities as employees or managers of the facility, separate and apart from any role on a review committee, are not in any way protected by the privilege.

*Wheeling Hosp.*, 782 S.E.2d at 634. This holding is critical when applied to the facts presented here as Petitioners confirm to the Court that Dr. Sodums Letter was specifically addressed and delivered to “CEO Peters,” which is his capacity as Chief Executive Officer or “manager of the facility, separate and apart from any role on a review committee.” See Petition, pp. 3, 12, 15. This is an important distinction as Petitioners concede the Letter was not addressed to “Raleigh General Hospital Quality Improvement/Peer Review Committee” nor was the Letter addressed to the attention of “Peer Review Committee Member Peters” or the like. Through his deposition

testimony discussed above, it is established that Dr. Sodums' Letter was not "originally prepared exclusively for the committee," but was rather prepared to guard against any potential implication that Dr. Sodums might be involved in the injuring and killing patients as a result of fraudulent medical procedures. Additionally, it is unequivocally clear that Dr. Sodums Letter was addressed to CEO Peters separate and apart from any role Mr. Peters may have on any committee. Petitioners in their own brief confirm that the letter was addressed to the attention of and delivered specifically to CEO Peters, not the Peer Review Committee as a whole or "Peer Review Committee Member Peters;" therefore, the Letter would constitute a document "accessible to staff of the facility in their capacities as employees or managers of the facility, separate and apart from any role on a review committee." See Petition, pp. 3, 12, 15; *Wheeling Hosp.*, 782 S.E.2d at 634. As the Letter has been shown not to be prepared exclusively for the committee as well as accessible and addressed to the attention of CEO Peters in his capacity as Chief Executive Officer or "manager of the facility, separate and apart from any role on a review committee;" the Sodums Letter is not in any way protected by the privilege.

Indeed, if W.Va. Code, § 30-3C-3 is given the broad interpretation advocated by Defendants, no document addressing patient care or safety matters would ever be subject to disclosure but would be subject to privilege. This is not the purpose or intent of the peer review privilege. See *e.g. Wheeling Hosp.*, 782 S.E.2d at 634 ("Neither is '[t]he peer-review privilege ... a generalized cloak of secrecy over the entire peer-review process. If all materials viewed and utilized by review committees were deemed undiscoverable, a hospital could never be held accountable for any negligent act within the purview of the committee' ") (citation omitted). By limiting the privilege to "documents created exclusively by or for a review organization, or that originate therein, and that are used solely by that entity in peer review process," the purpose of

the peer review privilege – to foster candid internal discussions for the purpose of making improvements in the quality of care – is met without permitting the concealment of information accumulated or promulgated by other means or for other purposes. *See Id.* at 634.

Further, Defendants’ argument that the Sodums Letter is automatically shielded by the peer review privilege given Dr. Sodums’ status as a member of the medical staff subject to the bylaws of Raleigh General Hospital is absurd. As previously discussed, according to Dr. Sodums’ own testimony, the Letter was neither prepared pursuant to any “peer review” much less any identified case review. (App. 442, 473-474, 476-477, 492-494). Defendants’ argument that Dr. Sodums’ responsibilities set forth in the hospital bylaws somehow triggers application of the peer review privilege with respect to any information relating to patient care provided by a physician ignores well-established law. As this Court recognized in *Wheeling Hosp.*,

Above all ...

[t]he party seeking privilege must ... establish that the documents being sought were prepared by or for the use of a peer review committee. Stated another way, the party seeking privilege is required to show that each of the documents over which it asserts the privilege is a record within the scope of a peer review committee.

*Wheeling Hosp.*, 782 S.E.2d at 634, quoting, *Bailey v. Manor Care of Mayfield Heights*, 4 N.E.3d 1071, 1078-79 (Ohio Ct. App. 2013).

Here, the clear evidence establishes that the Sodum Letter was, in fact, not prepared by or for the use of the medical review committee or any peer review committee. As the Letter did not arise from any peer review proceeding, the peer review privilege provided by W.Va. Code, § 30-3C-3 is inapplicable and the circuit court properly directed production of the Letter.

**B. THE PRIVILEGE WAS NOT TRIGGERED BY THE RECIPIENT'S SUBSEQUENT PLACEMENT OF THE LETTER IN A PEER REVIEW FILE**

Defendants' contention that the Sodums Letter is subject to privilege on the grounds that it was solely addressed to Peters and that Peters directed the Letter to the Quality Improvement/Peer Review Committee is equally untenable. Neither of these facts supports a finding that the "use" of the Letter was for the purpose of "peer review" as contemplated by W.Va. Code, §30-3C-3 and as is required for the peer review privilege to attach. *See e.g. Wheeling Hosp.*, 782 S.E.2d at 633 (recognizing that "the information must be used for peer review purposes. If it originated outside the peer review process, it is not privileged") (citation omitted).

The Health Care Peer Review Organization Act, W.Va. Code § 30-3C-1 *et. seq.*, defines "[p]eer review" as "the procedure for evaluation by health care professionals 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. According to Dr. Sodums' own testimony, the concerns that he expressed in his Letter were voiced, not as a result of or for the purpose of a peer review investigation of Dr. Glaser or for any other procedure conducted by a "review organization"<sup>2</sup>, but because Dr. Sodums was concerned

---

<sup>2</sup> A "[r]eview organization" is defined as,

any committee or organization engaging in peer review, including a hospital utilization review committee, a hospital tissue committee, a medical audit committee, a health insurance review committee, a health maintenance organization review committee, hospital, medical, dental and health service corporation review committee, a hospital plan corporation review committee, a professional health service plan review committee or organization ... a physicians' advisory committee ... for the purposes of: (i) Evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care. It shall also mean any hospital board committee or organization reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto, and any professional standards review organizations established or required under state or federal statutes or regulations.

with Dr. Glaser's repeated mischaracterizations of medical symptoms and circumstances, performance of unnecessary medical procedures, and falsification of records. (App. 442, 476-477, 492-494).

Further, Defendants cannot claim the peer review privilege with respect to the Sodums Letter simply because Peters placed the Letter into the peer review file:

[D]ocuments that are otherwise discoverable do not become privileged merely because they have been dipped in the waters of a peer review committee file ... Neither is '[t]he peer-review privilege ... a generalized cloak of secrecy over the entire peer-review process. If all materials viewed and utilized by review committees were deemed undiscoverable, a hospital could never be held accountable for any negligent act within the purview of the committee.' ... Rather,

[t]he peer review privilege is intended to extend far enough to foster candid internal discussions for the purpose of making improvements in the quality of care, but not so far as to permit the concealment of routinely accumulated information. The privilege does not prevent discovery of material that has been presented to a hospital committee if it is otherwise available and offered or proved by means apart from the record of the committee.

*Wheeling Hosp.*, 782 S.E.2d at 634 (internal citations omitted).

The evidence establishes that the Letter was not authored by Dr. Sodums as part of any "procedure" conducted by any "review organization" for the evaluation of Dr. Glaser. W.Va. Code § 30-3C-3. Given this and the fact that the Sodums Letter was not prepared by or for the use of the medical review committee or any peer review committee, Defendants cannot meet their burden of establishing that the Letter is subject to peer review privilege pursuant to W.Va. Code § 30-3C-3. Accordingly, there is no basis upon which to issue a writ of prohibition as requested by Defendants.

### III. IN CAMERA REVIEW OF THE SODUMS LETTER WAS NOT REQUIRED

*In camera* review of the Sodums Letter by the circuit court is neither required by the Health Care Peer Review Organization Act, W.Va. Code § 30-3C-1 *et. seq.*, nor necessary in this instance. The Act includes no direct mandate of an *in camera* review of all documents withheld by a hospital under a claimed privilege. Rather, as the parties asserting the privilege, Defendants have the burden of establishing its application to the Sodums Letter. *See e.g.* Syl. Pt. 3, *Wheeling Hosp.*, 782 S.E.2d 622; *State ex rel. HCR Manorcare, LLC v. Stucky*, 235 W. Va. 677, 686, 776 S.E.2d 271, 280 (2015). Importantly, Defendants never requested that the circuit court review the letter *in camera*. Defendants raised this issue for the first time in its Petition for Writ of Prohibition.

Moreover, where, as here, the evidence establishes that the document sought to be withheld was neither “created exclusively by or solely for a review organization”<sup>3</sup> as defined by W.Va. Code § 30-3C-3, *in camera* review of the document is not only unnecessary but would not have aided the court in determining whether the peer review privilege is applicable. The circuit court was presented with and considered sworn deposition testimony, a sworn affidavit, and documentary evidence from the parties regarding the circumstances under which the Sodums Letter originated and its subsequent use. In fact, consideration of the content of the Sodums Letter in determining the application, if any, of the peer review privilege under these facts is not permissible. As previously discussed, it is the *origin* of the Letter, *not the content*, which triggers the peer review privilege:

[i]n determining whether a medical peer review privilege applies in a particular circumstance, we look to the way in which a document was created and the purpose for which it was used, **not ... its content ...**

*Wheeling Hosp.*, 782 S.E.2d at 632-633 (internal citations and quotations omitted).

---

<sup>3</sup> *Wheeling Hosp.*, 782 S.E.2d at 633.

Having properly considered the evidence presented with respect to the Sodums Letter's origin and use, and, based upon the same, determined that the Letter did not arise from any peer review proceeding, an *in camera* review of the Letter was not required, necessary or, arguably, advisable by the circuit court. Accordingly, there is no basis upon which to issue a writ of prohibition to direct an *in camera* review of the Letter.

**IV. THE CIRCUIT COURT'S ORDER REFLECTS A PROPER APPLICATION OF THE LEGISLATIVE PURPOSE OF W.VA. CODE § 30-3C-3**

Defendants' plea that a writ of prohibition should issue because disclosure of the Sodums Letter will purportedly have a "chilling effect" on the peer review process is without basis in law or fact.

As this Court has recognized, the "peer review privilege represents a legislative choice between medical staff candor and the plaintiff's access to evidence." *Wheeling Hosp.*, 782 S.E.2d at 629, quoting, *Shroades*, 187 W.Va. at 727, 421 S.E.2d at 268 (footnote omitted). *Accord*, *Daily Gazette Co., Inc. v. West Virginia Bd. of Med.*, 177 W.Va. 316, 322, 352 S.E.2d 66, 71 (1986) ("[I]t seems evident that the legislature enacted these provisions with the ultimate purpose of improving the quality of medical care provided in the hospitals of this State").

In balancing this interest between medical candor and a patient/plaintiff's access to evidence, the West Virginia Legislature elected to limit the privilege provided by W.Va. Code §30-3C-3 to "documents created exclusively by or for a review organization, or that originate therein, and that are used solely by that entity in peer review process ..." Syl. Pt. 1, *Wheeling Hosp.*, 782 S.E.2d 622.

The privilege is not intended to, nor does it, provide blanket protection to a hospital or physician from the disclosure of information or documents that may prove critical or derogatory to either. Rather, the privilege is intended to extend only so far as to "foster candid internal

discussions for the purpose of making improvements in the quality of care, but not so far as to ... prevent discovery of material that has been presented to a hospital committee if it is otherwise available and offered or proved by means apart from the record of the committee.” *Wheeling Hosp.*, 782 S.E.2d at 634 (internal citations omitted).

For these reasons, the peer review privilege covers only “information gathered or prepared by the members of [a review organization] and information gathered or prepared by others at [the review organization’s] request.” *Wheeling Hosp.*, 782 S.E.2d at 633, quoting, *Powell v. Community Health Sys., Inc.*, 312 S.W.3d 496, 510 (Tenn. 2010) (citations omitted). Conversely, if the information/document “originated outside the peer review process, it is not privileged.” *Id.* Without these limitations, virtually any document addressing or even mentioning patient care or safety concerns by physicians or other medical personnel could be withheld on the basis of peer review privilege. In fact, Defendants appear to advocate for the application of W.Va. Code § 30-3C-3 in this manner which is contrary to established law.

Here, the circuit court’s Order directing the production of the Sodums Letter properly balances the interest between the desire for candor among medical professionals employed at RGH and other medical facilities in West Virginia, and the Plaintiff’s access to documents and information relevant to the claims made in this case regarding his medical care. The Sodums Letter was offered and provided by Dr. Sodums apart from and unrelated to any investigation by any review organization. (App. 442, 473-474, 476-477, 492-494). According to W.Va. Code §30-3C-3 and this Court’s directives in *Wheeling Hosp.*, the peer review privilege does not apply to the Letter. Moreover, Defendants’ contention that physicians will be reluctant to candidly offer concerns or criticisms about patient care absent the cloak of the peer review privilege is

belied by Dr. Sodums' actions here where he provided information regarding patient safety concerns to the Hospital's CEO apparently absent any expectation of confidentiality.

On the other hand, Dr. Glaser's petition to withhold the Sodums Letter is not based upon any real desire to protect the ability of physicians and/or those in the medical community to have free and frank discussions for the purpose of making improvements in the quality of patient care at RGH. Rather, Dr. Glaser along with the other Defendants seek to conceal information regarding fraudulent conduct involving patient care and safety. The possibility that disclosure of the Sodums Letter may injure Dr. Glaser's reputation or cause economic damage is not the test for determining whether the Letter is covered by the peer review privilege.

Stated succinctly, the privilege provided by W.Va. Code § 30-3C-3 is inapplicable to the Sodums Letter as it originated outside the peer review process. For those seeking to limit the disclosure of documents containing information concerning patient care issues in the future, the rule is simple: The document must have been gathered or prepared by the members of a peer review organization or gathered or prepared by others at the review organization's request. *Wheeling Hosp.*, 782 S.E.2d at 633.

### **CONCLUSION**

Defendants have failed to establish that the extraordinary remedy of prohibition is necessary in this case where the rulings made by the circuit court in the July 5, 2016, Order are not clearly erroneous as a matter of law. In that Order, the circuit court properly granted Plaintiff's Motion to Compel the production of the Sodums Letter. Accordingly, Defendants' Petition should be denied.

**EARL DOUGLAS JOHNSON,**  
*By counsel*



---

Ben Salango (WVSB #7790)  
**Preston & Salango, P.L.L.C.**  
Post Office Box 3084  
108 ½ Capitol Street, Suite 300  
Charleston, West Virginia 25331  
Phone: (304) 342-0512  
Fax: (304) 342-0513

## CERTIFICATE OF SERVICE

I, Ben Salango, counsel for Earl Douglas Johnson, do hereby certify that I have served a true and exact copy of the foregoing "**Response to Petition for a Writ of Prohibition**" via e-mail, on this 7th day of September, 2016, addressed to the following.

Honorable H. L. Kirkpatrick  
Circuit Court of Raleigh County  
Raleigh County Judicial Center  
222 Main Street  
Beckley, WV 25801

Don R. Sensabaugh, Esq.  
Flaherty, Sensabaugh & Bonasso, PLLC  
P.O. Box 3843  
Charleston, WV 25338-3843  
[DSensabaugh@flahertylegal.com](mailto:DSensabaugh@flahertylegal.com)  
[AMalone@flahertylegal.com](mailto:AMalone@flahertylegal.com)  
[SCompton@flahertylegal.com](mailto:SCompton@flahertylegal.com)

D.C. Offutt, Esq.  
Offutt Nord Burchett, PLLC  
P.O. Box 2868  
Huntington, WV 25728  
[dcoffutt@onblaw.com](mailto:dcoffutt@onblaw.com)

Thomas Hurney, Esq.  
Jackson Kelly, PLLC  
1600 Laidley Tower  
Charleston, WV 25301  
[THURNEY@jacksonkelly.com](mailto:THURNEY@jacksonkelly.com)  
[GCALLAS@jacksonkelly.com](mailto:GCALLAS@jacksonkelly.com)

Robert V. Berthold, Jr., Esq.  
Berthold Law Firm, PLLC  
208 Capitol Street  
P.O. Box 3508  
Charleston, WV 25335  
[rvb@bertholdlaw.com](mailto:rvb@bertholdlaw.com)  
[mcb@bertholdlaw.com](mailto:mcb@bertholdlaw.com)

Todd Thompson, Esq.  
Thompson Miller & Simpson, PLLC  
734 West Main Street, Suite 400  
Louisville, KY 40202  
[TThompson@Tmslawplc.com](mailto:TThompson@Tmslawplc.com)

C.J. Gideon, Esq.  
Gideon Cooper & Essary, PLLC  
315 Deaderick Street, Suite 1100  
Nashville, TN 37328  
[cj@gideoncooper.com](mailto:cj@gideoncooper.com)

John Curry  
Pauley Curry, PLLC  
PO Box 2786  
Charleston, WV 25330  
[JOHN@pcsv.com](mailto:JOHN@pcsv.com)

Greg Haddad  
Bailey & Glasser  
209 Capitol Street  
Charleston, WV 25301  
[GHaddad@baileyglasser.com](mailto:GHaddad@baileyglasser.com)



---

Ben Salango (WVSB #7790)

**PRESTON & SALANGO, PLLC**  
108 ½ Capitol St., Suite 300  
Charleston, WV 25301  
[bsalango@wvlawyer.com](mailto:bsalango@wvlawyer.com)  
(304) 342-0512