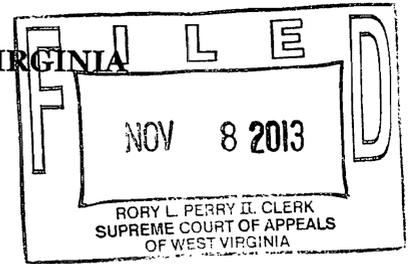


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 13-0766



**LARRY TABATA, SHIRLEY
CHANCEY, WILLIAM WELLS,
DONALD R. HOLSTEIN, JR.,
and KAY KIRK,**

Petitioners,

V.)

**CHARLESTON AREA MEDICAL
CENTER, INC. and CAMC
HEATH EDUCATION AND
RESEARCH INSTITUTE, INC.,**

Respondents.

Appeal from a final order
of the Circuit Court of Kanawha
County (11-C-524)

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

ASSIGNMENTS OF ERROR

1. The Circuit Court erred when it ruled that, pursuant to Rule 23(a)(2) of the *West Virginia Rules of Civil Procedure*, the commonality requirement for class certification was not satisfied because the Petitioners and class members did not show that they suffered the same type of harm, and in further ruling that proof of causation and damages cannot be ascertained on a class-wide basis.
2. The Circuit Court erred by denying class certification under the typicality requirement of Rule 23(a)(3), based on its ruling that the claims of the Petitioners and class members require individual determinations of the appropriate remedies.
3. The Circuit Court erred when it denied class certification under Rule 23(b), based on its conclusion that the individual issues regarding damages, causation, and adequate remedies may predominate over common issues of law or fact.
4. The Circuit Court erred when it denied class certification based on its finding that the Petitioners lacked standing because they did not articulate and suffer a concrete and particularized injury.

STATEMENT OF THE CASE

The Petitioners are among three-thousand, six-hundred and fifty-five (3,655) current and former patients (sometimes “affected patients” or “class members”) of Charleston Area Medical Center (“CAMC”) whose confidential personal information and private medical records were concentrated for storage on a specific CAMC electronic database and website in early 2009. (A.R. 233-234).¹

In or around February of 2011, a relative of one of the affected patients informed the Consumer Protection Division of the West Virginia Attorney General’s Office that she had uncovered the confidential records of this patient while conducting a basic Internet search. A subsequent investigation revealed that the confidential records of the

¹ References to the Appendix Record – the contents of which were agreed to by the parties – are set forth as “A.R. ____.”

Petitioners and affected patients had been accessible and publicized on the Internet since September of 2010. (A.R. 233-234).

On February 16, 2011, the Privacy Office of CAMC sent a form letter to the Petitioners and their fellow affected patients. The content of each letter sent was identical. (A.R. 133). In this letter, CAMC represented, in part, as follows:

We are writing to inform you about a security incident that occurred at Charleston Area Medical Center (CAMC), which involved some of your personal information.

On February 8, 2011, we learned that one of our databases containing information about some of our patients with respiratory problems, had a security vulnerability.

Unfortunately, when an update was made in September 2010, the technology contractor overlooked a vulnerability that left data in one section of the database exposed if someone were to conduct an advanced Internet search.

The respiratory database contained the names, contact details, Social Security numbers, and dates of birth of 3655 patients, along with certain basic respiratory care information about some of them. Regrettably, your personal information was included in the database.

[W]e nevertheless recognize that this breach may be a concern for individuals whose data may have been subject to unauthorized access.

(A.R. 233-234).

The present Petitioners and Plaintiffs filed their Amended Class Action complaint in the Circuit Court of Kanawha County, West Virginia on December 30, 2011, against CAMC and CAMC Health Education and Research Institute, Inc. (collectively, "Respondents"). On behalf of themselves and their fellow affected patients and class members, the Petitioners alleged four distinct common law violations: (1) Breach of the Duty of Confidentiality; (2) Invasion of Privacy: Intrusion Upon the Seclusion of the

Affected Patients; (3) Invasion of Privacy: Unreasonable Publicity Into the Affected Patients' Private Lives; and (4) Negligence. ² (A.R. 485-494).

Petitioners filed their Motion for Class Certification with the Circuit Court on December 14, 2012. (A.R. 516). Discovery then commenced on the issue of class certification. Respondents filed a Response in Opposition to Class Certification on May 28, 2013 - three days before the hearing on Petitioners' class certification motion was conducted before the Circuit Court on May 31, 2013. (A.R. 574).

After receiving arguments, the Circuit Court directed each of the parties to submit proposed findings of fact and conclusions of law. (A.R. 98). However, in the interim and before complying with the Circuit Court's directive, Respondents sent a letter on June 14, 2013 to the Circuit Court asserting arguments not previously raised in their previous pleadings or at the hearing on class certification. (A.R. 478-481). Accordingly, the Petitioners sent a letter to the Circuit Court on June 19, 2013, in which they, in part, "objected to "this recent correspondence of defense counsel, as it is improperly asserted . . . There are no rules of civil procedure or any other legal authorities that support submitting a pleading masked as a letter after arguments have been heard by this Court." (A.R. 482-484).

On June 24, 2013, the Circuit Court denied Plaintiff's Motion for Class Certification, and entered as its Order the Defendants' Proposed Findings of Fact and

² Before class certification was sought by the Petitioners, the Defendants filed a Motion to Dismiss the Amended Class Action Complaint, and asserted that the Petitioners' claims were subject to preemption under the Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d-1, *et seq.* ("HIPAA"). After briefing and a hearing before the Circuit Court, the Defendants' Motion to Dismiss was denied.

Conclusions of Law. (A.R. 1-20).³ The Circuit Court based its denial of class certification on its findings that (i) the commonality requirement of Rule 23(a)(2) of the *West Virginia Rules of Civil Procedure* for class certification had not been satisfied because the class members did not suffer the same type of harm, and because causation and damages could not be ascertained on a class-wide basis (A.R. 6); (ii) the typicality requirement of Rule 23(a)(3) had not been satisfied, because the claims of the class members required individual determinations of remedies (A.R. 13); (iii) individual issues of damages, causation, and adequate remedies may predominate over questions affecting only individual members, thus precluding class certification under to Rule 23(b)(3) (A.R. 16); and; (iv) Petitioners lack standing to bring a class action because they failed to articulate that they suffered a particularized injury that is not hypothetical or conjectural. (A.R. 17).

SUMMARY OF ARGUMENT

In denying class certification below, the Circuit Court ruled in direct contradiction to Rule 23 of the West Virginia Rules of Civil Procedure and this Court's holding of *In re West Virginia Rezulin Litigation*. In doing so, the Circuit Court committed four specific errors.

First, the court improperly found that the commonality requirement of Rule 23(a)(2) was not satisfied, based on its conclusion that the Petitioners and class members did not suffer the same type of harm, and because proof of causation and damages could not be obtained class-wide. However, the proper analysis under

³ The Circuit's Order stated that "[t]he objections and exceptions of the Plaintiffs are noted." (A.R. 19).

commonality focuses on the existence of common questions of law and fact. That the Petitioners and class members suffered the same increased risk to future harm is sufficient to satisfy Rule 23(a)(2).

Second, the Circuit Court erroneously concluded that typicality could not be demonstrated under Rule 23(a)(3) because the Petitioners assert claims that require individual determination. This analysis of the Circuit Court was also misplaced. Typicality is present amongst a class of plaintiffs when their claims arise from the same event or course of conduct, and if their claims are based on the same legal theories. The claims of the present Petitioners are based on the unlawful disclosure and publication of their private information by the Respondents, and these claims are brought under the same common law legal theories.

Third, the Circuit Court erred when it denied class certification under Rule 23(b), based on its unfounded conclusion that individual issues of damages causation and adequate remedies may predominate over common issues of law or fact. This Court established in *In re West Virginia Rezulin Litigation* that causation challenges are not appropriate under the predominance test. The presence of individual damages does not preclude class certification where, as in the present case, common issues of law or fact predominate.

Fourth and finally, the Circuit Court erred by eschewing well established precedent and finding that the Petitioners lack standing to proceed under their asserted claims. The Circuit Court based this finding on its erroneous conclusion that the injuries suffered by the Petitioners and their fellow class members are merely hypothetical, because they cannot show that they have yet to suffer concrete economic injury or

identity theft as a result of the Respondents unlawful actions. However, the Petitioners and their fellow class members suffered a well-recognized injury-in-fact once their private information was breached and made public. Thus, the Petitioners clearly possess standing to proceed against the Respondents under the established legal theories of invasion of privacy, breach of the duty of confidentiality, and negligence.

The Circuit Court's denial of class certification should be overturned, and this Court should remand with instructions to certify the present class, based on the facts and legal authority asserted *herein*.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principal legal issues have been authoritatively decided in the Court's decision of *In re West Virginia Rezulin Litigation*, infra, oral argument under Rev. R.A.P. 18(a) is not necessary in the present matter, unless this Court determines that other issues arising upon the record should be addressed. However, if this Court determines that oral argument is necessary, oral argument is appropriate under Rev. R.A.P. 19, because this case involves assignments of error by the Circuit Court in the application of settled law. Furthermore, this case is appropriate for disposition by memorandum decision.

ARGUMENT

I. STANDARD OF REVIEW

In 2003, this Court issued its seminal decision of *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 585 S.E. 2d 52 (2003). This decision remains the roadmap for courts and litigants throughout West Virginia to follow when deciding the propriety of class action certification.

As it relates to the standard of review, the *In re West Virginia Rezulin Litigation* Court established as follows: “We therefore conclude that this Court will review a circuit court's order granting or denying a motion for class certification under an abuse of discretion standard. Of course, the circuit court's discretion must be exercised in the context of the appropriate rules of procedure.” 214 W. Va. 52, 61, 585 S.E. 2d 52, 61. “In the instant case, the circuit court was called upon to apply and interpret Rule 23 of the West Virginia Rules of Civil Procedure. As we stated in Syllabus Point 4 of *Keesecker v. Bird*, 200 W.Va. 667, 490 S.E.2d 754 (1997), ‘An interpretation of the West Virginia Rules of Civil Procedure presents a question of law subject to a de novo review.’” 214 W. Va. 52, 61, 585 S.E. 2d 52, 61.

This Court further held in *In re West Virginia Rezulin Litigation* that “[a]ny question as to whether a case should proceed as a class in a doubtful case should be resolved in favor of allowing class certification.” *Id.* (citing *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir.1968), *cert denied*, 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459 (1969): (“[T]he interests of justice require that in a doubtful case ... any error, if there is to be one, should be committed in favor of allowing the class action.”)

II. THE CIRCUIT COURT ERRED WHEN IT FAILED TO FIND THE COMMONALITY REQUIREMENT OF RULE 23(a)(2) WAS SATISFIED.

In erroneously concluding that the instant Petitioners could not satisfy the commonality requirement of Rule 23(a)(2), the Circuit Court stated that “Plaintiffs have failed to show commonality among the claims of the named Plaintiffs and the class members because there has been no showing that all class members suffered the same type of harm and because proof of causation and damages cannot be ascertained on a

class-wide basis.” (A.R. 6). This conclusion of the Circuit Court clearly runs afoul of this Court’s holding in *In re West Virginia Rezulin Litigation*.

“The ‘commonality’ requirement of Rule 23(a)(2) of the *West Virginia Rules of Civil Procedure* requires that the party seeking class certification show that ‘there are questions of law or fact common to the class.’ A common nucleus of operative fact or law is usually enough to satisfy the commonality requirement. The threshold of ‘commonality’ is not high, and requires only that the resolution of common questions affect all or a substantial number of the class members.” Syl. Pt. 11, *In re W. Virginia Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52.

“Commonality requires that class members share a single common issue.” 214 W. Va. 52, 67, 585 S.E.2d 52, 67. **“The fact that class members must individually demonstrate their right to recover, or that they may suffer varying degrees of injury, will not bar a class action;** nor is a class action precluded by the presence of individual defenses against class Petitioners.” *Id.* (emphasis added)(*quoting*, A. Conte and H. Newberg, 1 *Newberg on Class Actions, 4th Ed.*, § 3:12 at 314–315 (2002)).

Accordingly, the *In re W. Virginia Rezulin Litig.* Court reversed the circuit court’s finding that the Rule 23(a)(2) commonality requirement was not satisfied:

The plaintiffs, however, have identified numerous issues which they contend are common to all potential class members, including whether the drug was not reasonably safe for its intended use by the public as a whole; whether the drug was defective because its instructions and warnings were not adequate for the reasonable, prudent consumer; whether the defendants acted with each other and third parties to mislead physicians and the public about the efficacy and safety of the drug; and whether the defendants violated the Consumer Protection Act in its actions toward West Virginia consumers. We find that issues such as these are common to all or a substantial number of potential class members, and therefore conclude that the circuit court erred in finding otherwise.

214 W. Va. 52, 67, 585 S.E.2d 52, 67.

As acknowledged by the Circuit Court, “[t]o properly analyze commonality, a court must look at the elements of the counts in the complaint.” (A.R. 9). Accordingly, in their Complaint, the present Petitioners asserted as follows: “Significant common questions of law and fact exist as to all members of the Class, and these common questions affect all or a substantial number of the Class members. These common issues of law and fact among the Class include, but are not limited to:

Whether the Defendants breached the duty of confidentiality they owed to the Plaintiffs and their fellow Class members when they disclosed and published the confidential records of these individuals without their consent;

Whether the Defendants’ actions invaded the privacy of the Plaintiffs and their fellow Class members by unreasonably intruding upon their seclusion and by bringing unreasonable publicity to their private lives;

Whether the Defendants were negligent in failing to meet the minimum standard of care in maintaining the confidentiality of the personal information and private medical records of the Plaintiffs and their fellow Class members; and

Whether the Plaintiffs and their fellow Class members are entitled to damages as a result of the Defendants’ unlawful conduct.”

(A.R. 488).

The Circuit Court ignored the plain language of Rule 23(a)(2) requiring an analysis of common issues of law and fact, and instead denied commonality based on its erroneous conclusion that “[t]he Plaintiffs’ inability to fulfill these elements is best demonstrated by the total lack of injury to any of the remaining representative plaintiffs.” (A.R. 9). Such a conclusion is in direct contradiction with this Court’s well-established jurisprudence.

The Court in *In re W. Virginia Rezulin Litig.* observed that “[t]he plaintiffs contended that the defendants’ product caused the plaintiffs to be subject to an **increased risk** of liver disease and injury.” 214 W. Va. 52, 59, 585 S.E.2d 52, 59 (emphasis added). To obtain relief for such a claim, it must only be shown “that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure.” 214 W. Va. 52, 73, 585 S.E.2d 52, 73 (citation omitted). Such a showing can be obtained “even if the disease it is intended to diagnose is not reasonably certain to occur.” *Id.* This Court found that this element was satisfied because “it appears that the plaintiffs’ evidence will show that they have an increased risk of contracting a serious disease [.] It also appears from the record that the plaintiffs intend to prove these final elements as to all class members, and not on an individualized basis.” *In re W. Virginia Rezulin Litig.* 214 W. Va. 52, 73, 585 S.E.2d 52, 73.

Similarly, in the present case, Petitioners and plaintiffs below seek redress from the increased risk of traditional and medical identity theft that is clear and present due to the unlawful actions of the Defendants. (A.R.490). The exposure to such risk has been acknowledged by the Defendants: “[W]e nevertheless recognize that this breach may be a concern for individuals whose data may have been subject to unauthorized access.” (A.R. 234); *see also*, (A.R. 169)(“Q. So you would agree that [the security breach] creates an additional risk [of identity theft]? A. (Lynn Brookshire, Director of CAMC Privacy Office) Certainly, it would have created an additional risk for those individuals.”)

A class of plaintiffs nearly identical to the present Petitioners was recently certified by the Superior Court of California in the matter of *In re Blue Cross of California Website Security Cases* (Judicial Council Coordination Proceeding No. 4647, Superior Court of the State of California, County of Orange (July 12, 2011)), where the representative plaintiffs were among those individuals who “submitted confidential health insurance applications to [defendants] containing very personal, private and potentially valuable information about themselves . . . **only to have [defendants] publicly disclose this information on the Internet for all to access view and potentially misuse.**” *In re Blue Cross Complaint* at *2 (emphasis in original).⁴ The plaintiffs in *In re Blue Cross of California Website Security Cases* further alleged that the defendants “**made such Confidential Applications publicly available from approximately October 23, 2009 to approximately March 10, 2010.**” *Id.* (emphasis in original).

In its Order certifying the class, the California Superior Court stated: “The Settlement Class is defined as: All persons in the United States: (1) whose Private Information was on WellPoint’s Affected Servers from August 15, 2008 through March 10, 2010 or (2) who received a Notification Letter from WellPoint regarding the alleged failure of WellPoint to secure their highly personal and private information.” *In re Blue Cross Order Certifying Class* at *3. As such, the Court found that “there are questions of

⁴ Per the direction of this Court’s Office on Counsel, Petitioners have submitted the complaint and order granting class certification in *In re Blue Cross of California Website Security Cases* as a supplement to the instant brief and appendix, as these documents are not readily available. Petitioners further respectfully request that this Court take judicial notice of said complaint and order.

law and fact common to the Settlement Class,” and determined that the commonality requirement was satisfied for class certification.” *Id.*

Unlike the Circuit Court below, in a remarkably similar case, the court in *In re Blue Cross of California Website Security Cases* properly focused its commonality finding on questions of law and fact, and not on the damages that the class representatives were at increased risk of suffering. Furthermore, just as in the present case, in *In re Blue Cross of California Website Security Cases*, (i) the affected individuals and class members received notification from the defendants admitting the security breach; and (ii) the amount of time the plaintiffs’ confidential information was publicly available on the Internet was also approximately five months.

The Circuit Court below erroneously concluded that the commonality requirement for class certification was not satisfied based on an improper analysis of causation and damages, rather than the prescribed analysis of questions of law or fact. The Petitioners’ claims are common to the class because they derive from the unauthorized and unlawful publication of theirs and their fellow class members’ confidential information on the Internet by the Respondents. Such is precisely the common nucleus of operative fact that supports class-wide resolution of claims that result from such identifiable and established conduct of the Defendants. That the Petitioners and class members have and/or may not suffer the exact same injuries does not defeat commonality.

III. THE CIRCUIT COURT ERRED WHEN IT FAILED TO FIND THE TYPICALITY REQUIREMENT OF RULE 23(a)(3) WAS SATISFIED.

The Circuit Court committed legal error in denying class certification based on its finding that “Plaintiffs have failed to show typicality because the evidence does not establish whether the class members have suffered the same type of legal harm, which will consequently require individual determinations of the appropriate remedies.” (A.R. 13).

“The ‘typicality’ requirement of Rule 23(a)(3) of the *West Virginia Rules of Civil Procedure* [1998] requires that the ‘claims or defenses of the representative parties [be] typical of the claims or defenses of the class.’ A representative party’s claim or defense is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. Rule 23(a)(3) only requires that the class representatives’ claims be typical of the other class members’ claims, not that the claims be identical. When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment.” Syl. Pt. 12, *In re W. Virginia Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52.

Recently, in *Perrine v. E.I. Du Pont De Nemours & Co.*, 225 W.Va. 482, 694 S.E.2d 815 (2010), this Court reaffirmed its holding of *In re W. Virginia Rezulin Litig.*, and with regard to Rule 23(a)(3), held that “the trial court found that the representative parties were affected by the same conduct as the class, and they would rely on legal theories and remedies available to each other and the class members. Accordingly, we

find no error in the circuit court's conclusion that the typicality requirement was met[.]” 225 W.Va. 482, 525, 694 S.E.2d 815, 858.

“Differences in the situation of each plaintiff or each class member do not necessarily defeat typicality: The harm suffered by the named Petitioners may differ in degree from that suffered by other members of the class so long as the harm suffered is *of the same type*.” *In re W. Virginia Rezulin Litig.*, 214 W. Va. 52, 68, 585 S.E.2d 52, 68 (emphasis in original)(citations omitted). “Thus, because [the plaintiffs’] exposure to Rezulin alone is claimed as the basis for [their claims], the class and the representatives have nearly identical claims.” *Id.* ⁵

In the present case, the Petitioners’ claims arise from the same event, practice and course of conduct affecting all of the class members - the unauthorized and unlawful publication of theirs and class members’ confidential information on the Internet by the Respondents. Just as in the *In re West Virginia Rezulin Litigation* case, the basis of the Petitioners and class members’ claims is the unnecessary exposure of their private information to global access. For this conduct perpetrated against them by the Respondents, these Petitioners bring state tort law claims under the same legal theories that support recovery on a class-wide basis: (1) Breach of the Duty of Confidentiality; (2) Invasion of Privacy: Intrusion Upon the Seclusion of the Affected Patients; (3) Invasion of Privacy: Unreasonable Publicity Into the Affected Patients’ Private Lives; and (4) Negligence. (A.R. 485 - 493).

⁵ In certifying the class of plaintiffs in the nearly identical case of *In re Blue Cross of California Website Security Cases*, the court found that “[t]he claims of Representative Plaintiffs are typical of the claims of members of the Settlement Class.” *In re Blue Cross Order Certifying Class* at *3.

In support of denying typicality, the Circuit Court below concluded that that this matter will “require individual determinations of appropriate remedies.” (A.R. 13). However, this Court has clarified that to satisfy the typicality requirement, “[t]he harm suffered by the named Petitioners may differ in degree from that suffered by other members of the class so long as the harm suffered *is of the same type.*”” *In re W. Virginia Rezulin Litig.*, 214 W. Va. 52, 68, 585 S.E.2d 52, 68. The harm suffered by the Petitioners and class members is of the exact same type: the unreasonable and offensive invasion of their privacy and unnecessary risk of future identity theft due to the Respondents’ negligence and breach of the duty of confidentiality owed to them.

Furthermore, the Circuit Court refused to find typicality based on the erroneous conclusion that “the evidence does not establish whether the class members suffered the same type of legal harm.” (A.R. 13). It is impossible to reconcile this finding with the evidence in this case and the actual admissions of the Respondents.

The privacy office of CAMC sent the exact same form letter to each of the 3,655 potential class members. (A.R. 133). In this letter, CAMC informed these affected patients of the same security incident that caused the breach of each of the affected patients’ confidential information. **But more telling is the fact that CAMC offered each of the class members the exact same offer of one year of credit monitoring.** (A.R. 233- 234). It is therefore untenable to conclude that the Petitioners and class members did not suffer the same type of legal harm, when CAMC itself acknowledged as much when it offered the exact same remedy to each affected patient for the same future risk of identity theft that each now faces.

The present Petitioners and class members were exposed to an unnecessary risk of the same type of harm due to the Defendants' unlawful conduct. As such, the Petitioners' claims are typical of the class, and the Circuit Court's order to the contrary must be overturned.

IV. THE CIRCUIT COURT ERRED WHEN, PURSUANT TO RULE 23(b), IT FOUND INDIVIDUAL ISSUES REGARDING DAMAGES, CAUSATION AND ADEQUATE REMEDIES PREDOMINATE OVER COMMON ISSUES OF LAW OR FACT.

The Circuit Court's denial of class certification was further based on the erroneous conclusion that "[t]he record shows that the individual issues regarding damages, causation, and adequate remedies will predominate over common issues of law or fact at trial. In addition to failing to meet the requirements of Rule 23(a), Petitioners have not satisfied Rule 23(b)." (A.R. 16).

"A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions." *In re W. Virginia Rezulin Litig.*, 214 W. Va. 52, 68, 585 S.E.2d 52, 68 (citations omitted). "As the leading treatise in this area states, '[c]hallenges based on ... causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability.'" *Id.* (quoting 2 *Newberg on Class Actions*, 4th Ed., § 4.26 at 241). **"That class members may eventually have to make an individual showing of damages does not preclude class certification."** *In re W. Virginia Rezulin Litig.*, 214 W. Va. 52, 68, 585 S.E.2d 52, 68 (emphasis added)(citations omitted).

In *Perrine*, the Court reaffirmed this legal standard: “Indeed, the only issue of any significance that is not identical to all class members is the amount of damages sustained by each claimant. **But the need for an individual showing of damages does not preclude class certification under Rule 23(b)(3) where, as here, common issues predominate.**” *Perrine*, 225 W.Va. 482, 527, 694 S.E.2d 815, 860 (citation omitted)(emphasis added).

The *Perrine* Court further held that “there are common questions of law or fact that predominate over any individual issues that may arise among the class members. Liability is one such issue.” *Id.*; citing, *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir.2004) (“Liability of plant owner for toxic emissions was a common issue that predominated over individual questions of damages.”); and, *Bolanos v. Norwegian Cruise Lines, Ltd.*, 212 F.R.D. 144 (S.D.N.Y.2002) (“Courts should particularly focus on the liability issue ... and if the liability issue is common to the class, common questions are held to predominate over individual questions.”). “The defendants’ liability arises out of the same nucleus of operative facts for each plaintiff. For example, each plaintiff would rely upon the same evidence to show the negligent conduct of each defendant.” *Perrine*, 225 W.Va. 482, 527, 694 S.E.2d 815, 860.

In the present case, liability is a common question of law and fact all but conceded by the Respondents. The shared liability questions on behalf of the Respondents towards the class members is evidenced by the February 16, 2011 form letter sent to each of the class members: “Unfortunately, when an update was made in September 2010, the technology contractor overlooked a vulnerability that left data in one section of the database exposed if someone were to conduct an advanced Internet

search . . . The respiratory database contained the names, contact details, Social Security numbers, and dates of birth of 3655 patients, along with certain basic respiratory care information about some of them. Regrettably, your personal information was included in the database.” (A.R. 233).

The Circuit Court erred in denying class certification under Rule 23(b) based on its conclusion that predominance of common issues or law and/or fact are lacking, and by improperly basing its finding on causation and damages. The Circuit Court’s finding on this issue is contrary to this Court’s well-established requirement that the relevant inquiry focus on questions of liability, and not the class members’ eventual right to recover.

V. THE CIRCUIT COURT ERRED WHEN IT DENIED CLASS CERTIFICATION BASED ON ITS FINDING THAT THE PETITIONERS LACKED STANDING TO BRING THEIR CLAIMS ON BEHALF OF THEMSELVES AND THEIR FELLOW CLASS MEMBERS.

The Circuit Court erred when it concluded that “[i]n addition to denying class certification under Rule 23, this Court denies class certification because the named Petitioners lack standing as they have failed to articulate and suffer a concrete and particularized injury that is not hypothetical or conjectural.” (A.R. 17).

In order to achieve standing, “the party must have suffered an ‘injury-in-fact’-an invasion of a legally protected interest.” *Guido v. Guido*, 202 W. Va. 198, 202, 503 S.E.2d 511, 515 (1998). “In order to have standing ... a party must allege an injury in fact, **either economic or otherwise**, which is the result of the challenged action[.]” *Snyder v. Callaghan*, 168 W. Va. 265, 272, 284 S.E.2d 241, 248 (1981).(emphasis added).

As it relates to class certification, a challenged “[a]ction or inaction [by a defendant] is directed to a class within the meaning of Rule 23(b)(2) even if it has taken effect or **is threatened** only as to one or a few members of the class, provided it is based on grounds that have general application to the class.” *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 70, 585 S.E. 2d 52, 70. (emphasis added). “Furthermore, a circuit court may not deny a class certification motion merely because some members of the class **have not suffered an injury or loss**, or because there are members who may not want to participate in the class action.” *Id.*, 214 W. Va. 52, 66, 585 S.E.2d 52, 66. (emphasis added).

In its seminal decision of *In re West Virginia Rezulin Litigation*, this Court further held as follows:

As we stated in Syllabus Point 2 of *State ex rel. Metropolitan Life Ins. Co. v. Starcher*, 196 W.Va. 519, 474 S.E.2d 186 (1996):

‘To demonstrate the existence of a class pursuant to Rule 23 of the West Virginia Rules of Civil Procedure, it is not required that each class member be identified, but only that the class can be objectively defined. It is not a proper objection to certification that the class as defined may include some members who do not have claims because certification is conditional and may be altered, expanded, subdivided, or vacated as the case progresses toward resolution on the merits.’

In support of our holding in the *Metropolitan Life* case, we relied upon *Joseph v. General Motors Corp.*, 109 F.R.D. 635, 639 (D.Colo. 1986), where the district court concluded that ‘the fact that the class may initially include persons who have not had difficulties with their V8-6-4 engines or who do not wish to have these purported problems remedied is not important at this stage of the litigation.’

Id., 214 W. Va. 52, 62, 585 S.E.2d 52, 62.

The Petitioners have clearly suffered an invasion into their legally protected interests of privacy, and the Respondents' publication of their private information represents a breach of the legal duty of confidentiality owed to the Petitioners and class members. That the Petitioners have not at this point suffered identifiable economic injury due to the Defendants' unlawful actions is of no consequence to the issue of standing.

This Court has rejected "the contention that a claim . . . must rest upon the existence of present and proven physical harm. To the contrary, '[t]he 'injury' that underlies a claim . . . just as with any other cause of action sounding in tort—is the invasion of any legally protected interest." *In re W. Virginia Rezulin Litig.*, 214 W. Va. 52, 73, 585 S.E.2d 52, 73 (citations omitted). "[T]he plaintiff must only show that there is a significantly increased risk of [harm] relative to what would be the case in the absence of [the Defendant's conduct]." *Id.* As such, "[t]he plaintiffs are not required, at the class certification stage, to identify the specific injuries of each class member, and it was error for the circuit court to so hold." *Id.*

Yet, perhaps most troubling is that under the Circuit Court's ruling denying standing, the case will be extinguished as a whole. As would the common law torts of invasion of privacy and duty of confidentiality, except in the rare cases in which a plaintiff can show a concrete and present economic injury due to the invasion or breach.

In the present case, only those class members who could directly tie an actual theft of their identity to the unlawful conduct of the Respondents would be able to proceed. Such a direct connection would be nearly impossible to achieve, as the class members private information was published and accessible on a global information

network, and there do not exist adequate means to conclusively determine who, when and if this information has been accessed. This is precisely why the torts on invasion of privacy, breach of the duty of confidentiality, and negligence do not require that the present Petitioners and class members identify that a particular instance of identity theft or other economic injury has occurred.

Accordingly, the Circuit Court's refusal to acknowledge the standing of the Petitioners and class members would reverse years of established precedent by this Court, and every other Court in the country, recognizing the common law torts of invasion of privacy and breach of the duty of confidentiality, and would abrogate an individuals' right to recover under these well-established legal theories.

In *R.K. v. St. Mary's Med. Ctr., Inc.*, 229 W.Va. 712, 735 S.E.2d 715 (W.Va., 2012) the Plaintiff sought a remedy for the unlawful access of his confidential medical information by a hospital employee. The plaintiff "filed several state law claims," which included, just as in the instant case, claims for invasion of privacy, breach of confidentiality, and negligence. 229 W.Va. 712, 715, 735 S.E.2d 715, 718. However, the plaintiff did not allege any economic or any other present injury outside of the unauthorized access of his private information. *Id., et al.* In its holding, the Court overturned the trial court's finding that the plaintiff's state law claims were preempted by HIPAA. *Id.*

However, this Court also recognized the importance of private causes of action in cases such *R.K. v. St. Mary's Med. Ctr., Inc.* and the present one. Beyond providing a remedy for well-established violations of the common law, the Court found that such private causes of action "support[] at least one of HIPAA's goals by establishing another

disincentive to wrongfully disclose a patient's health care record.” 229 W.Va. 712, 720, 735 S.E.2d 715, 723. The Court cited numerous other jurisdictions recognizing private causes of action in similar factual circumstances, many of which validated such claims “without discussing even the possibility of HIPAA preemption.” *Id.*

Similarly, in *R.K.*, this Court did not discuss the possibility that the plaintiff lacked standing to bring the same claims that the present Petitioners assert. This is because standing is not an issue in cases such as *R.K.* and the present, where plaintiffs bring claims of invasion of privacy, breach of confidentiality and negligence based on the unauthorized access of private medical information. The Circuit Court’s finding below that the current Petitioners and class members lack standing is unprecedented and completely contradictory to well-established theories of common law liability and recovery.

The invasion of the Petitioners and class members’ legally protected interests occurred at the point their private and confidential information was unlawfully publicized and exposed by the Defendants. Such publication and exposure is the “injury-in-fact” in the present case. Once this information was unlawfully made accessible on the Internet, its security was forever compromised.

The Petitioners and their fellow class members have been robbed by the Respondents of their right to be secure and confident that their most private information will forever remain only theirs, or with those whom they voluntarily choose to share this information. Such injury is far beyond “hypothetical or conjectural,” and characterizing it as such not only represents a fundamental misunderstanding of the

law, but also a disturbing lack of acumen as to the harm that the Petitioners and their fellow class members have suffered at the hands of the Respondents.

Accordingly, the Circuit Court's finding that the Petitioners lack standing is clearly erroneous and should be overturned by this Court.

CONCLUSION

By their instant appeal, the Petitioners request that this Court vacate the June 24, 2013 Order of the Circuit Court denying class certification. Petitioners further request that this Court order that their Motion for Class Certification be granted, as the record in this case is sufficient to allow this Court to grant such relief.

Signed:  _____

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