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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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' REPLY BRIEF

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INTRODUCTION

In seeking to uphold the Circuit Court's denial of class certification, the Respondents plead with this Court to ignore the plain language of Rule 23 of the West Virginia Rules of Civil Procedure, and to further ignore the clearly established precedent of this Court in interpreting and applying Rule 23. More specifically, the Respondents assert that the focus of class certification was properly directed by the Circuit Court toward the issues of causation and damages. However, the proper focus in deciding whether the commonality and typicality requirements of Rule 23(a) are satisfied is on the existence of common factual circumstances and legal theories of recovery amongst the Petitioners and their fellow class members.

The error of the Respondents' argument is compounded by reliance on these same factors – individual issues of injury, causation and damages – in asserting that the Circuit Court correctly found a lack of predominance under Rule 23(b).

In arguing to uphold the wrongful denial of class certification of the Circuit Court, Respondents also implore this Court to disregard black letter law related to the common law claims asserted, the damages that are available under each of these claims, and the standing clearly present among the Petitioners to bring these claims on behalf of themselves and their fellow class members. Furthermore, the Circuit Court's decision is adverse to the majority of jurisdictions that are utilizing class action litigation to decide claims based on the wrongful disclosure of confidential personal information and/or private medical records, when numerous plaintiffs are affected by the same or similar data breaches.

For the reasons set forth in the Petitioners' brief, the Circuit Court's denial of

class certification should be vacated, and class certification ordered by this Court. Petitioners offer as follows in further support of their petition requesting such relief.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING CLASS CERTIFICATION BASED ON AN ANALYSIS OF COMMON DAMAGES AND HARM, RATHER THAN THE PROPER ANALYSIS OF COMMON FACTUAL CIRCUMSTANCES AND LEGAL THEORIES OF RECOVERY.

The Respondents indicate as follows in their second point heading: "The Circuit Court properly found that petitioners failed to satisfy the commonality element because the representative plaintiffs offered no proof that all class members suffered the **same type of harm**." Resp. Br. 7. Yet remarkably, the Respondents immediately follow with this Court's holding that conclusively establishes the Circuit Court's error in refusing to find commonality: "Pursuant to Rule 23(a)(2), the party seeking class certification must show that there are questions of **law or fact** common to the class." *Id.* (emphasis added)(citing *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 57, 585 S.E. 2d 52, 57 (2003). As it directly relates to commonality, "**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**[.]" *Id.* (emphasis added)(internal citation omitted).

Questions of both law and fact are common among the Petitioners and their fellow class members, and these questions will be the object of most, if not all, of the efforts of this Court and the parties in this matter. 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). As such, the instant Complaint clearly sets forth the following common questions of law and fact:

> 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).

Furthermore, the Circuit Court erroneously determined that typicality was lacking under the same misguided outcome-driven approach. More specifically, the Circuit Court refused to find typicality was satisfied based on its conclusion that the remedies available to the Petitioners and class members may vary. However, as the Respondents acknowledge, "[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.**" See Resp. Br. 12 (quoting *In re W. Virginia Rezulin Litig.* 214 W. Va. at 57, 585 S.E.2d at 57.) As described in the Complaint and quoted above, the same event – the unlawful publication of the Petitioners' private records – supports their causes of action under the same legal theories: breach of the duty of confidentiality, invasion of privacy, and negligence.

As it relates to typicality, "[w]hen 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. This Court clarified the required analysis for typicality recently in *Perrine v. E.I. Du Pont De Nemours & Co.*: "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.*" 225 W.Va. 482, 514, 694 S.E.2d 815, 857 (2010) (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.* Here, the same exposure of the Petitioners and class members' private information to global access supports their identical claims for relief, and the typicality requirement is satisfied.

The Circuit Court also refused to find that common questions of law and fact predominate over those affecting only individual member of the proposed class. In doing so, the Circuit Court again improperly focused its analysis on issues of damages, causation and the availability of adequate remedies.

"[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." *In re W. Virginia Rezulin Litig.*, 214 W. Va. 52, 68, 585 S.E.2d 52, 68 (citations omitted). When analyzing predominance under Rule 23(b), the fact "[t]hat class members may eventually have to make an individual showing of damages does not

preclude class certification." *Id*; *see also*, *Perrine*, 225 W.Va. 482, 527, 694 S.E.2d 815, 860("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.") (citation omitted).

Throughout their brief, the Respondents criticize the holding of *In re W. Virginia Rezulin Litig*. as outdated. Yet the Respondents fail to cite any subsequent decisions indicating that this Court has strayed from this holding and established an alternative analysis in determining class certification. Even more telling is that the Respondents extensively cite to *In re W. Virginia Rezulin Litig*. as controlling authority in their brief. *See* Resp. Br. 5, 6, 7, 12, 14. The holding of *In re W. Virginia Rezulin Litig*. remains the roadmap to determine class certification. This holding and the subsequent decisions interpreting it compels a finding that the Circuit Court erred in denying class certification based on its misplaced conclusion that commonality, typicality and predominance of common issues of fact and law are not present in this case.

II. THE PETITIONERS HAVE SUFFERED A PRESENT AND CONTINUING INJURY, AND ARE ENTITLED TO SEEK ALL COMPENSATORY DAMAGES PROVIDED FOR THE CLAIMS THEY HAVE ASSERTED.

As explained above, an inquiry into damages is not required at this stage in order to determine class certification. However, even if such an analysis was proper, it is clear that contrary to argument of the Respondents, the Petitioners and their fellow class members have suffered actual injuries and related damages that are compensable under the common law theories of liability presently asserted.

As explained in the Petitioners' brief, this Court found a present injury when "[t]he plaintiffs contended that the defendants' product caused the plaintiffs to be subject to an **increased risk** of liver disease and injury." *In re W. Virginia Rezulin Litig.* 214 W. Va. 52, 59, 585 S.E.2d 52, 59 (emphasis added). As a matter of law, such an injury is not speculative and is compensable, and it must only be demonstrated "'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). Indeed, plaintiffs can meet this requirement "'even if the disease it is intended to diagnose is not reasonably certain to occur." *Id.*

In the present case, Petitioners seek redress from the increased risk of traditional and medical identity due to the unlawful actions of the Defendants. (A.R.490). This increased risk is equally shared by the Petitioners and their fellow class members as a result of the same data breach at CAMC that led to the publication of their confidential personal information and private medical records. Despite the Respondents futile attempt to argue otherwise, the Petitioners do not offer this important aspect of the *In re W. Virginia Rezulin Litig.* holding to establish a medical monitoring claim. Instead, as abundantly clear from Petitioners' brief, it is only utilized for purpose of analogy to demonstrate that increased future risk is a recognized and compensable form of injury.

Puzzlingly, the Respondents state in their brief that they have "never articulated an understanding that members of the putative class were actually at an increased risk for future identify theft[.]" Resp. Br. 2. Such a statement is directly contradicted by the evidence: "[W]e [CAMC] 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 identiy theft]? A. (Lynn Brookshire, Director of CAMC Privacy Office) Certainly, it would have created an additional risk for those individuals.")

Javelin Strategy & Research ("Javelin"), a leading provider of quantitative and qualitative research, released a 2012 Identity Fraud Report (the "Javelin Report"), quantifying the impact of data breaches. According to the Javelin Report, individuals whose confidential personal information and private medical records are subject to a reported data breach— such as the data breach at issue here— are approximately 9.5 times more likely than the general public to suffer identity fraud and/or identity theft.

The Respondents further stake their argument on the assertion that none of the class members have been identified as suffering identity theft, and that proof has not yet been uncovered that any of these class members' information has been accessed. Resp. Br. 13. This is an irrational position. The process of identifying and providing notice to the 3,655 individual potential class members has not yet commenced, as class certification was erroneously denied by the Circuit Court. Disregarding the fact that such identity theft or access is not required to be demonstrated to obtain class certification and show actual harm, such an argument by the Respondents demonstrates the untenable nature of their plea to uphold the decision below.

Moreover, there is a high likelihood that significant identity theft and/or identity fraud has not yet been discovered or reported. There is also a high probability that criminals who may now possess Petitioners' and class members' confidential personal information and private medical records have not yet used the information but will do so later, or re-sell it. The fact that the Petitioners' and class members' confidential

personal information and private medical records were accessible on a global information network renders it impossible to accurately determine if they have or will be subject to traditional or medical identity theft. What is unquestionable is that this information was publicized and made publicly available without the consent of the Petitioners and their fellow class members, and that these individuals now face a significant and unreasonable increased risk due to such public disclosure.

The Complaint details that as a direct and proximate result of the Defendants' actions and inactions at issue, 3,655 patients, namely Petitioners and their fellow class members, were subjected to an unauthorized and prohibited disclosure of their confidential information and have suffered an invasion of their privacy. These individuals have spent or will need to spend considerable time and expense to protect themselves against identity theft and damage to their credit ratings; have been or will be forced to have fraud alerts placed through credit reporting agencies; have been deprived of the exclusive use and control of their confidential information; have incurred or will incur the costs of time and money to monitor their credit card accounts, prescription accounts, credit reports, and other financial information to protect themselves against identity theft and other improper use of the disclosed confidential information; and have otherwise suffered further compensatory damages.

Furthermore, in what can only be described as willful ignorance, the Respondents fail to acknowledge that the Petitioners are seeking and entitled to compensatory damages for the annoyance, aggravation, inconvenience and similar damages that flow from the common law claims asserted. Respondents conveniently do not address this

aspect of harm suffered by the Petitioners for which they seek damages, despite the fact it has been specifically pled and addressed as follows before the Circuit Court:

"[Counsel for the Petitioners]: The other aspect [of damages] is for annoyance, inconvenience and loss of personal security in their most personal information that these individuals have already suffered." A.R. 87. "[Counsel for the Petitioners]: Nowhere in the pleadings – nowhere has it ever been said that annoyance and inconvenience and loss of personal security is directly tied to 'if identity theft occurs.' They are two separate [theories] - - That's how they need to be analyzed." A.R. 90.

Not only are compensatory damages for annoyance, aggravation, inconvenience and similar damages clearly available under each of the Petitioners' asserted causes of action, but they are particularly appropriate in the present case. For example, in *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 713, 320 S.E.2d 70, 84 (W. Va. 1983), this Court established that "[t]he right of privacy, including the right of an individual to be let alone and to keep secret his private communications, conversations and affairs, is a right the unwarranted invasion or violation of which gives rise to a common-law right of action for damages." *Id.* (quotation omitted). The *Crump* Court further established that "**privacy actions involve injuries to emotions and mental suffering**." *Id.* at 87 (emphasis added).

It is practically impossible to determine if or when the confidential personal information and private medical records of the Petitioners has or will be accessed and utilized for improper purposes. However, it is perfectly clear that these individuals suffer the same unnecessary increased risk of such an occurrence, and that they have all suffered annoyance, inconvenience and other emotional injuries as a result of losing

their personal security due to the same unlawful actions of the Defendants. Damages associated with these injuries are recoverable under the asserted theories of breach of confidentiality, invasion of privacy, and negligence, and the Circuit Court erred and abused its discretion when it determined otherwise and denied class certification.

III. THE PETITIONERS POSSESS STANDING TO ASSERT CLAIMS ON BEHALF OF THEMSELVES AND THEIR FELLOW CLASS MEMBERS BECAUSE THEY HAVE SUFFERED A CONCRETE INJURY IN FACT THAT HAS CAUSED THEM COGNIZABLE HARM.

In denying class certification, the Circuit Court below also determined that the Petitioners lacked standing to bring their class claims based on a finding that "they have not suffered any existing injury and only allege prospective injury." Resp. Br. 17 (citing A.R. 17). Such a finding is in clear contradiction to the well-established requirement for standing under Article III of the Constitution.

In *Friends of the Earth, Inc. v. Gaston Copper*, 204 F.3d 149 (4th Cir., 1999), the Fourth Circuit examined the standing requirement of justiciable harm and identifiable injury. Like the Circuit Court in the present matter, the District Court in *Friends of the Earth, Inc.* denied standing to the plaintiffs based, in part, on a finding that the threatened and prospective injury they claimed did not constitute a sufficient injury in fact. *Id.* at 151.

Just as this Court recognized in *Findley v. State Farm Mut. Auto Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002), the *Friends of the Earth, Inc.* Court clarified that in order to achieve standing, a plaintiff must first establish that he has suffered "an invasion of a legally protected interest that is 'concrete and particularized' before he can bring an action." *Friends of the Earth, Inc.*, 204 F.3d at 156. "The injury in fact

requirement also blocks suit by those whose allegations of injury are based on mere conjecture rather than an actual **or threatened** invasion of their legally protected interests." *Id.* (emphasis added).

In its en banc decision overturning the District Court's denial of standing, the Court in *Friends of the Earth, Inc.* could not have been more clear: "Courts have also left no doubt that threatened injury to [a plaintiff] is by itself injury in fact. The Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing requirements. 'One does not have to await the consummation of threatened injury to obtain preventive relief.'" *Id.* at 160 (internal citations and quotation marks omitted). "Threats or increased risk thus constitutes cognizable harm. [O]ther circuits have had no trouble understanding the injurious nature of risk itself. [A] threatened injury is sufficient to provide injury in fact." *Id.* at 160 (internal citations and quotation marks omitted).

In *Pisciotta v. Old Nat. Bancorp*, 499 F.3d 629 (7th Cir., 2007) – a decision cited by the Respondents in their brief – the Court examined standing on behalf of the class plaintiffs, who brought claims for the defendant's failure to safeguard their financial information. In this regard, the *Pisciotta* Court held as follows:

> As many of our sister circuits have noted, the injury-in-fact requirement [sufficient to confer Article III standing] can be satisfied by a threat of future harm or by an act which harms the plaintiff only by increasing the risk of future harm that the plaintiff would have otherwise faced, absent the defendant's actions. We concur in this view. Once the plaintiffs' allegations establish at least this level of injury, the fact that the plaintiffs anticipate that some greater potential harm might follow the defendant's act does not affect the standing inquiry.

Id. at 635 (internal citations omitted). [1]

The *Pisciotta* decision cited by the Respondents directly contradicts their argument that the Circuit Court properly denied standing based on its determination that an injury in fact cannot exist without proof that the private information of the Petitioners has been misused. Courts across the country have consistently held that threatened injury is sufficient to obtain Article III standing, and the Circuit Court's finding to the contrary must be overturned.

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[1] In footnotes three and four of its decision, and in support of its holding that the plaintiffs possessed standing to bring their claims, the *Pisciotta* Court cited the following decisions:

> 3. *See, e.g., Denney v. Deutsche Bank AG,* 443 F.3d 253, 264-65 (2d Cir.2006) (stating, in dicta, that exposure to toxic substances creates a cognizable injury for standing purposes, "even though exposure alone may not provide sufficient ground for a claim under state tort law"); *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 574-75 (6th Cir.2005) (holding that standing was present where a defective medical implement presented an increased risk of future health problems); *Cent. Delta Water Agency v. United States,* 306 F.3d 938, 947-48 (9th Cir.2002) (holding that "the possibility of future injury may be sufficient to confer standing on plaintiffs" and concluding that the suit could proceed when the plaintiffs demonstrated a factual issue about "whether they suffer a substantial risk of harm"); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc) ("Threats or increased risk thus constitutes cognizable harm.").
>
> 4. *See Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton,* 422 F.3d 490, 498 (7th Cir.2005) ("[T]he present impact of a future though uncertain harm may establish injury in fact for standing purposes."); *Johnson v. Allsteel, Inc.*, 259 F.3d 885, 888 (7th Cir.2001) (holding that an ERISA plan administrator's increased discretion increased risk that the participant would be denied benefits and that "[t]he increased risk the participant faces as a result is an injury-in-fact" for standing purposes); *Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir.1993) ("[E]ven a small probability of injury is sufficient to create a case or controversy — to take a suit out of the category of the hypothetical — provided of course that the relief sought would, if granted, reduce the probability.").

Pisciotta, 499 F.3d at 634.

IV. CLASS CERTIFICATION IS CONSISTENT WITH OTHER JURISDUCTIONS FACIING CLASS COMPLAINTS ON BEHALF OF NUMEROUS CITIZENS AFFECTED BY BREACHES OF MEDICAL AND OTHER PRIVATE INFORMATION.

The following courts have certified and allowed similar claims as those asserted by the current Petitioners to proceed as class actions: *See, for example, Anderson v. Hannaford Bros. Co.*, 659 F3d 151, 162-67 (1st Cir. 2011) (holding class-action plaintiffs' negligence and related claims were cognizable and could proceed where plaintiffs alleged mitigation damages arising from the theft of credit and debit card numbers); *Claridge v. RockYou, Inc.,* 785 F. Supp. 2d 855, 864-66 (N.D. Cal. 2011) (holding class-action plaintiff's breach-of-contract and negligence claims were sufficient where they alleged lost unidentified "value" and/or a "property right" inherent in plaintiff's personal information following data breach affecting developer of social media applications; *Kuhn v. Capital One Fin. Corp.*, 67 Mass. App. Ct. 1111, 2006 WL 3007931 (2006) (slip op.) (holding that "the value of the time spent" by the plaintiff to prevent further identify theft was compensable injury, even though she did not have to pay charges on fraudulent accounts); *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010) (holding, on issue of first impression, that class-action plaintiffs had standing where they alleged threat of identity theft); *In Re. Backup Tape Theft Incident In San Antonio, Texas On September 12, 2011* (MDL Docket No. 12-0156)(consolidating and maintaining class status for eight putative class actions in four different districts where "Plaintiffs have pled a variety of common legal theories, including similar or identical claims for negligence and public disclosure of private facts"); *Philippe Gross v. University of Hawaii, et al.,* Civil No. 11-1-1217-06 PWB (Haw., 1st Cir.)(ratifying class

certification and approving class settlement for claims based on plaintiffs whose confidential information was released and/or made available by the University of Hawaii); and *JUANA CURRY, et al. v. AVMED INC.*, Case No. 10-cv-24513-JLK, (S.D. Fla) (certifying class and approving class settlement in data breach case, including for those plaintiffs who had not suffered identity theft).

The above are examples of the Courts across the country realizing that class certification is the proper vehicle by which to seek redress for claims such as those asserted by the Petitioners. As such, this Court should vacate the Circuit Court's order finding otherwise, and order that the present proposed class be certified.

CONCLUSION

The Petitioners respectfully 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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CERTIFICATE OF SERVICE

I certify that on this 29th day of January, 2014, a true and exact copy of the Petitioners' Reply to Respondents' Brief was deposited in the U. S. Mail, via firts class, postage prepaid, addressed to the following:

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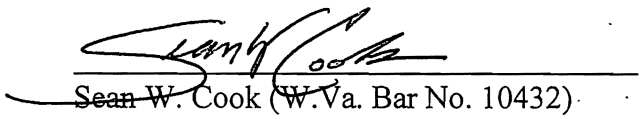

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