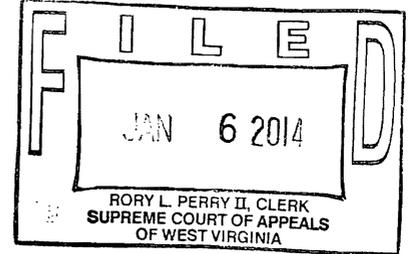


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET NO. 13-0766



**LARRY TABATA, ET AL.,**  
Petitioners

v.

Appeal from an order of the Circuit  
Court of Kanawha County (11-C-524)  
denying class certification

**CHARLESTON AREA MEDICAL  
CENTER, INC., ET AL.,**  
Respondents

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**Respondents' Brief**

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## **STATEMENT OF THE CASE**

Petitioners' Amended Complaint alleged that Respondents wrongfully allowed personal health information of the proposed class members to be accessible via the internet from approximately September of 2010 until February of 2011. (A.R. 486-487). Based on this allegation, Petitioners sued Respondents under the theories of: 1) Breach of the Duty of Confidentiality, 2) Invasion of Privacy-Intrusion upon the Seclusion of the Plaintiffs, 3) Invasion of Privacy-Unreasonable Publicity into the Plaintiffs' Private Lives, and 4) Negligence. (A.R. 490-492). In terms of the harm or injury allegedly suffered by the putative class members, the Amended Complaint did not allege any current injury, but identified only the "serious danger of both traditional and medical identity theft." (A.R. 489-490). Subsequently, Petitioners articulated the purported harm of invasion privacy merely by having their personal information available on the internet, discoverable only by a specific internet search for the information. Pet'rs' Br. 1, 22.

Following class certification discovery by both parties that was directed at the claims of the representative plaintiffs and the actions of CAMC, the parties briefed the issue of class certification, the court conducted a thorough oral argument on the issue and then rendered its decision by written order denying class certification and directing that the claims proceed as individual causes of action.

The record before the Circuit Court demonstrated that none of the Petitioners suffered any actual or attempted traditional or medical identify theft, even though more than two years had passed since the security vulnerability. (A.R. 576-577). The Petitioners, as well as Respondents, had no information indicating their information had been accessed by a malicious actor. (A.R. 576-580). Similarly, the Petitioners knew

neither of an actual or attempted identity theft of any class member nor of any access by a malicious actor. (A.R. 233 and 576-580). Further, the record indicated that even among the Petitioners, great variances existed in their personal situations that would impact the “risk,” if any, of future identity theft. (A.R. 576-580).

Equally apparent to the Circuit Court was that the only contested issues would involve individual determinations of the existence of harm, causation, and damages. Once Respondents became aware of the security vulnerability, Respondents’ position has always been that such vulnerability existed for the records of 3,655 current and former patients, which were housed on a particular database of Respondent CAMC Health Education and Research Institute, Inc., and that an “advanced internet” search for the specific information contained on the database could have led to its discovery. (A.R. 233-234). However, because of the limited availability of the information and the multitude of factors that must be considered to determine an individual’s particular risk of identity theft, Respondent has never articulated an understanding that members of the putative class were actually at an increased risk of future identity theft or that there was any invasion of privacy. (A.R. 579-580).

Additionally, Respondents note that the filing of their Memorandum in Opposition to Plaintiffs’ Motion for Class Certification was done in accordance with Rule 6 of the West Virginia Rules of Civil Procedure. Also, Respondents’ letter to the Circuit Court, dated June 14, 2013, was in response to arguments made by Petitioners for the first time during oral argument at the Circuit Court’s hearing on class certification. (A.R. 478-481). Finally, to the extent not inconsistent with the above, Respondents incorporate herein Petitioners’ Statement of the Case pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure.

## **SUMMARY OF ARGUMENT**

Because the core contested issues of this litigation revolve around the inherently individualized facts of determining each class member's potential injury, its causation, and a corresponding damage award, the Circuit Court correctly ruled that this case is inappropriate for adjudication as a class action under Rule 23 of the Rules of Civil Procedure. At the trial court, Petitioners failed to make the necessary showing to establish class certification. In particular, Petitioners did not show the element of commonality because the record indicated that the salient issues centered on proof of harm, causation, and damages, yet Petitioners could offer no evidence of the class members suffering the same type of harm or a common methodology of proving causation and damages.

Similarly, Petitioners could not demonstrate typicality of claims because the variances in injury, if any, preclude a class-wide remedy capable of addressing collectively the legal damages, if any, of the class members. To overcome this shortcoming, Petitioners attempted to create a new cause of action for "medical monitoring" for data security claims. Arguments for the application of this cause of action to the data security field have been summarily rejected by other jurisdictions and are not supported by West Virginia law.

Additionally, Petitioners did not satisfy the predominance test of Rule 23(b). The trial court found that individual issues of injury, causation, and damages would predominate over common issues in the trial of this action. While Petitioners assert that particularized findings of the degree of harm and causation cannot defeat class certification, they fail to acknowledge the unique circumstances of this case and recent persuasive authority that recognizes the failure to have a class-wide mechanism for

reliably offering proof on causation and damages can, in fact, defeat class certification under the predominance test.

Finally, Petitioners' failed to articulate a concrete and particularized injury that is actual or imminent and accordingly, lack standing to bring this suit. A want of standing is an appropriate basis for denying class certification. By admission, Petitioners complain of prospective injury, essentially the possibility that something may happen in the future that may result in actual injury. This position cannot support standing. Again, to skirt the absence of standing, Petitioners attempt to contrive a current injury stated as an "increased risk" of identity theft; however, as mentioned previously, such novel concept of harm is not supportable under the law. Finally, Petitioners try to establish standing by claiming that an invasion of privacy occurred, but the record is absent as to any such invasion.

Respondents contend that Rule 23 was drafted to ensure that a class action suit would efficiently and effectively resolve numerous similar claims against a defendant. As noted herein, because of the absence of any existing injury, the claims of the representative plaintiffs would quickly disintegrate into numerous individualized trials on the issues of harm, causation, and damages, as these issues not only predominate but are essentially the only matters in dispute. Therefore, understanding the purpose of class action litigation and appropriately applying Rule 23, the Circuit Court did not abuse its discretion when it denied class certification.

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

Unless this Court finds that a memorandum decision is appropriate under Rule 21(c), Respondents request oral argument before this Court takes action on Petitioners' appeal.

## ARGUMENT

### I. THE CIRCUIT COURT'S DECISION DENYING CLASS CERTIFICATION WAS NOT AN ABUSE OF DISCRETION AND THEREFORE, SHOULD BE UPHELD.

In West Virginia, the propriety of class certification “rests within the sound discretion of the trial court.” *In re West Virginia Rezulin Litig.*, 214 W.Va. 52, 62-3, 585 S.E.2d 52, 62-3 (2003) (citing Syl. Pt. 5, *Mitchem v. Melton*, 167 W.Va. 21, 277 S.E.2d 895 (1981)). When evaluating a circuit court’s ruling on class certification, this Court “will review a circuit court’s order granting or denying a motion for class certification under an abuse of discretion standard.” *Id.* at 61, 585 S.E.2d at 61. This standard necessarily affords deference to the decisions of lower courts on the issue of class certification. *Id.* (citing *Associated Med. Networks, Ltd. v. Lewis*, 785 N.E.2d 230, 234 (Ind. App. 2003) (“We review a trial court’s decision to certify a class action for an abuse of discretion. An abuse of discretion occurs when the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court.”) (certain citations omitted)).

Nevertheless, if a circuit court’s decision hinges on its interpretation of the West Virginia Rules of Civil Procedure, this Court’s review is *de novo*. Syl. Pt. 4, *Keesucker v. Bird*, 200 W.Va. 667, 490 S.E.2d 754 (1997); *see also State Farm Fire & Cas. Co. v. Prinz*, 231 W.Va. 96, 100, 743 S.E.2d 907, 911 (2013) (“[T]o the extent a circuit court’s ruling turns on an interpretation, meaning, or scope of the statute or a rule of evidence our review is *de novo*.”) (internal citations omitted). Because the Circuit Court in this case applied well-settled law that has evolved since the *Rezulin* decision, this Court should apply the abuse of discretion standard.

**II. 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**

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. *In re West Virginia Rezulin Litig.*, 214 W.Va. at 57, 585 S.E.2d at 57. While this Court originally articulated in *Rezulin* a low threshold for satisfying commonality, it subsequently refined the expansive language and essentially hollow interpretation of commonality under Rule 23 and began focusing on common issues that would be the focus of the litigation, mirroring the trend in federal courts. *See id.* In *Ways v. Imation Enterprises Corp.*, a class action alleging breach of contract and employment discrimination, this Court found that a motion for class certification was properly denied under the concepts of commonality and typicality when “individualized evidence as to the specific circumstances surrounding the alleged promises is required [for the breach of contract claim].” 214 W.Va. 305, 312-14, 589 S.E.2d 36, 43-45 (2003) (*per curiam*). With respect to the class employment discrimination allegation, this Court noted that simply showing common race, gender, or age among the named plaintiffs and members of the class was inadequate and that the named plaintiffs must also share common qualifications and work experience. *Id.* at 315, 589 S.E.2d at 46. Without such specific commonalities, “it cannot be shown that the resolution of common questions affect all or a substantial number of class members<sup>1</sup>.” *Id.*

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<sup>1</sup> Of note in *Ways* is the dissent by Justice Darrell McGraw, who criticized the majority for failing to follow the clear mandate of *Rezulin*, which he asserted required class certification where the allegations of discrimination arose from the same set of operative facts. *Ways*, 214 W.Va. at 316-17, 589 S.E.2d. at 47-48.

The *Ways* opinion clearly shows a departure from *Rezulin*'s overly broad statement that “[t]he common questions need be neither important nor controlling, and one significant common question of law or fact will satisfy this requirement.” *In re West Virginia Rezulin Litig.*, 214 W.Va. at 57, 585 S.E.2d at 57 (citing *Ga. State Conf. of Branches of NAACP v. Georgia*, 99 F.R.D. 16, 25 (S.D. Ga. 1983)). Quite oppositely, *Rezulin* sets forth a resolution-oriented analytical framework that focuses on the purpose of class-action litigation—efficiently resolving the claims of numerous plaintiffs against a common defendant. *See id.* at 62, 585 S.E.2d at 62 (“The rule is a procedural device that was adopted with the goals of economies of time, effort and expense, uniformity of decisions, the promotion of efficiency and fairness in handling large numbers of similar claims.”).

Similarly, the *Litigation Handbook on West Virginia Rules of Civil Procedure* reflects the narrowing scope of commonality post *Rezulin*. “The commonality requirement for class certification requires that class members suffer common deprivation; *it is not sufficient that class members share common circumstance.*” Cleckley, Davis & Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23(a)[2][b] (2012) (emphasis added). “The correct standard for determining if common questions of law or fact exist for class action purposes, is *whether common or individual questions would be the object of most of the efforts of the litigants and the court.*” *Id.* (emphasis added).

Recently, the United States Supreme Court acknowledged that the language of Rule 23(a)(2) of the Federal Rules of Civil Procedure, which tracks West Virginia's Rule

23,<sup>2</sup> “is easy to misread, since “[a]ny competently crafted class complaint literally raises common ‘questions.’” *Wal-Mart Stores, Inc. v. Dukes*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2541, 2551 (2011) (citing Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 131–32 (2009)). The Court continued, explaining that raising common questions is not the relevant determination, rather “the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation” should be the focus. *Id.* Further clarifying, the Court stated “[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers[]” and thus defeat commonality. *Id.* In the context of discussing *General Telephone Co. of Southwest v. Falcon*, the Court explained:

[The claims of the named plaintiffs] must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

*Id.* To attain this level of commonality, plaintiffs must “demonstrate that the class members have suffered the same injury.” *Id.* (internal citations omitted). Accordingly, to survive a challenge under commonality, a plaintiff must show that the class members have suffered the same injury and that the contested *questions and answers*, which will

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<sup>2</sup> A federal court’s interpretation of a comparable Federal Rule of Civil Procedure is to be considered persuasive authority. *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 522, 694 S.E.2d 815, 856 n. 48 (2010) (“Traditionally, this Court has utilized decisions of federal courts when interpreting and applying our Rules of Civil Procedure.”) (internal citations omitted); *see also Love v. Ga. Pac. Corp.*, 214 W.Va. 484, 488 n. 2, 590 S.E.2d 677, 681 n. 2 (2003) (*per curiam*) (Davis, J., dissenting) (“Due to the similarities between our Rules of Civil Procedure and the Federal Rules, we often look to decisions of the Federal Courts interpreting their rules as persuasive authority on how to apply our own rules.”) (citation omitted); *Lawyer Disciplinary Bd. v. Cunningham*, 195 W.Va. 27, 33 n. 11, 464 S.E.2d 181, 187 n. 11 (1995) (“[W]e follow our usual practice of giving substantial weight to federal cases in determining the meaning and scope of our rules of civil procedure.”) (citation omitted).

drive the litigation, will be common to the claims of the class members, allowing for the efficient resolution of the claims of the class. Although articulated by the United States Supreme Court nearly eight years after the *Ways* decision, this standard has been the applicable measure of commonality under West Virginia law since 2003.

In this case, the Circuit Court properly applied this established standard of commonality and logically found that the Petitioners failed to meet their burden. In particular, Petitioners did not show that the members of the class suffered any injury, much less a similar injury, and that the contested issues, specifically causation and damages, were capable of being resolved on a class level. (A.R. 2-13). In meeting its obligation of thoroughness and not abusing its discretion, the Circuit Court analyzed the elements of each cause of action in light of the record and concluded that commonality was lacking. (A.R. 2-13).

In the context of commonality, Petitioner's Brief hinges solely on the breadth of the *Rezulin* decision and ignores the significance of post-*Rezulin* state and federal decisions. Apparently, Petitioners rely on *Rezulin's* statement that any common issue of fact or law, regardless of its import, satisfies the commonality requirement. Pet'rs' Br. 9. Specifically, Petitioners recite four "common issues of law and fact" verbatim from their Amended Class Action Complaint. *Id.* However, because none of the enumerated common questions are likely to be the significant and determinative issues litigated in the suit, they are irrelevant for the purpose of determining the existence of commonality.

Further underscoring this point is a more recent version of authority cited by the Petitioners. Petitioners cite to *Newberg on Class Actions* (2002) for the proposition that requiring each class member to prove his/her right to recover or the suffering of

varying degrees of harm does not bar a class action under commonality. *Id.* at 8. However, the shortcoming of Petitioners' position is that it fails to recognize the importance of these issues in this litigation—they will consume it, making all other matters peripheral. “[B]ecause the commonality requirement is qualitative, not quantitative, the Supreme Court has held that at least one common issue must be central to the litigation . . . Similarly, other courts have held that the common issues must be at the ‘core’ or ‘nucleus’ of, rather than peripheral to, the litigation.” William B. Rubenstein, 1 *Newberg on Class Actions* § 3:22 (5th ed. 2013). Because the only issues at the core of the litigation necessarily involve individual determinations of harm, if any, and causation, if any, commonality cannot exist, which was the proper conclusion reached by the Circuit Court.

To overcome their deficiencies in establishing commonality, as well as any type of legally cognizable and redressible harm, Petitioners attempt to manufacture a novel type of injury—“the increased risk of traditional and medical identity theft”—by analogizing their purported plight to that of plaintiffs in medical monitoring cases. Pet’rs’ Br. 10. Petitioners raised this proposition for the first time during oral argument on the Plaintiff’s Motion for Class Certification. (A.R. 478-481). However, as explained to and accepted by the Circuit Court, the law does not support the expansion of medical monitoring to data security cases.

Such an extension was expressly rejected in *Reilly v. Ceridian Corp.*, 664 F.3d 38, 41-6 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2395 (2012) and should be rejected by this Court under existing West Virginia law. Petitioners’ comparison to medical monitoring suits is problematic, principally because medical monitoring is a cause of action, not a claim for damages, in West Virginia. In *Bower v. Westinghouse Electric*

*Corp.*, this Court established a “cause of action . . . for the recovery of medical monitoring costs . . .” Syl. Pt. 2, 206 W.Va. 133, 135, 522 S.E.2d 424, 426 (1999); see also *State of West Virginia ex rel. Chemtall Inc. v. Madden*, 216 W.Va. 443, 455, 607 S.E.2d 772, 784 (2004). Further, this Court refused to extend the rationale of *Bower*, particularly the risk of future harm, beyond medical monitoring causes of action. In the *Carter v. Monsanto Co.* case, this Court rejected plaintiff’s contention that a current “well founded fear” of future contamination of his property constituted a present injury, thereby limiting the applicability and scope of the analysis of medical monitoring actions to suits like *Bower*, where there is a known exposure to a toxic substance. 212 W.Va. 732, 736, 575 S.E.2d 342, 346 (2002).

Further underscoring the weakness of Petitioners’ position is the fact that Petitioners could not identify any authority for its novel concept of damages in this case. Petitioners assert that *In re Blue Cross of California Website Security Cases* supports their new category of harm. Proceeding No. 4647 (Ca. Super. Ct. 2011). However, this California case is not on point because the defendants consented to class certification for the purpose of conducting a settlement class. Accordingly, Petitioners’ argument for the creation of a new type of compensable damage for the risk of future medical and identity theft under the analytical framework of medical monitoring is simply not supported by the facts or West Virginia law and cannot serve as the mechanism to establish commonality in this case. Therefore, the Circuit Court properly applied existing law when it determined commonality did not exist because there is no common issue at the core of the litigation.

**III. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND TYPICALITY WANTING BECAUSE OF THE INHERENTLY INDIVIDUALIZED NATURE OF ANY POTENTIAL REMEDY.**

While acknowledging that the “commonality and typicality requirements of Rule 23(a) tend to merge,” this Court has stated that:

[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

*Ways*, 214 W.Va. at 312, 589 S.E.2d at 43. The typicality requirement for class certification under Rule 23(a)(3) requires that the “claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” *In re West Virginia Rezulin Litig.*, 214 W.Va. at 52, 585 S.E.2d at 52 (citing W. Va. R. Civ. P. 23(a)(3)). “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.” *Id.* at 57, 585 S.E.2d at 57.

Although typicality does not require that the claims of all class members be identical, it does require them to arise “out of the same legal or remedial theory.” *Id.* at 68, 585 S.E.2d at 68 (citing *United Bros. of Carpenters & Joiners of Am., Local 899 v. Phoenix Assocs., Inc.*, 152 F.R.D. 518, 522 (S.D.W. Va. 1994)). While commonality looks at the similarity of the representative plaintiffs and class members, typicality requires that the legal harm sustained be the same, so that there can be a class-wide remedy. *Id.* (citing *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 65 (S.D. Ohio 1991)). In both

*Rezulin* and *State of West Virginia ex rel. Chemtall Inc. v. Madden*, this Court relied on the ability or inability of plaintiffs to prove a common harm and common remedy when analyzing typicality. *See Madden*, 216 W.Va. 443, 455, 607 S.E.2d 772, 784 (2004); *In re West Virginia Rezulin Litig.*, 214 W.Va. at 68, 585 S.E.2d at 68. In particular, these cases hinged on the available remedy of medical monitoring. *See id.* Recognizing the harm and remedy-based approach to typicality, the test was defined as “(1) whether other members have the same or similar injury, (2) whether the action is based on conduct which is not unique to the named representatives, and (3) whether other class members have been injured by the same course of conduct.” *Cleckley, Davis & Palmer, Litigation Handbook on West Virginia Rules of Civil Procedure* § 23(a)[2][c].

As the Circuit Court concluded, even though Petitioners sued under the same causes of action, they failed to identify and prove whether members of the class have suffered the same harm, whether any such harm resulted from the same course of conduct of the Respondents, and whether the same legal remedies are capable of addressing the alleged injuries of Petitioners. (A.R. 13-16). As noted above, the Petitioners have no knowledge as to whether the representative plaintiffs, or any of the other putative class members, have suffered any type of damage or injury, other than an alleged increased risk of future identity theft.<sup>3</sup> Brief of Petitioners at 15. Further, the Petitioners offered no statistical or other analytical tool for quantifying on a class-wide basis the risk of future identity theft. (A.R. 2).

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<sup>3</sup> An “increased risk of future identity theft,” absent an actual or attempted identity theft or a malicious actor accessing the personal information, is not a legally cognizable and redressible injury. Further, the record is bare as to any unwanted or malicious users accessing the information to support a claim of invasion of privacy. (A.R. 2).

Without such common proof, any remedy sought to address claimed injuries will have to be individualized based on the specific damage to the particular class member. (A.R. 15). This type of proof necessarily precludes a common, class-wide remedy. *Id.* The differences among the Petitioners demonstrate the necessity of this individualized approach. For example, Plaintiff Holstein, who has never applied for any type of credit, could entirely eliminate any risk of future financial identity theft by simply placing a credit freeze. *Id.* Oppositely, if a member of the class has already suffered an actual identity theft, a credit freeze would not likely be an adequate remedy. *Id.* Based on the particular situation of the class member, an adequate remedy could range from no action to financial reimbursement for credit monitoring and actual economic losses. *Id.* Consequently, the record currently before this Court indicates that the Circuit Court carefully analyzed whether there could be a class-wide remedy and determined that this suit will necessarily devolve into individualized claims of harm, requiring individualized remedies. From this conclusion, the Circuit Court properly ruled that Petitioners failed to satisfy the typicality requirement of Rule 23(a).

**IV. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT INDIVIDUAL ISSUES OF DAMAGES, CAUSATION, AND APPROPRIATE REMEDIES WOULD PREDOMINATE OVER COMMON ISSUES OF LAW OR FACT.**

Rule 23(b)(3) requires that questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. W. Va. R. Civ. P. 23(b)(3). These requirements are typically referred to as the predominance and superiority tests or criteria. The predominance test forces the plaintiff to show that common questions of law or fact outweigh individual

questions. *In re West Virginia Rezulin Litig.*, 214 W.Va. at 71, 585 S.E.2d at 71. “The central question raised by the predominance criterion is whether adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves.” *Mantz v. St. Paul Fire and Marine Ins. Co.*, No. Civ. A. 02C-770, 2003 WL 23109763, at \*5 (Kanawha Cir. Ct. Dec. 17, 2003) (internal citations omitted).

Although individual determinations of causation and damages have not typically been adequate to defeat class certification under the predominance test, certain circumstances necessitate a finding that individual causation and damage issues do, in fact, predominate. William B. Rubenstein, 2 *Newberg on Class Actions* § 4:54 (5th Ed. 2013). The U.S. Supreme Court confirmed that an analysis of individualized concepts of proof for causation and damages is appropriate under the predominance test, holding that the predominance criterion makes the plaintiffs “show (1) that the existence of individual injury . . . was capable of proof at trial through evidence that [was] common to the class rather than individual to its members; and (2) that the damages resulting from that injury were measurable on a class-wide basis through use of a common methodology.” *Comcast Corp. v. Behrend*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1426, 1430 (2013) (citations omitted).

Once again, being mindful of the purpose of class actions to resolve efficiently numerous disputes, the Court said: “[w]ithout presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.” *Id.* Similarly, in a data breach case, the U.S. District Court emphasized the inability of the plaintiffs to show a common basis for proving damages class-wide in its decision to deny class

certification under predominance. *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 2:08-MD-1954-DBH, 2013 WL 1182733, at \*8-10 (D. Me. Mar. 20, 2013).

This analytical framework mirrors the methodology applicable to typicality outlined above. As the Circuit Court rightfully found, the focus of the litigation will be on the extent, if any, of the damages sustained by each individual class member and the causation of such harm, which will necessarily involve individual inquiries into the particular class member's personal conduct regarding his/her handling of personal information. (A.R. 16-17). Due to the uniqueness of the potential injuries and causative factors, the resulting remedy, if any, will be fashioned specifically for each class member. This individualized proof and remedy illustrates the lack of predominance of common issues and the impropriety of granting class status in this case. (A.R. 17). Accordingly, the Circuit Court properly ruled that individual issues related to damages, which cannot be ascertained on a class-wide scale using a set formula, and causation, will predominate over common issues.

**V. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN IT RULED THAT CLASS CERTIFICATION WAS INAPPROPRIATE BECAUSE PETITIONERS LACKED STANDING TO BRING SUIT.**

West Virginia courts apply the concept of "standing" to every civil case. The basis for such application is the West Virginia Constitution, which provides "[t]he court shall have appellate jurisdiction in civil cases at law where the matter in controversy, exclusive of interest and costs, is of greater value or amount than three hundred dollars unless such value or amount is increased by the Legislature." W. Va. Const., art. VIII, § 3. "Section 3 of Article VIII of the West Virginia Constitution refers to the word 'controversy' in discussing this Court's appellate jurisdiction." *Guido v. Guido*, 202 W.Va. 198, 202, 503 S.E.2d 511, 515 (1998). The applicability of standing extends

beyond appeals to the West Virginia Supreme Court of Appeals. *Id.* (“A party is entitled to prosecute a civil action as the real party in interest when he establishes an actual and justiciable interest in the subject matter of the litigation.”).

Under West Virginia law, standing encompasses three parts: 1) the party must have suffered an injury-in-fact, 2) there must be a causal connection linking the injury to some form of conduct; and 3) the injury must be redressible through the court. *Id.* An injury-in-fact is “the invasion of a legally protected interest, which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical.” *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 94-5, 576 S.E.2d 807, 821-22 (2002). A “particularized” injury is one that affects the plaintiff in a personal and individual way. *Men & Women Against Discrimination v. Family Prot. Servs. Bd.*, 229 W.Va. 55, 61-2, 725 S.E.2d 756, 762-63 (2011) (*per curiam*).

The Circuit Court correctly found that Petitioners do not have standing because they have not suffered any existing injury and only allege prospective injury. (A.R. 17). In their pleadings, discovery responses, Motion, and deposition testimony, Petitioners repeatedly emphasize that their only injuries are the future increased risk of identity theft. Brief of Petitioners at 18-23. Numerous courts have held that a security vulnerability, absent an actual malicious and unauthorized access or an attempted or actual theft of information, is not an injury-in-fact. *See Reilly* at 41-6; *Pisciotta v. Old Nat. Bancorp*, 499 F.3d 629, 635 (7th Cir. 2007); *Randolph v. ING Life Ins. and Annuity Co.*, 973 A.2d 702, 708 (D.C. 2009); *Paul v. Providence Health System—Oregon*, 351 Or. 587, 273 P.3d 106, 112 (2012); *Hammer v. Sam’s E., Inc.*, 12-CV-2618-CM, 2013 WL 3756573 (D. Kan. July 16, 2013).

Petitioners stated in their depositions that they believe they are at risk for future identity theft but acknowledged that they have suffered no present injury. They were unable to articulate when an actual injury may occur and conceded that with approximately two years having passed from the security incident without any actual or attempted identity theft, the likelihood of any such theft is low. Petitioners cannot state whether anyone actually accessed their information.<sup>4</sup> This type of bare speculation of an indeterminate, yet looming, amorphous and non-quantifiable risk of harm constitutes precisely the type of non-injury that precludes standing. *Clapper v. Amnesty Int'l USA*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1138, 1143 (2013). Accordingly, the Circuit Court properly found that Petitioners lack standing to bring this suit.

In order to bring a class action, a named plaintiff must have standing at the time of the filing of the complaint and certification of the class. *Scarborough v. Austin*, 968 F.2d 1211 (4th Cir. 1992) (citing *Tucker v. Phyfer*, 819 F.2d 1030, 1033 (11th Cir. 1987)); Cleckley, Davis & Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23[2]. This Court has recognized the applicability of standing to class action parties at the pre-certification stage of the lawsuit. *State ex rel. Erie Fire Ins. Co. v. Madden*, 204 W.Va. 606, 610, 515 S.E.2d 351, 355 (1998).

Petitioners mistakenly offer language from the *Rezulin* opinion to suggest that standing is not required for class certification. Pet'rs' Br. 19 ("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 . . ."). The circumstances of *Rezulin* are clearly distinguishable from the current case. Specifically, Respondents contend and the record

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<sup>4</sup> Even if alleging Invasion of Privacy, there must be evidence of some "invasion" of the Plaintiffs' protected interests. Here, after class certification discovery, the only proof was that Plaintiffs' data was accessible. There is no evidence that it was actually accessed.

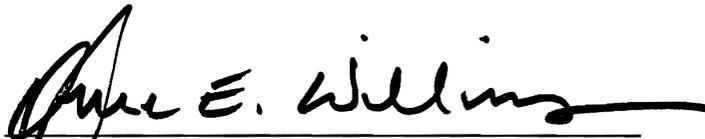
supports that *no members* of the class, including the Petitioners, have suffered an injury or loss sufficient for a finding of standing. Additionally, the *Rezulin* case deals significantly with medical monitoring as a legally redressible damage and its corresponding rationale, which, as previously stated, is not applicable in this case.

Similarly, to survive Respondents' challenge to standing, Petitioners cite to *R.K. v. St. Mary's Medical Center, Inc.* and claim that it stands for the proposition that standing automatically exists when a plaintiff asserts "claims of invasion of privacy, breach of confidentiality, and negligence based on the unauthorized access of private medical information." Pet'rs' Br. 22. Petitioners' reference to the *R.K.* case is also not persuasive. First, as Petitioners note, the *R.K.* case did not involve a challenge to plaintiff's standing. *Id.* Second, *R.K.* involved a specifically alleged improper access and disclosure of personal health information belonging to a single person. "Nevertheless, during R.K.'s hospitalization, St. Mary's employees improperly accessed his medical records, which contained his psychological information, and informed R.K.'s estranged wife and her divorce lawyer of R.K.'s hospitalization and disclosed to them other confidential medical and psychological information pertaining to R.K." *R.K. v. St. Mary's Med. Ctr., Inc.*, 229 W. Va. 712, 714, 735 S.E.2d 715, 717 (2012), *cert. denied*, 133 S. Ct. 1738, 185 L. Ed. 2d 788 (2013). Obviously, in the current matter, no evidence proves that the information of the class members was improperly accessed or disclosed to third parties. Accordingly, the *R.K.* decision is not only not controlling but not relevant to the issue of standing in this case. Therefore, Petitioners' reliance on *Rezulin* and *R.K.* is misplaced in the context of standing, and the Circuit Court's decision to deny class certification for a want of standing was not an abuse of discretion.

## CONCLUSION

The Circuit Court's decision denying class certification should be upheld, and this matter should be remanded for further proceedings consistent with this opinion.

**Charleston Area Medical Center, Inc.  
and CAMC Health Education and  
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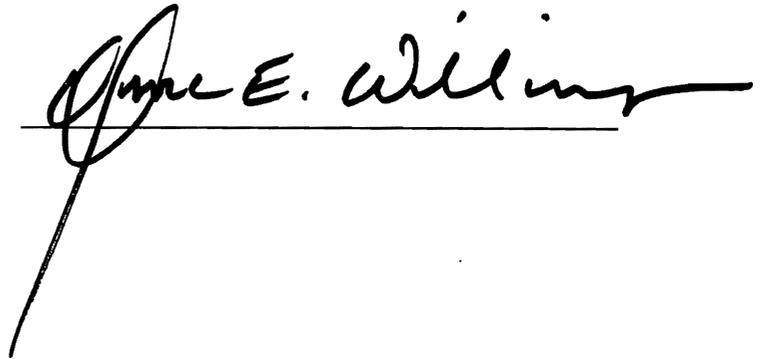
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## CERTIFICATE OF SERVICE

I hereby certify that on this 6<sup>th</sup> day of January, 2014, true and accurate copies of the foregoing **Respondents' Brief** were deposited in the U.S. Mail contained in postage-paid envelopes addressed to counsel for all other parties to this appeal as follows:

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A handwritten signature in black ink, appearing to read "Sean W. Cook", is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping underline that extends to the left and then curves back up to meet the end of the signature.