No. 20-0806

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE ex rel. RADIOLOGY, INC. and MARK JASON AKERS, M.D.,

Petitioners,

v.

THE HONORABLE PHILLIP M. STOWERS, JUDGE of the CIRCUIT COURT OF PUTNAM COUNTY and J.M.A.,

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION AND MOTION FOR STAY

From the Circuit Court of Putnam County, West Virginia
Civil Action No. CC-40-2019-C-75

Respectfully submitted by,

RADIOLOGY, INC. AND MARK JASON AKERS, M.D.,

By Counsel:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

CONSTITUTIONAL PROVISIONS:

OTHER AUTHORITIES:

QUESTIONS PRESENTED

I. Whether the trial court lacked subject matter jurisdiction by virtue of Plaintiff's failure to comply with the West Virginia Medical Professional Liability Act's pre-suit filing requirements.

II. Whether venue is proper in the Circuit Court of Putnam County.

III. Whether a cause of action exists under the West Virginia Consumer Credit and Protection Act for alleged unauthorized disclosure of medical information by a HIPAA-covered entity.

STATEMENT OF THE CASE

On or about April 10, 2019, Plaintiff, J.M.A. filed a Complaint in the Circuit Court of Putnam County, West Virginia naming as Defendants Marshall University Joan C. Edwards School of Medicine, Marshall University Board of Governors, (hereinafter "MUBOG"), Radiology, Inc., Cabell Huntington Hospital, Inc. ("CHH") and John Doe Doctor – Radiologist. (Appx. 8-23). J.M.A.'s Complaint alleged that he received a medical procedure from Cabell Huntington Hospital sometime around 2012, during which x-ray images were taken and that these x-rays were subsequently shown to his fellow classmates in early 2018, while he was a student at Marshall University School of Medicine, without his personal identifying information having been redacted from the radiology images. (Appx. 10, Complaint at ¶¶10, 13).

On or about May 10, 2019, Radiology, Inc. filed its *Motion to Dismiss and Answer of Radiology, Inc.* pursuant to Rule 12(b)(3) of the West Virginia Rules of Civil Procedure for lack of proper venue. (Appx. 24.). Defendant MUBOG filed a motion to dismiss pursuant to Rule 12(b)(3) for improper venue in accordance with West Virginia Code § 14-2-2a. (Appx. 1-5, Docket Sheet.) CHH filed a motion to dismiss pursuant to Rule 12(b)(1), 12(b)(3) and Rule 12(b)(6) of the West Virginia Rules of Civil Procedure for lack of subject matter jurisdiction, lack of venue and failure to state a claim upon which relief could be granted. (Appx. 1-5, Docket Sheet). These

motions were based, in part, upon J.M.A. instituting this civil action against the Defendants in Putnam County for events which occurred in Huntington, Cabell County, West Virginia. (Appx. 9; Complaint at ¶7). The Defendant corporations are all domestic corporations with their principal places of business located in Huntington, Cabell County, West Virginia. (Appx. 8-9, Complaint at ¶¶ 2, 3, 4 & 5). Radiology, Inc.'s motion to dismiss the Complaint argued that venue was not proper in accordance with West Virginia Code § 56-1-1, which requires that J.M.A.'s civil action be brought in the circuit court of the county where the Defendants reside or the cause of action arose. W.VA. CODE § 56-1-1(a). (Appx. 24) Defendants' motions to dismiss, including Radiology, Inc.'s Motion to Dismiss, were heard by the Honorable Joseph Reeder on June 19, 2019, during which it was discovered that Judge Reeder knew J.M.A.'s parents as they lived in the same neighborhood. (Appx. 1, Docket Sheet, Lines 13-14) Following the hearing J.M.A. advised the circuit court of his objection to Judge Reeder continuing to preside over the matter and the case was transferred to the Honorable Phillip M. Stowers. (Appx. 2, Docket Sheet line 38)

On or about October 23, 2019, *Plaintiff's Motion for Leave to Amend Complaint* was filed alleging that, since the filing of the Complaint, further investigation had revealed the identity of the John Doe Doctor as Mark Jason Akers, M.D., and further alleging that Dr. Akers was the "original doctor who took J.M.A.'s radiology films and used them as "teaching tools." (Appx. 57) A hearing on the Defendants' motions to dismiss and Plaintiff's motion for leave to amend his Complaint took place on or about November 7, 2019. (Appx. 2, Docket Sheet line 42.) Plaintiff's motion for leave was granted. The *Amended Complaint* named Mark Jason Akers, M.D., and additionally alleged that venue was proper in Putnam County because the Plaintiff resides in Putnam County and "the harm to the Plaintiff occurred in Putnam County." (Appx. 80, Amended Complaint at ¶ 7.) The *Amended Complaint* further alleged that venue was also proper pursuant

to West Virginia Code § 46A-5-107, the venue provision of the West Virginia Consumer Credit and Protection Act. (Appx. 80, Amended Complaint at ¶ 8).

A *Motion to Dismiss and Answer of Radiology, Inc. to Amended Complaint* was filed on or about December 20, 2019, wherein pursuant to Rule 12(b)(1), (3) and (6), Radiology, Inc. moved to dismiss J.M.A's *Amended Complaint* for lack of subject matter jurisdiction, lack of proper venue, and failure to state a claim upon which relief can be granted under the West Virginia Consumer Credit and Protection Act. (Appx. 115) *Defendant, Mark J. Akers, M.D.'s Motion to Dismiss and Memorandum of Law in Support Thereof* was filed contemporaneously therewith.[1] Radiology, Inc. and Dr. Akers moved to dismiss Plaintiff's *Amended Complaint* under Rule 12(b)(1) and (3) of the West Virginia Rules of Civil Procedure based upon Plaintiff's failure to comply with the mandatory pre-suit requirements of the West Virginia Medical Professional Liability Act ("MPLA"), West Virginia Code §55-7B-6 (2017) having deprived the circuit court of subject matter jurisdiction, improper venue, and further argued that the venue provision of the West Virginia Consumer Credit and Protection Act, West Virginia Code § 46A-5-107, was not applicable to an alleged violation of the Health Insurance Portability and Accountability Act (HIPAA) such as the claim being asserted by Plaintiff. (Appx. 94-114)

Following the filing of the *Amended Complaint*, the Circuit Court held a hearing on all Defendants' pending motions to dismiss, at which time the Court announced its intention to deny said motions. (Appx. 185-227, Hearing Transcript). By correspondence dated July 2, 2020, Plaintiff presented to counsel of record three (3) proposed orders denying Defendants' motions to dismiss, respectively, and advising that said orders would be filed with Court that day pursuant to

[1] *Defendant Mark J. Akers, M.D.'s Motion to Dismiss and Memorandum of Law in Support Thereof* was adopted and incorporated by reference within the *Motion to Dismiss and Answer of Radiology, Inc.* (Appx. 115)

West Virginia Trial Court Rule 24.01(c). (Appx. 161-167). By electronic correspondence also dated July 2, 2020, counsel for Radiology, Inc. and Dr. Akers advised Plaintiff of objections to the proposed *Order Denying Defendants Radiology, Inc. and Mark Jason Akers, M.D.'s Motion to Dismiss*. (Appx. 168) The parties attempted but were unable to meet and/or otherwise confer regarding the proposed Order and objections; however, some of Radiology, Inc. and Dr. Akers' suggested revisions were made and a revised proposed *Order Denying Defendants Radiology, Inc. and Mark Jason Akers, M.D.'s Motion to Dismiss* was filed with the Court by Plaintiff on Thursday, July 2, 2020. (Appx. 169-177).

On Tuesday, July 7, 2020, prior to the expiration of five (5) days in which to file objections to a proposed Order under West Virginia Trial Court Rule 24.01(c), the Circuit Court entered Plaintiff's *Order Denying Defendants Radiology, Inc. and Mark Jason Akers, M.D.'s Motion to Dismiss.* [2] (Appx. 176-184). It is from this Order that Petitioners seek the extraordinary relief of a writ of prohibition.

SUMMARY OF ARGUMENT

The Circuit Court committed clear error and exceeded its legitimate jurisdictional authority when it denied the Petitioners' Motion to Dismiss. Plaintiff's claims fall within the definition of "health care" under the West Virginia Medical Professional Liability Act ("MPLA"). The Plaintiff failed to comply with the mandatory pre-suit filing requirements under the MPLA necessary to assert an action alleging medical negligence against a health care provider thereby depriving the Circuit Court of subject matter jurisdiction. Additionally, the Circuit Court committed clear error

[2] "In computing any period of time prescribed or allowed by these rules, by the local rules of any court. . . the day of the act, event . . from which the designated period of time begins to run shall not be included. The last day of the period shall be included . . . "When the period of time prescribed or allowed is fewer than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule . . . "legal holiday" includes . . . Independence Day[.]" W.VA.R.CIV.P., Rule 6(a).

in finding that venue was proper in the Circuit Court of Putnam County when the Defendants are residents of Cabell County, the cause of action arose in and all alleged acts or omissions occurred in Cabell County, West Virginia. Additionally, the Circuit Court erred when it found venue proper in the Circuit Court of Putnam County pursuant to the West Virginia Consumer Credit and Protection Act ("WVCCPA"), venue provision, West Virginia Code §46A-6-104 as Plaintiff's *Amended Complaint* cannot sustain a cause of action under the WVCCPA.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this matter as the relevant dispositive legal issues in question have been authoritatively decided and the facts and legal arguments can be adequately presented in the brief such that oral argument would not significantly aide the decisional process.

ARGUMENT

This writ of prohibition lies as a matter of right because the Circuit Court of Putnam County did not have jurisdiction over the subject matter in controversy. W.VA. CODE § 53-1-1. Should this Court find that the Circuit Court of Putnam County had subject matter jurisdiction over the Plaintiff's suit, prohibition is nevertheless still appropriate as the Circuit Court exceeded its legitimate powers in finding venue was proper. *Id.*

I. Jurisdiction and Standard of Review

The Petitioners invoke this Court's original jurisdiction as set forth in Article VII, Section Three of the West Virginia Constitution with regard to proceedings in prohibition and West Virginia Code § 53-1-1. A "writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W.VA. CODE § 53-1-1. West Virginia law clearly prohibits the filing of a medical professional liability action against any

health care provider without first complying with the provisions of *West Virginia Code* § 55-7B-6(a). W. VA. CODE § 55-7B-6(a) (2017). "The pre-suit notice requirements contained in the West Virginia Medical Professional Liability Act are jurisdictional, and failure to provide such notice deprives a circuit court of subject matter jurisdiction." Syl. Pt. 2, State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth, 835 S.E.2d 579 (W.Va. 2019).

In the event that the Court would find that Plaintiff's claims are not subject to the West Virginia Medical Professional Liability Act, prohibition would still lie to prevent the Circuit Court from exceeding its legitimate powers in finding venue proper in the Circuit Court of Putnam County.

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, State ex rel. Hoover v. Berger, 483 S.E.2d 12 (W.Va. 1996). The Petitioners herein have no other adequate means to address the issue of improper venue and, if forced to litigate this action in an improper venue, will be prejudiced in a way that is not correctable on appeal. Consequently, "that the issue of venue may be properly addressed through a writ of prohibition is well-settled." State ex rel. Thornhill Group, Inc. v. King, 759 S.E.2d 795, 798 (W.Va. 2014); *accord*, State ex rel. Ferrell v. McGraw, 842 S.E.2d 445, 450 (W.Va. 2020) ("[I]ssues of venue are appropriately addressed in prohibition."); State ex rel. Riffle v. Ranson, 464 S.E.2d 763, 766

(W.Va. 1995) (Expressing a preference for resolving the issue of venue in an original action given the "inadequacy of the relief permitted by appeal.") " '[I]n the context of disputes over venue, . . . this Court has previously held that a writ of prohibition is an appropriate remedy "to resolve the issue of where venue for a civil action lies," because "the issue of venue [has] the potential of placing a litigant at an unwarranted disadvantage in a pending action and [] relief by appeal would be inadequate."'" State ex rel. Ford Motor Co. v. Nibert, 773 S.E.2d 1, 4 (W.Va. 2015), quoting State ex rel. Mylan, Inc. v. Zakaib, 713 S.E.2d 356 (W.Va. 2011), quoting State ex rel. Huffman v. Stephens, 526 S.E.2d 23, 25 (W.Va. 1999).

II. Plaintiff's Claims Are Governed By the Medical Professional Liability Act.

"[T]he determination of whether a cause of action falls within the MPLA is based upon the factual circumstances giving rise to the cause of action, not the type of claim asserted." Blankenship v. Ethicon, 656 S.E.2d 451, 453-54 (W.Va. 2007). The *Amended Complaint* asserts causes of action for breach of confidentiality; unjust enrichment; negligence *per se;* breach of contract (express and implied); reckless indifference; negligent supervision; breach of covenant of good faith and fair dealing; invasion of privacy; negligence; and violations of the West Virginia Consumer Credit and Protection Act. (Appx. 79-93, Amended Complaint.) However all of these causes of action are based upon the operative facts that the Plaintiff's radiology images, which were taken in April of 2011,[3] as part of medical diagnosis and treatment provided to the Plaintiff by the Defendant healthcare providers, were improperly disclosed to fellow classmates while the Plaintiff was a student at Marshall University Joan C. Edwards School of Medicine in April of 2015. (Appx. 81,

[3] The *Amended Complaint* asserts that subject x-rays were taken "some time in or around 2012"; exhibit "A" and "B" of *Motion to Dismiss Amended Complaint by Defendant, Cabell Huntington Hospital, Inc., and Memorandum of Law in Support Thereof*, suggest the x-rays were taken in April of 2011. This factual discrepancy is immaterial for purposes of this Writ and/or the Plaintiff's claims.

Amended Complaint at ¶ 11). Plaintiff's failure to plead these claims as being governed by the West Virginia Medical Professional Liability Act, W.VA. CODE § 55-7B-1, *et seq.*, "does not preclude application of the Act. Where the alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of "health care" as defined by W.VA. CODE § 55-7B-2(e) (2006), the Act applies regardless of how the claims have been pled." Syl Pt. 4, Blankenship v. Ethicon, Inc., 656 S.E.2d 451 (W.Va. 2007).

Although this Court has previously held in the case of *R.K. v. St. Mary's Medical Center, Inc.*, 229 W.Va. 712 (W.Va. 2012) that the West Virginia Medical Professional Liability Act did not apply to state law claims arising from the unauthorized disclosure by a healthcare provider of confidential medical and psychological information, the Court's analysis was based heavily upon the language of West Virginia Code § 55-7B-2(e) (2006) and the statutory definition of "health care" which existed at that time. R.K. at 726. When *R.K. v. St. Mary's Medical Center, Inc.* was decided, the MPLA defined "health care" as "any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient during the patient's medical care, treatment or confinement." W.VA. CODE § 55-7B-2(e) (2006) (Supp. 2007). Likewise the holding in *Manor Care, Inc. v. Douglas*, that negligence-based claims predicated on corporate budgeting and staffing decisions do not fall under the MPLA, was handed down in 2014, based upon the language of the MPLA as it existed in 2006. Manor Care v. Douglas, 763 S.E.2d 73 (W.Va. 2014). The MPLA was thereafter amended by the Legislature to apply to "[t]he process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers." W.VA. CODE § 55-7B-2(e)(3) [2015].

Similarly, the holding in *Boggs v. Cambden-Clark Hospital, Corp.*, 609 W.Va. 917 (W.Va. 2014), finding that the MPLA "does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability" was also based upon a prior, more narrowly defined, version of the MPLA. Boggs at 662. The MPLA's definition of "medical professional liability" was, however, amended in 2015 to redress this issue so as to specifically include "other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services." W.VA. CODE § 55-7B-2(i) (2015).

The current and governing definition of "health care" under the MPLA has been greatly expanded and currently encompasses:

> (1) Any act, service or treatment provided under, pursuant to or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment;
>
> (2) Any act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to or on behalf of a patient during the patient's medical care, treatment or confinement, including, but not limited to, staffing, medical transport, custodial care or basic care, infection control, positioning, hydration, nutrition and similar patient services; and
>
> (3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers.

W. VA. CODE § 55-7B-2(e) (2017).

Thus, the issue before the Court is whether the creation, collection and maintenance of the confidentiality of medical records now falls within the expanded definition of "health care" as set forth in the MPLA. The answer is "yes." Medical records are most certainly created, collected

and maintained "in furtherance" of a physician or health care facilities "plan of care." W. VA. CODE § 55-7B-2(e)(1) (2017). "Creating and maintaining accurate and complete medical records are a fundamental part of professional practice, and are integral to the delivery of high quality medical care to patients in this state." West Virginia Board of Medicine, *Medical Records Retention Guidelines*.[4] The creation, maintenance and security of medical records are inherent activities to the practice of medicine which cannot be divorced from the delivery of quality healthcare. *See e.g.*, Healy v. West Virginia Bd. of Medicine, 506 S.E.2d 89, 92 (W.Va. 1998) ("We are persuaded that a physician's duty to a patient cannot but encompass his affirmative obligation to maintain the integrity, accuracy, truth and reliability of the patient's medical record. His obligation in this regard is no less compelling than his duties respecting diagnosis and treatment of the patient since the medical community must, of necessity, be able to rely on those records in the continuing and future care of that patient.") (internal citation omitted.)

By all accounts the earliest translations of the Hippocratic Oath, written in the 5th century B.C., contain a provision relating to patient privacy and the confidentiality of the doctor-patient relationship. "And whatsoever I shall see or hear in the course of my profession, as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets." HIPPOCRATES OF COS, *The Oath*, Loeb Classical Library, pg. 299; *accord*, Edelstein, Ludwig, The Hippocratic Oath. Text, Translation and Interpretation, United States, Johns Hopkins Press, 1964. Modern versions of this oath, which has persisted among medical physicians for over 1500 years, still contain a vow with regard to

[4] https://scontent-iad3-1.xx.fbcdn.net/v/t1.0-0/p180x540/13516261_1225616077449286_8063151321013958462_n.jpg?_nc_cat=102&_nc_sid=8bfeb9&_nc_ohc=Xgx1i3vQTYgAX-5RsEa&_nc_ht=scontent-iad3-1.xx&tp=6&oh=4a7658cfb5f68095af59464020ff9a9d&oe=5F735F7E

patient confidentiality: "I will respect the privacy of my patient, for their problems are not disclosed to me that the world may know." Shield, Jr., M.D., FACP, FACR, William C., Medical Definition of Hippocratic Oath, Medicinenet.com, Medical Dictionary, retrieved September 2020. Patient confidentiality and medical records cannot and should not be surgically dissected from the practice of medicine and the implementation of health care. It is the "fiduciary relationship between a patient and a physician which prohibits the physician from divulging confidential information he has acquired while attending to a patient." Morris v. Consolidation Coal Co., 446 S.E.2d 648, 656 (W.Va. 1994). "[W]hen a physician wrongfully discloses information, the right which is violated is the patient's right to have the information kept confidential." Id. This fiduciary relationship between doctor and patient and the common law cause of action for violation of a patient's right to have medical information kept confidential cannot exist independently of the delivery of "health care" and necessarily falls within the confines of the MPLA as currently defined by the West Virginia Legislature.

Accordingly, any potential action against Radiology, Inc. and/or Mark J. Akers, M.D. in this matter arising from the creation and maintenance of healthcare records is governed by the West Virginia Medical Professional Liability Act ("MPLA"). W. VA. CODE § 55-7B-1 *et seq.*[5] Consistent with the revised and more expansive language of the statue, the Supreme Court of Appeals of West Virginia has recently reiterated that the MPLA "defines 'medical professional liability' broadly: "'Medical professional liability'" is "any liability for damages resulting from the death or injury of a person for *any tort or breach of contract* based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to

[5] Factual discovery yet to be conducted in this manner will show that the medical records at issue were in fact not collected, maintained and/or secured by these Petitioners, but rather were maintained and appropriately secured by Defendant Cabell Huntington Hospital and, thereafter, permissibly accessed by medical students of Defendant Marshall University Board of Governors for educational purposes.

a patient.'" State ex. Rel. Primecare Medical of West Virginia, Inc. v. Faircloth, 835 S.E.2d 579, 587 (W.Va. 2019) (quoting) W. VA. CODE § 55-7B-2(i)(2017) (emphasis added); see also Blankenship v. Ethicon, Inc., 656 S.E.2d 451 (W. Va. 2007). It also includes "other claims that may be *contemporaneous to or related to* the alleged tort or breach of contract or otherwise provided, all *in the context of rendering health care services*." Id. at 586. (emphasis in original).

Plaintiff's "failure to plead a claim as governed by the MPLA does not preclude application of the Act[;] . . . the Act applies regardless of how the claims have been pled." Blankenship, 656 S.E.2d 453, at syl. pt. 4. Nevertheless, it is undisputed that the subject radiology images were taken as part of and in conjunction with medical treatment provided to the Plaintiff by the Defendant healthcare providers. (Appx. 81, Amended Complaint at ¶ 11).

Additionally, Plaintiff's *Amended Complaint* clearly asserts that that the healthcare services for which he paid the Defendants, as a patient, included the service of "safeguarding of private information" which he now alleges the Defendants failed to properly perform. (Appx. 81, Amended Complaint at ¶ 13). By the terms of the *Amended Complaint*, Plaintiff is asserting that the Defendants failed to provide to him healthcare services "part of which included the service of safeguarding any and all private information" collected by them during his treatment. (Appx. 81, Amended Complaint at ¶12). Accordingly, Plaintiff's claims against these Petitioners, sound in medical professional liability for Plaintiff's purported injuries arise from a "tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient" and are governed by the West Virginia Medical Professional Liability Act. W. VA. CODE § 55-7B-2(i)(2017).

The Plaintiff argued to the lower court that the MPLA should not apply because providing a screening certificate would be impossible by virtue of the inability to find a medical professional

who devotes more than 60 percent of his or her medical practice to data security protocols. (Appx. 202, Hearing Transcript pg. 18). However, Plaintiff's argument in this regard was a complete red herring. The Petitioners in this matter are a radiologist, who acts as an associate professor in connection with a Defendant medical school, and his employer, a professional organization of radiologists. (Appx.80, Amended Complaint). The standard of care in this matter would be that of a licensed radiologist actively practicing while also engaged in teaching activities. *See* W.VA. CODE § 55-7B-3. The Petitioners herein have no such expertise in medical data security protocols, nor are any such data security protocols relevant to the facts of this case. There was no data security breach or outside hacker involved in the present case. (Appx. 79-93, Amended Complaint.) The Plaintiff's claims involve alleged unauthorized showing / disclosure of an x-ray image to medical students by a teaching radiologist and are much more akin to the disclosure of photographs in *Mays v. Marshall University Bd. of Governors*, 2015 WL6181508 (W.Va. 2015), than the posting of names, medical information, contact details, social security numbers and dates of birth on the internet as took place in *Tabata v. Charleston Area Medical Center*, 759 S.E.2d 459 (W.Va. 2014). The applicable standard of care at issue is that of a teaching radiologist, subject to the provisions of HIPAA, and not a medical data security officer.[6] Nevertheless, a Plaintiff's alleged difficulty in locating an expert witness to satisfy the provisions of the MPLA is not a proper legal justification for a circuit court to refuse to properly apply and enforce the MPLA.

[6] Of note, many courts have held that HIPAA may inform the appropriate standard of care in cases alleging wrongful disclosure of patient health information. *See e.g.*, R.K. v. St. Mary's Medical Center, Inc., 735 S.E.2d 715, 723 (W.Va. 2012) (internal citations omitted). However, the HIPAA allows "a covered entity" "to use or disclosed protected health information for . . . health care operations" 45 CRF § 506(a). The definition of "health care operations" includes "conducting training programs in which students, trainees, or practitioners in areas of health care learn under supervision to practice or improve their skills as health care providers[.]" 45 C.F.R. § 164.501.

A. The Circuit Court Lacked Subject Matter Jurisdiction as a Consequence of Plaintiff's Failure to Comply with the West Virginia Medical Professional Liability Act.

"[N]o person may file a medical professional liability action against any health care provider without complying with the provisions of [West Virginia Code § 55-7B-6.]" W.VA. CODE § 55-7B-6(a) (2017)[7].

> "Medical professional liability" means any liability for damages resulting from death or injury of a person *for any tort or breach of contract based on health care services rendered*, or which should have been rendered, by a health care provider or health care facility to a patient. *It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services.*

W. VA. CODE § 55-7B-2(i) (2017) (emphasis added.)

It is undisputed that the Plaintiff failed to satisfy the pre-suit requirements of the MPLA as set forth in *West Virginia Code* § 55-7B-6. "[T]he purposes of requiring a pre-suit notice of claim and screening certificate of merit are (1) to prevent the making and filing of frivolous medical malpractice claims and lawsuits; and (2) to promote the pre-suit resolution of non-frivolous medical malpractice claims. The requirement of a pre-suit notice of claim and screening certificate of merit is not intended to restrict or deny citizens' access to the courts." Syl. Pt. 2, Hinchman v. Gillette, 618 S.E.2d 387 (W.Va. 2005). "The pre-suit notice requirements contained in the West Virginia Medical Professional Liability Act are jurisdictional, and failure to provide such notice deprives a circuit court of subject matter jurisdiction." Syl. Pt. 2, State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth, 835 S.E.2d 579 (W.Va. 2019). "[A] circuit court has no

[7] There is no dispute that Defendants Radiology, Inc., Mark J. Akers, M.D. and Cabell Huntington Hospital are "health care facilities" and a "health care provider" as defined by West Virginia Code § 55-7B-2(f) and (g). In the present case, Petitioner Mark J. Akers, M.D., as a licensed physician, is a qualifying "health care provider" as that phrase is defined by the MPLA. W. VA. CODE § 55-7B-2(g) (2017).

authority to suspend the MPLA's pre-suit notice requirements and allow a claimant to serve notice after the claimant has filed suit. To do so would amount to a judicial repeal of W. Va. Code § 55-7B-6." Primecare, at 589 (citing *Motto v. CSX Transp., Inc.*, 220 W. Va. 412, 419, 647 S.E.2d 848, 855 (2007) (refusing "[t]o accept the circuit court's opinion that it ha[d] discretion to waive this mandatory [pre-suit] notice [to state agencies]" because it "would require us, in effect, to judicially repeal W. Va. Code § 55–17–3(a)")).

Plaintiff has never served Defendants Mark J. Akers, M.D. or Radiology, Inc. with a Notice of Claim and a screening certificate of merit or, in the alternative, a written explanation as to why such a screening certificate was not required as mandated by the MPLA. Consequently, Plaintiff's claims against these Petitioners should have been dismissed for want of subject matter jurisdiction. Failure to comply with the MPLA pre-filing requirements required dismissal in accordance with Rule 12(h)(3) of the West Virginia Rules of Civil Procedure which "clearly states that a circuit court must dismiss an action "'[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter[.]'" PrimeCare at 589 (quoting W.V.R.CIV.P., Rule 12(h)(3)).

III. Venue Is Not Proper In The Circuit Court Of Putnam County.

The Defendant corporations are all domestic corporations with their principal places of business located in Huntington, Cabell County, West Virginia; Dr. Akers similarly lives and works in Cabell County. (Appx. 79-80, Amended Complaint at ¶¶ 2, 3, 4, 5 & 6). Venue is governed by West Virginia Code § 56-1-1, which provides, that venue is appropriate in the county where any of the Defendants reside or the cause of action arose; with regard to domestic corporations such as these Defendants, venue is proper in the county of their principle office or where the chief officer resides. W. VA. CODE § 56-1-1 (2018) (emphasis added). All of the corporate Defendants to this

action are domestic corporations which have their principal offices in the State of West Virginia. (Appx. 79-80, Amended Complaint at ¶¶ 2, 3, 4 & 5). West Virginia's general venue statute allows for the analysis of "wherein [a corporation] does business" only if the principal corporate office is not located in this State and its chief officer does not reside within this State. W.VA. CODE § 56-1-1(a)(2). These Petitioners are not challenging personal jurisdiction; "they are objecting to being improperly required to defend against claims in the wrong *county* of this state on grounds of venue." State ex rel. Airsquid Ventures, Inc. v. Hummel, 778 S.E.2d 591, 596 (W.Va. 2015) (emphasis in original). Consequently, "due process concerns" relating to "personal jurisdiction that underlie the issue of minimum contacts are not implicated in this case." Id.

Furthermore, Plaintiff's choice of venue is of no import as the Plaintiff may properly assert venue in the county in which he or she resides ***only if*** the Defendant is a "corporation or other corporate entity organized under the laws of this state which has it principal office located outside of this state and which has no office or place of business within this state[.]" W.VA. CODE § 56-1-1(a)(2). "[P]laintiff's choice [of forum] is no longer the dominant factor that it was prior to [the] adoption of [W.VA. CODE § 56-1-1]." State ex rel. Airsquid Ventures, Inc. v. Hummel, 778 S.E.2d 591, 594 (W.Va. 2015), quoting State ex rel. Thornhill Group, Inc. v. King, 759 S.E.2d 795 (W.Va. 2014) (under West Virginia Code § 56-1-1, the place of the Plaintiff's residency has no independent bearing on where a cause of action may be maintained.") (*quoting* State ex rel. Smith v. Maynard, 454 S.E.2d 46, 52 (W.Va. 1994)). "[T]he residence of a Plaintiff, without more, is not a valid ground of venue in the absence of a statute or other principal of law authorizing it." Crawford v. Carson, 78 S.E.2d 268, 272 (W.Va. 1953).

Not a single Defendant, corporate or individual, has residency in Putnam County; the Defendant corporations are domestic corporations with principal offices located in Cabell County

and the individual Defendant lives and works in Cabell County. . (Appx. 79-80, Amended Complaint at ¶¶ 2, 3, 4, 5 & 6). Furthermore, the cause of action did not arise in Putnam County.[8] The duty of confidentiality arose in the context of the patient-physician relationship which was created at Cabell Huntington Hospital in Cabell County. (Appx. 81, Amended Complaint at ¶11.) The x-ray image at issue was collected and maintained in Cabell County. The alleged "breach", if one occurred, took place in Cabell County when the image was viewed by medical students of the Marshall University Joan C. Edwards School of Medicine. (Appx. 81, Amended Complaint at ¶ 13).

In an effort to negate these facts, Plaintiff attempts to argue that the *damage* to him occurred in Putnam County because he received a correspondence notifying him of the alleged unauthorized disclosure of his health information in Putnam County. (Appx. 80, Amended Complaint at ¶ 7.) However, Plaintiff also alleges that he was a student of Marshall University Joan C. Edwards School of Medicine (in Cabell County) at the time of the alleged improper disclosure as the information was "viewed by his classmates." (Appx. 81-82, Amended Complaint at 17.) Consequently, the Plaintiff's status as a medical student at the time of the alleged unauthorized disclosure necessarily suggests any purported injury would have occurred, at least in part, in Cabell County. Nevertheless, this Court has long held that receipt of such correspondence is insufficient to establish proper venue. *See e.g.*, Savarese v. Allstate, 672 S.E.2d 255 (W.Va. 2008) (Communications with insured's attorney in Ohio county were insufficient to satisfy venue requirement under West Virginia Code §56-1-1(c) that "all or a substantial part of the acts or omissions giving rise to the claim" occur in West Virginia where Plaintiff was not a West Virginia

[8] Plaintiff's original Complaint alleged that the cause of action arose in Cabell County. *See* Plaintiff's Complaint at ¶ 7 ("this cause of action arose in Cabell County, West Virginia.").

resident and Defendant did not voluntarily direct communications into a jurisdiction in an effort to establish a business relationship or fraudulently induce action in that jurisdiction.) As set forth in Plaintiff's original Complaint, the cause of action arose in Cabell County and therefore venue is not appropriate in Putnam County under West Virginia §56-1-1 (2018). Moreover, as Marshall University Board of Governors is identified as a Defendant herein, West Virginia Code Ann. § 14-2-2a (2018) establishes the proper venue of this matter to be in Cabell County, West Virginia.

IV. Plaintiff Cannot State A Claim Under The West Virginia Consumer Credit And Protection Act And Therefore The Trial Court Committed Error In Finding Venue Was Proper Under W.Va. Code §46A-5-107

Plaintiff alleges that by virtue of his merely attempting to assert a claim against these Defendants for purported violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA"), the venue provision of the WVCCP, West Virginia Code §46A-5-107, is applicable to his action and confers venue on the Circuit Court of Putnam County. West Virginia Code §46A-5-107, *Venue*, provides:

> Any civil action or other proceeding brought by a consumer to recover actual damages or a penalty, or both, from [a] creditor or a debt collector, founded upon illegal, fraudulent or unconscionable conduct, or prohibited debt collection practice, or both, shall be brought either in the circuit court of the county in which the plaint has his or her legal residence at the time of the civil action . . . or in the circuit court of the county in which the creditor or debt collector has its principal place of business . . . [.] With respect to causes of action arising under this chapter, the venue provisions of this section shall be exclusive of and shall supersede the venue provisions of any other West Virginia statute or rule.

W.VA. CODE §46A-5-107. It stands to reason however that in order to invoke the venue provision of the WVCCA, Plaintiff must actually present a *viable* claim under the Act. Otherwise, nothing would prevent every Plaintiff from simply alleging a violation of the WVCCA in any lawsuit involving any type of goods or services so as to give venue in the forum of their choosing,

The analysis of a motion to dismiss for lack of venue permits a Court to move beyond the pleadings in order to assess whether venue is proper.[9] Constitution Park of West Virginia v. Jezioro, 2009 WL 10710235 (N.D.W.Va. 2009) (*quoting* Sucampo Pharms., Inc. v. Astellas Pharma, Inc., 471 F.3d 544, 549-50 (4th Cir. 2006) ("If the Defendant's motion to dismiss is based upon Rule 12(b)(3), improper venue "'the pleadings are not accepted as true, as would be required under a Rule 12(b)(6) analysis.'")). Consequently, the Court may proceed to analyze the Plaintiff's *Amended Complaint* with regard to application of the WVCCPA and, to the extent its venue analysis necessarily involves determination under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure as to whether a claim for relief has been stated, the Court is not bound to accept as true the legal conclusions in the *Amended Complaint*, even when they are couched as factual allegations. *See e.g.*, Ashcroft v. Iqubal, 556 U.S. 662, 678 (2009)("[T]he tenant that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."); *accord*, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

A. West Virginia General Consumer Protection Law Does Not Apply To The Alleged Disclosure Of Health Information By HIPAA-Covered Entities.

With regard to these Petitioners, Plaintiff alleges that he was a consumer/patient who paid for services which were not adequately provided. (Appx. 92, Amended Complaint at ¶102.) More specifically, Plaintiff alleges that "the money which the Plaintiff paid to the Defendants to protect their *(sic)* sensitive information was wasted when the Defendants allowed the Plaintiff's sensitive information to be sent throughout his campus." (Appx. 92, Amended Complaint at ¶ 103.) Plaintiff further asserts the allegations set forth in his Complaint are "deceptive act[s] or practice[s]

[9] The court is therefore permitted to look beyond the pleadings and take notice of the fact that the Petitioners, Radiology, Inc. and Mark Jason Akers, M.D., are HIPAA- covered entities under the Health Insurance Portability and Accountability Act (HIPAA). *See* 45 C.F.R. § 160.103.

in violation of the [*sic*] W.VA. CODE §46A-6-104 & §46A-6-102." (Appx. 93, Amended Complaint at ¶ 104). This preceding statement is not an allegation of fact, but rather a conclusion of law which is required no deference from the Court. Nevertheless, even if all of the *facts* alleged in the Plaintiff's *Amended Complaint* are true, Plaintiff cannot state a claim for relief under the West Virginia Consumer Credit Protection Act generally, and cannot make a claim for violation of West Virginia §46A-6-104 and §46A-6-102 in particular.

Both of the provisions relied upon by the Plaintiff are found in Article 6 of the WVCCP. Article 6, *General Consumer Protection*, of Section 46A, sets for the following Legislative declarations and statutory construction:

> The Legislature hereby declares that the purpose of this article is to complement the body of federal law governing unfair competition and unfair deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the Legislature that, in construing this article, the courts be guided by the policies of the Federal Trade Commission and interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal trade Commission Act (15 U.S.C. § 45(a)(1)), as from time to time amended and to the various other federal statutes dealing with the same or similar matters. To this end, this article shall be liberally construed so that its beneficial purposes may be served.

W.VA. CODE § 46A-6-101. The West Virginia Legislature has expressly stated that the court may look to the "policies of the Federal Trade Commission" and the construction/interpretation of the Federal Trade Commission Act as to the scope, meaning and application of Section 5(a)(1) when interpreting the *General Consumer Protection* provisions of the WVCCPA. Id.

Section 5(a)(1), as it is commonly known, of the Federal Trade Commission Act states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful." 15 U.S.C. §45(a)(1). There can be no doubt as to the wisdom of the West Virginia Legislature's mandate that this federal law and the policies of the Federal Trade Commission should be used in the interpretation of the

General Consumer Protection provisions of the WVCCP as the language of West Virginia Code § 46A-6-104 is nearly identical in form and wholly indistinguishable in substance: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." W.VA. CODE § 46A-6-104. For this reason, it is imperative to look to the policies of the Federal Trade Commission to determine whether West Virginia's *General Consumer Protection* law would apply to regulate consumer claims arising from the alleged disclosure of sensitive health information by HIPAA-covered entities such as these Petitioners.

In analyzing the policies of the Federal Trade Commission (FTC) and Section 5, it is important to note that the United States Congress did not grant authority to the FTC to regulate patient/health information data security matters as they relate to HIPAA-covered entities. Rather, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health Act (HITECH) which not only meticulously set forth patient-information data-security standards, but also designate the U.S. Department of Health and Human Services (HHS), not the Federal Trade Commission, as the enforcement agency for those standards. *See e.g.*, Pub. L. 111-5 § 13001(a), 123 STAT. 230.[10] Importantly, the DHHS is the exclusive administrative and enforcement authority with regard to HIPAA-covered entities under these laws. *See e.g.* 42 U.S.C. § 1320d-2(d)(1)("Security standards for health information" stating that the "Secretary shall adopt security standards. . .") In fact, in the context of HIPAA and HITECH the Federal Trade Commission is mentioned only in relation to a joint study directed to be completed by the Secretary (of DHHS) "in consultation with the

[10] "There is established within the Department of Health and Human Services an Office of the National Coordinator for Health Information Technology (referred to in this section as the 'Office'). The Office shall be headed by a National Coordinator who shall be appointed by the Secretary and shall report directly to the Secretary." Id.

Federal Trade Commission" "on privacy and security requirements ***for entities that are not covered entities*** or businesses associates[.]" Pub. L. 111-5 § 13422(b)(1), 123 Stat. 226, 277 (2009); *see also*, 42 U.S.C. § 17937, *Temporary breach notification requirement for vendors of personal health records and other non-HIPAA covered entities.* The study was to report on recommended requirements relating to security and privacy which should be applied to non-covered entities.[11] *See* Pub. L. 111-5 § 13422(b)(1)(A), 123 Stat. 226, 277-278 (2009). The joint study was to thereafter make "a determination of which Federal government agency is best equipped to enforce such requirements recommended to be applied[.]" Pub. L. 111-5 § 13422(b)(1)(B), 123 Stat. 226, 278.

In short, under the guidance of the relevant federal regulations, HIPAA-covered entities are governed by regulations promulgated by the Secretary of the U.S. Department of Health and Human Services. 45 C.F.R. § 164.408. Non-covered entities are to be governed by the regulations promulgated by the Federal Trade Commission. *See* 16 C.F.R. § 318 (noting that regulation "does not apply to HIPAA-covered entities, or to any other entity to the extent that it engages in activities as a business associate of a HIPAA-covered entity."). The Federal Trade Commission makes clear that the Federal Trade Commission Health Breach Notification Rule

> applies only to health information that is not secured through technologies specified by the Department of Health and Human Resources and does not apply to businesses or organizations covered by the Health Insurance Portability & Accountability Act (HIPAA). In case of a security breach, entities covered by HIPAA must comply with HHS' breach notification rule.[12]

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[11] Vendors of personal health records; entities that offer products or services through the website of a vendor of personal health records; non-covered entities that offer products or services through the websites of covered entities; non-covered entities that access or send information in a personal health record; and third-party service providers used by such vendors. Pub. L. 111-5 § 13422(b)(1)(A), 123 Stat. 226, 277-278 (2009).

[12] https://www.ftc.gov/tips-advice/business-center/guidance/health-breach-notification-rule

Consequently, it would be contrary to federal regulations, which are deemed instructive herein by the West Virginia Legislature, to apply the *General Consumer Protection* statutes to an alleged disclosure of private health information by a HIPAA-covered entity.

B. West Virginia Code §46A-6-104 Is Ambiguous And Must Be Construed Against Application To The Claims In This Matter.

The provision of the West Virginia Consumer Credit and Protection Act under which Plaintiff asserts his claim, West Virginia Code §46A-6-104, also found in the *General Consumer Protection* article of the WVCCPA has been recognized by the Supreme Court of Appeals of West Virginia as being "among the most ambiguous provisions of the consumer protection act." State ex rel. McGraw v. Bear, Sterns & Co., Inc., 618 S.E.2d 582, 585-6 (W.Va. 2005) (*citing* McFoy v. Amerigas, Inc., 295 S.E.2d 16, 19 (W.Va. 1982) (West Virginia Code §46A-6-104 "is among the most broadly drawn provision contained in the Consumer Credit and Protection Act and it is also among the most ambiguous.")). Consequently, in order to determine whether the West Virginia Consumer Credit and Protection Act ("WVCCPA") and West Virginia Code §46A-6-104 are applicable to the facts as alleged in Plaintiff's *Amended Complaint*, the statute must be construed. *See* Syl. Pt. 1, Farley v. Buckalew, 414 S.E.2d 454 (W.Va. 1992) ("A statute that is ambiguous must be construed before it can be applied.") Construction using the policies of the Federal Trade Commission, as required by West Virginia Code § 46A-6-101, clearly shows that Plaintiff's claims against these Petitioners cannot be maintained under the WVCCPA.

"Interpreting a statute presents a purely legal question." Syl. Pt. 1, in part, West Virginia Human Rights Com'n v. Garretson, 468 S.E.2d 733 (W.Va. 1996). "The primary rule of statute construction is to ascertain and give effect to the intention of the Legislature." Syl. Pt. 8, Vest v. Cobb, 76 S.E.2d 885 (W.Va. 1953). Thus, the initial step in statutory construction is to ascertain the legislative intent. Syl Pt. 1, Ohio County Com'n v. Manchin, 301 S.E.2d 183 (W.Va. 1983).

"Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. Pt. 3, Smith v. State Workmen's Comp. Comm'r., 219 S.E.2d 361 (W.Va. 1975). "In ascertaining legislative intent, effect must be given to each party of the statue and to the statue as a whole so as to accomplish the general purpose of the legislation." Id. at Syl. Pt. 2.

C. The WVCCPA Was Not Intended Or Designed To Be Applied To Claims Of Improper Disclosure Of Protected Health Information By HIPAA-Covered Entities.

A complete reading of the West Virginia Consumer Credit and Protection Act reveals that is was not intended to regulate the implementation of healthcare services and certainly was not intended to regulate an alleged disclosure of protected health information by a HIPAA-covered entity. West Virginia Code §46A-1-104 governs the *application* of the West Virginia Consumer Credit and Protection Act:

> (1) ***This chapter applies if a consumer***, who is a resident of this state, ***is induced to enter into a consumer credit sale made pursuant to a revolving charge account***, to enter into a revolving charge account, ***to enter into a consumer loan*** made pursuant to a revolving loan account, ***or*** to enter into ***a consumer lease***, by personal or ***by*** mail ***solicitation***, and the goods, services or proceeds are delivered to the consumer in this state, and payment on such account is to be made from this state.
>
> (2) With respect to consumer credit sales or consumer loans consummated in another state, a creditor may not collect in an action brought in this state a sales finance charge or loan finance charge in excess of that permitted by this chapter.

W.VA. CODE §46A-1-104 (emphasis added). "Under this general statement of applicability, three elements need to be satisfied for the CCPA to apply: 1) a creditor 2) induces a consumer 3) to enter into a consumer credit sale, a consumer loan, or a consumer lease." State ex rel. Morrisey v. Cooper Beech Townhome Communities Twenty-Six, LLC, 806 S.E.2d 172, 178 (W.Va. 2017); *accord*, Bennett v. Skyline Corp., 52 F.Supp.3d 796 (N.D.W.V. 2014) (The elements of a cause of action under the West Virginia Consumer Credit and Protection Act (WVVVPA) include unlawful

conduct by the seller, an ascertainable loss on the part of the consumer, and a causal connection between the ascertainable loss and the conduct forming the basis of the lawsuit.)

> A private cause of action brought pursuant to the provisions of West Virginia Code §46A-6-106(a)(2005) of the West Virginia Consumer Credit and Protection Act must allege: (1) unlawful conduct by a seller; (2) an ascertainable loss on the party of the consumer; and (3) proof of a causal connection between the alleged unlawful conduct and the consumer's ascertainable loss. Where the alleged deceptive conduct or practice involves affirmative misrepresentations, reliance on such misrepresentations must be proven in order to satisfy the causal connection.

Syl Pt. 5, White v. Wyeth, 705 S.E.2d 828 (W.Va. 2010).

In the present case, Plaintiff's factual allegations regarding disclosure of private medical information have absolutely no relationship to the essential elements of a cause of action under the WVCCPA. Much like an insurance policy that does not provide coverage because the risk is foreign to the risk insured, the essence of Plaintiff's claims and the wrongs alleged in his *Amended Complaint* are not of the nature of wrongs the Legislature sought to remedy through enactment of the WVCCPA. While all the protections afforded by the WVCCPA do not necessarily involve consumer credit, the WVCCPA is simply not applicable to every sale of every good or every service occurring in the State of West Virginia. *See e.g.,* Syl. Pt. 6, White v. Wyeth, 705 S.E.2d 828 (W.Va. 2010) ("The private cause of action afforded consumers under West Virginia Code §46A-6-106(a)(2005) does not extend to prescription drug purchases."); Wamsley v. LifeNet Transplant Services, Inc., 2011 WL 5520245 (S.D.W.Va. 2011) (unreported) (granting Defendant's motion to dismiss under Rule 12(b)(6) because Plaintiff's claim against supplier and distributor of human tissue and transplant services was not cognizable under the West Virginia Consumer Credit Protection Act.); Syl. Pt. 2, State ex rel. Morrissey v. Copper Beech Townhome Communities Twenty-Six, LLC, 806 S.E.2d 172 (W.Va. 2017) ("The debt collection provisions, W.VA. CODE §§46A-2-122 to 129a [1996], and deceptive practices provisions, W.VA. CODE §§

46A-6-101 to 106 [2015], both contained in the West Virginia Consumer Credit and Protection Act, do not apply to and regulate the fees a landlord may charge to a tenant pursuant to a lease of residential real property.").

In addition, there is clear evidence of the Legislative intent that the WVCCPA, and it individual articles, be limited in application to certain commercial transactions as illustrated in its express grant of a private cause of action as follows:

> (a) Subject to subsections (b) and (c) of this section, any person ***who purchases*** or leases ***goods or services and thereby suffers an ascertainable loss of money or property***, real or personal, ***as a result of the use*** or employment by another person ***of a method, act or practice prohibited or declared to be unlawful by*** the provisions of ***this article may bring an action*** in the circuit court of the county in which the seller or lessor resides or has his or her principal place of business or is doing business, or as provided for in sections one and two, article one, chapter fifty-six of this code, ***to recover actual damages*** or $200, whichever is greater. The count may, in its discretion, provide such equitable relief it considers necessary or proper. Any party to an action for damages under this subsection has the right to demand a jury trial.
>
> (b) ***No award of damages*** in an action pursuant to subsection (a) ***may be made without proof that the person seeking damages suffered an actual out-of-pocket loss*** that was ***proximately caused by a violation*** of this article. If a person seeking to recover damages for a violation of this article alleges that an affirmative misrepresentation is the basis for his or her claim then he or she must provide that the deceptive act or practice caused him or her to enter into the transaction that resulted in his or her damages. If a person seeking to recover damages for a violation of this article alleges that the concealment or omission of information is the basis for his or her claim, then he or she must prove that the person's loss was proximately caused by the concealment or omission.
>
> (c) Notwithstanding the provisions of subsections (a) and (b) of this section, ***no action***, counterclaim, cross-claim or third-party claim ***may be brought*** pursuant to the provisions of this section ***until the person has informed the seller*** or lessor ***in writing*** and by certified mail, return receipt requested, ***of the alleged violation and provided the seller*** or lessor ***twenty days*** from receipt of the notice of violation but ten days in the case a cause of action has already been filed ***to make a cure offer***: *Provided*, That the person shall have ten days from receipt of the cure offer to accept the cure offer or it is deemed refused and withdrawn.

W.VA. CODE §46A-6-106(a) – (c) (emphasis added).[13] The statutory grant of the private cause of action under the WVCCPA requires that a Plaintiff show: (1) the purchase of goods or services; (2) an ascertainable loss of money or property established by proof of an out-of-pocket loss; (3) proximately caused by a prohibited practice; (4) following an opportunity by the seller to cure. Id.

Assuming as true the facts alleged in Plaintiff's *Amended Complaint*, Plaintiff cannot satisfy any of the prerequisites for filing a cause of action under the WVCCPA as mandated by the plain language of West Virginia Code §46A-6-106. As an initial matter: Plaintiff did not purchase the medical services about which he now complains; he has not suffered, nor has he alleged that he has suffered an out-of-pocket loss; there is no proximate cause between any alleged act prohibited by the WVCCPA and the generalized injury alleged by the Plaintiff; and there is no possible way to demand or effectuate a cure offer in this case as required by the statute.

Furthermore, West Virginia Code §46A-6-104 provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." West Virginia Code §46A-6-102, defines the scope of "unfair methods of competition and unfair or deceptive acts or practices" as:

> (A) Passing off goods or services as those of another;
>
> (B) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;
>
> (C) Causing the likelihood of confusion or misunderstanding as to affiliation, connection or association with or certification by another;
>
> (D) Using deceptive representations or designations of geographic origin in connection with goods or services;

[13] It should also be noted that the statute expressly creating a private cause of action under the WVCCPA provides that the cause of action be brought "in the circuit court of the county in which the seller or lessor resides or has his or her principal place of business or is doing business, or as provided for in sections one and two, article one, chapter fifty-six of this code." W.VA. CODE §46A-6-106.

(E) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or qualities that they do not have ...;

(F) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

(G) Representing that good or services are of a particular standard, quality or grade, or that goods are of a particular style or model if they are of another;

(H) Disparaging the goods, services or business of another by false or misleading representation of fact;

(I) Advertising goods or services with intent not to sell them as advertised;

(J) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(K) Making false or misleading statements of fact concerning the reasons for, existence of or *amounts of price reductions*;

(L) Engaging in other conduct which similarly creates a likelihood of confusion or of misunderstanding;

(M) The act, use or employment by any person of any deception, *fraud*, false pretense, false promise or misrepresentation, or the *concealment*, suppression or omission of any *material fact* with intent that others rely upon such concealment, suppression or omission, in connection *with the sale or advertisement of any goods or services*, whether or not any person has in fact been misled, deceived or damaged thereby;

(N) Advertising ... distributing ... or causing to be advertised ... distributed or broadcast in any manner any statement or representation with regard to the *sale of goods* or the *extension of consumer credit* ... which is false, misleading or deceptive ...;

(O) Representing that any person won a prize. . .; or

(P) Violating any provision or requirement of article six-b of this chapter.

W.VA. CODE §46A-6-102(7). Despite sixteen separate illustrations of "unfair methods of competition and unfair or deceptive acts or practices" to choose from, Plaintiff does not, and cannot, identify the subsection of West Virginia Code §46A-6-102 which has purportedly been violated by these Petitioners, or any other Defendant, with regard to the alleged disclosure of his name and associated radiology image. It is not surprising that the Plaintiff cannot articulate the

Defendants' alleged "unfair or deceptive acts or practices" for the simple fact that the WVCCPA was not intended to govern the alleged improper disclosure of private health information by a HIPAA-covered entity. W.VA. CODE §46A-1-104.

D. Data Security Breach Provisions Of The WVCCA Are Inapplicable To Plaintiff's Claims As Alleged In The Amended Complaint.

The WVCCPA's inapplicability to Plaintiff's factual allegations as set forth in his Amended Complaint is further bolstered by its provisions which do address consumer identity protections as expressly set forth within Article 2A of the WVCCPA, *Breach of Security of Consumer Information. See*, W.VA. CODE §§ 46A-2A-101-105. The West Virginia Legislature, when faced with the opportunity to address the disclosure of personal protected information within the context of the WVCCPA, chose to limit the application of these provisions to "personal information" the meaning of which requires not only the individuals

> first name or first initial and last name linked to any one or more of the following data elements . . . (A) Social security number; (B) Driver's license number. . . or (C) Financial account number, or credit card, or debt card number in combination with any required security code, access code or password that would permit access to a resident's financial accounts.

W.VA. CODE § 46A-2A-101(6). Additionally, the Legislature required that an established "[b]reach of the security of a system" must include "unauthorized access and acquisition . . that causes the individual or entity to reasonably believe that the breach of security has caused or will cause identity theft or other fraud[.]" W.VA. CODE § 46A-2A-101(1). Furthermore, it is only "the Attorney General [that] shall have exclusive authority to bring action" as a result of the violation of the notice provisions proscribed in Article 2A. W.VA. CODE § 46A-2A-104(b).

Plaintiff's claims that his name was disclosed to his fellow medical school classmates in connection with an x-ray image of his person do not fall within the parameters of the plain language

of the only provisions of the WVCCPA which address disclosure of protected personal information.

It is undisputed that in order for the venue provision of the WVCCPA to dictate the venue of this case, Plaintiff must have a legally recognized, viable claim under the WVCCPA against these Defendants. Yet, even assuming all of the **factual** allegations in the *Amended Complaint* are true (as opposed to legal conclusions), the facts set forth do not establish a colorable claim for relief under the WVCCPA. The West Virginia legislature simply did not intend the WVCCPA to regulate the disclosure of private health information by a healthcare provider. *See e.g.*, W.VA. CODE § 46A-6-101; State ex rel. McGraw v. Scott Runyon Pontiac-Buick, 461 S.E.2d 516, 523 (1995) ("The purpose of the WVCCPA is to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action."); Foster v. Memorial Hospital Ass'n of Charleston, 219 S.E.2d 916, 919 (W.Va. 1975) ("Concepts of purchase and sale cannot separately be attached to the healing materials – such as medicines, drugs or, indeed, blood – supplied by the hospital for a price as part of the medical services is offers.") (internal citations omitted).

STAY OF PROCEEDINGS

In the interest of judicial economy and conservation of resources, the Petitioners move this Court to stay the trial court proceedings until the issues set forth in this Writ are ruled upon by this Court.

CONCLUSION

The Circuit Court of Putnam County committed clear error and exceeded its legitimate jurisdictional authority when it denied the Petitioners' Motion to Dismiss. Plaintiff's claims fall

within the definition of "health care" under the West Virginia Medical Professional Liability Act ("MPLA") such that the Plaintiff's failure to comply with the mandatory pre-suit filing requirements under the MPLA deprived the Circuit Court of subject matter jurisdiction. Additionally, the circuit court committed clear error in finding that venue was proper in the Circuit Court of Putnam County when the Defendants are residents of Cabell County, the cause of action arose in and all alleged acts or omissions occurred in Cabell County, West Virginia. Finally, the circuit court erred when it found venue proper in the Circuit Court of Putnam County under the West Virginia Consumer Credit and Protection Act's ("WVCCPA") venue provision, West Virginia Code §46A-6-104, as Plaintiff's *Amended Complaint* does not state a viable cause of action under the WVCCP. Absent application of the venue provision of the WVCCPA to grant venue in Putnam County, the Plaintiff's Amended Complaint must be dismissed. The exclusive authority for discretionary transfer or change of venue is West Virginia Code § 56-1-1(b), which provides for a transfer only when "a civil action or proceeding is brought in the county wherein the cause of action arose." Riffle v. Ranson, 464 S.E.2d 763, 765 (W. Va. 1995). Such is not the case here and Plaintiff's Amended Complaint must properly be dismissed.

RADIOLOGY, INC. AND MARK JASON AKERS, M.C.,
By Counsel:

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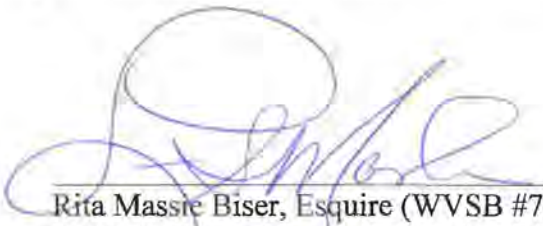
VERIFICATION

The undersigned counsel for the Petitioners does hereby verify, as required by West Virginia Code § 53-1-3, that the facts and arguments contained in the foregoing Verified Petition for Writ of Prohibition are true and correct to the best of my knowledge and belief and that the Petitioner is entitled to the relief requested herein.



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CERTIFICATE OF SERVICE

The undersigned counsel for Radiology, Inc. and Mark J. Akers, M.D., hereby certifies that a true and exact copy of the foregoing **VERIFIED PETITION FOR WRIT OF PROHIBITION AND MOTION TO STAY** and **PETITIONER'S APPENDIX RE: VERIFIED PETITION FOR WRIT OF PROHIBITION AND MOTION TO STAY** was served upon counsel of record for the respondent J.M.A. and upon the respondent Honorable Phillip M. Stowers, this 15th day of October, 2020, by depositing the same in the United States mail, first-class postage pre-paid, addressed as follows:

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Honorable Phillip M. Stowers, Judge
Circuit Court of Putnam County
Putnam County Courthouse
12093 Winfield Road
Winfield, West Virginia 25701

Copies the foregoing **VERIFIED PETITION FOR WRIT OF PROHIBITION AND MOTION TO STAY** were provided to other counsel of record as follows:

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