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

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE ex rel. MARSHALL UNIVERSITY JOAN C. EDWARDS SCHOOL OF MEDICINE; MARSHALL UNIVERSITY BOARD OF GOVERNORS,

Petitioner,

v. **Writ No.** 20-0815

THE HONORABLE PHILLIP M. STOWERS and J.M.A.,

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION/MANDAMUS AND MOTION FOR EMERGENCY STAY

Respectfully submitted by,

Marshall University Joan C. Edwards School of Medicine, Marshall University Board of Governors.,

By Counsel:

Michael A. Meadows (WVSB #10100)
Campbell Woods, PLLC
1002 3rd Avenue
Huntington, West Virginia 25701
Telephone: (304) 529-2391
Facsimile: (304) 529-1832
mmeadows@campbellwoods.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

West Virginia Code Provisions

West Virginia Trial Court Rules

West Virginia Rules of Appellate Procedure

QUESTIONS PRESENTED

I. Whether the West Virginia Consumer Credit and Protection Act apply to the relationship between a student and a state institution of higher learning.

II. Whether the venue provision of the West Virginia Consumer Credit and Protection Act supersedes W.Va. Code § 14-2-2a in a claim brought by a student against a state institution of higher learning.

III. Whether in the underlying proceedings an Order Denying Marshall's Motion to Dismiss should have been entered with extensive language regarding the cause of action arising in Putnam County despite no mention of where the cause of action arose in the Plaintiff's Amended Complaint, evidence, or arguments against the motion to dismiss.

IV. Whether this Court should entertain the instant Petition for a Writ of Prohibition.

V. Whether this Court should stay the underlying proceedings pending the final resolution of this Petition for a Writ of Prohibition.

STATEMENT OF THE CASE

On April 10, 2019 J.M.A. filed a lawsuit against Marshall University Joan C. Edwards School of Medicine; Marshall University Board of Governors (hereinafter referred to as "Marshall")[1], Radiology, Inc. (hereinafter referred to as "Radiology"), Cabell Huntington Hospital, Inc. (hereinafter referred to "Cabell"), and John Doe Doctor – Radiologist (hereinafter referred to as "Doctor") in the Circuit Court of Putnam County. The case alleges in a single count a violation of the West Virginia Consumer Code [2]. The case was assigned to Judge Joseph Reeder. (A.R. p. 1). Marshall filed a "Motion of Defendants Marshall University Joan C. Edwards School

[1] Marshall University Joan C. Edwards School of Medicine is not a separate legal entity from Marshall University, which is under the direction of Marshall University Board of Governors. Therefore, Marshall University Joan C. Edwards School of Medicine and the Marshall University Board of Governors are one in the same.

[2] There are a total of ten (10) counts in the complaint, but for purposes of this Writ of Prohibition, the West Virginia Consumer Code violations count is specified.

of Medicine and Marshall University Board of Governors to Dismiss Complaint for Improper Venue and Memorandum of Law in Support" on May 9, 2019 (A.R. p. 18) and noticed the same for argument on June 19, 2019 before Judge Reeder [3] (A.R. p. 27). The Plaintiff filed a "Plaintiff's Response in Opposition to Defendant Marshall University Joan C. Edwards School of Medicine and Marshall University Board of Governors Motion to Dismiss Complaint for Improper Venue" on June 14, 2019 (A.R. p. 30). Marshall filed a "Reply to Plaintiff's Response in Opposition to Defendant Marshall University Joan C. Edwards School of Medicine and Marshall University Board of Governors' Motion to Dismiss Complaint for Improper Venue" on June 18, 2019 (A.R. p. 38). Upon receiving the aforementioned response by Marshall, the Plaintiff filed a "Plaintiff's Surreply in Response to Untimely Filed Brief" on June 18, 2019 (A.R. p. 47).

The motion to dismiss initially filed by the Defendant Marshall was based upon W.Va. Code § 14-2-2a as the applicable venue statute since the Defendant Marshall is a state institution of higher education and venue "shall be brought in the court of any county wherein the cause of action arose" and the Plaintiff plead in paragraph seven (7) of the Complaint that "this cause of action arose in Cabell County, West Virginia." The matter came on for a hearing on June 19, 2019 before Judge Reeder and after hearing substantially complete arguments from all parties and prior to ruling on the merits of the motions to dismiss, the Plaintiff submitted a letter to Judge Reeder which disclosed the name and address of the Plaintiff, whom Judge Reeder recognized as his neighbor. Based upon this disclosure the Plaintiff asked Judge Reeder to recuse himself and he did so by Order entered on August 8, 2019. (A.R. p. 65) The case was then transferred to Judge Stowers.

[3] Defendants Cabell and Radiology also filed motions to dismiss the complaint which were argued on June 19, 2019.

Marshall's motion to dismiss was then noticed for a hearing on November 7, 2019 before Judge Stowers (A.R. p. 67). On or about October 23, 2019, Plaintiff filed a "Motion for Leave to Amend Complaint" which was heard on November 7, 2019 (A.R. p. 70). Although there was no order entered from this hearing, Judge Stowers declined to dismiss the action based on venue arguments and allowed the plaintiff to amend their complaint. An Amended Complaint was deemed filed on or about November 26, 2019 (A.R. p. 93). It should be noted that the main difference in the amended complaint aside from naming the doctor in the matter was to change paragraph seven (7) of the amended complaint to state, "the harm to the Plaintiff occurred in Putnam County, West Virginia" and adding that venue is proper in Putnam County pursuant to W.Va. Code § 46A-5-107 (the West Virginia Consumer Code), "as the Plaintiff resides in Putnam County, West Virginia". There is no mention of where the "cause of action arose" contained in the Amended Complaint, however, paragraph one-hundred and three (103) of the Amended Complaint states that the harm occurred when "the Defendants allowed the Plaintiff's sensitive information to be sent throughout his campus".

Marshall filed a subsequent "Motion of Defendants Marshall University Joan C. Edwards School of Medicine and Marshall University Board of Governors Motion to Dismiss Amended Complaint for Improper Venue and Memorandum of Law in Support" on January 7, 2019 (A.R. p. 108) [4]. Plaintiff filed a "Plaintiff's Response in Opposition to Defendant Marshall University Joan C. Edwards School of Medicine and Marshall University Board of Governors Motion to Dismiss the Amended Complaint" on February 18, 2020 (A.R. p. 119). After several delays, including Covid-19, the motions to dismiss were heard via Skype on June 29, 2020. A transcript of the hearing from June 29, 2020 is included in the Appendix (A.R. p. 124). Plaintiff submitted a

[4] Cabell and Radiology also filed motions to dismiss the amended complaint.

proposed "Order Denying Defendants Marshall University Joan C. Edwards School of Medicine and Marshall University Board of Governor's Motions to Dismiss" pursuant to West Virginia Trial Court Rule 24.01(c) on July 2, 2020 at 4:28 p.m. (A.R. p. 167) [5]. Prior to the expiration on the five (5) days to note objections and the above "Order Denying Defendants Marshall University Joan C. Edwards School of Medicine and Marshall University Board of Governor's Motions to Dismiss" was entered on July 7, 2020 at 1:18 p.m. (A.R. p. 172) [6]. Subsequent to the orders denying the motions to dismiss, all Defendants have filed answers, a scheduling order has been entered (A.R. p. 177), the Defendants have responded to initial overly burdensome discovery requests, and the parties have disclosed fact witnesses.

The instant Petition is filed to seek a Writ of Prohibition/Mandamus finding and concluding that the Circuit Court has exceeded its legitimate powers by denying the motion to dismiss, despite law clearly entitling Marshall to a dismissal to all of Plaintiff's claims as venue is not proper in Putnam County. Marshall respectfully requests that this Court issue a writ prohibiting the Circuit Court from denying the motion to dismiss, ordering that the lower tribunal reverse its ruling, and holding that the WVCCPA venue statute does not apply to Marshall as well as find that W.Va. § 14-2-2a definitively controls venue for state institutions of higher education. Additionally, Marshall requests an order staying the lower proceedings pending a final ruling on this Petition.

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[5] July 3, 2020 was a Friday and a state court holiday.

[6] The "Order Denying Defendants Marshall University Joan C. Edwards School of Medicine and Marshall University Board of Governors' Motion to Dismiss incorrectly states in paragraph seven (7) that the "Plaintiff's Complaint alleges that the cause of action, the harm caused to the Plaintiff, occurred in Putnam County, West Virginia. The "cause of action" language previously used in the original Complaint was removed from the Amended Complaint and there is no mention of where the cause of action arose in the Amended Complaint. In fact, paragraph 103 of the Amended Complaint states that the WVCCPA claim occurred when the "Defendants allowed the Plaintiff's sensitive information to be sent **throughout his** campus" (emphasis added). The Order denying the motion to dismiss contains not less than five (5) references to the cause of action arising in Putnam County, yet the Plaintiff's Amended Complaint does not allege the cause of action arose in Putnam County even one time.

SUMMARY OF ARGUMENT

The WVCCPA does not apply to the consumer transaction that is the subject of the civil action, as the relationship between the Plaintiff and Defendant, Marshall is not covered under the WVCCPA. The WVCCPA, on its face, does not apply to this transaction. Thus, the Defendants' have failed to allege any cause of action under the WVCCPA. Venue of actions involving state institutions of higher education shall be brought in the circuit court of any county wherein the cause of action arose.

A Writ of Prohibition for extraordinary relief is appropriate in this case. The Circuit Court's ruling is clearly erroneous based upon the plain language of the W.Va. Code § 14-2-2a and the WVCCPA as well as the other arguments presented in Marshall's Motion to Dismiss. Marshall is irreparably and unduly prejudiced by this ruling, as it has transformed a straightforward case into lengthy, burdensome, and legally baseless litigation under the WVCCPA and application of the venue provision contained in W.Va. Code § 14-2-2a. Moreover, there is no way other than by extraordinary writ for Marshall to have relief from that prejudice before fully litigating these frivolous claims, at which point the damage will be done. The precedent which the Circuit Court's ruling would set is that any case involving a state institution of higher education may fall under the WVCCPA if a count is simply added to an otherwise unrelated claim. This precedent could trigger an avalanche of new litigation in West Virginia, forcing state institutions of higher education to defend themselves in every nook and cranny of this state where a student resides unless this Court definitively rules that the WVCCPA does not apply in this case and that W.Va. Code § 14-2-2a controls the venue in this matter.

An emergency stay should be granted in this case because allowing the Plaintiff's frivolous and legally unsound claims to proceed creates an undue hardship on Marshall by forcing it to

litigate claims that should have been dismissed because of improper venue. Additionally, without a stay, extensive litigation will proceed on what should have been a straightforward negligence suit, which will waste significant judicial resources.

This Petition will first address each substantive issue incorrectly ruled on by the Circuit Court and will then address, in more depth, why this Court should entertain this Petition for a Writ of Prohibition.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 19 and 20, this petition requires oral argument as it (1) involves assignments of error in the application of settled law; (2) involves a claim asserting an unsustainable exercise of discretion where the law governing that discretion is settled; (3) involves issues of first impression; and (4) involves issues of fundamental public importance.

ARGUMENT

I. Standard of Law.

The Supreme Court of Appeals of West Virginia will entertain a petition for an extraordinary writ when it finds that a lower tribunal exceeded its legitimate powers. Syl. Pt. 3, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1997). When determining whether a lower Court has exceeded its legitimate powers the following factors are considered:

> whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Id. at Syl. Pt. 4.

II. Plaintiff's claim failed to state a claim under the WVCCPA because the relationship between the Plaintiff and the Defendant, Marshall University does not apply under the WVCCPA, therefore the venue provisions of the WVCCPA should not govern.

West Virginia Code § 46A-5-107 is not the proper venue code for this action. The Plaintiff is attempting to circumvent the proper venue of Cabell County by attempting to make the square peg of this action fit into the round hole of the WVCCPA. The section reads:

> Any civil action or other proceeding brought by a consumer to recover actual damages or a penalty, or both, from 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 plaintiff has his or her legal residence at the time of the civil action, the circuit court of the county in which the plaintiff last resided in the state of West Virginia, or in the circuit court of the county in which the creditor or debt collector has its principal place of business or, if the creditor or debt collector is an individual, in the circuit court of the county of his or her legal residence. 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.

The Plaintiff asserts that this venue section applies because of a violation of the WVCCPA. In Count X of the Amended Complaint, the Plaintiff pleads the violation of the West Virginia Consumer Code as the "taking of the Plaintiff's money and failing to provide the service being paid for is a deceptive act or practice in violation of the West Virginia Code §§ 46A-6-104 & 46A-6-102. The definition clearly does not apply to the Defendant Marshall.

The West Virginia Supreme Court has discussed the limited application of West Virginia Code §§ 46A-6-101-106 in the *State ex rel. Morrisey v. Copper Beech Townhome Cmtys. Twenty-Six, LLC*, 806 S.E.2d 172 (W. Va. 2017). The *Copper Beech* Court states that the WVCCPA "is a comprehensive attempt on the part of the West Virginia legislature to extend protection to consumers and persons who obtain credit in state." *Id. at 175, see also, Harper v. Jackson Hewitt, Inc.*, 227 W.Va. 142, 151, 706 S.E.2d 63, 72 (2010). At no point did Marshall extend credit to the

Plaintiff to otherwise fit into the statutory definition of what a debtor creditor relationship is contemplated as under the WVCCPA.

The West Virginia Supreme Court has found that West Virginia Code § 46A-6-104 is ambiguous, *see McFoy v. Amerigas, Inc.*, 170 W.Va. 526, 529, 295 S.E.2d 16, 19 (W. Va. 1982) (stating that " 46A-6-104 [1974] is among the most broadly drawn provisions contained in the Consumer Credit and Protection Act and it is also among the most ambiguous"). When a statute is ambiguous, it must be construed before it can be applied. The West Virginia Supreme Court has construed the ambiguity contained in § 46A-6-104 to limit, rather than expand the breadth of the WVCCPA. The West Virginia Supreme Court has gone as far as to hold that even something as contractually driven as a landlord tenant relationship does not apply to the WVCCPA. *State ex rel. Morrisey v. Copper Beech Townhome Cmtys. Twenty-Six, LLC*, 806 S.E.2d 172 (W. Va. 2017). Additionally, this Court has even taken up the applicability of the WVCCPA and its relation to state institutions of higher education previously. In *Mountain State Coll. V. Holsinger,* 230 W.Va. 678, 684, 742 S.E.2d 94, 100 (W.Va. 2013), this Court held that "this Court concludes that the enrollment agreement between respondents and the college does not constitute a consumer credit sale."

It is clear, given the nature of the Plaintiff's relationship to Marshall University and the West Virginia Supreme Court's reluctance to stretch the application of the West Virginia Consumer Protection Act, that the WVCCPA does not apply in this case. The Plaintiff is attempting to use the WVCCPA as a vehicle to force Marshall University and the other Defendants to defend this action where no venue properly exists.

III. Venue of actions in which Marshall is named as a Defendant is governed by W. Va. Code § 14-2-2a(a).

Venue of actions in which MUBOG is named as a Defendant is governed by W. Va. Code § 14-2-2a(a):

> (a) Notwithstanding the provisions of § 14-2-2 of this code, any civil action in which the **governing board of any state institution of higher education, any state institution of higher education**, or any department or office of any of those entities, or any officer, employee, agent, intern or resident of any of those entities, acting within the scope of his or her employment, is made a party defendant, **shall be brought in the circuit court of any county wherein the cause of action arose,** unless otherwise agreed by the parties.

[Emphasis supplied].[7] It is not alleged that the cause of action arose in Putnam County; in fact, the Plaintiff chose to remove the language that the "cause of action arose in Cabell County" after amending the complaint. Instead, the Plaintiff's Amended Complaint uses the specifically worded "that the harm to the Plaintiff occurred in Putnam County". It is clear from the facts directly stated and the initial complaint and the facts listed in the Amended Complaint that the cause of action arose in Cabell County. In fact, despite the Plaintiff's attempt to scrub any mention of which could be used to argue the cause of action arose in Cabell County from the Amended Complaint, the Plaintiff states in paragraph one-hundred and three of the Amended Complaint that "the money which the Plaintiff paid to the Defendants to protect their sensitive information was wasted when the Defendants allowed the Plaintiff's sensitive information to be sent throughout his campus." As the Plaintiff was a student at the medical school at Marshall University, his campus was in Huntington, Cabell County, West Virginia. Taking the allegations as pled in the Amended Complaint as true, the cause of action would have arisen in Cabell County, West Virginia.

While § 14-2-2a is clear by its terms – governing boards of any state institution of higher education, and any state institution of higher education **must** be brought where the cause of action

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[7] The exceptions for specific kinds of actions stated in W. Va. Code § 14-2-2a(b) and § 14-2-2a(c) are not applicable to the pending action. It is clear from the Amended Complaint that the cause of action arose in Cabell County.

arose – all possible doubt is eliminated by examining the context in which § 14-2-2a was enacted and subsequently amended[8]. The enactment of § 14-2-2a was precipitated by the Supreme Court of Appeals' opinion in *King v. Heffernan*, 214 W. Va. 835 (2003). In that case, the Court held that since the state's liability insurance coverage was implicated, venue could be established either under § 56-1-1, the general venue section, or § 14-2-2, the venue section then applicable to all governmental agencies.[9]

The decision in *King v. Heffernan* was released on 3 December 2003. During its next regular session, the legislature enacted § 14-2-2a. 2004 W. Va. Laws Ch. 3 (H.B. 3097). In its preamble the legislature described the purpose of the new section:

> West Virginia University, Marshall University – Venue for Suits and Actions AN ACT to amend the code of West Virginia, 1931, as amended, by adding thereto a new section, designated § 14-2-2a, relating to **prescribing proper venue in suits involving West Virginia University or Marshall University**.

[Emphasis supplied]. As stated in the prior section itself and reiterated in the preamble, § 14-2-2a alone determined where suits involving Marshall University may be brought.

In 2018, 14-2-2a was amended to limit venue as to *all* state universities and colleges to the county where the cause of action arose. That amendment, which does not affect this civil action, was apparently in response to another Supreme Court of Appeals decision, *State ex rel. Fairmont State Univ. Bd. of Governors v. Wilson*, 806 S.E.2d 794 (W. Va. 2017). In *Fairmont State* the Court held that, because § 14-2-2a limited venue only as to WVU and Marshall University, venue of a civil action against Fairmont State lay in Kanawha County.

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[8] W. Va. Code § 14-2-2a was amended by 2018 WV Acts (H.B. 4013). The amendment does not affect this civil action.

[9] MUBOG is a state agency. *King v. Heffernan, supra.*

The *State ex rel. Fairmont State Univ. Bd. of Governors v. Wilson* decision was filed on 1 November 2017. During its next regular session, the legislature passed 2018 W. Va. Acts (H.B. 4013) which amended § 14-2-2a to its current form "providing that any civil action in which the governing board of any state institution of higher education or any state institution of higher education is made a party defendant **shall** be brought in the circuit court of the county wherein the cause of action arose, unless otherwise agreed upon". [Emphasis supplied]. In this case, the Plaintiff was a student at Marshall in Cabell County and any alleged disclosure of sensitive information would have taken place in Cabell County, hence the cause of action would have arisen in Cabell County.

As previously stated, the Plaintiff has contended that venue in Putman County is proper relying upon the venue provision of the WVCCPA, W. Va. Code § 46a-5-107, as it is the alleged residence of the Plaintiff. As argued above, this Court has previously found that the WVCCPA is ambiguous and therefore must be construed. In construing the WVCCPA, this Court has chosen to limit rather expand the application of the WVCCPA, *see McFoy v. Amerigas, Inc.*, 170 W.Va. 526, 529, 295 S.E.2d 16, 19 (W. Va. 1982). As the WVCCPA has been found to be ambiguous and not specific, the specific venue provisions articulated in § 14-2-2a should control venue. Rules of statutory construction require that the specific statute, § 14-2-2a, be given precedence over the general or ambiguously worded WVCCPA, including the WVCCPA venue code, W. Va. Code § 46a-5-107; *Newark Ins. Co. v. Brown,* syl. pt. 3, 218 W. Va. 346, 624 S.E2d 783 (2005):

> When faced with a choice between two statutes, one of which is couched in general terms and the other of which specifically speaks to the matter at hand, preference generally is accorded to the specific statute. "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syl. pt. 1, *UMWA by Trumka v. Kingdon,* 174 W.Va. 330, 325 S.E.2d 120 (1984). *Accord* Syl. pt. 6, *Carvey v. West Virginia State Bd. of Educ.,* 206 W.Va. 720, 527 S.E.2d 831 (1999). *See also Bowers v. Wurzburg,* 205 W.Va. 450, 462, 519 S.E.2d

> 148, 160 (1999)("Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails." (citation omitted)); *Daily Gazette Co., Inc. v. Caryl,* 181 W.Va. 42, 45, 380 S.E.2d 209, 212 (1989) ("The rules of statutory construction require that a specific statute will control over a general statute[.]" (citations omitted)).

Id., at 351-352, brackets in original.

Second, rules of statutory construction accord the word "shall" a mandatory connotation:

> We repeatedly have held that "[i]t is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Syl. pt. 1, *Nelson v. West Virginia Pub. Employees Ins. Bd.,* 171 W.Va. 445, 300 S.E.2d 86 (1982). *Accord* Syl. pt. 6, *State v. Myers,* 216 W.Va. 120, 602 S.E.2d 796 (2004), *cert. denied,* 543 U.S. 1075, 125 S.Ct. 925, 160 L.Ed.2d 813 (2005). *See also State ex rel. Brooks v. Zakaib,* 214 W.Va. 253, 264–65, 588 S.E.2d 418, 429–30 (2003) ("Ordinarily, the word 'shall' has a mandatory, directory connotation." (citations omitted)); *State v. Allen,* 208 W.Va. 144, 153, 539 S.E.2d 87, 96 (1999) ("Generally, 'shall' commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary." (citations omitted)).

Id., at 353. Thus, the prescription in § 14-2-2a is mandatory – suits against the governing board of any state institution of higher education or any state institution of higher education, may be brought ***only*** where the cause of action arose.

IV. The Order entered denying the motion to dismiss should be vacated as it does not correctly reflect the allegations and arguments asserted by the Plaintiff and was entered by the Court contrary to WV Trial Court Rule 24.01.

The Order which was prematurely entered denying the motion to dismiss makes numerous references to where the cause of action arose despite that the amended complaint makes no mention of where the cause of action arose nor do the arguments of the Plaintiff in response to the motions to dismiss. The order was submitted by the Plaintiff and entered prior to the expiration of the five (5) day period before the objections of the Defendant MUBOG could be filed with the judge pursuant to W.Va. Trial Ct. Rule 24.01. It is clear from the four corners of the Amended Complaint that any alleged cause of action would have arisen in Cabell county, not Putnam county. The action

complained in Count X of the Amended Complaint of is the alleged disclosure of the sensitive information to a third party, not the notice to the Plaintiff by the Defendant that the disclosure took place.

Amending the initial complaint and excising the language stating where the "cause of action arose in Cabell County", and then inserting the "cause of action arose in Putnam county" in the submitted proposed order is an attempt by the Plaintiff to have the § 14-2-2a convey venue in Putnam County even after the WVCCPA claim is dismissed as the meritless count that it is. In fact, in paragraph once-hundred and three (103) of the amended complaint, the Plaintiff states, that "Such services were not adequately provided, and the money which the Plaintiff paid to the Defendants to protect their sensitive information was wasted when the Defendants allowed the Plaintiff's sensitive information to be **sent throughout his campus**" (emphasis added). It is clear that by inserting the language that the cause of action arose in Putnam County in the Order denying the motion to dismiss, the Plaintiff attempted and has succeeded in inaccurately shifting the facts in this case to circumvent the proper application of § 14-2-2a which would otherwise place venue in Cabell County.

V. A Writ of Prohibition and/or Mandamus is appropriate in this case because no other adequate means exist to obtain the desired relief, the petitioner will be prejudiced without being able to correct the prejudice on appeal, the Circuit Court's order is clearly erroneous as a matter of law, the Circuit Court's conduct manifests blatant disregard for precedent and procedure, and the Circuit Court's order creates new and serious problems under existing law.

There is a clearly defined standard for when this Court will entertain a Petition for an Extraordinary Writ stemming from a normally unappealable interlocutory order, as outlined in the Standard of Review section, *supra*. This Petition satisfies all of the elements this Court considers.

First, no other adequate means exists to obtain the desired relief sought, that the frivolous claim raised by the Plaintiff should be dismissed. For all the reasons set out fully above, all of the Plaintiff's WVCCPA claims are non-existent and unsupported by either law or the facts alleged in the Amended Complaint (which for the purposes of the Motion to Dismiss were taken as true). Without relief from this Court, Marshall will be forced into years of litigation and unnecessary expense in a venue that should not hear this claim pursuant to § 14-2-2a. The Circuit Court's Order (which was entered prematurely according to W.Va. Trial Ct. Rule 24.01) makes it clear that the Plaintiff is attempting to shift venue to Putnam County when this Court or Circuit Court finds that the WVCCPA rightfully does not apply. The improperly entered Order precludes Marshall from relying on § 14-2-2a even after the dismissal of the WVCCPA claim, because the Circuit Court has held, as a finding of fact in this case, that the cause of action arose in Putnam County, despite no pleading, evidence, or argument to support this. Additionally, the Circuit Court has held that WVCCPA applies to state institutions of higher education. There is no way for Marshall to avoid this unjust outcome and obtain the desired relief, without extraordinary intervention from this Court.

Second, Marshall will be prejudiced without being able to correct that harm on appeal. The prejudice suffered by Marshall includes being forced into litigation which is both legally and factually unsupported. In particular, the Circuit Court's Order forces Marshall to litigate this case in an inappropriate venue. Although Putnam County is relatively close to Cabell County, defending this action based upon a completely erroneous interpretation of the WVCCPA would cause irreparable harm to Marshall. As Marshall has students throughout West Virginia, based upon this interpretation of the WVCCPA, Marshall could be forced to defend an action from a student who resides in Berkeley County in the eastern panhandle. Despite the WVCCPA's clear language,

under the current Order entered in this matter, Marshall, and for that matter every other state institution of higher education would be subject to the WVCCPA should the plaintiff simply toss in a meritless WVCCPA claim. Although Marshall is confident that this Court would overturn the Circuit Court's Order on an appeal after the trial of this case, at that point, the damage will already be done.

Finally, the Circuit Court's ruling is clearly erroneous as a matter of law. The conclusion of law in the Circuit Court's Order that the "cause of action arose in Putnam County" (A.R. p. 173) is completely unsupported by pleading, evidence, or argument. This line of reasoning is clearly flawed and is an attempt by the Plaintiff to prepare for the eventuality when the WVCCPA claim will ultimately fail. Once the WVCCPA claim is no longer a part of this case, the Plaintiff will undoubtedly use the language contained in this order to shift the venue to Putnam County under the controlling language of § 14-2-2a. It is clear from the facts outlined in the Amended Complaint, that the cause of action would have arisen in Cabell County, where the alleged disclosure of any sensitive information took place. Moreover, in addition to misconstruing and erroneously ruling on that singular issue, the Circuit Court simply ignored all other aspects of Marshall's argument regarding the WVCCPA, such as the fact that the WVCCPA did not apply as a matter of law in this case.

For the foregoing reasons, because the underlying ruling and conduct of the Circuit Court checks off every consideration this Court takes into account, this Court should entertain this Petition for a Writ of Prohibition/Mandamus.

VI. This Court should suspend the underlying proceedings until a final decision on this Petition has been rendered because allowing the underlying case to proceed would be prejudicial to the Petitioner and would waste judicial resources on claims which should have been dismissed.

W.Va. § 53-1-9 states that when a petition for a writ of prohibition is made, the "Supreme Court of Appeals . . . may, at any time before or after the application for the writ is made, if deemed proper, make an order, a copy of which shall be served on the defendant, suspending the proceedings sought to be prohibited until the final decision of the cause." Although this Petition has not been filed to resolve an issue of qualified immunity, it has been filed, similar to qualified immunity, to resolve a threshold issue. This Court has held that immunity exists to prevent a party "from having to go forward with an inquiry in the merits of the case" when that case is legally unfounded. *Hutchinson v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649, 658 (1996).

Like immunity, whether the Plaintiff's relationship with Defendant Marshall is subject to the WVCCPA is "more than a defense to a suit." *Id.* at Syl Pt. 1. It is a question of whether the suit is proper under established law. The result of this Petition will affect the entirety of the underlying case going forward. The granting of this Petition would "spare[] the [defendant] from having to go forward with an inquiry into the merits of the case," when the claims alleged in the Amended Complaint are legally unsound. *Id.*

A scheduling order has already been entered in this case, and discovery requests have been served and answered by Defendant's counsel. (A.R. p. 177). Those discovery requests include, numerous interrogatories, requests for admission, and forty (40) requests for production which demand the production of a wide variety of documents spanning the last decade. (A.R. p. 184). These requests are not even specific to the Defendant Marshall in the case below. For example, request for production no. 23 states:

> Produce all documents, communications, and ESI that relate to your budget allocations and expenditures for complying with industry standards for managing and protecting your patient's Protected Health Information and Sensitive Information for each year from January 1, 2010 through present.

(A.R. p. 192). The gravamen of the allegations in the Amended Complaint against Marshall stem from the Plaintiff's relationship as a student of the Marshall medical school and are not related to any care he received. These requests demonstrate the burden Marshall will endure without a stay of the underlying proceedings. Without a stay pending a final ruling on this Petition, Marshall will be forced to go through extensive discovery and possibly even trial for claims that have no legal merit. Not staying the underlying proceedings while awaiting a final determination on this Petition would effectively deprive Marshall of part of the benefit of a ruling in its favor.

Thus, in the interest of justice, and as it is in this Court's sound discretion, the lower proceeding should be stayed pending the final decision on this Petition.

CONCLUSION

In determining whether to issue the requested writ and stay, this Court considers other adequate means of relief; damage to the petitioner, which will be extensive; whether the lower Court's ruling is clearly erroneous, which is clear from a plain reading of the WVCCPA and review of the Amended Complaint; whether the lower Court's order manifests persistent disregard for substantive law and procedure, which is evidenced by the lower Court's entering an Order Denying the Motion to Dismiss which is not supported by the pleadings, evidence or arguments, and improperly entering the order contrary to West Virginia Trial Court Rule 24.01; and whether the lower Court's ruling would create serious problems with existing law, which this ruling would. *Hoover*, 199 W.Va. 12 at Syl. Pt. 4.

As argued above, the Circuit Court's ruling and Order are a manifestly incorrect interpretation of the WVCCPA and other established precedent. The effect of the ruling would not only force the Petitioner to undergo months and possibly years of costly and frivolous litigation, but could set a precedent which would allow other state institutions of higher education to be sued

under the WVCCPA when that statute, on its face, does not apply to their relationship with students.

Accordingly, and for all the reasons set forth throughout this Petition, the Petitioner requests that this Court enter an order staying the underlying proceedings in civil action no. 19-C-75, grant the instant Petition for a Writ of Prohibition/Mandamus, holding that the Circuit Court's Order denying the motion to dismiss was incorrect as a matter of law and prohibiting the Circuit Court from making that ruling, and directing the Circuit Court to enter an order dismissing the Defendants' Amended Complaint for improper venue as was originally requested in Petitioner's Motion to Dismiss.

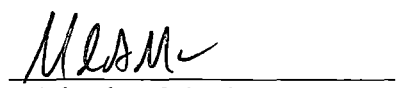
Respectfully submitted,

Counsel for Defendant, Marshall University

Michael A. Meadows (W. Va. Bar No. 10100)
Campbell Woods, PLLC
1002 Third Avenue
Huntington, West Virginia 25701
Telephone: (304) 529-2391
Facsimile: (304) 529-1832
mmeadows@campbellwoods.com

VERIFICATION

I, Michael A. Meadows, Esq., counsel for the Petitioner, do hereby verify, as required by W.Va. Code § 53-1-3, that the facts and arguments set out in this Petitioner are true to the best of my knowledge and belief and that Petitioner is entitled to the relief requested herein.



Michael A. Meadows, Esq.

CERTIFICATE OF SERVICE

The undersigned, of counsel for defendant Marshall University Board of Governors and Marshall University Joan C. Edwards School of Medicine, certifies that service of the foregoing **Verified Petition for Writ of Prohibition/Mandamus and Motion for Emergency Stay** was made upon counsel of record for the respondents J.M.A.; and upon the respondent Honorable Phillip M. Stowers, Judge, this date by depositing a true copy of the same in the United States mail, first-class postage prepaid, addressed to the following:

Troy N. Giatras, Esq.
Matthew Stonestreet, Esq.
The Giatras Law Firm, PLLC
118 Capitol Street, Suite 400
Charleston, WV 25301

Honorable Phillip M. Stowers, Judge
Putnam County Judicial Building
12093 Winfield Road
Winfield, WV 25213

Rebecca C. Brown, Esq
Bailes, Craig & Yon, PLLC
PO Box 1926
Huntington, WV 25720
Counsel for Defendant Cabell Huntington Hospital

Rita Massie Biser, Esquire
Lynette Simon Marshall, Esquire
MOORE & BISER, PLLC
317 Fifth Avenue
Charleston, WV 25303
Counsel for Defendants
Radiology, Inc. and Jason Akers, M.D.

Done this **15th** day of **October, 2020.**