BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA EX REL. CABELL HUNTINGTON HOSPITAL, INC., D/B/A CABELL HUNTINGTON HOSPITAL
Defendant Below,

Petitioners,

vs.

THE HONORABLE PHILLIP M. STOWERS, JUDGE OF THE CIRCUIT COURT OF PUTNAM COUNTY, AND J.M.A., Plaintiff Below,

Respondents.

WV SUPREME COURT NO. 20-0818
CIRCUIT COURT OF PUTNAM COUNTY
CIVIL ACTION NO. CC-40-2019-C-75

RESPONSE OF J.M.A. TO THE PETITION FOR WRIT OF PROHIBITION/MANDAMUS AND MOTION FOR EMERGENCY STAY

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RESPONSE OF J.M.A. TO THE AMENDED PETITION FOR WRIT OF PROHIBITION/MANDAMUS AND MOTION FOR EMERGENCY STAY

COMES NOW the Respondent, J.M.A. and in response and opposition to the Petitioner's Amended Petition for *Writ of Prohibition/Mandamus* and Motion for Emergency Stay states the following:

The Amended Petition fails to make a sufficient showing of a need for a writ of prohibition under the five factors identified in this Court's precedent including the Court's syllabus point in the *State ex rel. Owners Ins. Co.* opinion at 760 S.E.2d at page 591.

> 2. "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 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 rei. Hoover v. Berger,* 199 W.Va. 12, 483 S.E.2d 12 (1996).

STATEMENT OF THE CASE

The Respondent, J.M.A., while still a minor, had a very serious emergency in 2012 which required x-rays. Those x-rays were of a very private part of J.M.A.'s body and potentially extremely embarrassing to J.M.A. The Petitioner, in whose facilities the x-rays were taken more than five (5) years earlier, allowed the x-rays to be disclosed without first being properly de-identified. In a bizarre coincidence, *more than five (5) years after the x-rays were taken*, while a medical student at Marshall University (also a party to this case), the x-rays that were taken at the Petitioner's facility were shown to J.M.A.'s classmates without any de-identification. What is more, given the amount of time that had passed between J.M.A.'s incident and such time as *he found out* it was disclosed, it is highly likely that the Petitioner had allowed this to happen for years before it was finally brought to the attention of someone who brought it to J.M.A.'s attention. Obviously, this was, and continues to be, a humiliating and stressful event. J.M.A. could have never

anticipated his most private medical information would be exposed to his classmates five years after his procedure.

On November 26, 2019, J.M.A. filed an Amended Complaint against Marshall University Joan C. Edwards School of Medicine; Marshall University Board of Governors (hereinafter referred to as "Marshall"); Radiology, Inc.; Cabell Huntington Hospital, Inc.; and, Mark Jason Akers, M.D.-Radiologist in the Circuit Court of Putnam County. The lawsuit alleges in ten (10) separate counts: (1) Breach of Duty of Confidentiality; (2) Unjust Enrichment; (3) Negligence *Per Se*; (4) Breach of Contract (express and implied); (5) Reckless Indifference; (6) Negligent Supervision; (7) Breach of Covenant of Good Faith & Fair Dealing; (8) Invasion of Privacy; (9) Negligence; and, (10) Violations of the West Virginia Consumer Code.

On November 27, 2019, Cabell Hunting Hospital, Inc. filed a Motion to Dismiss the Amended Complaint and J.M.A. filed a Response in Opposition to the Motion to Dismiss on February 18, 2020. A hearing on the motions to dismiss were heard via remote hearing on June 29, 2020, and thereafter, counsel a proposed order and the Judge entered the Order denying the Motions to Dismiss on July 7, 2020.

The instant petition filed by Cabell Huntington Hospital, Inc. seeks a *Writ of Prohibition/Mandamus* finding and concluding that the Circuit Court has

exceeded its legitimate powers in denying their motion to dismiss and ordering that the lower tribunal reverse its ruling.

This case is an interlocutory appeal disguised as a request for a *Writ of Prohibition*, and, as the Petitioner has made the affirmative decision to make such an inappropriate request, it must be held to that prohibitive standard. The Petitioner asks this Court to overturn a lower court's decision to allow a case at the pleading stage to move forward. **This case has not had the benefit of full discovery or even a single deposition**. Rather than permitting this matter to be decided on its merits, as has long been the policy of this State and this Court, the Petitioner seeks to excise all of J.M.A.'s claims with an extraordinary writ. Syl. Pt. 2, *McDaniel v. Romano*, 155 W.Va. 875, 190 S.E. 2d 8 (1972). The lower court denied the Petitioner's motion to dismiss a West Virginia citizen's claims pursuant to Rules 12(b)(1), (3), and (6) of the *W. Va. R. C. P.*, as is typical of such requests. *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W. Va. 603, 606, 245 S.E.2d 157, 159 (1978)("the motion to dismiss for failure to state a claim should be **viewed with disfavor and rarely granted**")(emphasis added). Compounding the exceptionally high standard which any party must overcome in order to be granted a dismissal order pursuant to Rule 12(b)(6), the Petitioner, along with its fellow co-defendants, has now requested this Court issue a *Writ of Prohibition* against the lower court, which has itself a uniquely high standard. *See* Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 15, 483

S.E.2d 12, 15 (1996). Stated plainly, the Petitioner's request should be denied not simply because it is without merit, but also because it asks this Court to grant an extraordinary remedy *in order to grant a different extraordinary remedy*. In addition, the Petitioner's request is untimely. The Petitioner has other avenues for redress if it truly feels the lower court ruled in error, but *writ of prohibition* proceedings must be reserved for only the most immediate and dire of Supreme Court intervention, and cannot be allowed to devolve into commonplace appeals from Petitioners seeking to avoid litigation and liability.

This is a case in which the record is undeveloped, and many factual inquiries remain present.

STANDARD OF REVIEW

A *writ of prohibition* is an extraordinary remedy. It is only available when a Petitioner can show that "...the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1.

> 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*, at 14–15.

Thus, the question is whether the Circuit Court exceeded its legitimate powers in denying a pleading motion. Central to that analysis is whether the denial of the Motion to Dismiss was "'**clearly erroneous**' as a matter of law." *Hoover v. Berger*, at 14–15. As to the standard applied for that analysis, this Court has held that "[i]n determining the third factor, the existence of clear error as a matter of law, we will employ a *de novo* standard of review, as in matters in which purely legal issues are at issue." *State ex rel Gessler v. Mazzone*, 212 W.Va. 368, 372, 572 S.E.2d 891, 895 (2002)." *State ex rel. Nelson v. Frye*, 221 W. Va. 391, 395, 655 S.E.2d 137, 141 (2007). The Court went on in *Nelson* to cite Syl. Pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979)[1] for the proposition that:

> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, **this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate** which may be resolved independently of any disputed facts

[1] Superseded by statute on other grounds.

> and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Id. (emphasis added).

A determination that a finding is "clearly erroneous" requires this Court to find that it has a "**definite and firm conviction** that a mistake has been committed." Syl. Pt. 1, *In re Faith C.*, 226 W. Va. 188, 189, 699 S.E.2d 730, 731 (2010) (emphasis added).

Petitioner, therefore, has an extreme burden to carry in its improper and premature challenge. Considering the *substantial* deference afforded to a non-moving party at the motion to dismiss stage with the enormous bar this Court has set for *Writs of Prohibition*, the Petitioner must show that absolutely no factual issues remain relevant to the ultimate determination, that the issues are solely legal in nature, and that the lower court committed a "substantial, clear-cut, legal error." *Nelson*, 221 W. Va. 391, at 395. The Petitioner has failed to carry its burden.

While the Petitioner has obviously failed to carry its burden to be granted an extraordinary *Writ of Prohibition* against the lower court, it is important to note the standard against which that lower court was required to hold the Petitioner's original inappropriate request for dismissal.

Rule 12(b)(6) of the *W. Va. R. C. P.*, requires that the complaint be construed in the light most favorable to its drafter and its allegations are to be taken as true. *See Lodge v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158-59 (1978).

"The trial court, in appraising the sufficiency of a [claim] on a Rule 12(b)(6) motion, should not dismiss the [claim] unless it appears beyond doubt that the [pleader] can prove no set of facts in support of his claim which would entitle him to relief." *See Highmark West Virginia Inc. v Jamie*, 221 W.Va. 487, 655 S.E.2d 509, 513 (2007); *see also Chapman v. Kane Transfer Co.*, 160 W.Va. 530, 538, 236 S.E.2d 207, 212 (1977). The policy of the rule "is thus to decide cases upon their merits, and if the complaint states a claim **upon which relief can be granted under any legal theory**," a motion to dismiss should be denied. *See Lodge*, 161 W.Va. at 605, 245 S.E.2d at 158-59 (emphasis added).

When West Virginia's dismissal standard of law is applied to the case at hand, it is not shocking or unusual that the Petitioner's original motion was rejected. The Petitioner moved the lower court to ignore the facts alleged. As the Respondent set forth sufficient information to outline the elements of his claims and/or to permit inferences to be drawn that those elements exist, the lower court did not commit clear error in denying the Petitioner's motion to dismiss.

Finally, in *Roth v. Defelicecare, Inc.*, 226 W. Va. 214, at 220, 700 S.E.2d 183, at 189 (W. Va. 2010), this Court clearly stated its position that **"motions to dismiss are generally viewed with disfavor because the complaint is to be construed in the light most favorable to the plaintiff and its allegations are to be taken as**

true." (citing *Sticklen v. Kittle*, 168 W. Va. 147, 163-64, 287 S.E.2d 148, 157 (1981)) (emphasis added).

When the West Virginia Rules of Civil procedure and the well-settled dismissal standard are applied to the case at hand, it is clear that the Petitioner's pleading motion should have been rejected. More importantly, it is clear that the Petitioner's invitation to this Court to effectively dismiss all of the Respondent's claims, without a single deposition having been taken, is simply not the function of an extraordinary writ.

SUMMARY ARGUMENT

The Petitioner's *Writ of Prohibition* must be denied as failing to meet the exceptionally high standard of that request. Simply put, the lower court's rulings that the Respondent's Amended Complaint pled actionable claims, and that the MPLA was not invoked by the Amended Complaint such that presuit notice or a screening certificate was required in this case are supported by fact and law, and therefore cannot be said to be "clearly erroneous."

Regarding the Respondent's claims brought under the West Virginia Consumer Credit and Protection Act (WVCCPA), the Respondent alleged a multitude of times in his Amended Complaint violations based upon the Petitioner's misrepresentation of the care it would take with his sensitive information, and diminished value of the service it provided him based upon its carelessness with said

information. The lower court found that, at the pleading stage, these allegations were colorable and simply refused to obliterate the Respondent's entire case in its infancy with no development of the record. This is not an appropriate ruling for a *Writ of Prohibition.*

Similarly, the lower court's reliance on this Court's seminal ruling in Syl. Pt. 5, *R.K. v. St. Mary's Med. Ctr., Inc.*, 229 W. Va. 712, 713, that such data security violations do not invoke the State's Medical Professional Liability Act (MPLA) is also, obviously, well supported and inappropriate for a request for a *Writ of Prohibition* against it. The lower court acted well within its discretion when it followed this Court's guidance and refused to accept the Petitioner's argument that merely speculates as to the legislative intent of a subsequent amendment to the Act. The MPLA is not invoked by the Respondent's claims for several reasons, including the facts that the Respondent is not claiming the Petitioner committed medical malpractice, the violation of his sensitive data occurred years after the Petitioner's services were rendered, and, importantly, the presuit notification and screening certificate requirements would be impossible to comply with given the nature of these facts. Also, finding that a wrongful disclosure of a medical record necessarily invokes the MPLA is counter to the express purpose of that act, which is to limit the exposure of hospitals and physicians. Were "data breaches," such as they are, governed by the MPLA, the result would be a host of medical malpractice claims

against physicians simply by virtue of having treated the patient, even absent any mistake by said physician.[2] Expanding a body of law meant to constrict litigation in that area (while simultaneously attempting to constrict a body of law – this State's consumer code – meant to be liberally construed) is inappropriate, especially in the context of a *Writ of Prohibition*. Once again, the lower court's refusal to dismiss the Plaintiff's entire Amended Complaint based upon a tenuous argument is not "clearly erroneous," as this Court would have to find in order to grant the Petitioner's request for a *Writ of Prohibition*.

Regarding the Respondent's claims brought under the WVCCPA, the Respondent alleged in several paragraphs in his Amended Complaint violations based upon the Petitioner's misrepresentation of the care it would take with his sensitive information, and diminished value of the service it provided him based upon its carelessness with said information. The lower court found that, at the pleading stage, these allegations were colorable and simply refused to dismiss the Respondent's entire case in its infancy with no development of the record. This is not an appropriate decision for this Court to grant against that court a *Writ of Prohibition*. This argument of the Petitioner's is necessary for its further extrapolation that venue is improper in Putnam County. The Petitioner seems to be

[2] This example is counter to the reality of this peculiar case, in which the treating physician was actually he who disclosed the sensitive information.

conceding that venue would be proper if the WVCCPA claims were such upon which relief could be granted. As stated, those claims are well pled in the Respondent's Amended Complaint such as to survive a 12(b)(6) challenge, and therefore the venue statute found in the WVCCPA allows for this case to be properly brought before the Circuit Court of Putnam County.

The Petitioner fails in all of its arguments to meet the high standard required to have a *Writ of Prohibition* granted. At no point did the Circuit Court exceed its legitimate powers or make any Order that is *clearly erroneous* as a matter of law.

ARGUMENT

The Amended Petition seeking this Writ is an attempt to circumvent the normal appellate procedure and should be dismissed on both procedural and merit-based grounds. To the extent Petitioner's legal arguments are considered, the Circuit Court neither exceeded its legitimate power to deny the Petitioners' respective motions dismiss, nor did the Court make any clearly erroneous Orders.

A. THE PETITIONER FAILS TO MEET THE EXCEPTIONALLY HIGH STANDARD REQUIRED TO BE GRANTED A *WRIT OF PROHIBITION/MANDAMUS*

This Court has, on multiple occasions, stated that "[t]o justify this extraordinary remedy, the petitioner[s] ha[ve] the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy." *State ex rel. Stewart v. Alsop*, 533 S.E.2d 362,364 (W.Va. 2000)

(citing *State ex rel. Paul B. v. Hill*, 201 W.Va. 248,254, 496 S.E.2d 198, 204 (1997) (quoting *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 37,454 S.E.2d 77, 82 (1994) (Cleckley, J., concurring))).

The Petitioner requests this Court to use its power to grant a *Writ of Prohibition*. This Court has held that, "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers[.]" Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977). Those factors, again, are: "(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." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, at 14–15.

The Petitioner cannot, of course, argue that it has **no** other adequate means to obtain its desired relief or that it has been prejudiced in such a way that is not correctable on appeal. Regarding its argument that the MPLA, and not the WVCCPA applies, based upon factual contentions made without the benefit of discovery, direct

appeal is available once the record has been developed, as would even have been an interlocutory appeal, had the Petitioner desired to pursue that course of action. Instead, the Petitioner desires this Court to issue what amounts to its highest disapproval of a lower court's decision mid-litigation. *See Suriano v. Gaughan*, 198 W.Va. 339, at 345("As an extraordinary remedy, this Court reserves the granting of such relief to 'really extraordinary causes.'"). *See also* Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953)("Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari."). *See also* Syl. Pt. 2, *Woodall v. Laurita*, 156 W.Va. 707("Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.").

The analysis put forth by this Court in *Woodall* dooms the Petitioner's request. Failing to grant a specious motion based upon legal arguments for which there is no split among the circuits is unquestionably within a circuit court's "legitimate powers." The "particular facts" which this Court must consider are simply whether

the Petitioner may seek remedy by direct appeal, and whether the lower court's decision that the Petitioner failed to reach the high burden of a pleading stage dismissal was "so flagrant and violative it [its] rights as to make remedy by appeal inadequate." *Id.* Clearly, the Petitioner has not been so injured by the lower court's denial of its motion at the earliest pleading stage. In fact, in addition to a direct or interlocutory appeal, the Petitioner still has the ability to file a motion for summary judgment once the record has been further developed. The Petitioner's argument that, because it did not receive presuit notice, it is irreparably harmed if it is forced to participate in *any* litigation, including discovery, is unfounded. It would be an injustice, and a far departure from the settled jurisprudence of this State, to issue a *Writ of Prohibition* against a circuit court for simply allowing a case to proceed at the pleading stage and discovery be completed.

The third factor considered by the *Hoover* Court, and stated to be given the most weight, is whether the lower court's ruling was clearly erroneous. *Hoover*, at 14-15. "Clearly erroneous," is, itself, an exceptionally high standard. Only upon a "definite and firm conviction" that the lower court exceeded its legitimate powers can a writ be granted. *See* Syl. Pt. 1, *In re Faith C.*, 226 W. Va. 188, 189, 699 S.E.2d 730, 731 (2010). The lower court's affirmative decisions, regarding this Petitioner, is that, at the pleading stage, the Respondent stated a claim upon which relief could be granted, that the allegations contained therein did not, on the Amended

Complaint's face, invoke the pre-suit notification requirements of the MPLA, and that the Respondent's WVCCPA claims were adequately pled and therefore that statute's venue provision could be applied by the Respondent in lieu of the Code's general venue provision. Essentially, the lower court merely ruled that the Respondent's Amended Complaint overcame the very low bar that is the fair notice pleading requirement of this State. Certainly, this Court cannot have a definite and firm conviction that such a ruling is beyond the legitimate powers of the circuit courts of this State. The lower court's rulings that, on the face of the Complaint, the Respondent's claims are colorable under the WVCCPA, and that no presuit notice was required based upon this Court's previous rulings is not *clearly* erroneous as it finds support in the caselaw.

Again, writs of prohibition are exceptional in nature. Regarding such extraordinary remedies:

> This Court has explained the standard of review applicable to a writ of prohibition, stating that "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va. Code 53-1-1." Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314,233 S.E.2d 425 (1977) ....
>
> We have held that an extraordinary writ ... is not to be used as a substitute for an appeal. "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl. pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). In addition, "[t]his Court is 'restrictive in its use of

> prohibition as a remedy.' *State ex rel. West Virginia Fire Cas. Co. v. Karl*, 199 W.Va. 678,683,487 S.E.2d 336,341 (1997)." *State ex rel. Allstate Ins. Co. v. Gaughan*, 220 W.Va. 113, 118, 640 S.E.2d 176, 182 (2006). In syllabus point 4 of *State ex rel. Hoover v. Berger*, [199 W.Va. 12,483 S.E.2d 12 (1996)], this Court said:

State ex rel. Owners Ins. Co. v. McGraw, 233 W.Va. 776, 779-80, 760 S.E.2d 590, 593-94 (2014) (per curiam) (emphases added).

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." Syl. Pt. 4, *State ex rel. Jeanette H. v. Pancake*, 529 S.E.2d 865 (W.Va. 2000); *State ex rel. Lambert v. King*, 208 W.Va. 87, 538 S.E.2d 385 (2000). A heavy burden of proof is required to demonstrate that a circuit court's finding is clearly erroneous. As explained by this Court in *State ex rel. Owners Ins. Co. v. McGraw*, 233 W.Va. at 780, 760 S.E.2d at 594: "A finding is 'clearly erroneous' when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. **However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirely."** (emphasis added) (quoting Syl. Pt. 1, in part, *In the interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)). The Petitioner simply does not meet the standard for extraordinary relief it seeks.

B. THE RESPONDENT'S AMENDED COMPLAINT PLEADS WVCCPA CLAIMS SUFFICIENT TO SURVIVE A PLEADING STAGE DISMISSAL MOTION

The Petitioner's argument that, as a hospital, this State's consumer protection laws do not apply to it is troubling. The Petitioner's tenuous argument is telling in its recital of the WVCCPA's purpose published by Professor Cardi in its petition. *Petitioner's Amended Petition*, p. 7, ll. 1-16. Among those purposes, Professor Cardi lists as the ultimate purpose "[to] protect consumers who purchase goods and services for cash or credit form, and to give them remedies for, defective or shoddy goods and services and unfair and deceptive selling practices." The West Virginia Consumer Credit and Protection Act, 77 W.Va. L. Rev. 4001 (1974-75). That is precisely what the Respondent alleges against the Petitioner. The Respondent alleges that he paid the Petitioner for a service which ultimately proved to be "defective or shoddy" when the Petitioner failed its duty to protect his sensitive information, after misrepresenting to him and all consumers that it would do so.

The Petitioner would have this Court believe that its provision of safeguards to consumer healthcare information is a service for which it is not compensated. This statement is belied by the fact that the Defendant hires privacy officers, HIPAA compliance employees, pays for data software to protect patients' information, and spends significant amounts of money to protect patient's sensitive information. The suggestion that a patient pays only for medical services is contradicted by the reality that a patient pays for the protection of sensitive information. If a patient pays for

medical care, that same patient is paying to keep his sensitive information secure. The Defendants misrepresented that it would safeguard sensitive information of the Plaintiff, which is well-pleaded in the following paragraphs:

> The Plaintiff was a consumer who paid for services from the Defendants – part of which included the service of safeguarding any and all private information with which the Defendant Petitioner was entrusted.
>
> That paid-for service – the safeguarding of private information – was denied to the Plaintiff when his private information – consisting of his unredacted and not de-identified radiological images – were shared with members of his class, causing him severe shame and embarrassment.
>
> As a result of Defendants' failure to follow contractually-agreed upon, legally-prescribed, industry standard security procedures, the Plaintiff received only a diminished value of the services which Defendant provided. Plaintiff contracted for services **that included a guarantee by Defendant to safeguard his personal information and, instead, Plaintiff received services devoid of these very important protections**. Accordingly, Plaintiff alleges claims for breach of contract, breach of implied contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, negligence, wantonness, invasion of privacy, negligent supervision of employees, and breach of confidentiality.
>
> Defendants came into possession of the Plaintiff's Sensitive Information and had a duty to exercise reasonable care in safeguarding and protecting such information from being compromised, stolen, lost, misused, and/or disclosed to unauthorized parties.

To the extent that it was not expressed, an implied contract was created whereby Defendants promised to safeguard Plaintiff's health information and Sensitive Information from being accessed, copied, and transferred by third parties.

Defendants did not safeguard Plaintiff's health information and Sensitive Information and, therefore, breached its contract with Plaintiff.

Defendants knew, were substantially aware, should have known, or acted in reckless disregard that the Plaintiff would be harmed if Defendant did not safeguard and protect Plaintiff's Sensitive Information.

Defendants requested and came into possession of Plaintiff's Sensitive Information and had a duty to exercise reasonable care in safeguarding and protecting such information from being accessed. Defendants' duty arose from the industry standards discussed above and its relationship with Plaintiff.

Defendants, through their actions and/or omissions, unlawfully breached their duty to Plaintiff by failing to implement industry protocols and exercise reasonable care in protecting and safeguarding Plaintiff's Sensitive Information within Defendants' control.

Plaintiff's Sensitive Information was taken and accessed as the proximate result of Defendant's failing to exercise reasonable care in safeguarding such information by adopting, implementing, and maintaining appropriate security measures and encryption.

See Plaintiff's Complaint ¶¶ 12, 13, 24, 53, 62, 64, 69, 70, 72, and 75.

If you guarantee, in providing a service, that you will safeguard sensitive information, it is important to make good on that guarantee. Making misrepresentations, taking someone's money, and failing to provide a promised service clearly violates W.Va. Code § 46A-6-102 and W.Va. Code § 46A-6-104. When the Defendants misrepresented that the Plaintiff's information would be safeguarded, the Defendants violated the Plaintiff's fundamental rights under the WVCCPA broadly prohibiting misrepresentations of services. The Complaint includes a properly pled and strong consumer claim.

Binding legal authority instructs that the West Virginia Consumer Credit and Protection Act is to be broadly construed to protect West Virginia consumers and not narrowly interpreted for the benefit of wrongdoers. Any arguments attempting to constrain the Act's broad prohibitions against unlawful conduct are entirely inconsistent with the remedial nature of this statute. As recently as November of 2020, the West Virginia Supreme Court of Appeals interpreted the provisions of the Act and reaffirmed that "[s]tatutes which are remedial in their very nature should be liberally construed to effectuate their purpose." Syl. pt. 7, *State of West Virginia, ex rel. 3M Company v. Honorable Jay Hoke and Patrick Morrisey*, No. 20-0014, (November 23, 2020) (citing Syl. pt. 6, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953)). This recent decision by the WVSCA is clear in upholding precedent that the Act should be interpreted so as to effectuate its purpose in protecting consumers.

Again, as the consumer claims invoking the WVCCPA are well supported on the face of the Complaint, it cannot be said that the lower court's ruling that it applies is "clearly erroneous," as is required for this Court to grant the Petitioner's extraordinary *Writ of Prohibition.*

C. THE MPLA DOES NOT APPLY TO THIS CASE, AND THUS NO PRE-SUIT SCREENING CERTIFICATE IS REQUIRED

The Petitioner in this case incorrectly invokes this State's Medical Professional Liability Act (MPLA) to determine that the Respondent has failed to provide the requisite pre-suit notice under that act. However, the MPLA in no way applies to the instant case. The Respondent has brought several claims against the Petitioner, including breach of the duty of confidentiality, unjust enrichment, negligence *per se*, breach of contract, reckless indifference, negligent supervision, breach of the covenant of good faith and fair dealing, invasion of privacy, negligence, and violations of the West Virginia Consumer Credit and Protection Act (WVCCPA). Nowhere in his Complaint does the Respondent allege medical malpractice on the part of the Petitioner.[3] The Respondent's claims extend from the Petitioner's carelessness in allowing his sensitive information to be disseminated without his permission and to his detriment.

[3] In fact, the Respondent was, prior to the humiliating release of his sensitive medical information, very satisfied with the skill and proficiency with which the procedure was performed, making a malpractice claim all the more inappropriate.

The West Virginia Supreme Court of Appeals (WVSCA) has examined this very issue – whether claims arising from a healthcare provider's unauthorized disclosure of confidential medical information is governed by the MPLA such that a notice of claim and screening certificate of merit were required – and ruled in the negative. *See R.K. v. St. Mary's Med. Ctr., Inc.,* 229 W. Va. 712, 735 S.E.2d 715 (2012). This case is dispositive on the issue. In *R.K.*, this Court unequivocally stated that the "allegations asserted in [that] case, which pertain to the improper disclosure of medical records, [do] not fall within the MPLA's definition of 'health care,' and, therefore, the MPLA does not apply. Accordingly, we affirm the circuit court's order insofar as it refused [the hospital's] motion to dismiss for failure to comply with the pre-suit notice requirements of the MPLA."

The law is clear. The MPLA does not apply to claims "that may be contemporaneous to or related to the alleged act of medical professional liability." Syl. Pt. 5, *R.K. v. St. Mary's Med. Ctr., Inc.*, 229 W. Va. 712, 713. (quoting *Syl. Pt. Boggs v. Camden–Clark Memorial Petitioner Corp.*, 216 W.Va. 656, 609 S.E.2d 917 (2004)). Here, the Respondent has brought no claims of malpractice against the Petitioner based upon the medical services which were provided to him. All of the Respondent's claims against the Petitioner extend from its improper disclosure of

his sensitive medical information. Therefore, the Respondent never had an obligation to comply with the pre-suit notice requirements of the MPLA.[4]

The Petitioner relies on a subsequent, 2015 amendment of the MPLA which amended the definition of "medical professional liability" to include, "other claims which are contemporaneous to or related to tort or breach of contract or otherwise provided all in the context of rendering health care services." W. Va. Code 55-7B-2(i).

However, in *R.K.*, this Court unequivocally stated that the "allegations asserted in [that] case, which pertain to the improper disclosure of medical records, **[do] not fall within the MPLA's definition of 'health care,' and, therefore, the MPLA does not apply**. Accordingly, we affirm the circuit court's order insofar as it refused [the hospital's] motion to dismiss for failure to comply with the pre-suit notice requirements of the MPLA." *R.K. v. St. Mary's Med. Ctr., Inc.,* 229 W. Va. 712, 722 (emphasis added).[5] This is an important distinction regarding statutory construction. Even if the legislature *did* amend the definition of "medical

[4] The Petitioner also includes in its writ of prohibition an argument regarding the WVCCPA's pre-suit notice requirements. However, as this point was never argued in the lower court, nor was it heard or ruled upon by that court, it is not germane or appropriate for this writ of prohibition.

[5] It is also important to note that, had the Legislature unquestionably intended that improper disclosure of medical records be conduct which would invoke the MPLA, it would have written that into the statute, specifically, as such conduct was expressly stated to not apply in *R.K. v. St. Mary's*, the very case to which the Petitioner contends the MPLA's 2015 amendment was enacted in response. *Id.* Therefore, the Petitioner's entire argument which is founded upon its belief as to the legislative intent of the MPLA's 2015 amendment is tenuous, to say the least.

professional liability" in response to this Court's decision in *R.K.*, this Court's decision did not rely on the legislature's definition of "medical professional liability," but on its definition of "health care" within that act.

"Health care," as defined by the MPLA, means:

(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).

Nowhere in any of those possible definitions of healthcare is the maintenance and safeguarding of patient information listed. Nor did the improper disclosure of this Respondent's data occur *contemporaneously* with his treatment, or in a manner related to it at the time.

Practically speaking, it would be useless to require an expert opinion and/or a screening certificate in a case like this one. The question becomes: who would issue it? What medical professional could attest to a data breach which was beyond the professional standard of care?

W.Va. Code § 55-7B-6 requires that:

(b) At least 30 days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve by certified mail, return receipt requested, a notice of claim on each health care provider the claimant will join in litigation. For the purposes of this section, where the medical professional liability claim against a health care facility is premised upon the act or failure to act of agents, servants, employees, or officers of the health care facility, such agents, servants, employees, or officers shall be identified by area of professional practice or role in the health care at issue. The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent, together with a screening certificate of merit. The screening certificate of merit **shall be executed under oath by a health care provider who:**

(1) Is qualified as an expert under the West Virginia rules of evidence;

(2) Meets the requirements of § 55-7B-7(a)(5) and § 55-7B-7(a)(6) of this code; and

(3) Devoted, at the time of medical injury, 60 percent of his or her professional time annually to the active clinical practice in his or her medical field or specialty, or to teaching in his or her medical field or specialty in an accredited university.

W. Va. Code § 55-7B-6 (West) (emphasis added).

The fact of the matter is that it would be impossible for any person who suffered the breach of his sensitive information by a medical provider to recover for said breach of it were held to be governed by the MPLA. This is obvious because a "health care provider" who meets all three (3) requirements above would not qualify as an expert on computer systems and record maintenance.

Finally, it makes sense that the MPLA does not apply to wrongful disclosure of patients' sensitive information as happened here. The MPLA's very purpose includes the following language:

> The unpredictable nature of traumatic injury health care services often results in a greater likelihood of unsatisfactory patient outcomes, a higher degree of patient and patient family dissatisfaction and frequent malpractice claims, creating a financial strain on the trauma care system of our state, increasing costs for all users of the trauma care system and impacting the availability of these services, requires appropriate and balanced limitations on the rights of persons asserting claims against trauma care health care providers, this balance must guarantee availability of trauma care services while mandating that these services meet all national standards of care, to assure that our health care resources are being directed towards providing the best trauma care available;

W. Va. Code § 55-7B-1.

Essentially, a primary purpose for enactment of the MPLA was to limit the number of lawsuits brought against health care providers of this State. By finding that the MPLA applies to the instant case, and, by extension, other cases in which sensitive medical information has been wrongfully or negligently disclosed, just the opposite would be achieved. Such a ruling would have the effect of dismissing this case based upon a failure to comply with presuit screening requirements, but would subsequently cause myriad lawsuits against doctors, individually, as well as hospitals for failure to protect patient records, while increasing, rather than decreasing, the litigation costs for such lawsuits. While this instant case is a lawsuit against a hospital, as well as a doctor, this is only because both were integral in the

disclosure of the Respondent's medical information to third parties. The typical case in which medical data is breached involving negligence or theft would rarely, if ever, include the doctor as a defendant. That is, unless the MPLA were found to apply to data breach laws, in which case virtually *every* medical data breach lawsuit would. This result entirely perverts the express purposes of the legislature in enacting the MPLA, and therefore would be inappropriate.[6]

This is in line with the fiscal reality that, as data breaches are not adjudged pursuant to the MPLA, businesses who are found to be the negligent cause of them are covered under their general liability insurance, or, if the business so chooses, the burgeoning industry of cyber insurance. However, were consumer/patient data breaches be found to governed by the MPLA, then such lawsuits would necessarily have to be paid for by a doctor's or hospital's much-more-costly malpractice insurance, with all the reporting and other onerous requirements attendant thereto. Public policy, and clearly the intent of the legislature, would dictate that the most protection of West Virginians for the least cost to West Virginia businesses and healthcare providers is preferable to the alternative.

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[6] Other likely scenarios include multiple treating physicians during a single hospital visit being sued because a hacker steals a hospital laptop, as every treating physician would have been part of the breached data record, or a doctor who, years after treatment, nosily views the medical records of an acquaintance without a business purpose. In the latter example, the doctor viewing the medical record without a business purpose would be liable, of course, but, if data breaches were all governed by the MPLA, as the Petitioner suggests, so would the treating physician from years before.

Finally, common sense would dictate that data breaches should not be governed by the MPLA because it is just an ancillary service attendant to the medical care. If a patient, on her way out of the hospital, trips on a loose tile, her injury would very well be actionable, but certainly it would not be *medical malpractice*. To state that everything with even the slightest hint of medical adjacency is governed by the MPLA is not only unwise, but actually against the express purpose of the act (to protect West Virginia citizens while limiting litigation costs to doctors and hospitals).

The MPLA simply does not apply to the instant case, and the lower court's ruling in that regard is well supported by this Court's authority, public policy, legislative intent, and common sense, and therefore cannot be said to be "clearly erroneous," as would be necessary for this Court to grant the Petitioner's extraordinary *Writ of Prohibition*.

D. THE PETITIONERS ARE NOT ENTITLED TO A STAY OF THE PROCEEDINGS BELOW

As noted, this case can rightfully be said to be in its infancy, the gravamen of all of the Petitioners' *writs* being challenges to the Respondent's Amended Complaint in the pleading stage. However, none of the relief requested by any Petitioner, regardless as to whether the challenge was to subject matter jurisdiction based upon the MPLA or venue challenges based upon the inapplicability of the consumer code, speak to the merits of this case.

As stated above, an extraordinary *writ* is just that – extraordinary. *See, e.g.*, Syl. Pt. 4, *State ex rel. Jeanette H. v. Pancake*, 529 S.E.2d 865 (W.Va. 2000); *State ex rel. Lambert v. King*, 208 W.Va. 87, 538 S.E.2d 385 (2000). The Petitioner's argument that it is its *only* means of remedy is unfounded, as addressed, *supra*, but even were this Court inclined to agree with it that the Respondent's consumer claims fail, that it was required to give presuit notice under the MPLA, or that venue lies in the Circuit Court of Cabell, rather than Putnam, County, the litigation against it does not end. Were this Court to grant the Petitioner's request to the ultimate effect of a dismissal of the Respondent's claims under the WVCCPA, the Respondent would undoubtedly still have viable tort claims for the humiliating breach of his identifiable x-rays - and time to give presuit notice to the Petitioner – against the Petitioner, as the events which transpired leading to this lawsuit are inarguably actionable.

Even were this case entirely dismissed before the Circuit Court of Putnam County, such a dismissal could only be without prejudice as involuntary and never reaching the merits of the case, and therefore would invoke this State's saving statute founded in W. Va. Code § 55-2-18, which would give the Respondent up to one (1) year to re-file his case in the Circuit Court of Cabell County. *Id.* Simply put, none of the Petitioners in this action can realistically avoid litigation for the undeniable damages inflicted upon the Respondent, and therefore a stay of the proceedings below, including the exchange of discovery, is senseless and inappropriate.

Protective orders are in place and the only danger to the parties regarding discovery is a danger to the Respondent as more time passes that information and documents in the Petitioners' possession and control be lost or damaged. For this reason, this Court should refuse to stay the proceedings of the lower court which would result in discovery being exchanged by the parties.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that Cabell Huntington Hospital's *Amended Petition for Writ of Prohibition* be denied, as well as that Petitioner's contemporaneous motion to stay the lower proceedings. The Respondent further requests all such other relief as this Court may deem just and proper.

Signed: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2020, true and accurate copies of the foregoing ***"Response of J.M.A. to the Amended Petition for Writ of Prohibition/Mandamus"*** was deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal, and to the Respondent, The Honorable Phillip M. Stowers, Judge, as follows:

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