IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-1029

STATE OF WEST VIRGINIA ex rel.
HEALTH CARE ALLIANCE, INC. and
HCFS HEALTH CARE FINANCIAL SERVICES, LLC
d/b/a ALCOA BILLING CENTER,

Petitioners,

v.

THE HONORABLE ERIC O'BRIANT,
Judge, Circuit Court of Logan County and
KELSEY STARR,

Respondents.

PETITION FOR WRIT OF PROHIBITION

From the Circuit Court of Logan County,
Case No. 20-C-58

Caleb B. David, Esq. (WVSB # 12732)
cdavid@shumanlaw.com
Michael D. Dunham, Esq. (WVSB # 12533)
mdunham@shumanlaw.com
SHUMAN MCCUSKEY SLICER PLLC
1411 Virginia Street East, Suite 200
Charleston, West Virginia 25301
Counsel for Petitioners

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QUESTIONS PRESENTED

1. Whether the circuit court committed clear legal error and exceeded its legitimate powers in ordering HCFS Health Care Financial Services, LLC to disclose the names, addresses, and healthcare account information of non-litigant third party patients, in a searchable format, when that information is not relevant to any claim or defense in the litigation, and HCFS Health Care Financial Services, LLC does not possess the information in a searchable format.

STATEMENT OF THE CASE

I. Introduction

The State of West Virginia has long recognized that individuals have legally protected privacy interests. Private health information is even more legally safeguarded. However, the Circuit Court of Logan County did not adequately protect those privacy interests when it ordered HCFS Health Care Financial Services, LLC to produce protected personal healthcare information, which is not relevant to any fact at issue, regarding patients who are not involved in the litigation pending before the Circuit Court.

Pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure, HCFS requests this Court issue a Writ of Prohibition, prohibiting the respondent, the Honorable Eric O'Briant, from enforcing an Order Granting Plaintiff's Motion to Compel. In its Order entered December 4, 2020, the circuit court failed to protect the privacy interests of non-litigant third party patients by requiring HCFS Health Care Financial Services, LLC to produce their names, addresses, and healthcare account information.

II. Amended Class Action Complaint

On June 8, 2020, Petitioner, Kelsey Starr, a Logan County, West Virginia resident, filed her Complaint in the Circuit Court of Logan County. Appendix "Appx." at 010. On June 29, 2020, Ms. Starr filed her Amended Class Action Complaint. Appx. 021. Ms. Starr names Healthcare

Alliance, Inc. ("HCA") and HCFS Health Care Financial Services, LLC ("HCFS") d/b/a Alcoa Billing Center as defendants.[1]

Under a portion of her Amended Class Action Complaint entitled "Class Representation Allegations," Ms. Starr claims that HCFS has not registered the tradename or d/b/a "Alcoa Billing Center" within the State of West Virginia nor has HCFS registered as a collection agency within the State of West Virginia. Appx. 022. She asserts that she intends to bring a class claim "on behalf of all West Virginia residents who (1) received written communications from defendants attempting to collect debt using the name Alcoa or Alcoa Billing Center while defendants were not licensed and bonded in West Virginia to do so." Appx. 022. She asserts that "the central issue raised by this action is whether defendant violated W.Va. Code §46A-2-127 et seq. in collecting debt in the name of Alcoa Billing Center[.]" Appx. 022.

Ms. Starr asserts class claims for "violation of W. Va. Code § 46A-2-127 et seq.," "Violation of Public Policy," and "Violation of W. Va. Code 47-16-1 et seq. and W.Va. Code 46A-2-127 et seq and W.Va. Code 46A-6-104." Appx. 026 – 031. Additionally, Ms. Starr seeks a declaratory judgment asking the circuit court "to declare that defendant while representing themselves to be Alcoa or Alcoa Billing Center constitutes the collection of debt for another and thus is required to comply with the requirements of W.Va. Code §§47-16- 1 et seq. governing collection agencies." Appx. 031 – 032.

Ms. Starr asserts an "individual account" claim for an alleged violation of W. Va. Code § 46A-2-127. Appx. 032 – 033. Specifically, she claims that HCA asserted that she is the guarantor of a debt obligation arising from healthcare services rendered to her minor relative, Alex Starr. Appx. 032. Ms. Starr claims she was not present when the healthcare services were provided to

[1] In her original Complaint, Ms. Starr names Alcoa Billing Center as a defendant but does not name HCFS as a defendant. Appx. 10.

Alex Starr, and she did not guarantee a debt obligation with respect to services rendered to Alex Starr. Appx. 033. Yet, Ms. Starr claims HCFS sent a collection letter to her, but the letter appeared to be from "Alcoa Billing Center." Appx. 026. She claims Alcoa Billing Center is not a registered business entity or d/b/a in the State of West Virginia, and HCFS "made a false implication that [Alcoa Billing Center was] vouched for, bonded by, or affiliated with a state or an agency to collect . . . consumer debt[s]" from her and all other West Virginia residents. Appx. 027. She asserts this conduct is in violation of West Virginia Code § 46A-2-127.

III. Discovery Dispute

On June 30, 2020, Ms. Starr served her First Set of Interrogatories and Requests for Production of Documents to HCFS. Appx. 054. On August 13, 2020, HCFS responded to Ms. Starr's discovery requests. Appx. 054. On August 18, 2020, Ms. Starr sent a meet and confer letter requesting supplementation of HCFS's discovery responses. Appx. 035 – 040, 054. On August 28, 2020, Ms. Starr filed her Motion to Compel. Appx. 041. Also, on August 28, 2020, HCFS served its Supplemental Answers and Responses to Plaintiff's discovery requests. Appx. 055, 068. On November 12, 2020, HCFS served its Second Supplemental Answers and Responses to Plaintiff's discovery requests providing numerical information rather than specific patient information to satisfy Ms. Starr's discovery requests. Appx. 055, 069 – 077. Following the two supplemental productions, Ms. Starr proceeded on her Motion to Compel as to Interrogatories Nos. 3 and 13 and Request for Production of Documents No. 11. Interrogatory No. 3 requests

> For a period between June 2016 and present, identify all individuals with a West Virginia address whom Defendant HCFS sent written statements, letters, or other written communications evidencing an amount due or allegedly due. Please list the consumer's name and address, date letter was sent, the name of original creditor, original creditor's account or reference number, the amount owed or allegedly owed, and the current balance.

Appx. 038, 049, 055, 083, 088.[2] HCFS initially objected to Interrogatory No. 3 on the grounds of relevance and because the information requested is protected by the Health Insurance Portability and Accountability Act ("HIPAA") as HCFS's medical billing services relate to medical care. Appx. 038, 049, 064, 088. Ms. Starr contended that this information was not HIPAA-protected so long as a protective order was entered and proffered a protective order for consideration. HCFS maintained its objection in its Supplemental Discovery Responses, stating:

> Plaintiff's proposed Stipulated Protective Order does not provide satisfactory assurance that the information requested will not be used outside this lawsuit. Plaintiff simply cites to "numerosity, typicality, commonality, adequacy, and superiority/predominance," without any explanation as to why the actual names and account information are relevant to any of the class certification elements. The names and account information of individuals receiving billing statements from Defendant would only be relevant for notification purposes following certification. Because Plaintiff has failed to provide any explanation as to the relevance of the names and account information and how, at this stage, the information would be used for purposes of this lawsuit, Defendant maintains its objections and is not satisfactorily assured that the HIPAA-protected information would only be used for purposes of this lawsuit.

Appx. 056, 065, 088 – 089.

In its Second Supplemental Discovery Responses, HCFS provided the following numerical information of individuals who received written communications:

> Subject to the previously stated objections, and per the parties' agreement regarding resolution of a discovery dispute, Defendant states that, from June 1, 2016 to the present, approximately 11,630 individuals may have received statements sent by

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[2] Request for Production of Documents No. 11 requests documentation of the information sought in Interrogatory No. 3. Specifically, it requests:

> For Defendant HCFS, please produce in searchable formatting (such as excel) the identification of every individual with a West Virginia address that was sent a letter, account statement, bill, or written request for payment between June 2016 and present. For every such individual, please produce in electronic searchable format, excel format, or other format the consumer's name and address, date letter was sent, the name of original creditor, original creditor's account or reference number, the amount owed or allegedly owed, and the current balance.

Appx. 035 – 036, 047, 087.

> Defendant HCFS with the name of Alcoa Billing Center listed as the return address for services rendered by Defendant Healthcare Alliance, Inc. at Logan Regional Medical Center. Defendant cannot state this figure with absolute certainty because it would require Defendant to access and review the confidential account information for each and every patient separately. Not all of these 11,630 patients *may have* received a statement from Defendant HCFS; however, these 11,630 patients' accounts were in a status in which the patient, rather than an insurer, was identified as the responsible party for the services received. Thus, 11,630 represents the *maximum* number of patients that may have received a statement. These 11,630 patients account for 21,775 dates of service.

Appx. 056, 089.

IV. Circuit Court Order

On December 4, 2020, the circuit court entered an order granting Ms. Starr's Motion to Compel. Appx. 001 – 005. The circuit court found that the Amended Class Action Complaint alleges that HCFS "violated various consumer [statutes] and purports to brings claims 'on behalf of all West Virginia residents who (1) received written communications from defendants attempting to collect debt using the name Alcoa or Alcoa Billing Center while defendants were not licensed and bonded in West Virginia to do so.'" Appx. 002.

The circuit court ordered HCFS to supplement its responses to Request for Production No. 11 and Interrogatory No. 3 within sixty (60) days of its order to include, "in searchable format, all individuals who received communications from Defendant HCFS between June 2016 and the time of the filing of the Complaint sent to a West Virginia billing address not limited to only patients of Logan Regional Medical Center[.]"[3] Appx. 003. The circuit court ordered HCFS to produce the names and addresses of individuals receiving such communications, the date of the

[3] Additionally, the circuit court ordered HCFS to supplement its response to Interrogatory No. 13 and Interrogatory No. 14 within ten (10) days of its ruling. On December 1, 2020, HCFS supplemented its responses to these interrogatories. HCFS is not challenging the circuit court's ruling with respect to Interrogatory No. 13 and Interrogatory No. 14.

communication, the name of the original creditor, the account number, the amount allegedly owed, and the current balance owed. Appx. 003 – 004.

In support of its order, the circuit court found that the name of the original creditor, account number, amount allegedly owed, and current balance "goes towards proving at the certification stage common questions of fact or law, typical claims or common defenses, i.e. 'commonality' and 'typicality.'" Appx. 003. The circuit court did not expressly provide its rationale for ordering HCFS to produce the names and addresses of individuals receiving communications but cited to this Court for the proposition that "reasonable discovery related to class certification issues is appropriate, particularly where the pleadings and record do not sufficiently indicate the presence or absence of the requisite facts to warrant an initial determination of class action status." Appx. 003 (citing *Love v. Georgia Pacific Corp.*, 214 W. Va. 484, 590 S.E.2d 677 (2003) (quoting *Burks v. Wymer*, 172 W. Va. 478, 485, 307 S.E.2d 647, 654 (1983))).

SUMMARY OF ARGUMENT

The circuit court committed clear error when it ordered HCFS to produce the names, addresses, and healthcare account information of non-litigant third party patients because such information is not relevant to any claim or defense in the litigation, and HCFS does not have permission from those individuals to release their personal information. Further, the circuit court committed error when it ordered HCFS to provide the requested information in a format that currently does not exist, requiring HCFS to create documents.

Styling a complaint as a class action does not entitle a party to obtain discovery that is not relevant and not likely to lead to the discovery of admissible evidence. Ms. Starr's "individual account" claim asserted in her Amended Class Action Complaint is solely related to correspondences received by her related to medical care provided to a family member at Logan Regional Medical Center. Appx. 032 – 033. Although Ms. Starr seeks certification of a class, the

information sought in Interrogatory No. 3 and Request for Production of Documents No. 11 – specifically, the names and addresses of the non-litigant third party patients and other healthcare account information – does not make any of the prerequisite class factors outlined in Rule 23 of the West Virginia Rules of Civil Procedure more likely or less likely. This is particularly true given that HCFS has already identified the ***number*** of individuals who may have received statements from HCFS with the name Alcoa Billing Center listed as the return address for services rendered from June 1, 2016 to the present by HCA at Logan Regional Medical Center.

Moreover, Ms. Starr does not currently represent a class of plaintiffs, and she is not entitled to discover the confidential, HIPAA-protected information of other West Virginia residents merely because she seeks to represent them. *See State ex rel. West Virginia Fire & Cas. Co. v. Karl*, 202 W. Va. 471, 476, 505 S.E.2d 210, 215 (1998) (the "interests in protecting the privacy rights of its claimants clearly outweighs any right the real parties in interest have to discover the identities of the other claimants") (internal quotation marks and citations omitted). Ms. Starr's individual claim is not related to any other patient's services nor does the specific healthcare account information of non-litigant third-party patients relate to any of the prerequisite factors for class certification. Finally, HCFS does not maintain account information in the manner requested by Ms. Starr and is not required to create documents for purposes of discovery.

The circuit court committed clear legal error and exceeded its legitimate powers when it ordered HCFS to disclose the names, addresses, and healthcare account information of non-litigant third-party patients, in a searchable format, when that information is not relevant to any claim or defense in the litigation, and HCFS does possess the information in a searchable format. Accordingly, this Court should stay further proceedings in the Circuit Court of Logan County, West Virginia, issue a rule to show cause as to why a Writ of Prohibition should not be granted,

schedule this action for Rule 19 argument, enter an order granting the Writ of Prohibition, prohibit the lower court from enforcing the Order of December 4, 2020, and direct the circuit court to deny the Motion to Compel.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument in this matter under Rule 19 will aid this Court in its decision process. This case involves issues of settled law that are narrow in scope and involves the circuit court's clear legal error in applying that settled law. W. Va. R. App. P. 19(a)(1) and (4).

ARGUMENT

I. Standard

This Court's original jurisdiction is recognized in Rule 16 of the West Virginia Rules of Appellate Procedure. A writ of prohibition is proper whenever an inferior court does not have jurisdiction or has jurisdiction but exceeds its legitimate powers. *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 664, 584 S.E.2d 517, 520 (2003).

HCFS seeks a writ of prohibition because the circuit court exceeded its legitimate powers and committed clear legal error when it ordered HCFS to provide names, addresses and healthcare account information of potentially more than 11,630 healthcare patients who are not involved in the underlying civil action and have not consented to the release of their protected health information. In such instances, this Court has established the following standard of review for issuing a writ of prohibition:

> 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*, 199 W. Va. 12, 483 S.E.2d 12 (1996); *see also* Syl. Pt. 2, *State ex rel. West Virginia Nat'l Auto Ins. Co. v. Bedell*, 223 W.Va. 222, 672 S.E.2d 358 (2008); Syl. Pt. 1, *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 624 S.E.2d 844 (2005); Syl. Pt. 1, *State ex rel. Cosenza v. Hill*, 216 W. Va. 482, 607 S.E.2d 811 (2004); Syl. Pt. 2, *State ex rel. Isferding v. Canady*, 199 W. Va. 209, 483 S.E.2d 555 (1997).

The first two factors unquestionably are present here. "A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders." Syl. Pt.1, *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992); Syl. Pt. 3, *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 226 W. Va. 138, 697 S.E.2d 730 (2010). Moreover, "prohibition may be available where the orders concern the disclosure of potentially privileged information." *State ex rel. HCR ManorCare, LLC v. Stucky*, 235 W. Va. 677, 684, 776 S.E.2d 271, 278 (2015). If not corrected, the circuit court's erroneous ruling will require dissemination of personal and private health information of countless individuals who have no interest in this litigation and have not authorized HCFS to release their information to outsiders, such as Ms. Starr. A writ of prohibition is the only means to correct the circuit court's legal error.

The third and most important factor – that the lower tribunal's order is clearly erroneous as a matter of law – exists here. This Court has long recognized an individual's right to privacy. *State ex rel. State Farm Mut. Auto. Ins. Co. v. Cramer*, 237 W. Va. 60, 785 S.E.2d 257 (2016); *Tabata Charleston Area Med. Ctr.*, 233 W. Va. 512, 759 S.E.2d 459 (2014); *Roach v. Harper*, 143

W. Va. 869, 105 S.E.2d 564 (1958). Individuals who seek medical care have an expectation that their personal information, including their names, addresses, and healthcare account information, will not be provided to strangers who are not involved in the handling of their medical care. The circuit court committed clear legal error when it overlooked the privacy interests of these individuals.

II. Discussion

A. The circuit court committed clear legal error and exceeded the scope of its authority when it failed to protect the healthcare privacy interests of non-litigant third parties.

Under Rule 26(b)(1) of the West Virginia Rules of Civil Procedure, a party "may obtain discovery regarding any matter, **not privileged, which is relevant to the subject matter involved in the pending action** . . .." W. Va. R. Civ. P. 26(b)(1) (emphasis added). "The question of the relevancy of the information sought through discovery essentially involves a determination of how substantively the information requested bears on the issues to be tried." Syl. Pt. 4, in part, *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992).

Additionally, West Virginia recognizes a "legally protected interest in privacy." *Twigg v. Hercules Corp.*, 185 W. Va. 155, 157, 406 S.E.2d 52, 54 (1990). "The right of privacy, including the right of an individual to be let alone and to keep secret his private communications, conversations and affairs, is a right the unwarranted invasion or violation of which gives rise to a common law right of action for damages." Syl. Pt. 1, *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958); *see also* Syl. Pt. 4, *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W. Va. 512, 759 S.E.2d 459 (2014) (finding that individuals had standing to assert claims for invasion of privacy when their personal information, including names, contact details, Social Security numbers and dates of birth were placed on the Internet).

"Weighing the requesting party's need to obtain the information against the burden that producing the information places upon [the disclosing party], [courts] must be cognizant of the privacy rights of non-litigant third parties." *State ex rel. West Virginia Fire & Cas. Co. v. Karl*, 202 W. Va. 471, 476, 505 S.E.2d 210, 215 (1998). In *Karl*, the plaintiffs requested claim files of non-litigants relating to infant settlement proceedings, and the insurer objected to providing such information on the basis that doing so would violate the privacy interests of the non-litigant third parties. Although the lower court entered a protective order, prohibiting dissemination of information outside the confines of the litigation, this Court's protection of the non-litigant third parties' privacy interests went beyond the mere issuance of a protective order. "[C]ognizant of the privacy rights of non-litigant third parties," this Court held the insurer "should be required to produce redacted copies of the infant claim portions of the requested claim files. [The insurer] **may adequately protect the privacy interests of the non-litigants by redacting the names, addresses, personal medical information, and other identifying material from the records**." *Id.* at 476, 505 S.E.2d at 215 (emphasis added).

This Court relied upon its rationale in *Karl* when it found that a circuit court committed clear legal error when the circuit court failed to bar the disclosure of the names, addresses, and telephone numbers of an insurance company's insureds who were non-litigant third parties. *State ex rel. State Farm Mut. Auto. Ins. Co. v. Cramer*, 237 W. Va. 60, 785 S.E.2d 257 (2016). In *Cramer*, the plaintiff alleged an unfair claims settlement practices claim and contended that the names, addresses, and telephone numbers of an insurance company's non-litigant third party insureds were necessary to establish the "general business practice" element of the plaintiff's claim. *Id.* at 65, 785 S.E.2d at 262. This Court concluded that the information the plaintiff sought could be provided if the insurance company disclosed the form it used with regard to the non-

litigant third party insureds. *Id.* at 67, 785 S.E.2d at 264. The Court reasoned that the form, absent the names, addresses, and telephone numbers of the non-litigant third party insureds, "directly relate[d]" to the "general business practice" component of the plaintiff's cause of action for unfair claim settlement practices. Thus, disclosure of the names, addresses, and telephone numbers of the non-litigant third-party insureds was not relevant nor warranted under the circumstances. *Id.*

There is little distinction between the privacy interests at issue in *Karl* and *Cramer* and the privacy interests Ms. Starr seeks to invade in this case. If anything, the privacy interests at stake in this case—which include protected health information—may be greater than the interests at stake in *Karl* and *Cramer*. Personal information, including a patient's name, a patient's address, name of original creditor, original creditor's account or reference number, amount owed or allegedly owed, and the current balance, is not required to establish any of the prerequisite factors to certify a class under Rule 23 of the West Virginia Rules of Civil Procedure.[4] Under Rule 23, a class member may sue as a representative party of the class if

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

W. Va. R. Civ. P. 23(a).

Although Ms. Starr attempts to argue that the name of the original creditor, account number, amount allegedly owed, and current balance "go[ ] towards proving at the certification stage . . . that all individuals are similarly situated," she fails to provide any reason or rationale (nor does the circuit court explain in its order) how a non-litigant third-party patient's name, address, or healthcare account information establishes (or even relates to) any of the Rule 23

[4] Ms. Starr concedes that the requested information is not relevant to her individual claim. Appx. 082. Ms. Starr contends the information is relevant to establish the Rule 23 prerequisites for establishing a class.

prerequisite factors for certifying a class. Moreover, Ms. Starr has already been provided the number of individuals who received written communications from HCFS. In its Second Supplemental Discovery Responses, HCFS provided the following information:

> Subject to the previously stated objections, and per the parties' agreement regarding resolution of a discovery dispute, Defendant states that, from June 1, 2016 to the present, **approximately 11,630 individuals may have received statements sent by Defendant HCFS with the name of Alcoa Billing Center listed as the return address for services rendered by Defendant Healthcare Alliance, Inc. at Logan Regional Medical Center.** Defendant cannot state this figure with absolute certainty because it would require Defendant to access and review the confidential account information for each and every patient separately. Not all of these 11,630 patients may have received a statement from Defendant HCFS; however, these 11,630 patients' accounts were in a status in which the patient, rather than an insurer, was identified as the responsible party for the services received. Thus, 11,630 represents the maximum number of patients that may have received a statement. These 11,630 patients account for 21,775 dates of service.

Appx. 056, 089. (emphasis added).

Thus, in regard to the first Rule 23 prerequisite, "numerosity," HCFS has provided information showing that up to 11,630 individuals may have received statements sent by HCFS with the name of Alcoa Billing Center listed as the return address for services rendered by HCA at Logan Regional Medical Center. Ms. Starr does not provide any argument as to how the names, addresses, or healthcare account information of non-litigant third party patients are relevant to establishing Rule 23's numerosity prerequisite.

Ms. Starr also fails to explain how the names, addresses, or healthcare account information of the non-litigant third-party patients establishes or relates to any of the remaining Rule 23 prerequisite factors. In fact, Ms. Starr does not even allege that the information she seeks in discovery is relevant or necessary to establish her class. She asserts that "the central issue raised by this action is whether defendant violated W.Va. Code §46A-2-127 et seq. in collecting debt in the name of Alcoa Billing Center[.]" Appx. 024. In her Amended Class Action Complaint, she

does not identify the non-litigant third-party patients' names, addresses, or healthcare account information as "[q]uestions of law and fact that are common to the entire Class[.]" Appx. 020, 023. According to Ms. Starr, the questions of law and fact common to the putative class are:

> a. Whether the defendant HCFS was using the name Alcoa Billing Center illegally and without registering the name as a trademark or DBA (doing business as) with the State of West Virginia to legally use the name in the pursuit of the collection of claims;
>
> b. Whether Plaintiff and Class Members were contacted by the defendants for the purpose of collecting consumer debt in the State of West Virginia when the defendant were not licensed and bonded to do so in violation of the law;
>
> c. Whether Alcoa Billing Center is a true name of the defendant Health Care Services Financial [sic], LLC;
>
> d. Whether defendants are legally responsible for damages incurred by Plaintiffs and the Class Members for their conduct surrounding the use of Alcoa Billing Center and the unlicensed collection of debt;
>
> e. Whether either of the Defendants are unlicensed collection agencies engaged in the collection of debt;

Appx. 023.

Ms. Starr does not need (and is not entitled to) the non-litigant third-party patients' names, addresses, or healthcare account information to reveal whether individuals were sent statements by HCFS with the name of Alcoa Billing Center listed as the return address. HCFS has already provided that information and answered that question in the affirmative. Nor does Ms. Starr need the non-litigant third-party patients' names, addresses, or healthcare account information to provide a numerical count of individuals who received such statements. As noted, as many as 11,630 individuals may have received statements sent by HCFS with the name of Alcoa Billing Center listed as the return address for services rendered by HCA at Logan Regional Medical Center. Appx. 056, 089. These 11,630 patients' accounts were in a status in which the patient,

rather than an insurer, was identified as the responsible party for the services received. Appx. 056, 089. Thus, 11,630 represents the maximum number of patients that may have received a statement. This information directly and explicitly answers Ms. Starr's "questions of fact and law" as to whether she and other putative class members were contacted by any of the underlying defendants.

Finally, Ms. Starr fails to explain how the non-litigant third-party patients' names, addresses, or healthcare account information is relevant to whether her claim is common or typical to the claims of the class. Ms. Starr alleges that the "central issue" of her lawsuit is whether HCFS violated W.Va. Code §46A-2-127 by "using the name Alcoa Billing Center illegally[.]" Thus, as outlined in her Amended Class Action Complaint, the information Ms. Starr requires to satisfy the "commonality" and "typicality" prerequisites is "whether Plaintiff and Class Members were contacted by the defendants for the purpose of collecting consumer debt in the State of West Virginia[.]" Appx. 023. Providing the names, addresses, and healthcare account information of non-litigant third party patients does not provide any information useful to Ms. Starr to satisfy Rule 23's "commonality" or "typicality" prerequisites.

In sum, Ms. Starr asserts that she intends to bring a class claim "on behalf of all West Virginia residents who (1) received written communications from defendants attempting to collect debt using the name Alcoa or Alcoa Billing Center[.]" Appx. 022. She provides no explanation as to why the names, addresses, or healthcare account information of non-litigant third party patients are relevant to determine any of the certification prerequisites to certify that particular class. The *Karl* Court and the *Cramer* Court did not permit discovery of the names and addresses of non-litigant third parties because the private information was not relevant to any claim or defense in the litigation, and the "interest in protecting the privacy rights of [non-litigant third parties] clearly outweigh[ed] any right the real parties in interest have to discover the identities of the other [non-

litigant third parties]." *Karl*, 202 W. Va. at 476, 505 S.E.2d at 215. Here, the names and account information of non-litigant third parties receiving billing statements from HCFS would only be relevant for notification purposes following class certification, which has not occurred. Thus, the circuit court committed clear legal error and exceeded the scope of its authority when it failed to protect the healthcare privacy interests of non-litigant third party patients.

B. The circuit court committed clear legal error and exceeded the scope of its authority when it ordered HCFS to create new documents to produce in discovery.

HCFS does not maintain patient account information documentation in the manner requested by Ms. Starr. Despite not maintaining the documents in the manner requested by Ms. Starr, the circuit court ordered HCFS to produce the documents in "searchable format." Appx. 003.

"Rule 34 only requires a party to produce documents that exist at the time of the request; a party cannot be compelled to create a document for its production." *Atkins v. AT&T Mobility Servs., LLC*, Civil Action No. 2:18-cv-00599, 2019 U.S. Dist. LEXIS 227963, *16, 2019 WL 8017851 (S.D.W. Va. April 25, 2019); *see also Scantibodies Lab., Inc. v. Church & Dwight Co.*, Civil Action No. 14-cv-2275, 2016 U.S. Dist. LEXIS 154396 *68 – 69 (S.D.N.Y Nov. 4, 2016) ("[T]his Court notes that a party has no obligation to create new documents in discovery.") (citing *R.F.M.A.S., Inc. v. So*, 271 F.R.D. 13, 44 (S.D.N.Y. 2010)); *Condry v. Buckeye S.S. Co.*, 4 F.R.D. 310, 1945 U.S. Dist. LEXIS 1372 (D. Pa. 1945) ("But until this existence is established so that the documents asked for can be identified and this materiality established, there can be no order to produce under Rule 34."); *Alexander v. FBI*, 194 F.R.D. 305, 2000 U.S. Dist. LEXIS 8867 (D.D.C. 2000) ("Rule 34 only requires a party to produce documents that are already in existence."); *Harris v. Advance Am. Cash Advance Ctrs.*, 288 F.R.D. 170, 2012 U.S. Dist. LEXIS 173081 (S.D. Ohio 2012) ("Defendant is not required to create documents in response to plaintiff's requests for discovery.").

Rule 34 cannot be used to compel a party to create a document solely for its production in discovery. Ms. Starr's initial request asks that the documents be produced in "searchable formatting (such as excel)"; however, the requested documents are not maintained in excel or any other "searchable format." The circuit court is without authority to compel HCFS to create and produce any document in any form other than the form maintained. HCFS does not maintain the requested documents in the manner requested by Ms. Starr and is not required to create documents for purposes of discovery. The circuit court committed clear legal error and exceeded its legitimate powers when it ordered HCFS disclose the requested documents in a format the documents are not maintained.

CONCLUSION

Petitioner HCFS Health Care Financial Services, LLC requests that this Court stay further proceedings in the Circuit Court of Logan County, West Virginia, issue a rule to show cause as to why a Writ of Prohibition should not be granted, schedule this action for Rule 19 argument, enter an order granting the Writ of Prohibition, prohibit the lower court from enforcing the Order of December 4, 2020, and direct the circuit court to deny the Motion to Compel.

Caleb B. David, Esq. (WVSB # 12732)
cdavid@shumanlaw.com
Michael D. Dunham, Esq. (WVSB # 12533)
mdunham@shumanlaw.com
SHUMAN MCCUSKEY SLICER PLLC
1411 Virginia Street East, Suite 200
Charleston, West Virginia 25301
Counsel for Petitioners

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. _____

STATE OF WEST VIRGINIA ex rel.
HEALTH CARE ALLIANCE, INC. and
HCFS HEALTH CARE FINANCIAL SERVICES, LLC
d/b/a ALCOA BILLING CENTER,

Petitioner

v.

THE HONORABLE ERIC O'BRIANT,
Judge, Circuit Court of Logan County and
KELSEY STARR,

Respondents.

VERIFICATION

I, Caleb B. David, after first being duly sworn upon oath, respectfully state that I am counsel for Petitioners named in the foregoing Petition for Writ of Prohibition; that I am familiar with the contents of the related Appendix; and that the facts and allegations set forth in the Petition are true and accurate to the best of my knowledge and belief.

Caleb B. David, Esquire (WVSB #12732)

Taken, sworn to and subscribed before me this 23rd day of December, 2020.

My commissions expires: March 26, 2025.

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
LuAnn Searls
P.O. Box 842
Hurricane, WV 25526
My Commission Expires March 26, 2025

LuAnn Searls
Notary Public

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Judge, Circuit Court of Logan County and
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Respondents.

CERTIFICATE OF SERVICE

I, Caleb B. David, counsel for Petitioners, hereby certify that I have served a true and accurate copy of the foregoing "Petition for Writ of Prohibition" upon the parties whom a rule to show cause should be served by placing said copies in the United States mail, with first-class postage prepaid, on this day, December 23, 2020, addressed separately as follows:

Steven S. Wolfe, Esquire
Wolfe White & Associates
P.O. Box 536
Logan, WV 25601
Counsel for Respondent

Hon. Eric O'Briant, Circuit Judge
Seventh Judicial Circuit
Circuit Court of Logan County
300 Stratton Street
Logan, WV 25601

Caleb B. David, Esquire (WVSB #12732)
Michael D. Dunham, Esquire (WVSB #12533)
Counsel for Petitioners