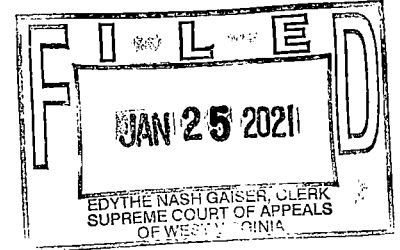


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel.
Health Care Alliance, Inc. and
HCFS Health Care Financial Services, LLC
d/b/a Alcoa Billing Center,
Petitioners,



vs.) No. 20-1029

The Honorable Eric O'Briant,
Jude of the Circuit Court of Logan
County, and Kelsey Starr,
Respondents.

RESPONDENT'S BRIEF

**FROM THE CIRCUIT COURT OF
LOGAN COUNTY, WEST VIRGINIA**

**TO THE HONORABLE JUSTICES
OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

A handwritten signature in black ink, appearing to read "Steven S. Wolfe".

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RESPONSE BRIEF

QUESTION PRESENTED BY PETITION

- I.** 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.

ANSWER: No. The circuit did not exceed its legitimate powers under Rule 23 and or Rule 26 in ordering reasonable discovery which would aid the circuit court in performing a thorough analysis of issues related to class certification.

FACTS & STATEMENT OF THE CASE

The Petitioner was offered and refused to sign or enter an Agreed Protective Order which gave reasonable assurances that the patient health information (names) would be protected and not used outside the course of this litigation. The Petitioner was offered and refused to produce the requested information AT ALL, much less in any searchable format that it chose, so that the Respondent Plaintiff could meaningfully search the information rather than sift through an endless data dump. The Respondent would acknowledge that they can in fact produce the data in a searchable format, such as portable document file (PDF) which is likely the most widely used

file format for scanned paper documents. Common programs such as Adobe, Microsoft Word, and similar software uses Optical Character Recognition (OCR) to read a scanned document and instantly make the document searchable.

Notwithstanding, the Respondent specifically argued and the circuit court agreed, that the information sought was necessary in determining the bounds of the various class certification issues of numerosity, commonality, and typicality. Despite the arguments in Petitioner's writ, the Petitioner has refused to produce an accurate number of potential class members which is essential burden of proof for Respondent to prove numerosity. The Petitioner does provide a number of 11,630 as a potential class size, but that number is only from one facility which Petitioner HCFS services. Petitioner HCFS has acknowledged that it services at least five (5) other facilities. Thus, the court agreed with Respondent that the information sought was highly relevant to certification issues and took reasonable steps in ordering the Petitioner to identify the five (5) other facilities and to "produce the names and addresses of individuals receiving such communications, the date of the communication, the name of the original creditor, the account number, the amount allegedly owed, and the current balance owed." The Respondent argued to the court, and the court found, that the name, address, original creditor, account number, and original & current amount owed will aid in defining the class certification issues.

SUMMARY OF ARGUMENTS

I. THE CIRCUIT COURT'S ORDER FALLS WITHIN A DISCLOSURE EXEMPTION UNDER 45 C.F.R. 164.512(e) (HIPAA) AND REASONABLY PROTECTS PATIENT INFORMATION

First, the circuit court was within its authority to order the Defendant HCFS Health Care Financial Services to produce the requested information because the Health Insurance Portability

and Accountability Act of 1996 (“HIPAA”) permits disclosure of certain patient health information when a court orders its disclosures and reasonable measures are put in place to protect the patient health information by the litigants. See 45 C.F.R. 164.512(e)(1)(i). Paragraphs 7 and 8 of the circuit court order ensures that the protected patient health information is protected from disclosure. HIPAA clearly permits this type of disclosure, so the Petitioner’s arguments that a court cannot order such a disclosures is without merit.

II. THE INFORMATION ORDERED TO BE PRODUCED IS WITHIN THE COURT’S LEGITIMATE POWERS FOR ANALYSING CLASS CERTIFICATION ISSUES.

Second, a circuit court has broad discretion under Rule 23 to order discovery for the purposes of determining the bounds and scope of a purported class as well as address commonality and typicality issues. Here, the Petitioner has refused to identify the number of potential class members from ALL of the facilities within West Virginia that it serviced over the applicable time period. Rather, it choose to only give a rough estimate of the potential class members from one (1) of five (5) facilities it services by estimating the number exceeds 11,630 individuals. Therefore, the court was left with no alternative except to compel a list of names, addresses, original creditors, account numbers and amounts owed. An address disclosure is necessary for numerosity, commonality, and typicality because this purported class action only pertains to individuals with a West Virginia addresses; all addresses outside of West Virginia are properly excluded. Thus, the information will assess numerosity as well as prove commonality and typicality. A particular individual may have received an improper debt collection communication but live in a different state and thus will not be ‘common or typical’ of the class. Names and ad-

dresses are indispensable for defining the class. Additionally, given that the type of debt was incurred for medical services, then it is foreseeable that parents on behalf of children will be receiving the collection letters, thus the original creditor and account numbers will help distinguish which collection efforts relate to the parent or the minor children.

The original creditor, account number, amount allegedly owed, are all necessary and vital information at the certification stage to prove commonality and typicality. If the communications to an individual do not allege an original creditor or an amount owed, then they do NOT share commonality or typicality with the class who were receiving letters demanding payment of debt.

STATEMENT REGARDING ORAL ARGUMENT

It is the belief of Petitioner that oral argument is NOT necessary in this matter, as the facts and legal arguments made herein would not be significantly aided by the oral argument.

STANDARD OF REVIEW

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).

“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).

RESPONSE TO ARGUMENT

First, the circuit court was within its authority to order the Defendant HCFS Health Care Financial Services to produce the requested information because the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) permits disclosure of certain patient health information when a court orders its disclosures and reasonable measures are put in place to protect the patient health information by the litigants. See 45 C.F.R. 164.512(e)(1)(i). Paragraphs 7 and 8 of the circuit court order ensures that the protected patient health information is protected from disclosure. HIPAA clearly permits this type of disclosure, and is common and routine in litigation. There is nothing unique about the court ordering the disclosure of non-party patient health information. The Respondent likewise disputes that the information is protected pursuant to HIPAA. The information consists of date, name and address, original creditor, account number, and amount. None of the information contains diagnosis codes or other unique patient health information. Nonetheless, HIPAA still permits disclosure by a court protected by an order to keep the information guarded and confidential.

Second, with regard to the legitimate powers of a court to compel information needed to address certification issues, the general rule is that ‘class lists’ are not normally discoverable pre-certification. See *Oppenheimer Fund, Inc v. Sanders* 28, 57 L.Ed.2d 253, 98 S.Ct. 2380, 437 U.S.

340 (1978)(discovery of class lists at the precertification stage are not ‘within the scope of legitimate discovery’) But, *Oppenheimer* likewise acknowledged that it did “not hold that class members’ names and addresses never can be obtained under the discovery rule,” but those instances are limited to issues relevant to class certification such as numerosity or where the contact with member so the class could yield information relevant to issues in the case.” *See Id.* at 351 n.13, 354 n.20. Rather, a litigant must demonstrate that the “[d]iscovery of unnamed members of a proposed class requires a demonstration of need. If precertification discovery of unnamed class members is appropriate, the court should consider imposing limits beyond those contemplated by the Federal Rules of Civil Procedure. Such limits might include the scope, subject matter, number, and time allowed for depositions, interrogatories, or other discovery directed to class representatives or unnamed class members, and might limit the period for completing certification-related discovery.” *Manual For Complex Litigation, Fourth Sec. 21.141* (Pg. 256) citing *Baldwin & Flynn v. Nat’l Safety Assocs.*, 149 F.R.D. 598 (N. D. Cal. 1993)(*defendants failed to show the need for identifying unnamed class members for purposes of opposing commonality and typicality at certification hearing*)

The Respondent proved to the circuit court that the information sought was needed to examine commonality, typicality at the certification stage. The Petitioner has failed to point to any instance where the circuit court exceeded its legitimate power. “Rule 23 is a procedural device that was adopted with the goals of economies of time, effort and expense, uniformity of decisions, the promotion of efficiency and fairness in handling large numbers of similar claims. . . . Rule 23 provides trial courts with a tool to vindicate the rights of numerous claimants in one action when individual actions might be impracticable.” *In re West Virginia Rezulin Litig.*, 214 W.Va. 52, 62, 585 S.E.2d 52, 62.

“The ‘commonality’ requirement of Rule 23(a)(2) of the West Virginia Rules of Civil Procedure [1998] requires that the party seeking class certification show that ‘there are questions of law or fact common to the class.’ A common nucleus of operative fact or law is usually enough to satisfy the commonality requirement. The threshold of “commonality” is not high, and requires only that the resolution of common questions affect all or a substantial number of the class members.” *Syl. pt. 11, In re W. Va. Rezulin Litigation*, 214 W.Va. 52, 585 S.E.2d 52 (2003).

“The ‘typicality’ requirement of Rule 23(a)(3) of the West Virginia Rules of Civil Procedure [1998] requires that the ‘claims or defenses of the representative parties [be] typical of the claims or defenses of the class.’ A representative party's claim or defense is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. Rule 23(a)(3) only requires that the class representatives' claims be typical of the other class members' claims, not that the claims be identical. When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment.” *Syl. pt. 12, In re W. Va. Rezulin Litigation*, 214 W.Va. 52, 585 S.E.2d 52 (2003).

In short, Rule 23 permits a circuit court the discretion to mold discovery so that the court may fairly and adequately assess certification issues. In this instance, defining the scope and size of the purported class, along with compelling information vital in determining commonality and typicality was not an excessive use of the court’s legitimate authority. “Where a party seeks to proceed as a class representative under Rule 23 of the West Virginia Rules of Civil Procedure [1998], and where issues related to class certification are present, 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.” *Love v. Georgia Pacific Corp.*, 214 W.Va. 484, 590 S.E.2d 677 (W. Va. 2003) “[A]n exploration beyond the pleadings is essential to make an informed judgment on the propriety of a proposed spurious class action.” *Love v. Georgia Pacific Corp.*, 214 W.Va. 484, 590 S.E.2d 677 (W.Va. 2003) The Petitioner has failed to show that the circuit court exceeded its legitimate authority when it agreed that the Respondent proved the need for compelling dates, names, addresses, and the like for proving commonality and typicality. It should likewise be noted that the Petitioner has not requested a ruling on any dispositive issues like in *GMS v. Miklos*, 798 S.E.2d 833 (W.Va. 2017) which may dispose of the case early and make class discovery unnecessary.

In each instance, Respondent proved to the circuit court that the information sought was vital to the class certification issues. By identifying name, address, original creditor, account number, and original debt, the circuit court will have the necessary information to efficiently and effectively determine numerosity, commonality, and typicality for weighing certification. As an example, take the following:

Date	Name	Address	Orig. Creditor	Account #	Amount Owed	Class Member?
1/1/17	John Smith	Logan, WV	Healthcare Alliance	1234	\$500	Yes
1/1/17	John Smith	Logan, WV	Healthcare Alliance	Minor135	\$465	Yes. Reason: different account #
1/1/17	Jon Smith	Logan, WV	Healthcare Alliance	1234	\$500	No. Reason: Different name but same address & account number
2/5/17	John Smith	Logan, WV	Greenbrier Emerg. Services., Inc.	A536613	\$350	Yes. Same name different date/creditor/account/amount

2/5/17	John Smith	Lexington, KY	GES Hospitalist Services	5678	\$100	No. Not West Virginia address
2/5/17	John Smith	Logan, WV	Southeastern Medical Group.	91234	\$0.00	No. No amount owed.
2/5/17	John Smith	Logan, WV	Virginia PAC Services	9515	\$68.00	Yes. Different date/creditor

In each example above, we have changed a critical piece of the identifying information, whether it be date, name spelling, address, original creditor, account number, or amount owed. Given that the debts at issue are being incurred for medical and hospital services, the original creditors will likely have multiple names, addresses, and dates of services for the same individuals. Likewise, they may have multiple individuals at the same address (families). This shows that each category of information sought is vital to determining commonality, typicality, and even predominance/superiority. Note that each of the 5 original creditors listed above have all been identified by the Petitioner. Without all of the information, how can the court determine the bounds of the purported class. Without a name and address showing a West Virginia address, the plaintiff cannot show the individual is common or typical. Without showing the original creditor, account number or amount, the Plaintiff cannot show the individual is common or typical to individuals that received collection letters. "The party who seeks to establish the propriety of a class action has the burden of proving that the prerequisites of Rule 23 of the W. Va. Rules of Civil Procedure have been satisfied." Syl. Pt. 4, *In re Rezulin*, 214 W.Va. 52, 585 S.E.2d 52 (2003) Lastly, Petitioner is claiming that they are not collecting debt as a defense, thus, an amount owed is vital to showing that the purported class members received communications seeking payment for an amount owed which is a defense 'common' to each of the purported members.

In this case, the Petitioner has acknowledged that 11,630 individuals may be implicated from one facility's location (Logan General Hospital). It is estimated that 30,000 to 40,000 individuals statewide may be purported class members from services at the other four facilities. In *Webb v. Healthcare Revenue Recovery Grp. LLC*, No. C. 13-00737 RS, 2014 WL 325132 (N.D. Cal. Jan. 29, 2014), the court reasoned that a "purported 'class list' is still discoverable if it bears relevance to uses of class certification." *Id.* at *3, citing *Knutson v. Schwan's Home Serv., Inc.*, 3:12:CV-0964-GPC-DHB, 2013 WL 3746118, at *4 (S.D. Cal. July 15, 2013) (*finding "a list of phone numbers may very well bear direct relevance to a violation of the TCPA concerning the dialing of the very phone numbers listed"*) At this point, without the information ordered by the circuit court, it would be difficult to for a circuit court to "undertake a rigorous assessment of the available evidence and the method or methods by which the plaintiffs propose to use the evidence to prove those elements." *State ex rel. Surnaik Holdings of WV, LLC v. Bedell* (W. Va. 2020). Although the circuit court decided the issues in this writ prior to the *Surnaik Holdings of WV, LLC v. Bedell* decision issued November 20, 2020, the information sought in this matter must be compelled so that the circuit court can meaningfully address the predominance issues that the *Surnaik* decision discussed. "The thorough analysis of the predominance requirement of West Virginia Rule of Civil Procedure 23(b)(3) includes (1) identifying the parties' claims and defenses and their respective elements; (2) determining whether these issues are common questions or individual questions by analyzing how each party will prove them at trial; and (3) determining whether the common questions predominate. In addition, circuit courts should assess predominance with its overarching purpose in mind—namely, ensuring that a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other

undesirable results. This analysis must be placed in the written record of the case by including it in the circuit court's order regarding class certification.” *State ex rel. Surnaik Holdings of WV, LLC v. Bedell* (W. Va. 2020) Likewise, “[a] circuit court’s failure to conduct a thorough analysis of the requirements for class certification pursuant to West Virginia Rules of Civil Procedure 23(a) and/or 23(b) amounts to clear error.” Syl. Pt. 8, *Surnaik Holdings of WV LLC v Bedell*. It would be counterintuitive to require that a circuit court undergo a “thorough analysis” of class certification issues on the record but deny, hamstring, limit, curtail, a circuit courts ability under Rule 23 to compel the information necessary to do so.

Lastly, the Petitioner argues that Rules of Civil Procedure do not require that a party create documents. But this position is indefensible in light of the electronically discoverable information that all modern businesses, especially collection services, use to operate. The ‘create’ that Petitioner opposes would nonetheless be required at other stages of the litigation should the class be certified, i.e. a list of class members for notice purposes so the information sought at the pre-certification stage to actually prove numerosity, commonality, typicality, adequacy, superiority and or predominance is not beyond the court’s legitimate powers.

CONCLUSION & PRAYER

Petitioner requests this Court to enter an Order denying the Petitioner’s writ and find that the Honorable Judge O’Briant did not exceed his legitimate authority in ordering necessary and pertinent discovery pursuant to his authority under Rule 23 and Rule 26 in light of the class certification issues presented in this matter. The Circuit Court’s Order dated December 4, 2020 granting the Motion to Compel and ordering certain disclosures is reasonable and within the sound discretion of the trial court to manage the case efficiently.

Respondent by Counsel,

/s/ Steven S. Wolfe *sw*

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CERTIFICATE OF SERVICE

COUNSEL does hereby state that a true and exact copy of Respondent's RESPONSE BRIEF was delivered on this 25th day of January 2021 to the counsel listed below by hand delivery or by First Class U.S. Mail to:

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