BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA EX REL. MARSHALL UNIVERSITY JOAN C. EDWARDS SCHOOL OF MEDICINE, AND MARSHALL UNIVERSITY BOARD OF GOVERNORS, Defendants 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. 20-0815
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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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA EX REL. MARSHALL UNIVERSITY JOAN C. EDWARDS SCHOOL OF MEDICINE, AND MARSHALL UNIVERSITY BOARD OF GOVERNORS, Defendants 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. 20-0815** **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

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

The Petition does not establish a basis of the entry of a writ of prohibition since the 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, who the Respondent paid to educate him and to protect him, allowed the x-rays to be disclosed without first being properly de-identified. In a bizarre coincidence, *more than five (5) years subsequent to the x-rays being taken*, while a medical student at the Petitioner's university, the embarrassing x-rays 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.[1] Obviously, this was, and continues to be, a humiliating event and has cause J.M.A. to suffer greatly.

On or about 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 (A.R. 93)[2]. 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 Credit and Protection Act (WVCCPA).

On January 7, 2020, Marshall filed a Motion to Dismiss the Amended Complaint for Improper Venue 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 Skype on June 29, 2020, and thereafter, counsel submitted to the Judge a proposed order and the Judge entered an Order denying the Motions to

[1] In fact, were it not for one of J.M.A.'s scrupulous classmates, J.M.A.'s de-identified x-rays might still be being shown today, as it was not the Petitioner, but a classmate or classmates who brought it to Petitioner's attention.

[2] References to the Appendix Record are set forth as "A.R.____".

Dismiss on July 7, 2020.

The instant petition filed by Marshall 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 and holding that the WVCCPA venue statute does not apply to Marshall.

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. (emphasis added). 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)[3] 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 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."

[3] Superseded by statute on other grounds.

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.

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.

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 excise 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 violations, and that venue properly lies with the Circuit Court of Putnam County 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 in myriad 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 ruling to be analyzed under the standard of law necessary to a *Writ of Prohibition.*

Next, the WVCCPA is meant to be liberally construed, and the "services" covered therein explicitly include educational services. *See* W. Va. Code § 46A-1-102(47). The Petitioner's predominant argument – especially as its made in this case's infancy without any benefit of discovery – that its relationship with the Respondent precludes consumer claims is unfounded and unsupported. The Petitioner needs this argument, however, because without it, its primary argument that venue lies not in the Circuit Court of Putnam County, but rather the Circuit Court of Cabell County, fails outright. This is because the venue statute found in the WVCCPA explicitly states that it "**shall** be **exclusive** of and **shall supersede** the venue provisions of **any other** West Virginia statute or rule." W. Va. Code § 46A-5-107. Should this venue statute not apply, the Petitioner's argument that W. Va. Code § 14-2-2a governing lawsuits against West Virginia institutions of higher education such as itself would have more merit. Alas, the wishes and desires of a Petitioner in a case are not appropriate grounds for this Court to grant such an extreme remedy against one of this State's Circuit Courts.

Regarding oral argument, 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 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 WVCCPA does not apply, such argument is based upon factual contentions made without the benefit of discovery, and 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."). [4]

The analysis put forth by this Court in *Woodall* dooms the Petitioner's request. 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

[4] The Petitioner goes so far as to admit it has other remedies when it states that it is "confident that this Court would overturn the Circuit Court's Order on an appeal after the trial of this case..." *See* Petitioner's Brief, p. 15, Lines 3-5.

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 believes venue to lie in a *neighboring* county, 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. And regarding the Petitioner's argument that the Circuit Court's Order denying its motion violated Rule 24.01 of the *West Virginia Trial Court Rules* by establishing venue in the Circuit Court of Putnam County, a Circuit Court of this State is empowered to enter its own orders, and has wide discretion in doing so, as that Rule specifically states. *Id.* ("unless otherwise determined by the judicial officer").

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'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 other venue provisions, including W. Va. Code §14-2-2a regarding this State's institutions of higher learning. 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 venue was therefore not barred in the Putnam County Circuit Court based upon West Virginia law is not *clearly* erroneous as it finds support.

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).

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 WVCCPA, AS WELL AS THE VENUE PROVISION OF THAT CHAPTER, APPLIES TO THIS CASE.

1. The Petitioner's Relationship to the Respondent allows for Claims under the WVCCPA

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.

As a statute meant to protect the citizens of this State, the WVCCPA is to be liberally construed, and questions regarding its application should be resolved in favor of coverage, not against. *See* W. Va. Code §46A-6-101. The Petitioner's predominant reliance on this Court's opinion of *State ex rel. Morrisey v. Copper Beech Townhome Cmtys. Twenty-Six, LLC*, 806 S.E.2d 172 (W. Va. 2017) which

merely held that the WVCCPA does not apply to residential leases (a decision largely based upon the fact that there exists a separate body of law governing that relationship in our Code)[5] is misplaced.

First, the University argues that it cannot be subject to this State's consumer laws because it did not extend credit to the Respondent. *See* Petitioner's Brief, p. 7, Line 33 & p. 8, Lines 1-2. It is important to note, again, that this case has not yet progressed beyond the pleading challenge stage, and no discovery has as yet been exchanged. Therefore, it is inappropriate for the Petitioner to request that this Court simply accept its unverified proffer that no extension of credit has been provided to the Respondent, with no evidence to support that claim. The WVCCPA defines credit merely as "the privilege granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." W.Va. Code § 46A-1-102(17). Anyway, as the Respondent's claims are brought under Article Six of the WVCCPA, the requirement of a creditor/debtor relationship would fundamentally alter that entire statute.

More importantly, whether the University is a creditor for purposes of the venue statute found in the WVCCPA is a question of contested fact that requires

[5] The Petitioner implies throughout that *Copper Beech* stands for the position that, if an industry is not explicitly listed in the WVCCPA, then it is not covered under it. However, that is not the case, and the opinion should be rightfully limited to its holding that fees charged landlord/tenant leases are not. *See, i.e., State ex rel. McGraw v. Imperial Marketing*, 196 W. Va. 346, 472 S.E.2d 792 (1996) (holding that mail-order marketers, which are not specifically mentioned in the WVCCPA, are still subject to it).

discovery – which has not yet been exchanged – to ascertain. If the Petitioner allows students to attend its classes for any amount of time on a mere promise to pay, then credit has been extended and the Petitioner is a creditor. It is likely that this is the case here, and, because the complaint is 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), and because the Respondent's Amended Complaint alleges consumer violations, the Petitioner's argument that the WVCCPA's venue provision does not apply must fail.

Regardless, the Petitioner's position that only the extension of credit invokes the WVCCPA is belied by the existence of Article Six of that Chapter, which prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." W. Va. Code § 46A-6-104. "'Trade' or 'commerce' is defined as "advertising, offering for sale, sale or distribution of any goods or services." W. Va. Code § 46A-6-102(6). And a "service" includes "privileges with respect to transportation, use of vehicles, hotel and restaurant accommodations, **education**, entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery accommodations, and the like.: W. Va. Code § 46A-1-102(47) (emphasis added).[6] Requiring that West Virginia citizens are only

[6] The Petitioner's invocation of this Court's language in *Mountain State Coll. v. Holsinger*, 230 W.Va. 678, 684, 742 S.E.2d 94, 100 (W. Va. 2013) fails to recognize that that case had actually

entitled to the protection of receiving the benefit of the service they pay for when they pay for it with credit would be absurd, and, contrary to express legislative intent, would greatly constrict what is supposed to be a liberally construed body of law. Again, this Court, just one (1) month ago at the time of this response, 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)).

Because the University participates in the sale and distribution of education services, its conduct cannot be said to be exempt from this State's consumer laws, and just that has been alleged by the Respondent in his well-pled Amended Complaint such that an extraordinary remedy against the Circuit Court which found as much is entirely inappropriate.

2. *The Venue Statute of the WVCCPA is Exclusive of, and Supersedes all other Venue Provisions found in the West Virginia Code*

The Petitioner argues against the application of this State's consumer laws at the pleading stage for just this purpose. If the WVCCPA claims are found to apply in this case, then the Respondent is entitled to the venue provision of W. Va. Code

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progressed *through trial*, whereas this case has only been pled and the parties have exchanged no discovery which the Petitioner may offer to support its position that it is not a creditor.

46A-5-107, which explicitly states that he is enabled to bring his lawsuit in which he had his legal residence at the time of the civil action. *Id.* While the Petitioner's reliance on W. Va. Code 14-2-2a would be well founded in any other context, the language of W. Va. Code 46A-5-107 is directly contradictory.

W. Va. Code § 46A-5-107 states, in its entirety:

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

Id. (emphasis added).

The Respondent, as master of his Complaint, has very clearly followed the venue provision which the legislature has afforded him. The statute is evident – the venue provision found in the WVCCPA "**shall** be **exclusive** of and **shall supersede** the venue provisions of **any other** West Virginia statute or rule." *Id.* (emphasis added). The venue provision on which the Petitioner relies – W. Va. Code § 14-2-2A – contains only the word 'exclusive' in reference to that particular code section. Further evidencing the WVCCPA's superseding venue provision is the fact that W.

Va. Code § 14-2-2A(a) ends with "unless otherwise agreed by the parties." Such language illustrates the legislature's intent that W. Va. Code § 14-2-2A be a malleable venue provision, while the language of the venue provision found in the WVCCPA illustrates just the opposite.

As the Defendant clearly states in its brief, "rules of statutory construction require that the specific statute...be given precedence of the general." *See* Petitioner's Brief, pp. 11-12 (citing Syl. Pt. 3, *Newark Ins. Co. v. Brown*, 218 W. Va. 346, 624 S.E2d 783 (2005)). Likewise, the Respondent wholeheartedly agrees with the Petitioner that "rules of statutory construction accord the word 'shall' a mandatory connotation." *Id.* at 12. As noted, however, the venue provision found in the WVCCPA is plainly more specific than W. Va. Code § 14-2-2A, and which "shall supersede the venue provisions of any other West Virginia statute or rule." W. Va. Code § 46A-5-107.

In the instant case, the legislature has carved out a specific allowance regarding consumer claims, which the Respondent has inarguably brought against the Petitioner. The Respondent was, at the time of filing (and, upon information and belief, still is) a resident of Putnam County, and has chosen it for that reason. Aside from needless litigation and use of the Court's time and resources, the Defendant has averred no legitimate reason why Putnam County is an inferior choice for venue.

Simply put, it cannot do so because Putnam County is not so.[7] Regarding the Petitioner's argument that the Circuit Court's Order denying its motion violated Rule 24.01 of the *West Virginia Trial Court Rules* by establishing venue in the Circuit Court of Putnam County, a Circuit Court of this State is empowered to enter its own orders, and has wide discretion in doing so, as that Rule specifically states. *Id.* ("unless otherwise determined by the judicial officer"). Regardless, the fact that a more specific statute exists allowing the Plaintiff to bring his action before the Circuit Court of his legal residence makes Putnam County Circuit Court the proper venue for the Respondent's lawsuit.

It is clear that, as the consumer claims invoking the WVCCPA are well supported on the face of the Amended Complaint, and therefore so is the venue provision which such claims entitle a plaintiff to utilize, it cannot be said that the lower court's ruling that applies them is "clearly erroneous," as is required for this Court to grant the Petitioner's extraordinary *Writ of Prohibition.*

C. THE PETITIONER IS NOT ENTITLED TO A STAY OF THE LOWER COURT PROCEEDINGS

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*

[7] It certainly needs noted that Putnam County and Cabell County – where the Petitioner wishes this action to be – are abutting, and their courthouses a mere thirty-nine (39) miles away from one another. Had the Plaintiff filed his action in the eastern or northern panhandle of this State – or even in Kanawha County – the Defendant's argument would have more merit.

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 and 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 against the Petitioner for the humiliating breach of his identifiable x-rays, as the events which transpired leading to this lawsuit are inarguably actionable.

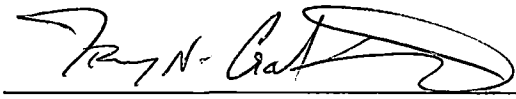
While the Petitioner has argued to the lower court that only dismissal of this case would remedy its venue challenge (which the Respondent does not concede on any point), even were this case entirely dismissed before the Circuit Court of Putnam County, such a dismissal could only be without prejudice 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 evade participation in this 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

WHEREFORE, for the reasons set forth in this response and such others as may appear to the Court the Respondent, J.M.A. requests that the Court deny the Petition and Motion for Emergency Stay.

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 Petition for Writ of Prohibition/Mandamus"*** was deposited in the U.S. Mail contained in postage-paid envelope addressed to the Respondent, The Honorable Phillip M. Stowers, Judge, and to counsel for all other parties to this appeal, as follows:

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