IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 21-0737

WEST VIRGINIA UNIVERSITY HOSPITALS, INC. and WEST VIRGINIA UNITED HEALTH SYSTEM, INC., d/b/a WVU Healthcare and any related entities of WVU Healthcare acting in concert with WVU Healthcare, Petitioners,

v.

THE HONORABLE PHILLIP D. GAUJOT, CHRISTOPHER THOMACK, and **JOSEPH MICHAEL JENKINS**, on their own behalf and on behalf of all similarly situated persons consisting of a class of aggrieved persons, Respondents.

Relief sought from an Order of the Circuit Court of Monongalia County (13-C-53) Denying Defendants' Renewed Motion to Decertify Class

PETITION FOR WRIT OF PROHIBITION

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QUESTIONS PRESENTED

I. Did the trial court fail to comply with the express mandate issued in *State ex rel. West Virginia University Hospitals v. Gaujot* by finding the commonality requirement for class certification under Rule of Civil Procedure 23(a) was satisfied based solely on an alleged common statutory violation?

II. Did the trial court fail to comply with the express mandate in *Gaujot* by failing to conduct a thorough analysis of ascertainability?

III. Did the trial court fail to comply with the express mandate in *Gaujot* and the recent decision of this Court in *State ex rel. Surnaik Holdings of WV, LLC v. Bedell* by failing to conduct a thorough analysis of the predominance requirement for class certification under Rule of Civil Procedure 23(b)(3) and by relying on case law that is now inapplicable?

IV. Did the trial court fail to comply with the express mandate issued in *Gaujot* by failing to give careful consideration to the inclusion of attorneys as class members?

STATEMENT OF THE CASE

I. Relevant Procedural History

This matter comes before the Supreme Court of Appeals of West Virginia for a second time because the trial court, on remand, failed to follow the express mandate of this Court set forth in *State ex rel. West Virginia University Hospitals v. Gaujot*, 242 W. Va. 54, 6829 S.E.2d 54 (2019).

Respondents filed this action against West Virginia University Hospital, Inc. ("WVUH") and West Virginia United Health System (collectively "Petitioners") in the Circuit Court of Monongalia County in 2014. *See generally* App. 38–47. The pertinent cause of action in Respondents' Consolidated Amended Complaint ("Amended Complaint") alleges violations of W. VA. CODE § 16-29-1, *et seq.*, which governs healthcare providers' entitlement to recoup reasonable expenses incurred in producing health information. Specifically, Respondents allege that the $0.40 per page and $10.00 per search fees charged by WVUH for the production of medical records from 2008 until 2014 violated W. VA. CODE § 16-29-1, *et seq*. *See* App. 40–41.

In April 2014, the trial court entered an order granting class certification with respect to all claims within the Amended Complaint.[1] In May 2017, this Court issued its opinion in *State ex rel. Healthport Technologies, LLC v. Stucky*, 239 W. Va. 239, 800 S.E.2d 506 (2017), which articulated the standing requirements in cases brought under W. VA. CODE § 16-29-1, *et seq.* Specifically, in *Healthport*, this Court determined that neither a medical record requestor nor that requestor's agent has standing until after the medical record requestor pays for the medical record.

[1] Petitioners sought a Writ of Prohibition regarding that Order (App. 388–419); however, this Court refused the Petition on August 26, 2014. App. 470–71. The case proceeded back to the trial court, where the parties continued to litigate various procedural issues, including a protracted dispute over whether Respondents should be permitted to consolidate actions against West Virginia University Health Systems entities in Monongalia County Circuit Court. The trial court ultimately decided against that consolidation. App. 477–88.

Healthport, 239 W. Va. at 243, 800 S.E.2d at 510. The mere fact that a medical record requestor's attorney paid for the records does not confer standing upon the requestor or her agent. *Id.*

Based on this Court's decision in *Healthport*, Petitioners moved to decertify the class. App. 523–35. The trial court denied that motion (App. 611–25), and later expanded the scope of the class, over Petitioners' objection, to include "[a]ny person, who from January 18, 2008 until June 5, 2014, (1) requested in writing copies of patient medical records from Defendant, West Virginia University Hospitals, Inc., including the individual patient and any person who was an authorized agent or authorized representative of the patient through legal representation; and (2) paid the fees charged by the Defendant to obtain such requested medical records." App 767.

Thereafter, in October 2018, Petitioners sought review of the Order entered by the trial court denying their motion to decertify and requested that this Court issue a writ of prohibition. *See generally* App. 962–1005.[2] Petitioners argued the class was improperly certified by the trial court because (1) the class included individuals who lacked standing, (2) class membership was unascertainable absent extensive individualized fact finding, and (3) the class did not satisfy the commonality prong of Rule 23(a) of the Rules of Civil Procedure. *See* App. 985–1004.

This Court granted a Petition for Writ of Prohibition, as moulded, in *State ex rel. West Virginia University Hospitals v. Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (2019) and held that trial courts must perform a thorough analysis when determining whether the requirements for class certification under Rule 23(a) of the Rules of Civil Procedure have been met. Syl. Pt. 1, *Gaujot*, 242 W. Va. 54, 829 S.E.2d 54. In *Gaujot*, this Court found that the trial court did not conduct a sufficiently thorough analysis of commonality and ordered the trial court, upon remand, to

[2] For a full procedural and factual history of this matter through the filling of Petitioners' first Petition for Writ of Prohibition, please refer to Petitioners' October 1, 2018 Petition for Writ of Prohibition, expressly incorporated herein. *See* App. 968–76.

reconsider the issue of the class certification requirements under Rule 23(a), particularly as they relate to commonality, and, if so, to craft a class definition consistent with such findings, while giving careful consideration to whether attorneys should be included in any class definition. *Id.* at 64 & n.16, 829 S.E.2d at 64 & n.16.

On remand, the parties engaged in additional discovery related to the process for the production of requested medical records, but the facts at issue remained unchanged. In September 2019, Petitioners filed a Renewed Motion to Decertify. *See generally* App. 1207–27. In October 2020, the trial court entered an Order denying Petitioners' Renewed Motion to Decertify, once again conducting a cursory review of commonality and again finding that Respondents' theory regarding violation of a common statute was a common issue for determination of liability. The trial court found that the commonality requirement under Rule 23(a) was satisfied and held that "Plaintiffs have met their burden to show that 'there are questions or law or fact common to the class.'" App. 1529, ¶ 19 (citing Syl. Pt. 11 (in part), *In re W. Va. Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52 (2003)). In addition, the trial court concluded that the class members were ascertainable through the use of sub-classes and properly crafted notices and claims forms. App. 1530, ¶ 24.

A few weeks later, on November 20, 2020, this Court again addressed class certification requirements under Rule 23 in *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, 244 W. Va. 248, 852 S.E.2d 748 (2020). The Court's decision in *Surnaik* reaffirmed the "sufficiently thorough analysis" requirement under Rule 23(a) of the Rules of Civil Procedure articulated in *Gaujot,* and further extended the "thorough analysis" requirement to Rule 23(b). Syl. Pt. 8, *Surnaik*, 852 S.E.2d 748. In *Surnaik*, this Court abrogated its holdings in *Rezulin* to the extent that the case suggested

that "no rigid test is necessary" to determine predominance, and it adopted a standard that is more consistent with the standard used by federal courts. *Surnaik*, 852 S.E.2d at 761.

Because the trial court's rulings were expressly contrary to this Court's mandate in *Gaujot* and because the trial court's decision to maintain this matter as a class action did not comply with *Surnaik*, Petitioners moved the trial court reconsider its Order Denying Defendants' Motion to Decertify and Order Amending Class Definition. *See generally* App. 1532–48. By Order dated July 28, 2021, the trial court denied Petitioners' Motion for Reconsideration in its entirety. *See* App. 1597–1615. In its Order, the trial court concluded that "[n]othing in the *Surnaik* opinion changes the Court's analysis of the Rule 23 elements[.]" App. 1614, ¶ 14.

II. Relevant Factual Background

The issue at the heart of this case remains what constitutes a reasonable fee under the version of W. VA. CODE § 16-29-2 (1999) in effect when Respondents requested their medical records.[3] The applicable version of W. VA. CODE § 16-29-2 allowed a healthcare provider to charge a patient or authorized representative for "all reasonable expenses incurred" in providing a copy of healthcare records, so long as the cost did not exceed $0.75 per page and a $10.00 search fee. W. VA. CODE § 16-29-2 (1999).

At the time Respondents requested their medical records, WVUH charged $0.40 per page and a $10.00 search fee. These charges were based on an earlier Order from Judge Recht of the Circuit Court of Ohio County, West Virginia, in a case involving WVUH and W. VA. CODE § 16-29-1, *et seq.*, which held that those charges constituted reasonable expenses incurred. *See Guida v. Weirton Med. Ctr., Inc.*, Civil Action No. 01-C-57, in the Circuit Court of Brooke County, West Virginia. App. 26, 31.

[3] Since this action was filed, W. VA. CODE § 16-29-2 has been substantively amended multiple times (in 2014 and 2017).

Pursuant to the Order entered in *Guida*, the prospective limitation on charging for records was set to last for seven years, ending on December 1, 2010. *See* App. 25, 31. In compliance with the Order in *Guida*, WVUH adopted a policy of recouping the reasonable costs incurred for producing healthcare records by charging $0.40 per page and a $10.00 search fee. Even after the time period under the *Guida* order expired in 2010, WVUH continued to charge fees of $0.40 per page and $10.00 per search, until W. VA. CODE § 16-29-2 was amended in 2014. *See* App. 1176–77 (pp. 41:21–42:8).

In 2014, the West Virginia Legislature changed the statute's requirements for charging for the production of healthcare records. Under the new statute, providers could charge a "reasonable, cost-based fee." W. VA. CODE § 16-29-2 (2014). That fee was to be based on the provider's cost of (1) providing labor for copying paper records or placing the records in electronic media, (2) supplies for creating the paper or electronic copy, and (3) postage if the requestor asked for the records to be mailed. *See* W. VA. CODE § 16-29-2(a) (2014). The 2014 version of the statute also added a ceiling on the hourly cost of labor at $25.00 per hour. W. VA. CODE § 16-29-2(b) (2014). Since the claims in this action all predate the 2014 amendment, the prior "all reasonable expenses incurred" standard applies, meaning that, during the class period, WVUH was entitled to reimbursement for "all reasonable expenses incurred." W. VA. CODE § 16-29-2 (1999).

Although Respondents have never been able to articulate what constitutes a reasonable fee, WVUH produced evidence showing that its costs vary considerably from record request to record request. To show the extensive work that goes into collecting, maintaining, and producing patient medical information, Melissa M. Martin, then the Director of Health Information Management and Chief Privacy Officer for WVUH, provided an unrefuted affidavit and a deposition explaining the time and resource-intensive process of responding to a request for medical records. During the

period of additional discovery on remand, Respondents deposed Ms. Martin, and, again, she testified regarding the variable costs associated with each individual record production. For example, Ms. Martin testified during her deposition about the specific process that WVUH's technicians follow when preparing medical records for production. *See* App. 1193–96 (pp. 58:20–61:2). Ms. Martin affirmed, as stated in her affidavit, that the production of medical records involves a complex process involving technicians searching multiple electronic databases, as well as physical storage facilities. *See id.* This process is further complicated by record systems that do not interface with each other and must be searched separately. *See id.* Further, when records are located, they must be extracted and copied into a production system. *Id.* After the records are reproduced electronically, a technician is required to "manually inspect" all records to ensure that the records produced comply with privacy regulations, that the records are complete based on the request, and that protected information is redacted when necessary. *See id.* This is the same complex, individualized process that Ms. Martin previously detailed in her affidavit. App. 76–77, ¶¶ 13–18. In fact, Respondents' counsel read Ms. Martin's affidavit into the record during her deposition and asked Ms. Martin if she wished to change any testimony provided in her affidavit, which she declined. *See* App. 1192–95 (pp. 57:4–60:16).

During Ms. Martin's deposition, Respondents' counsel revealed that Respondents' records had been requested, again, on or around April 10, 2015, after the amendment of the statute. According to Respondents' counsel, the cost charged for producing the records "under the amended statute" was less. *See* App. 1184–86 (pp. 49:22–51:15). Ms. Martin testified that even where record requests are identical, the cost of producing them multiple times may vary. *See* App. 1188 (p. 53:7–13). Ms. Martin explained:

> **Each request is different. I don't know**. Historically, there was a way that if we had requests[,] things could be saved to a file, and it's possible if this was an

> identical request that the analysis of all that information was already done and maybe that's why the cost is lower, but **I don't know without looking at the specific request and the process that was followed**.

See id. (emphasis added).

Ms. Martin further explained how WVUH's charging practices for the production of healthcare records were impacted by the amendment of W. VA. CODE § 16-29-2 (2014). Based on the 2014 amendment, WVUH created a new system to capture the costs enumerated in the amended statute. *See* App. 1179–80 (pp. 44:9–45:24). Ms. Martin confirmed that the new system was created solely for the purpose of calculating the costs permitted under the amended version of the statute. *See* App. 1179–81 (pp. 44:9–46:9).

Respondents also deposed Christine Matheny, Privacy Health Information Manager for WVUH. During her deposition, Ms. Metheny was asked whether she thought the formula designed to capture costs under the new system could be extended back to the class time period. *See* App. 721 (p. 60:2–24). Ms. Metheny opined that, although the new system was developed to capture the reimbursable costs permitted under the amended statute, the new system could likely be extended back in time. *See id.* Although Respondents construed Ms. Metheny's testimony to mean that damages could be calculated from the year 2008 forward using the new system, Respondents ignored that the amended statute is markedly different than the "all reasonable expenses incurred" standard under W. VA. CODE § 16-29-2 (1999), which governs the claims in this matter. Indeed, the new system was designed to capture the specific reimbursable costs enumerated in the 2014 statute, not "all reasonable expenses incurred" as permitted under W. VA. CODE § 16-29-2 (1999).

A. This Court's Mandate in *State ex rel. West Virginia University Hospitals v. Gaujot*

The fundamental facts before this Court are unchanged from the time the Court issued its decision in *State ex rel. West Virginia University Hospitals v. Gaujot.* The fact remains that

WVUH's production of healthcare records pursuant to W. VA. CODE § 16-29-2 (1999) required inherently individualized and complex processes that required the search of physical storage facilities and multiple electronic databases, the extraction and consolidation of records, and the manual review of records for compliance and completeness. *See* App. 145–46, ¶¶ 13–18; App. 1167–71 (pp. 32:15–36:22); App. 1192–95 (pp. 57:20–60:12). In *Gaujot*, this Court examined W. VA. CODE § 16-29-2 (1999) and recognized that that the nature of the statute inherently required an individualized analysis to determine whether a violation has occurred. *See Gaujot*, 242 W. Va. at 62–63, 829 S.E.2d at 62–63.

According to the factual findings of this Court, "[t]he consolidated complaint's central allegation is that the Hospitals violated W. VA. CODE § 16-29-2(a) [1999] by 'charging Plaintiffs $0.40 "per page" for copies of their already existing medical records.'" *Id.* at 58, 829 S.E.2d at 58. Citing the affidavit of Melissa Martin, this Court found that the process of finding, reviewing, and producing medical records "'can be very time consuming' because mental health information enjoys special protection and may be embedded in other records. Because of this concern, employees must actually '*read* the medical records.'" *Id.* (emphasis in original).

The Court further found that Respondents' case "turns on the core allegation that the Hospitals' uniform charging practice violated W. VA. CODE § 16-29-2(a) [1999]." *Id.* at 62, 829 S.E.2d at 62. However, this Court expressly held that "it is not enough for Mr. Thomack and Mr. Jenkins to allege that they and others like them are victims of the same statutory violation." *Id.* An allegation of a common statutory violation is not a common contention capable of class wide resolution. *See id.* The Court expounded on the common contention on which Respondents rested their case:

> The statute is framed such that liability and damages are two sides of the same coin, and we fail to see how a plaintiff could prove *that* a charge exceeded actual

> expenses, thus, establishing liability, without also proving *by how much* the charge exceeded actual expenses, and thereby establishing the amount of damages.

Id. at 63, 829 S.E.2d at 63.

The Court further noted that, according to Ms. Martin's testimony, WVUH's production of 1,000 pages of documents for one person could be markedly different from the production of the same quantity of documents for another person based on the inherent nature of the records processes. *See id.* at 63–64, 829 S.E.2d at 63–64. "The fact that [WVUH] charged all class members by the page (or by the image) does not change the statute or the fact that the statute's terms define the boundary between lawful and unlawful charges." *Id.*

The Court granted the Petition for Writ of Prohibition, as moulded, vacated the trial court's Order denying Petitioners' motion to decertify, and remanded the matter to the trial court for further proceedings consistent with its opinion in *Gaujot*. *See id.* at 64, 829 S.E.2d at 64. In so doing, this Court "urge[d] the circuit court to determine whether the requirements of Rule 23, particularly as they relate to commonality, ha[d] been met and, if so, to craft a class definition consistent with such findings." *Id.*

In addition, this Court expressed concerns with the proposed class definition because it included attorneys as members, thereby placing attorneys in a position where it is impossible to tell whether their efforts are "for the attorney [themselves] or the client." *Id.* at 64 n.16, 829 S.E.2d at 64 n.16. The Court instructed the trial court to give "careful consideration" on remand to "whether attorneys who pay for their clients' records should be included in any class," if the court determined that the requirements of Rule 23 had been met. *Id.*

B. The Trial Court's Rulings on Remand

On remand, the trial court ordered the parties to engage in additional discovery to further develop evidence for the class certification analysis under Rule 23. *See* App. 1518, ¶ 18. The

discovery culminated in Petitioners' Renewed Motion to Decertify Class on the basis that the facts remained unchanged, and, therefore, the requirements for class certification, including commonality, had not been met. *See generally* App. 1214–26. In October 2020, the trial court entered an Order denying the Renewed Motion to Decertify. App. 1514–31.

Despite the fact that W. VA. CODE § 16-29-2 (1999) allowed a healthcare provider to be reimbursed for "reasonable fees," whereas W. VA. CODE § 16-29-2 (2014) permitted reimbursement for a "cost based fee," the trial court determined that both versions of the statute "set forth the same restrictions regarding the charges that a hospital or other facility may place on producing a patient's medical record (that is, the fees must be reasonable and based upon the expenses actually incurred)." *See* App. 1519, ¶ 23. The trial court's conclusion ignores that the 2014 version of the statute removed the "safe harbor" provision of the 1999 statute and plainly allowed only for specific costs to be reimbursed. *Compare* W. VA. CODE § 16-29-2 (2014), *with* W. VA. CODE § 16-29-2 (1999).[4]

Based on a summary of invoices solicited by Respondents between June 6, 2014, and July 31, 2014, following the amendment of the statute and during the pendency of this litigation, the trial court found that "the difference in the costs of the invoices from before and after June 6, 2014, shows a significant disparity between the system WVUHS designed to recover its reasonable costs incurred using the time study and the costs charged during the class period." App. 1523, ¶ 35. The trial court further determined, incorrectly, that the new system could be used to calculate an

[4] Ironically, the newest version of W. VA. CODE § 16-29-2 (2017), would hurt Respondents' case. Under that version of the statute, a provider is permitted to charge a fee that is "consistent with HIPAA . . . ." W. VA. CODE § 16-29-2(a) (2017). The statute sets an upper limit on fees for paper copies including a search and handling fee of $20.00, a per page fee of $0.40, and the price of postage plus any taxes. W. VA. CODE § 16-29-2(b) (2017). Charges for electronic copies must not exceed $0.20 per page, but total costs may not exceed $150.00 plus taxes. Comparing charges with the newest statute would not only change the trial court's arbitrary average it used to establish commonality but also dramatically decrease the supposed "overcharging rate" that Respondents claim.

"average cost" of $2.08, and that this average cost is transferrable to the class period for purposes of assessing liability and calculating damages. *See* App. 1523–24, ¶¶ 36–42.[5] The trial court found commonality based solely on the $2.08 average and specifically held "it appears that each and every requestor suffered damages based on the $10.00 search fee alone, without even considering the additional damages related to the $0.40 per page/image fee that was charged for every class member's request." App. 1529, ¶ 16.

With regard to the other requirements for class certification under Rule 23, the trial court's Order denying Petitioners' Renewed Motion to Decertify Class contained little to no analysis. As to ascertainability, the Order states only that "Defendants' claims regarding difficulties in ascertaining class members lacks [sic] merit" (App. 1529, ¶ 21) and that class members may be managed through the use of "sub-classes, properly crafted notices, and claims forms." App. 1530 ¶ 24. The trial court's Order fails to address whether any other requirement of West Virginia Rule of Civil Procedure 23(a) or 23(b) is satisfied.

Finally, because the trial court found that commonality existed, it revised the class definition. *See generally* App. 1511–13. Despite this Court's clear directive to give careful consideration as to whether attorneys should be members of the class, the trial court instead gave no consideration whatsoever to this issue, and its Order Amending the Class Definition is devoid of any analysis regarding whether attorneys should be included as class members. *See id.* Over Petitioners' objections, the trial court revised the class definition to include:

Any person, who, from January 18, 2008 until June 5, 2014,

[5] In so finding, the trial court relied on the affidavit of Respondents' expert, who explicitly acknowledged that the two versions of the statute allowed for the reimbursement of different costs. *See* App. 1279, ¶¶ 11–12. Respondents' expert calculated the $2.08 average cost based entirely on a time study evaluation conducted by WVUH in 2014 in order to comply with the amended version of the statute. *See* App. 1282–83, ¶¶ 26–28.

> (1) requested in writing copies of patient medical records from Defendant, West Virginia University Hospitals. Inc., including the patient or any person who was an authorized agent or authorized representative of the patient; and
>
> (2) paid the fees charged by the Defendant to obtain such requested medical records; and
>
> (3) provided however, that attorneys who paid for a client's medical records in connection with investigation of claims and/or litigation on behalf of that client, but were never repaid for those costs, are specifically excluded from class membership.

App. 1512.

Because the trial court failed to comply with the express mandate set forth in *Gaujot* and erroneously concluded that Plaintiffs met their burden of showing that this action is proper for class certification, Petitioners seek a Writ of Prohibition prohibiting the Circuit Court of Monongalia County from conducting any further proceedings in this action until the Order denying Petitioners' Renewed Motion to Decertify Class has been vacated.

SUMMARY OF THE ARGUMENT

A writ of prohibition is the appropriate means of enforcing compliance with a mandate because a trial court's failure to comply with a mandate issued by an appellate court amounts to clear legal error. *See State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728 (2003).[6] Here, the trial court failed to comply with the express mandate issued by this Court in *Gaujot* by (1) finding commonality under Rule 23(a) solely on the basis of an alleged common statutory violation, (2) failing to conduct a thorough analysis of ascertainability, (3) failing to

[6] Under existing cases in West Virginia, there are two different standards for seeking appellate review of class certification decisions. A denial of class certification is appealable as a matter of right. *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 242 W. Va. 54, 61 n.12, 829 S.E.2d 54, 61 n.12 (2019) (citing Syl. Pt. 6, *Mitchem v. Melton*, 167 W. Va. 21, 277 S.E.2d 895 (1981)). A grant of class certification is only reviewable by a writ in prohibition. *Id.* (quoting Syl. Pt. 2, in part, *McFoy v. Amerigas, Inc.*, 170 W. Va. 526, 295 S.E.2d 16 (1982)). Why this difference exists in the standard of review is unclear from the cases. By comparison, Federal Rule of Civil Procedure 23(f) provides a mechanism for discretionary review of all class certification decisions. Fed. R. Civ. P. 23(f).

conduct a thorough analysis of predominance and relying on case law that is now inapplicable, and (4) improperly including attorneys as members of the class.

First, the trial court failed to comply with this Court's mandate when it persisted in finding commonality and certified a class action that requires individualized analysis to determine class membership. Despite this Court's holding that an alleged common statutory violation cannot serve as the basis to establish commonality under West Virginia Rule of Civil Procedure 23, the trial court's basis for finding commonality rests solely on WVUH's uniform charging practices. This Court expressly admonished such a finding in *Gaujot*. *See Gaujot*, 252 W. Va. at 62, 829 S.E.2d at 62.

Contrary to the law of the case, the trial court oversimplified the inherently individual analysis previously recognized by this Court in assessing liability and damages under W. VA. CODE § 16-29-2 (1999) and formulated an arbitrary "average" cost based on a different system that was developed to comply with an entirely different statute. *See* App. 1528–29, ¶¶ 15–16. In utilizing this average to calculate damages and thereby find liability, the trial court again based commonality solely on WVUH's uniform charges of $0.40 per page and $10.00 per search.

Second, the trial court failed to conduct a thorough analysis of ascertainability when it simply refused to address the merits of the issue. Instead, the trial court summarily concluded that the "claims regarding difficulties in ascertaining class members lacks [sic] merit" and that an ascertainable class could be accomplished through sub-classes. App. 1529–30, ¶ 21. Such a finding disregards the express mandate of this Court, which required the trial court to conduct a thorough analysis of the requirements for class certification. *Gaujot*, 252 W. Va. at 64, 829 S.E.2d at 64. In addition, the trial court's finding fails to contemplate the highly individualized inquiries necessary to identify class members and would improperly delay the identification of class

members until after there is a decision on the merits. *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 359–60 (4th Cir. 2014).

Third, the trial court failed to comply with the mandate in *Gaujot* by failing to conduct a thorough analysis of predominance required by this Court's decision in *Surnaik*. After finding that the commonality requirement was met under Rule of Civil Procedure 23(a), the trial court failed to conduct any analysis of the more stringent requirement of predominance under Rule 23(b). Further, Petitioners provided the trial court the opportunity to consider the implications of the *Surnaik* decision on class certification in this matter. However, the trial court made the same conclusory statement regarding predominance that was rejected in *Surnaik*.

Finally, the trial court's Order Amending the Class Definition fails to comply with the mandate of this Court by failing to give any consideration to whether attorneys should be included as members of the class. This Court informed the trial court that it had concerns regarding the existing class definition, which included attorneys, and instructed the trial court to give careful consideration to the issue. *See Gaujot*, 252 W. Va. at 64 n.16, 829 S.E.2d at 64 n.16. On remand, the trial court failed to heed the instructions of this Court and provided no analysis as to whether an attorney should be a member of the class. As a result, the amended class definition includes attorneys who have no injury-in-fact and possess a purely proprietary interest.

Due to these numerous errors, Petitioners will be irreparably harmed if this Court does not issue the requested Writ.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, Petitioners respectfully request a Rule 19 oral argument. This Petition is appropriate for oral argument under Rule of Appellate Procedure 19(a)(2). This Petition addresses issues of unsustainable exercise of discretion where the law governing that discretion is settled in the State of West Virginia.

Specifically, this Petition addresses settled law regarding ascertainability, commonality, predominance, and standing as they relate to class actions. The trial court has now misapplied the law for a second time, and its rulings directly contravene this Court's precedent and the express mandate in this case. Because this Petition satisfies Rule 19(a), oral argument is necessary and appropriate.

ARGUMENT

The law of the case doctrine is rooted in the principles of *res judicata*. *Mullins v. Green*, 145 W. Va. 469, 475, 115 S.E.2d 320, 324 (1960). "[W]hen a question has been definitely determined by this Court its decision is conclusive on parties, privies and courts, including this Court, upon a second appeal or writ of error and it is regarded as the law of the case." *Id.* at 474, 115 S.E.2d at 323. The law of the case is binding, "irrevocably determining the rights of the parties." *Id.* at 475, 115 S.E.2d at 324. No court has "any power or control over it other than the ascertainment of the intent and meaning of the decision, from the terms of the mandate, in entering such decrees as are necessary to carry into effect." *Id.* The mandate rule is a "special aspect" of the law of the case doctrine and is implicated when a case is remanded. *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 808 591 S.E.2d 728, 734 (2003) (hereinafter *Oxley II*).

When a trial court refuses to carry out a mandate or acts beyond the scope of the mandate, the trial court has exceeded its legitimate powers and committed clear legal error. *See Green*, 145 W. Va. at 324; *see also* Syl. Pt. 1, *Johnson v. Gould*, 62 W. Va. 599, 59 S.E. 611 (1907). When a circuit court "fails or refuses to obey or give effect to the mandate of this Court . . . the writ of prohibition is an appropriate means of enforcing compliance with the mandate." Syl. Pt. 5, *Oxley II*, 214 W. Va. 802, 591 S.E.2d 728. "A circuit court's interpretation of a mandate of this Court and whether the circuit court complied with such mandate are questions of law that are reviewed de novo." *Id.*

I. The trial court failed to follow this Court's mandate in *Gaujot* by failing to conduct a sufficiently thorough analysis of the requirements for class certification and by failing to comply with the law of the case.

This Court previously examined the requirements for class certification in this case and reaffirmed that a "thorough analysis" is required when determining whether a class should be certified. *See* Syl. Pt. 1, *Gaujot*, 242 W. Va. 54, 829 S.E.2d 54; *see also* Syl. Pt. 8, *State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004). In *Gaujot*, this Court adopted the federal standard with regard to the commonality inquiry under Rule 23(a) of the West Virginia Rules of Civil Procedure and required that an issue of law or fact resolve a question that is central to the validity of each one of the class members' claims in one stroke. *See Gaujot*, 252 W. Va. at 64, 829 S.E.2d at 64.

Recently, this Court extended the requisite "thorough analysis" to all requirements for class certification under Rule 23. *See* Syl. Pt. 8, *Surnaik*, 852 S.E.2d 748 (holding that "[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"). This Court again adopted the federal standard for conducting a sufficiently thorough analysis of predominance under Rule 23(b), requiring that trial courts employ a "rigid test" to determine whether common questions predominate over individual issues. *See id.* at 761.

Here, the trial court failed to comply with the clear mandate of this Court by again finding commonality solely based on an alleged common statutory violation and by failing to perform a sufficiently thorough analysis of the ascertainability and predominance requirements for class certification.

A. The trial court failed to comply with the express mandate issued in *Gaujot* by finding commonality based solely on an alleged common statutory violation.

"Upon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal." Syl. Pt. 3, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 805, 591 S.E.2d 728, 731 (2003). A mandate controls the framework that the trial court must use in effecting the remand, and decree entered by a trial court that is inconsistent with the mandate is erroneous and will be reversed. *Id.* at 808, 591 S.E.2d at 734. In addition, the law of the case doctrine "generally prohibits reconsideration of issues which have been decided in a prior appeal in the same case, provided that there has been no material changes in the facts since the prior appeal, such issues may not be relitigated in the trial court or reexamined in a second appeal." *Id.* "The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Id.* at 810, 591 S.E.2d at 736.

This Court expressly considered Respondents' claims and determined that those claims required inherent individualized analysis sufficient to preclude a finding of commonality. *See Gaujot*, 242 W. Va. at 63–64, 829 S.E.2d at 63–64. In doing so, the Court adopted the federal standard and held that for purposes of commonality under Rule 23(a), "a 'question' 'common to the class' must be a *dispute*, either of fact or law, *the resolution of which* will advance the determination of the class members' claims." *Id.* at Syl. Pt. 2 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 369 (2011)). "In other words, the issue of law (or fact) in question must be one whose '*determination* . . . will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *See id.* (citing *Dukes*, 564 U.S. at 369). It is well established that "a violation of law as a common issue may not support class certification in a setting where

individualized fact-finding is necessary." *State ex rel. Erie Ins. Prop. & Cas. Co. v. Nibert*, No. 16-0884, 2017 WL 564160, at *6 (W. Va. Feb. 13, 2017).

As this Court has already recognized, the plain language of W. VA. CODE §16-29-2 (1999) required individualized fact-finding to determine liability and damages related to any particular plaintiff's claims:

> Whether each charge for medical records exceeded the Hospitals' actual "reasonable expenses incurred" raises questions that relate to both liability and, if liability is determined, the amount of the damages incurred. The statute is framed such that liability and damages are two sides of the same coin, and **we fail to see how a plaintiff could prove *that* a charge exceeded actual expenses, thus, establishing liability, without also proving *by how much* the charge exceeded actual expenses, and thereby establishing the amount of damages. . . .** The fact that the Hospitals charged all class members by the page (or by the image) does not change the statute or the fact that the statute's terms define the boundary between lawful and unlawful charges.

Gaujot, 242 W. Va. at 63–64, 829 S.E.2d at 63–64 (emphasis added). Mere allegations of common statutory violations are simply insufficient to establish commonality under Rule 23(a). *See id.* at 62, 829 S.E.2d at 62.

Here, directly contrary to *Gaujot*, the trial court found that Respondents met their burden as to commonality under Rule 23(a) based on an alleged common statutory violation. *See generally* App. 1514–30. In finding commonality, the trial court used an "average cost" for records requests based on data gathered by WVUH's time study that was created to track costs for the 2014 *amended* statute's requirements. *See* App. 1528–29, ¶¶ 13–18. The trial court found commonality based solely on the $2.08 average cost and specifically held "it appears that each and every requestor suffered damages based on the $10.00 search fee alone, without even considering the additional damages related to the $0.40 per page/image fee that was charged for every class member's request." App. 1529, ¶ 16. But the trial court (and Respondents) ignore that the time study data was comprised of charges for healthcare record productions that were calculated based

on a system designed to comply with the amended statute, which contains distinct cost-based requirements. *Compare* W. VA. CODE §16-29-2 (1999), *with* W. VA. CODE §16-29-2 (2014). By using an average based on an entirely different system and statute to establish a common statutory violation of W. VA. CODE §16-29-2 (1999), the Order denying Petitioners' Renewed Motion to Decertify fails to comport with the express holding in *Gaujot* that W. VA. CODE §16-29-2 (1999) inherently required individual analysis.

The trial court's oversimplification of the relevant inquiry is contrary to this Court's express analysis of W. VA. CODE §16-29-2 (1999) in *Gaujot*. Because the trial court's Order rests on the use of an unrelated average in order to establish a common statutory violation, the trial court failed to identify any issue whose determination is capable of resolving an issue central to the validity of each claim in one stroke. *See* Syl. Pt. 2, *Gaujot*, 242 W. Va. 54, 62, 829 S.E.2d 54 (quoting *Dukes*, 564 U.S. at 369). Therefore, the trial court's Order denying Petitioners' Renewed Motion to Certify fails to comply with *Gaujot*.

B. The trial court erred by failing to conduct a thorough analysis of ascertainability, as required by the mandate issued in *Gaujot*.

It is well established law in West Virginia that "the class certification order should be detailed and specific in showing the rule basis for the certification and the relevant facts supporting the legal conclusions." Syl. Pt. 8, *State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004). Further, this Court requires that a trial court conduct a sufficiently thorough analysis of all class requirements under Rule 23 of the West Virginia Rules of Civil Procedure. *See* Syl. Pt. 8, *Surnaik*, 852 S.E.2d 748.

Upon remand, the trial court was required to conduct a sufficiently thorough analysis of ascertainability. *See Gaujot*, 242 W. Va. at 64, 829 S.E.2d at 64; *see also* 1 William B. Rubenstein et al., *Newberg on Class Actions* § 3:1 (5th ed.) (Despite the specificity of Rule 23, courts have

generally added two additional criteria, often referred to as the "implicit requirements" of class certification: that the class be "definite" or "ascertainable" and that the class representative be a member of the class.). "Before certifying a class pursuant to Rule 23 of the Rules of Civil Procedure, it is imperative that the class be identified with sufficient specificity so that it is administratively feasible for the court to ascertain whether a particular individual is a member." Syl. Pt. 3, *State ex rel. Metro. Life Ins. Co. v. Starcher*, 196 W. Va. 519, 526, 474 S.E.2d 186, 193 (1996).

Federal courts employ an "ascertainability" analysis and, like West Virginia, require that a class must be readily identifiable. *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (internal citations omitted). "Many courts and commentators have recognized that an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3), is that the class must be currently and readily ascertainable based on objective criteria." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592–93 (3d. Cir. 2012) (citing cases from the Fifth, First, and Second Circuits). The Fourth Circuit has noted that, "[i]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *EQT Prod. Co.*, 764 F.3d at 358 (citing *Marcus*, 687 F.3d at 593).

Here, WVUH argued to the trial court that the class, as defined, is not ascertainable because identifying class members poses a substantial administrative burden to the court. App. 1219–20. Specifically, Petitioners argued that the individualized inquiries regarding class membership are extensive and would encompass determination regarding who paid for the medical records, whether the attorney-client contract included a provision regarding reimbursement of attorney expenses, whether the medical record requestor received a favorable outcome and actually

reimbursed the attorney, when the medical records were paid for, and financial documentation detailing all of this. *See id.*

Respondents incorrectly claimed that the class is ascertainable because the medical records identify the requestor of the patient's medical records and the patient. *See* App. 1559. However, the mere identification of the requestor and the patient does not eliminate the substantial individual analysis required to ascertain class membership in this matter. The records do not show whether the requestor is (1) the attorney of the patient, (2) a representative or attorney of a third party, or (3) whether the requestor has suffered the requisite injury-in-fact to have standing under *State ex rel. Healthport Technologies v. Stucky*, 239 W. Va. 239, 800 S.E.2d 506 (2017). Simply, it is impossible to ascertain the relationship of the requestor to the patient and the requestor's injury, if any, without extensive, individualized analysis. Such a cumbersome process is the antithesis of the purpose of the ascertainability requirement.

The trial court summarily dismissed Petitioners' arguments on ascertainability, concluding that Petitioners' "claims regarding difficulties in ascertaining class members lacks [sic] merit" and that an ascertainable class could be accomplished through the use of sub-classes. App. 1529–30, ¶ 21. However, the use of subclasses does not change the problem in identifying who is a member of the class. As currently defined by the trial court, it is impossible to determine whether the entity requesting medical records is the patient, counsel for the patient, counsel for a litigant in which the patient is a party, or some other entity. The trial court's modification of the class definition actually increases the ascertainability problem, making it practically impossible to determine who is, and who is not, in the class without extensive individualized fact-finding.

In *EQT Production Co. v. Adair*, the district court certified a class defined to include all persons and their successors in interest, concluding that the class was ascertainable because some

class members were easily identifiable where ownership had not changed hands. *Id.* at 359. However, the Fourth Circuit found that because the class included successors in interest, the ascertainment of successors would involve complicated and individualized processes including review of individual land records. *See id.* Because the ascertainment of class members required inherently individualized fact finding to determine whether a potential class member would be bound by any potential ruling on the merits, the Fourth Circuit found that the class was not ascertainable and class certification was improper. *Id.*

The class here involves substantially similar individualized fact-finding contemplated by the Fourth Circuit in *Adair*. According to the plain language of W. VA. CODE § 16-29-2 (1999), a class member's claim must be individually examined to determine whether that class member suffered a violation of the statute. In addition, the statute provided that a patient or *their authorized representative* may request records on the patient's behalf. *See* W. VA. CODE § 16-29-2 (1999). In dismissing Petitioners' concerns regarding ascertainability, the trial court defined the class in a manner that would allow attorneys to be class members contingent on the nature of their relationship with the patient. *See* App. 1512. Allowing attorneys to partake as class members in this action requires individual inquiries to determine the attorney's relationship with the patient including: (1) whether the attorney requested and paid for the medical records, (2) whether the patient ever compensated the attorney for the medical records, and (3) the contractual relationship between the attorney and patient to determine whether the attorney acted as the patient's authorized representative. *See id.*

In its Order, the trial court failed to devote any analysis to the individualized inquiries necessary to ascertain members of the class who could be bound by a potential ruling on the merits. As in *Adair*, where the Fourth Circuit held that the class was not ascertainable because the

proposed class included members who required substantial individual analysis to determine who would be bound by a potential ruling on the merits, here, substantial individual analysis is necessary to determine whether members of the proposed class can even be bound by any potential ruling. *See* 764 F.3d at 359–60. In fact, Respondents' argument is identical to the argument of the plaintiffs in *Adair*, which is that class members who are entitled to recover damages can be determined on the back-end. *See id.* at 359. However, the Fourth Circuit expressly rejected that argument, holding that ascertaining which class members may be bound by a potential merits ruling is a prerequisite to class certification. *Id.* at 359–60 ("[W]e have little conception of the nature of the proposed classes or who may be bound by a potential merits ruling. Lacking even a rough outline of the classes' size and composition, we cannot conclude that they are sufficiently ascertainable.").

Accordingly, the circuit court failed to conduct a sufficiently thorough analysis of all class requirements, including ascertainability, and therefore failed to comply with this Court's express mandate and West Virginia law.

C. The trial court erred by failing to conduct a thorough analysis of predominance as required by *State ex rel. Surnaik Holdings of WV, LLC v. Bedell.*

West Virginia Rule of Civil Procedure 23 mandates that a court examine class certification requirements under Rule 23(b) after the court determines that class certification requirements have been established under Rule 23(a). *See Gaujot*, 242 W. Va. at 64, 829 S.E.2d at 64; *see also* W. Va. R. Civ. P. 23. In *Gaujot*, this Court adopted the federal standard in requiring that trial courts conduct a thorough analysis of Rule 23(a) class certification requirements. *See State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, 244 W. Va. 248, 852 S.E.2d 748 (2020). In *Surnaik*, this Court went further and adopted the more stringent federal standard for class certification under Rule 23(b), including predominance and superiority. *See* Syl. Pt. 7, *Surnaik*, 852 S.E.2d 748.

Accordingly, a trial court commits clear error where it fails to conduct a thorough analysis of class certification requirements under Rule 23(a) and Rule 23(b) of the Rules of Civil Procedure. *Id.* at Syl. Pt. 8. A trial court must further set forth the "thorough analysis" in the trial court's order regarding class certification. *Id.* at Syl. Pt. 7.

This Court remanded this matter to the trial court to "determine whether the requirements of Rule 23, particularly as they relate to commonality, have been met and, if so, to craft a class definition consistent with such findings." *Gaujot*, 252 W. Va. at 62, 829 S.E.2d at 62. "The predominance criterion in Rule 23(b)(3) is a corollary to the 'commonality' requirement found in Rule 23(a)(2). Although the 'commonality' requirement simply requires a showing of common questions, the 'predominance' requirement requires a showing that the common questions of law or fact outweigh individual questions." *Surnaik*, 852 S.E.2d at 760. Accordingly, where the commonality requirement is established under Rule 23(a), the trial court must then determine whether the more stringent corollary requirement of predominance is established under Rule 23(b). In fact, federal courts generally consider commonality and predominance together in determining whether class requirements have been met under Rule 23 of the Federal Rules of Civil Procedure. *See Lienhart v. Dryvit Sys., Inc.*, 255 F.3d. 138, n.4 (4th Cir. 2001) ("In a class action brought under Rule 23(b)(3), the 'commonality' requirement of Rule 23(a)(2) is 'subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class predominate over' other questions." (citation omitted)).

In reviewing predominance in *Surnaik*, this Court expressly adopted the federal standard for class certification and abrogated the more lenient standard set forth in *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52 (2003). *See Surnaik*, 852 S.E.2d at 761. The Court found that *Rezulin* provided "vague" standards for trial courts, especially in the context of

the predominance analysis. *Id.* In finding that the decision in *Rezulin* provided no guidance to trial courts and failed to require a "rigid test," the Court adopted the federal standard and recognized that its prior holdings in *Rezulin* are unworkable. *Id.* (concluding that, "to the extent *Rezulin* simply suggests that there is not much difference between commonality and predominance and that no rigid test is necessary, it must now be modified"). As a result, the Court established the requisite inquiry under Rule 23(b) of the Rules of Civil Procedure:

> 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.

Id.

Thus, in evaluating predominance, a trial court must thoroughly identify the parties' claims and defenses, analyze how claims and defenses will be proven at trial, and determine whether common questions (if they exist) predominate over individual ones. *See id.* at 761 (holding that the trial court "failed to examine any of the essential elements of the causes of action and failed to discuss whether those elements are capable of individualized or even generalized proof"). Trial courts should assess predominance with its overarching purpose in mind: "ensuring 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." *Id.*

Here, the trial court's Order Granting Class Certification failed to conduct a sufficiently thorough analysis of predominance under Rule 23(b). In addition to finding class certification requirements were met under Rule 23(a), the trial court also held that Respondents satisfied their burden with respect to the predominance and superiority requirements under Rule 23(b). *See* App.

384–85. The trial court specifically found that the predominance requirement was satisfied under the standard set forth in *Rezulin*. App. 384. The trial court failed to conduct any further analysis regarding predominance after finding that commonality had been established under Rule 23(a) in denying Defendants' Renewed Motion to Decertify. *See generally* App. 1514–30. Instead, the trial court rested on its Order Granting Class Certification, which merely held that Respondents "have satisfied the predominance requirement because the issue of the [sic] whether the amount charged to patients for copies of their medical records is 'reasonable' under the applicable statute predominates all issues affecting individual members." App. 384.

In light of this Court's recent decision in *Surnaik*, Petitioners moved for reconsideration of the trial court's Order denying the Renewed Motion to Decertify. Petitioners argued that the trial court's Order was in error because the court did not conduct a "thorough analysis" of predominance and because the Order relies on case law that is now inapplicable. *See generally* App. 1540–44. By Order entered July 28, 2021, the trial court denied Petitioners' Motion for Reconsideration and again failed to conduct a sufficiently thorough analysis of predominance under Rule 23(b). *See* App. 1609–15.

Even a cursory review of the trial court's Orders confirms that its analysis of predominance does not comply with the standard set forth in *Surnaik*. Pursuant to *Surnaik*, a trial court must do more than make conclusory findings that predominance has been established under Rule 23(b). *See Surnaik*, 852 S.E.2d at 761. A court must first thoroughly identify the parties' claims and defenses which includes identifying the respective elements of each claim and defense. *Id.* Next, the court must determine whether the issues are common questions or individual questions. *Id.* This inquiry requires the court to analyze how the party will seek to prove or establish each issue

at trial. *Id.* After the court has examined how the respective issues will be proven at trial, it must then determine whether the common questions predominate over individual questions. *Id.*

However, the trial court's analysis of predominance in its Order Granting Class Certification fails to identify any claims or defenses of the parties and does not examine the respective elements of each claim and defense. The Order is further devoid of any analysis regarding how the parties will prove their respective claims or defenses at trial, which is contrary to the standard set forth in *Surnaik*. The Order includes no more than a conclusory finding that the alleged issue of a common statutory violation predominates over individual questions. *See* App. 384, ¶¶ 14–15. This is plainly contrary to the thorough analysis requirement set forth in *Surnaik* and also contrary to the express finding of this Court in *Gaujot* that allegations of statutory violations are insufficient to establish commonality. *See Surnaik*, 852 S.E.2d at 761; *Gaujot*, 252 W. Va. at 62, 829 S.E.2d at 62.

Further, this Court in *Surnaik* explicitly held that analysis of a predominance is a more onerous analysis than that required for commonality under Rule 23(a). Yet, the trial court's analysis of predominance contains no more than mere conclusory findings that the alleged statutory violation predominates individual issues, despite Petitioners' arguments that the nature of the claims requires substantial individualized inquiries.

Notwithstanding the trial court's failure to conduct a thorough analysis, Respondents are nonetheless incapable of satisfying the predominance requirement. Petitioners have established that in order to determine liability under W. VA. CODE § 16-29-2 (1999), individual analysis must be conducted for every person to determine whether the amount charged for copies of medical records exceeded the reasonable amount incurred in producing those records. *See* App. 1401–08. This Court previously found that under W. VA. CODE § 16-29-2 (1999), damages and liability

require individual analysis based on each person's records request. *See Gaujot*, 242 W. Va. at 63–64, 829 S.E.2d at 63–64.

Respondents and the trial court disregard this Court's holdings in *Gaujot* and oversimplify the inquiry under the relevant statutory provision through the ad hoc development of an "average cost" based on an entirely different statutory system. However, the determination of whether a patient was overcharged for healthcare records depends on the reasonable cost of each search for those records under W. VA. CODE § 16-29-2 (1999). Contrary to Respondents' assertions, the question of "whether Defendants violated W. Va. Code § 16-29-1 (1999) by overcharging for medical records" does not predominate over the individual issues of determining the reasonable cost of each individual search, which includes examining the databases where records were stored, the nature of the request, and the records produced in relation to the scope of the request. *See* App. 1562; *see also* App. 1167 (p. 32:15–20); App. 1169–70 (pp. 34:17–35:8), App. 1171 (p. 36:12–22); App. 77, ¶¶ 17–18.

II. The trial court failed to follow the mandate of this Court by failing to give careful consideration to the ethical issues involved in including attorneys within the class definition.

In *Gaujot*, this Court expressly instructed the trial court to give "careful consideration" as to "whether attorneys who pay for their clients' records should be included in any class" if the trial court determined that the consolidated claims satisfied the commonality requirements and other requirements of Rule 23 of the Rules of Civil Procedure. *Gaujot*, 252 W. Va. at 64, n.16, 829 S.E.2d at 64, n.16. The Court recognized that the inclusion of attorneys in the class definition raises significant questions regarding the "ethical standards governing the attorney's role in the litigation," including whether an attorney's efforts would be on his or her own behalf or on behalf of the client. *See id.*

Upon remand, the trial court initially acknowledged this Court's concern regarding the inclusion of attorneys in the class definition and that based on that holding, including attorneys in the class was improper. *See* App. 1130 (p. 17:11–24). The trial court later reiterated that concern during the hearing on Petitioners' Renewed Motion to Decertify, stating, "I don't want to hear anything with regard to attorneys being proper parties in the class, ruling that the Court made a mistake when I entered that order regarding attorneys." App. 1425 (p. 4:11–14). Despite these statements, the trial court ultimately disregarded this Court's mandate and, again, included attorneys as members of the class in its Order Amending Class Definition. *See* App. 1512–13.

The Order Amending Class Definition does not contain any analysis regarding the inclusion of attorneys as members of the class, and the issues with including attorneys as members of the class are not resolved by the trial court's amended class definition. To the contrary, the trial court's ruling actually greatly compounds the issues and creates brand new problems as well. The Order now defines the class as:

> Any person, who, from January 18, 2008 until June 5, 2014,
>
> (1) requested in writing copies of patient medical records from Defendant, West Virginia University Hospitals, Inc., including the patient or any person who was an authorized agent or authorized representative of the patient; and
>
> (2) paid the fees charged by the Defendant to obtain such requested medical records; and
>
> (3) provided however, that attorneys who paid for a client's medical records in connect with investigation of claims and/or litigation on behalf of that client, but were never repaid for those costs, are specifically excluded from class membership.

App. 1512 (emphasis added).

Thus, the Order implements a two-step process to determine membership in the class. *First*, it broadly defines who is in the class: *Any person* who requested copies of a patient's medical records and paid the fees charged is a member of the class—this includes not only patients and

their representatives or lawyers, but also insurance companies, third-party claim administrators, claims representatives for defendants or insurance companies, lawyers representing tort defendants, and a myriad of other persons and entities. The requesting entity need have no relationship with the patient; it merely needs to be a "person." *Second*, it creates a limited exclusion of persons who would otherwise be class members: any attorney who paid for a client's medical records in connection with the investigation of claims and/or litigation on behalf of that client but was never repaid is excluded. *See id.* Thus, by way of example, the following persons would remain as class members: (1) attorneys who paid for medical records of a person who was not a client of that lawyer, (2) attorneys who paid for medical records of a client for reasons other than the investigation of claims or litigation on behalf of that client, and (3) attorneys who were reimbursed for the costs of the medical records.[7]

Thus, this two-step inclusion, then exclusion, process does *not* preclude all attorneys as members of the class and, instead, would ultimately allow a variety of lawyers to be class members, which is contrary to this Court's mandate issued in *Gaujot.* Allowing attorneys to be included in this class is improper because an attorney's membership in the class requires them to have been acting in their professional capacity. This gives attorneys a personal interest in their client's case. West Virginia Rule of Professional Conduct 1.8(i) states that a "lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for the client[.]" W. Va. R. Prof. Conduct 1.8(i).

In *State ex rel. Healthport Technologies v. Stucky*, this Court examined W. VA. CODE § 16-29-1(d) and found that a trial court lacks subject matter jurisdiction where a patient has not suffered

[7] As ordered, the Class Definition would require notice of the class to be given to attorneys who were reimbursed for the records that they obtained for their clients, notwithstanding that they would have no injury, and would have to be excluded from any verdict, judgment, settlement or recovery because of this lack of injury.

an injury in fact. 239 W. Va. 239, 800 S.E.2d 506 (2017). In *Healthport*, the plaintiff's attorney had requested and paid for medical records of his client for a personal injury contingency case. *Id.* at 241, 800 S.E.2d at 508. However, the client had not yet recovered any damages as a result of his personal injury suit and, as a result, had not repaid his attorney for the medical records recovered. *Id.* Because the client had not suffered any injury in fact because he advanced no costs for the procurement of the medical records, the Court held that the attorney also did not have an injury in fact to bring the claim as the client's agent. Accordingly, under W. VA. CODE § 16-29-1(d), the Court found that attorneys do not have standing to pursue a claim on behalf of a patient without an injury in fact. *See id.* at 243, 800 S.E.2d at 510.

Indeed, Respondents concede that the inclusion of attorneys is improper because "where the lawyer has been reimbursed, they have not suffered the injury, but rather the client has, and where the lawyer is not reimbursed, they are excluded from the class." App. 1565. Accordingly, the injury lies with the patient, and the class should therefore be expressly limited as such. There is simply no need for attorneys to be included in the class definition pursuant to Respondents' own logic.

Accordingly, the trial court's Order including lawyers within the scope of the class definition violates this Court's instructions in *Gaujot*, runs afoul of West Virginia Rule of Professional Conduct 1.8(i), and is contrary to the holding of *State ex rel. Healthport Technologies v. Stucky*.

CONCLUSION

The trial court violated established West Virginia law and the express mandate of the Court in this case when it refused to decertify Respondents' class. Accordingly, Petitioners request that this Court issue a rule to show cause why a Writ of Prohibition should not be issued and expeditiously order an automatic stay pursuant to Rule 16 of the West Virginia Rules of Appellate

Procedure. Further, Petitioners ask that, after there has been an opportunity to show cause, a Writ of Prohibition be issued prohibiting the Circuit Court of Monongalia County from conducting any further proceedings in this matter until the Order denying Petitioners' Renewed Motion to Decertify Class has been vacated.

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and

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Counsel for Petitioners,
West Virginia University Hospitals, Inc. and
West Virginia United Health System, Inc.

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF CABELL, to-wit:

I, Marc E. Williams, after being first duly sworn, depose and say that the facts contained in the foregoing Petition for Writ of Prohibition are true, except insofar as they are therein stated to be upon information and belief, I believe them to be true.

Marc E. Williams

MARC E. WILLIAMS

Taken, subscribed and sworn to before me, the undersigned Notary Public, this 16th Day of September, 2021.

My commission expires May 30, 2024

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Christianne L. Hobson
Nelson Mullins Riley & Scarborough LLP
949 Third Avenue
Suite 200
Huntington, WV 25701
My Commission Expires May 30, 2024

Christianne L. Hobson

NOTARY PUBLIC

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. _____

WEST VIRGINIA UNIVERSITY HOSPITALS, INC. and WEST VIRGINIA UNITED HEALTH SYSTEM, INC., d/b/a WVU Healthcare and any related entities of WVU Healthcare acting in concert with WVU Healthcare, Petitioners,

Relief sought from an Order of the Circuit Court of Monongalia County (13-C-53) Denying Defendants' Renewed Motion to Decertify Class

v.

THE HONORABLE PHILLIP D. GAUJOT, CHRISTOPHER THOMACK, and **JOSEPH MICHAEL JENKINS**, on their own behalf and on behalf of all similarly situated persons consisting of a class of aggrieved persons, Respondents.

CERTIFICATE OF SERVICE

I, Marc E. Williams, hereby certify that true and correct copies of the foregoing ***Petition for Writ of Prohibition*** and ***Appendix*** were served upon the following individuals via U.S. Mail, postage prepaid at Huntington, West Virginia this 16th day of September, 2021:

The Honorable Phillip D. Gaujot
Monongalia county Courthouse
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Morgantown, WV 25605

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Goddard Law PLLC
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and

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Counsel for Plaintiff Christopher Thomack

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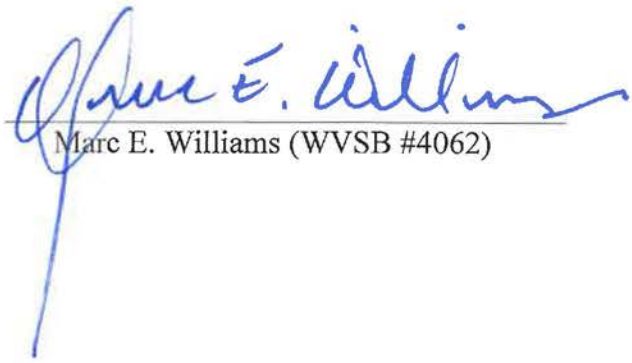
Counsel for Plaintiff Joseph Michael Jenkins



Marc E. Williams (WVSB #4062)