IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

NO. 21-0737

STATE OF WEST VIRGINIA EX REL. WEST VIRGINIA UNIVERSITY HOSITALS, 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.

From the Circuit Court of
Monongalia County, West Virginia
Civil Action No. 13-C-53

RESPONSE OF THE HONORABLE PHILLIP D. GAUJOT BY THE PLAINTIFFS BELOW, CHRISTOPHER THOMACK AND JOSEPH MICHAEL JENKINS, TO WEST VIRGINIA UNIVERSITY HOSPITALS, INC. AND WEST VIRGINIA UNITED HEALTH SYSTEM, INC.'S PETITION FOR A WRIT OF PROHIBITION

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QUESTIONS PRESENTED

I. Did the trial court appropriately apply *State ex rel. West Virginia University Hospitals v. Gaujot* and other authoritative West Virginia law regarding class certification in finding that Plaintiffs had met their burden to establish commonality?

Suggested Answer: Yes.

II. Did the trial court appropriately apply *State ex rel. West Virginia University Hospitals v. Gaujot* and other authoritative West Virginia law regarding class certification in finding that Plaintiffs had met their burden to establish ascertainability?

Suggested Answer: Yes.

III. Did the trial court appropriately apply *State ex rel. West Virginia University Hospitals v. Gaujot* and other authoritative West Virginia law regarding class certification in finding that Plaintiffs had met their burden to establish predominance?

Suggested Answer: Yes.

IV. Does the trial court's order narrowly tailor the class definition pertaining to attorneys as class members to comply with *State ex rel. Healthport Technologies v. Stucky*?

Suggested Answer: Yes.

STATEMENT OF THE CASE

A. Procedural History[1]

This case has been pending since January 29, 2013.[2] This is the third time that Defendants have sought a Writ of Prohibition in this matter, and the second time that they have sought a Writ on the very same issues set forth in their instant Petition.

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[1] Respondents incorporate fully herein by reference their Response to Petition for Writ of Prohibition, filed October 31, 2018, which contains a detailed recitation of the factual and procedural history of the case.

[2] Defendants' first Petition for Writ of Prohibition was filed on June 25, 2014, and was refused by Order of this Court on August 26, 2014. Defendants' second Petition for Writ of Prohibition was filed on October 1, 2018, and was ruled upon by opinion filed June 5, 2019, published as *State ex rel. West Virginia University Hospitals v. Gaujot*, 242 W. Va. 54, 928 S.E.2d 54 (2019).

This matter arises out of the Defendants' routine and systematic overcharging to produce copies of patients' medical records in response to patient requests, or requests made by authorized patient representatives, in violation of W.Va. Code § 16-29-1 *et seq.* On April 16, 2014, the Circuit Court of Monongalia County entered an Order certifying a class of Plaintiffs for all claims raised in the Plaintiffs' Amended Complaint.[3]

On July 21, 2017, Defendants filed a Motion to Decertify Class, and following full briefing and extensive oral argument, the Court entered an Order Denying Defendants' Motion to Decertify Class, which included recognition that the class definition would need to be amended to comport with the then recent rulings in *State ex rel. Healthport Technologies, LLC v. Stucky*, 239 W. Va. 239, 800 S.E.2d 506 (2017). Following additional discussions before the Court and between counsel for the parties regarding the need to amend the class definition, the Court entered an Order Amending Class Definition on July 7, 2018. The Amended Class Definition defined 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 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. 1511-13. This class definition remains in effect. The Order Amending Class Definition also specifically set forth the Trial Court's ruling that attorneys who paid for a client's medical records but were never repaid for those costs will not be members of the certified class, pursuant to the

[3] Plaintiffs' Amended Complaint contained a claim for fraud. The fraud claim has since been dismissed from the class certification/decertification analysis.

ruling in *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 800 S.E.2d 506 (2017). *Id.* at 1511.

On October 1, 2018, Defendants filed their second Petition for Writ of Prohibition in this matter, challenging class certification on the basis of commonality, ascertainability, and standing. Following briefing and oral argument, the WVSCA entered its opinion in *State ex. rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (2019). The matter was remanded back to the Court for additional Rule 23 analysis. The parties appeared before the Court for a status conference on June 19, 2019, during which it was decided that additional discovery would be conducted to aid in Rule 23 analysis, and such discovery was undertaken, including the deposition of WVUH Director of Health Information Management and Chief Privacy Officer, who had previously signed the affidavit which was relied upon by this honorable Court in its decision in *Gaujot*.

Defendants filed their Renewed Motion to Decertify Class on September 17, 2019. The matter was fully briefed, and on January 22, 2020, the parties appeared before the Court to argue Defendants' Renewed Motion to Decertify Class. During a hearing that lasted over two hours, the parties presented thorough arguments regarding the propriety of class certification, and the Court took the matter under advisement. On October 30, 2020, the Court entered an eighteen (18) page Order Denying Defendants' Renewed Motion to Decertify Class, setting forth extensive details supporting its ruling.

On March 1, 2021, Defendants filed a "Motion for Reconsideration" of the October 30, 2020 Order, and Plaintiffs responded in opposition. A hearing on the "Motion for Reconsideration" was held on May 13, 2021. The hearing lasted over an hour, and the Court thoroughly questioned counsel for both parties. Much discussion was had regarding the affidavit of Melissa Martin and

her deposition testimony, and the manner in which WVUH calculated costs for producing medical records under W. Va. Code § 16-29-2.[4] Notably, Ms. Martin testified that the labor involved in having a WVUH technician review the medical records prior to production was identical under both versions of the statute:

Q. "Depending on the type of record. After the records are reproduced electronically, a WVUH technician manually inspects the document bundle to ensure that the production complies with the scope of the request and that no images are duplicates or illegible." Can you explain to me what you mean about the WVU technician manually inspecting the documents?

A. So the WVUH technician would review the records to make sure that we're providing the minimum necessary required by the privacy regulations. They also evaluate and make sure that the record is complete based on the request, and that if there's any protected information, behavioral health information, that that's reviewed, and if the request does not provide the additional authorization for protected information, then we would remove that and not provide that to the requestor.

Q. And these efforts by the WVU technician would have been done under both of the two different versions of the statute we've talked about here today, correct?

A. Correct.

Q. So during the relevant timeframe from January of 2008 to June of 2014, someone would have looked at all records to make sure that they were compliant and not overly inclusive, no duplicates and the quality was fair, ok?

A. That's correct.

Q. And the same thing from June 6, 2014 and after, a WVU technician would have likewise inspected all of the documents to make sure that they were correct, legible, make sure they were not overly inclusive, and to make sure that there were no duplicates, fair?

A. Correct.

[4] Two versions of W. Va. Code § 16-29-2 were addressed, as the statute was amended effective June 6, 2014. The previous version of W. Va. Code § 16-29-2 was in effect for the entire period of the certified class in this matter, for January 18, 2008 through June 5, 2014. The two 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).

Deposition Transcript of Melissa Martin, at pp. 59-61. It is undisputed that Defendants charged every member of the class 40 cents per page plus a $10.00 search fee regardless of the amount of time or cost to produce the records.

Plaintiffs also deposed Christine Metheny, Privacy Health Manager of WVUH, in the capacity of a 30(b)(7) corporate designee for WVUH. Ms. Metheny testified to a "time study" conducted by WVUH after the amended version of W. Va. Code § 16-29-2 went into effect in 2014, which WVUH asserts was conducted to calculate recoverable costs under the amended version of the statute. Ms. Metheny testified, in no uncertain terms, that the time study could be transferred to prior years, including those encompassed by the class definition:

Q: Okay, and do you have any reason to believe that the time study, the results of the time study, would be invalid or would be transferrable to the same process say a year earlier?

A: Yes.

Q: Yes, you believe it would be transferrable?

A: Yes, I do.

Q: Okay do you have any reason to believe it would not be transferrable all the way up to say, 2010?

MR. WILLIAMS: All the way back?

Q: All the way back, that's what I mean.

A: Yes.

Q: Yes, you think it would be?

A: Based on the processes and systems in place, yes.

Deposition Transcript of Christine Metheny, App. 721.

During oral argument on Defendants' Renewed Motion to Decertify Class, and referenced again during argument on Defendants' "Motion for Reconsideration," Plaintiffs produced a spreadsheet which summarized each invoice produced by Defendants for the time period of June 6, 2014 and July 31, 2014, after the amended statute went into effect, showing that 165,617 pages

were produced, with the total amount billed to produce those pages shown as $732.95. Calculations for the same number of pages under Defendants' systematic charging of forty (40) cents per page plus a $10.00 search fee, the cost-calculation used during the class time period, would have resulted in a charge of $69,766.80, or a difference of $69,033.85 (or more than 95 times as much as it charged using the system developed based on WVUH's time study). Plaintiffs also produced an affidavit of their retained and disclosed expert, Kathryn S. Crous, which addressed the method of calculations set forth in Plaintiffs' spreadsheet, and asserted that calculating the average charge for all of the invoices produced by Defendants for the time period from June 6, 2014 to July 31, 2014 created a simple mechanism to determine the amount of Defendants' overcharges during the relevant class time period. During oral argument on their "Motion for Reconsideration," Defendants represented that they would present testimony from an expert that would contradict this evidence, but have not produced any such evidence in this matter to date.

Contrary to Petitioners' assertions in their Petition for Writ of Prohibition that the fundamental facts in this matter remained unchanged from the time of the *Gaujot* ruling, this additional evidence developed in the case was presented to the Trial Court, and relied upon by the Trial Court, in its July 28, 2021 Order that Petitioners now appeal. Based upon this additional evidence, the Trial Court correctly ruled that, for purposes of class certification, the preponderance of the evidence clearly supported the preliminary conclusion that the claims asserted in Plaintiffs' Amended Complaint involve issues that are common to all class members and that determination of each class member's damages would not require individual assessment. The Trial Court expressly noted that it retained the authority to manage the case pursuant to Rule 23, including decertifying the Class, but that the facts presented clearly demonstrated commonality of issues for both liability and damages sufficient to warrant class certification. The Trial Court further noted that, even if

Defendants were able to produce an expert opinion contradicting that of Plaintiffs' expert, such evidence could create a contested fact/opinion for a jury to resolve, but would not constitute a basis to decertify the Class.

The Trial Court also assessed the ascertainability element, noting that there is no requirement that all class members be ascertained at the time of class certification, and that for purposes of class certification, the ascertainability requirement simply requires the Trial Court to determine whether a class may be defined in a manner that can allow for identification of specific class members in an "administratively feasible way" at some point prior to resolution of the case. The Trial Court found that the proposed class notice and claims process submitted by the Plaintiffs would serve to ascertain class members prior to settlement or trial of this matter. Rulings on the ascertainability element were set forth over four (4) pages of the Order Denying Defendants' Motion for Reconsideration and included numerous citations to case law regarding ascertainability and class certification.

The Trial Court's Order Denying Defendants' Motion for Reconsideration addressed the question posed by this honorable Court in a footnote of the *Gaujot* opinion regarding whether any ethical issues would arise if attorneys were to be included in the class definition. The Trial Court found that it was conclusively established that the Plaintiff class representatives had standing, pursuant to *Stucky*, as they suffered an injury in fact when they repaid their attorneys who had acted as their authorized agent in acquiring the medical records to provide them with legal advice, and that the class definition appropriately excludes attorneys pursuant to *Stucky*, thereby avoiding ethical concerns. Counsel for the class Plaintiffs in this matter have never sought to be included in the class.

SUMMARY OF ARGUMENT

As with their previous Petition for a Writ of Prohibition, Petitioners' instant Petition seeks an interlocutory investigation into factual matters that are especially reserved for the discretion of the Trial Court and ignores well-established law that class certification is preliminary in nature. Syl. Pt. 6. *In re W. Virginia Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52 (2003). Class certification and definition of the plaintiff class is not a final judgment and does not give rise to appeal. Petitioners also seek to rehash arguments that have been extensively litigated and ruled upon, by both the Trial Court and this Court.

The Trial Court fully complied with this Court's instructions in *Gaujot* to conduct a thorough analysis of the commonality element. Additional evidence produced to the Trial Court following the remand establishes that the class members' claims in this matter all involve common issues of law and fact, and that damages can be assessed without individualized assessment. Contrary to Petitioners' assertion, the Trial Court's finding that commonality has been established is not based solely upon Petitioners' uniform violation of W. Va. Code § 16-29-2. Rather, the finding of commonality was reached after extensive inquiry into the evidence presented regarding WVUH's time study and Plaintiffs' expert's affidavit regarding the calculations for establishing how Petitioners overcharged across the class.

The Trial Court also conducted a thorough analysis of the ascertainability element. Citing to authoritative case law which establishes that, so long as a class is "objectively defined" "with sufficient specificity so that it is administratively feasible for the court to ascertain whether a particular individual is a member," then the requirements are met. The Trial Court set forth the basis of its ruling that Plaintiffs had met their burden to establish that the Plaintiff class in this matter can be ascertained through application of the time study, spreadsheets produced by the

Petitioners listing individuals who requested and paid for medical records, and the proposed class notice and claims plan.

With respect to the predominance analysis about which Petitioners complain, it is to be noted that this Court did not decide *State ex rel. Surnaik Holding of WV, LLC v. Bedell* until November 20, 2020, after the Circuit Court entered the Order Denying Defendants' Renewed Motion to Decertify Class. Nonetheless, nothing in *Surnaik* would change the Trial Court's analysis and finding that predominance has been established. The Trial Court conducted the very analysis addressed in *Surnaik* in the Order Denying Defendants' Renewed Motion to Decertify Class when it established that the parties' claims are common and discussed the evidence which supports the Plaintiffs' methodology for establishing the amount that Defendants systematically charged the class members for copies of their medical records during the relevant timeframe.

Petitioners also overlook the analysis that the Trial Court applied, and included in its Orders, regarding the class definition and whether attorneys could be included as class members. As cited in both the Order Denying Defendants' Renewed Motion to Decertify Class and Order Denying Defendants' Motion for Reconsideration, the Trial Court applied the rulings in *Stucky*, and clearly stated that only individuals who have suffered an injury-in-fact would be permitted in the class.

Finally, Petitioners are also unable to establish that they will suffer irreparable harm from allowing the case to proceed as a class action, and have not shown any legitimate reason why a Writ would be an appropriate remedy in this matter. As they have done repeatedly in this matter, the Petitioners seek only further, unnecessary delay, and not resolution. This matter should have been resolved long ago, but rather than engage in productive litigation and settlement negotiations, Petitioners continue to expend time and resources unnecessarily.

STATEMENT REGARDING ORAL ARGUMENT

Respondents believe that the Petition for Writ of Prohibition should be denied without oral argument, as it is fails to meet the standard for issuance of a writ, attempts to re-litigate well-settled issues, and seeks only to further delay resolution of this matter.

ARGUMENT

Petitioners attempt to argue that they seek the extraordinary remedy of a Writ of Prohibition on the grounds that the Trial Court failed to follow the instructions of this Court in *Gaujot*. However, the basis of Petitioners' appeal simply seeks to challenge the Trial Court's finding that the class in this matter is appropriately certified. As such, the appropriate standard of review is for abuse of discretion. "This Court will review a circuit court's order granting or denying a motion for class certification pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure* [1998] under an abuse of discretion standard." Syl. Pt. 1, *Tabata v. Charleston Area Med. Ctr., Inc.*, 13-0766, 2014 WL 2439961 (W. Va. May 28, 2014), quoting Syl. Pt. 1, *In re W. Va. Rezulin Litigation,* 214 W.Va. 52, 585 S.E.2d 52 (2003). "[W]hether the requisites for a class action exist rests within the sound discretion of the trial court." *In re W. Virginia Rezulin Litig.*, 214 W. Va. 52, 62, 585 S.E.2d 52, 62 (2003), quoting Syl. Pt. 5, *Mitchem v. Melton,* 167 W.Va. 21, 277 S.E.2d 895 (1981).

To the extent that this honorable Court considers the Petition to properly raise the issue of whether the Trial Court appropriately interpreted and adhered to this Court's instructions in *Gaujot*, the standard of review is *de novo*. *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 811, 591 S.E.2d 728, 737 (2003).

I. The Trial Court followed the instructions in *Gaujot* and conducted a thorough analysis of the requirements for class certification pursuant to authoritative case law.

In *Gaujot,* this Court recognized that commons issues of law and fact exist in this matter. This Court went on to explain that these common questions must also be capable of a class-wide

resolution, and that determination of the question of law or fact at issue "will resolve an issue that is central to the validity of each one of the claims in one stroke." Syl. Pt. 2, *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (2019), quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011). As detailed extensively herein, the Trial Court considered a host of evidence establishing all of the requisite analysis required under Rule 23, and properly detailed its findings that the Plaintiffs had met their burden of proof to proceed with this matter as a class action, further recognizing that this case is firmly suited for class action treatment.

A. The Trial Court conducted a thorough analysis of extensive evidence in reaching the determination that Plaintiffs had met their burden to establish commonality.

Petitioners entirely overlook the additional factual evidence which was added to the record of this matter *after* the *Gaujot* opinion was issued, but which was considered by the Trial Court in its review of the requirements of Rule 23 and its rulings on Defendants' Renewed Motion to Decertify Class and "Motion for Reconsideration." This Court noted in *Gaujot* that an inquiry into commonality in this matter involved questions that relate to both liability and damages. *Gaujot*, 242 W. Va. At 63-64, 829 S.E.2d at 63-64. This Court further explained that these common questions of law and fact, that address both liability and damages, must also be capable of a class-wide resolution, and that determination of the question of law or fact at issue "will resolve an issue that is central to the validity of each one of the claims in one stroke." Syl. Pt. 2, *Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (2019), quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).

While Plaintiffs have alleged that Defendants systematically violated a statute, W. Va. Code § 16-29-1 *et. seq.*, in charging class members for copies of their medical records, and further allege that common, uniform violation to all class members resulted in each class member

overpaying to obtain copies of their medical records, Plaintiffs also established that this class-wide harm can be resolved on a class-wide basis. Plaintiffs produced evidence, both in the form of documentation regarding Defendants' charges under the version of W. Va. Code § 16-29-1 *et. seq.* which was in effect as of January 8, 2008 through June 5, 2014 – the timeframe set forth in the class definition – and the drastically reduced charges under the subsequent version of W. Va. Code § 16-29-1 *et. seq.*, as well as deposition testimony from representatives of the Defendants which establishes that no changes in the process or procedure by which Defendants produced records to patients occurred when the statute was amended which would have reduced the costs involved in record production. The evidence clearly established that Defendants were capable of producing the medical records at the lower charges during the class time period, but did not do so, instead charging so as to turn a profit on the production of medical records. This is a violation of the statute's requirement that they charge only the "reasonable costs" to "reimburse" for production.

The version of W. Va. Code § 16-29-2 which was in effect during the timeframe defined in the class definition in this matter read as follows, in relevant part:

> (a) The provider shall be **reimbursed** by the person requesting in writing a copy of the records at the time of delivery **for all reasonable expenses incurred** in complying with this article; Provided, that the cost may not exceed seventy-five cents per page for the copying of any record or records which have already been reduced to written form and **a search fee may not exceed ten dollars.**

W. Va. Code § 16-29-2(a) (effective to June 5, 2014) (emphasis supplied).

The version of W. Va. Code § 16-29-2 which went into effective immediately after the end of the class definition in this matter reads as follows, in relevant part:

> (a) A person requesting records from a provider shall place the request in writing and pay **a reasonable, cost-based fee**, at the time of delivery. Notwithstanding any other section of the code or rule, the fee shall be based on the provider's cost of: (1) Labor for copying the requested records if in paper, or for placing the records in electronic media; (2) supplies for

creating the paper copy or electronic media; and (3) postage if the person requested that the records be mailed.

. . .

(b) **The labor for copying under this section shall not exceed twenty-five dollars per hour** and shall be adjusted to reflect the consumer price index for medical care services such that the base amount shall be increased by the proportional consumer price index in effect as of October of the calendar year in which the request was made, rounded to the nearest dollar.

W. Va. Code Ann. § 16-29-2(a) (effective June 6, 2014 to July 5, 2017) (emphasis supplied). The two 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 the fees must be reasonable and based upon the expenses actually incurred. The statute, under both versions, further limits the amount that an entity such as WVUH is permitted to charge for any labor involved in the production. The evidence in this matter, including that produced by WVUH and its representatives, makes clear that WVUH was charging well in excess of the reasonable costs incurred to reimburse for the production of the medical records and was doing so for all class members in this matter.

West Virginia University Hospitals Assistant Vice President of Privacy and Health Information Management, Melissa Martin, testified during her deposition that the labor involved in having a WVUH technician review the medical records prior to production was identical under each version of the statute, and invoices produced by WVUH in discovery establish that WVUH was charging significantly more under the earlier version of the statute than they were charging following the amendment of June 6, 2014.[5] Petitioners argue that the time study conducted to calculate charges under the amended version of the statute was specifically designed to comply

[5] For example, during the hearing on January 22, 2020, Plaintiffs' counsel presented an invoice from May 29, 2014 (one week before the new statute went into effect), which showed medical records containing 5,169 images produced on a CD resulted in charges of $2,077.60. Yet, invoices produced by WVUH for requests in the following two months included CDs containing far more images (as high as 6,150 images (invoice number 72654), 11,991 images (invoice number 72081) and 13, 984 images (invoice number 72723)) which resulted in invoices totaling only $1.44, $0.42 and $5.76 respectively. In other words, one week's difference equaled over $2,000 in additional charges for a patient to collect his/her medical records.

with that version, and therefore could not be applied to the Plaintiff class. However, testimony from WVUH's corporate designee, Christine Metheny, makes clear that this was not the case, and that the time study calculation could be transferred "all the way back" to the class time period.

Invoices produced by Petitioners themselves show a significant difference in charges for medical records production after the time study and amended statute from the charges set forth in invoices immediately prior to June 6, 2014. Plaintiffs' expert witness affidavit further establishes that the invoices that used the methodology adopted after the time study provide a clear and reasonable basis to establish that Petitioners were overcharging for records during the class time period and provide a means to compute damages on a class-wide basis. Specifically, the time study shows that, on average, each request generated an invoice of $2.08. Subtracting this average cost from the invoice totals for the Plaintiff class members, which were indisputably calculated at forty (40) cents per page plus a $10.00 search fee, establishes that Petitioners were significantly overcharging for production of medical records during the class time period. It also provides an amount for damages of each class member.

The Trial Court addressed all of this in its Order Denying Defendants' Renewed Motion to Decertify Class and Order Denying Defendants' Motion for Reconsideration. The Trial Court clearly set forth the various evidence that was considered and relied upon in reaching its ruling, including quotations from the testimony of representatives of the Petitioners, citations to the cost calculations created from Petitioners' time study, references to Plaintiffs' expert testimony, and citations to the statutes. The Orders further addresses that the affidavit of Melissa Martin, repeatedly relied upon by Petitioners in their Motions to Decertify and previous Petition for a Writ of Prohibition, is demonstrably inconsistent with the facts established by Ms. Martin's deposition and the production of the time study invoices.

Following the extensive detailing of the facts and evidence considered in assessing commonality in this matter, the Trial Court determined that Plaintiffs had met their burden to establish that common issues of fact and law exist with respect to all Plaintiff class members and that all such issues could be resolved on a class-wide basis. The Trial Court further recognized that this case was appropriate for class-action treatment, and that a class action would likely be the only mechanism for the Plaintiffs to see their day in court due to the relatively small amount of damages suffered by each Class member, thus serving one of the primary purposes of Rule 23. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417 (4th Cir. 2003) ("class certification will provide access to the courts for those with claims that would be uneconomical if brought in an individual action"); *Mey v. Venture Data, LLC,* No. 5:14-CV-123, 2017 WL 10398569, at *13 (N.D.W. Va. June 6, 2017) (citing *Gunnells* and *Amchem Prod.*); *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (1997)); *State ex rel. Dunlap v. Berger,* 211 W.Va. 549, 562, 567 S.E.2d 265, 278 (2002) (favorably quoting the purpose of Rule 23 cited above in *Amchem*).

The fact that this case is tailor-made for class action is supported by both federal and West Virginia caselaw. Courts have repeatedly recognized that class actions provide a means of recovery for those who have been harmed on a broad, systematic scale, and that, without ability to pursue claims as a class, many injured plaintiffs would have no viable means of justice or recovery and defendants would be permitted to escape liability for intentional, and often egregious, wrongful conduct simply because each individual harmed could not bring an individual lawsuit. As set forth in the Trial Court's Order Denying Motion for Reconsideration, "[i]t would drive a stake through

the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise, defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013). As further recognized by the Trial Court, "[t]he same principle espoused in many federal cases analyzing class actions squarely applies to this matter – class actions are the appropriate mechanism to address situations where a defendant has harmed individuals on a broad and systematic basis, and the defendant would be permitted to escape liability for intentional, and often egregious, wrongful conduct simply because each individual harmed could not bring an individual lawsuit."

The Trial Court conducted a thorough and extensive analysis of the commonality element, and that analysis is set forth in clear detail in the Orders. It is difficult to imagine a more "detailed and specific showing" of the "basis for the certification and the relevant facts supporting the legal conclusions" than is contained in the Trial Court's Order. Syl. Pt. 8, *State ex rel. Chemtall v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004). Petitioners are entirely unable to identify where the Trial Court failed to do so, and overlook the extensive citations to evidence, case law, and statutes which support its finding that the Plaintiffs met their burden to establish commonality and that class certification was appropriate. Petitioners simply disagree, once again, with the Trial Court's ruling, and seek to further delay resolution of this matter. This is not grounds for the extraordinary remedy of a Writ of Prohibition, and Petitioners' request for one should be denied.

B. The Trial Court conducted a thorough analysis of extensive evidence in reaching the determination that Plaintiffs had met their burden to establish ascertainability.

A class is adequately defined and clearly ascertainable if the class definition enables the court to identify those class members who will be bound by the final order of the court. If the class is "objectively defined" "with sufficient specificity so that it is administratively feasible for the court to ascertain whether a particular individual is a member," then the requirements are met. *State ex rel Metropolitan Life Ins. Co. v Starcher*, 196 W.Va. 519, 474 S.E.2d 186 (1996)(Syl. Pt. 2 & 3); *see also* Newberg on Class Actions § 3:2 (2002). In this matter, there is no doubt that the named class representatives suffered the same violations of law, as they were all were overcharged under the same statute and the same circumstances. This is established by the same evidence the Trial Court analyzed in its commonality examination. There is also no dispute that the class is identifiable as the Petitioners are able to produce the names and addresses of the class members, including the identity of the patient whether the patient's records were requested by the patient or the patient's authorized agent or representative. There could be no more "adequately defined and clearly ascertainable" class then that which this Court has certified and if these facts are not sufficient for class status under Rule 23, then no set of facts will ever satisfy Rule 23 under such interpretation. Accord, *Krakauer v. Dish Network*, LLC, 925 F.3d 643 (4th Cir. 2019).

The class definition in this matter specifically defines class members to include any person with the applicable timeframe who was charged an amount greater than the reasonable cost of production for medical records, and has paid the excess charges for copies of requested medical records, including through attorney reimbursement, which gives rise to this class action lawsuit, and which will be properly redressed by a favorable decision of the court.[6] This complies with this

[6] To be clear, it is expected that Plaintiffs' expert will testify that every single person who requested copies of their medical records during the class period and paid the amount invoiced by Petitioner was overcharged.

Court's ruling in *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 800 S.E.2d 506, 507 (2017). Syl. Pt. 2, *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 800 S.E.2d 506, 507 (2017) (quoting Syl. Pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002)).

Petitioners' arguments regarding the ascertainability element are unfounded for many of the same reasons as their critique of the commonality element, and do so again in their Petition. In fact, in oral argument on their Renewed Motion to Decertify Class, it became clear that Petitioners were not actually challenging ascertainability, they were attempting to further challenge commonality. Defendants failed to explain to the Trial Court why it would be "too difficult" to ascertain class members, as Petitioners themselves possess the spreadsheets showing each medical records request, the requester, and the amount charged. This is a clearly defined, known, and ascertained class, and as addressed in Plaintiffs' proposed Class Notice Plan, potential class members may be notified directly through the mail or other means. Claim forms can be completed by class members to verify class membership, through either mail-in forms or use of a website, and such forms will easily allow potential class members to confirm whether they requested and paid for their medical records, or whether an authorized representative did so for them and whether the client suffered an injury-in-fact by reimbursing their representatives for the records costs.

Petitioners are unable to articulate how this could pose a substantial administrative burden to the court, as almost every needed piece of information to confirm a class membership is available from Petitioners themselves. No "extensive and individualized fact-finding or 'mini-trials'" are required to identify the class in this matter as Petitioners argue. *Krakauer v. Dish Network*, LLC, 925 F.3d 643 (4th Cir. 2019) addressed the ascertainability requirement, explaining that:

> With the statute properly in view, the appellant's challenge to this class falls away. Appellant's core argument seems to be that this class includes a large number of uninjured persons. Other courts to address the question of uninjured plaintiffs have done so through the lens of predominance, asking whether the differences among the class members are so great that individual adjudication subsumes the class-wide issues. For its part, the district court took up the issue through the lens of ascertainability. Regardless of which approach is used, the issue has no bearing on this case. Because the private right of action is not as narrow as Dish and its amici suggest, there is simply not a large number of uninjured persons included within the plaintiffs' class.
>
> With this red herring cast aside, the class certified by the district court easily meets the demands of Rule 23. First, the class members are ascertainable. As we previously explained, class litigation should not move forward when a court cannot identify class members without "extensive and individualized fact-finding or 'mini-trials.'" *EQT Prod. Co.*, 764 F.3d at 358. **The goal is not to "identify every class member at the time of certification," *id.*, but to define a class in such a way as to ensure that there will be some "administratively feasible [way] for the court to determine whether a particular individual is a member" at some point.**"

Krakauer v. Dish Network, L.L.C., 925 F.3d 643, 657–58 (4th Cir.), *cert. denied*, 140 S. Ct. 676, 205 L. Ed. 2d 440 (2019) (internal citations omitted) (emphasis supplied). Petitioners' comparison to *EQT Production Co. v. Addair* is misguided, as determining class members in this matter will not require individualized review of records, but will simply require class members to complete claims forms to verify whether they paid the costs of their medical records, or reimbursed an authorized representative for such costs. All of the information necessary will be in the possession of the class members themselves.

This analysis was clearly and thoroughly addressed in the Trial Court's Order Denying Defendants' Motion for Reconsideration, and the Trial Court further addressed this in that Order by granting Plaintiffs' Motion for Approval of Class Notice in that same Order. Any concerns for ascertaining the Plaintiff class in this matter that may arise as the case proceeds to resolution can be addressed through standard class action practices such as the creation of sub-classes, along with

properly crafted class notices and claims forms, as recognized by the Trial Court in its Orders. Petitioners have not, and cannot, meet their burden to establish that a Writ of Prohibition is appropriate where the class in this matter is not only ascertainable, but is essentially known and identified.

C. The Trial Court conducted a thorough review of predominance, and nothing in *State ex rel. Surnaik Holdings of WV, LLC v. Bedell* altered the propriety of the Trial Court's analysis or ruling that class certification is appropriate in this matter.

State ex rel. Surnaik Holding of WV, LLC v. Bedell was not decided until November 20th, 2020, after the Circuit Court entered the Order Denying Defendants' Renewed Motion to Decertify Class. Petitioners cited to *Surnaik* in support of their "Motion for Reconsideration," however, in the many years that this case has been in litigation, and among the many challenges that Petitioners have raised regarding class certification, Petitioners never before raised criticisms of the predominance issue until the Motion for Reconsideration. Petitioners seized the opportunity to incorporate another issue to challenge class certification upon issuance of the *Surnaik* opinion, but it remains clear that this matter is, and always has been, tailor-made for class action treatment. There is nothing in *Surnaik* which alters that.

The predominance element is closely tied to the commonality element, and Petitioners acknowledge as much. Predominance "requires a showing that the common questions of law or fact outweigh individual questions." *State ex rel. Surnaik Holding of WV, LLC v. Bedell*, 244 W. Va. 248, 852 S.E.2d 748, 760 (2020). As applied to this case, *Surnaik* required the Trial Court to determine how the Plaintiff class will establish the issue of Petitioners' overcharging for production of their medical records at the trial of this matter, as that is the common issue of law and fact. As addressed through the Trial Court's commonality analysis, it is undisputed in this matter that the common question at issue in this matter is whether violated W. Va. Code § 16-29-

1 *et. seq.* by overcharging for medical records. This issue is common to all class members, and as addressed in the Trial Court's Orders, can be determined through use of the calculations created from the time study and invoices, and testimony from Plaintiffs' expert witness. The Trial Court's Order conducts the very analysis required by *Surnaik*, and clearly articulates that Plaintiffs can prove their claims at trial through use of the average cost mechanism.[7]

Surnaik instructs trial courts to apply Federal Rule of Civil Procedure 23's analysis of class certification, including for the predominance element. This inherently invokes the recognition by federal courts of the importance of class action lawsuits, which serve as the mechanism by which individuals who have been wronged on a broad scale or in a systematic matter can obtain recourse that would otherwise be unavailable to them as individuals. *See, e.g., Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013); *Carnegie v. Household Int'l., Inc.,* 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits . . ."); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417 (4th Cir. 2003) ("class certification will provide access to the courts for those with claims that would be uneconomical if brought in an individual action"); *Mey v. Venture Data, LLC,* No. 5:14-CV-123, 2017 WL 10398569, at *13 (N.D.W. Va. June 6, 2017) (citing *Gunnells* and *Amchem Prod.*); *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)); Geoffrey C.

[7] As the Trial Court correctly noted, the average cost of record productions using the later version of the statute is a fair and appropriate way to handle damages computations because Petitioners created the difficulty in computing damages with exactitude. Accordingly, the law mandates that any purported uncertainty must be resolved against the wrongdoer. *See* October 30, 2020 Order Denying Defendants' Renewed Motion to Decertify Class at Conclusions of Law ¶¶ 11-12.

Shaw, Class Ascertainability, 124 Yale L.J. 2354, 2368–69 (2015) (discussing how "small dollar consumer class actions are precisely the cases that the drafters of Rule 23 had in mind and wanted to enable: cases in which individuals 'are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive,'" and citing to federal court cases which address this aspect of Rule 23).

Yet, Petitioners attempt to make an argument that flies in the face of this well-established principle of class actions by federal courts. This matter falls squarely within that principle, and seeks to allow a large group of individuals who were harmed by Petitioners' wrongful conduct to recover where each class member could not do so on their own. Where a defendant, such as Petitioners, has taken advantage of individuals on a broad and systematic basis for its own financial gain, class actions hold that entity accountable. Petitioners' arguments ask this Court to permit them to avoid liability for their intentional wrongful conduct. The Trial Court appropriately recognized that the Plaintiff class members' common issues of facts and law can be presented at trial through use of the average cost methodology, without individual fact-finding, and that damages can be calculated the same way. Petitioners ask this Court to overlook the evidence establishing predominance in this matter and ignore the fact that this case is one of the clearest examples of a case that is appropriate for class action treatment. They effectively ask this Court to eliminate class actions in the state of West Virginia and remove avenues to justice for West Virginia citizens who have been intentionally and systematically harmed by corporate entities. These grounds do not provide any valid basis for a Writ of Prohibition, and Petitioners' request for one should be denied.

II. The Trial Court did not fail to carefully consider potential ethical issues associated with the inclusion of attorneys as class members.

This Court referenced the potential for ethical questions to arise if attorneys were to be included as class members in this matter in footnote 16 to *Gaujot*. The class definition was amended by the Trial Court to comport with the ruling in *State ex rel. Healthport Technologies, LLC v. Stucky*, 239 W. Va. 239, 800 S.E.2d 506 (2017), which held that a plaintiff does not have standing to pursue claims for being overcharged for medical records in violation of W.Va. Code § 16-29-1 *et seq.* until he has suffered an "injury in fact," something which could not occur until the plaintiff was required to reimburse his attorney for the costs of obtaining the medical records. The basis for Petitioners' argument that the Trial Court ran afoul of the ruling in *Stucky* is unclear, as the class definition was specifically amended to comport with *Stucky*. Plaintiff class representatives in this matter have repeatedly established that they have suffered an injury-in-fact and have standing to bring their claims on behalf of a class of similarly-situated persons.[8] It is well settled law that "if a class representative has standing, the case is justiciable, and the proponent of the class suit need not demonstrate that each class member has standing." Newberg on Class Actions § 2:3(5th ed.); see also *Dreher v. Experian Info. Solutions, Inc.*, 856 F.3d 337 (4th Cir. 2017) ("In a class action matter, we analyze standing based on the allegations of personal injury made by the named plaintiff'), quoting *Beck v. McDonald*, 848 F.3d 262, 269-70 (4th Cir. 2017), citing *Doe v. Obama*, 631 F.3d 157, 160 (4th Cir. 2011); *see also Neale v. Volvo Cars of North Am., LLC*, 794 F.3d 353, 362 (3d Cir. 201 5); *Kohen v. Pacific v. Mgmt. Co. LLC*, 571 F.3d 672,

[8] As set forth in Plaintiffs' Response in Opposition to Defendants' Renewed Motion for Class Certification and accompanying exhibits, both Plaintiff Thomack and Plaintiff Jenkins, through their attorneys, were charged for, and paid, for copies of their medical records. Both Plaintiffs reimbursed their attorneys through settlement funds, thereby suffering an injury-in-fact as defined in Stucky and establishing their standing to bring the claims at issue in this matter.

676 (7th Cir. 2009); *Milbourne v. JRK Residential Am.*, LLC, 2016 WL 1071564, at *6 (E.D. Va. Mar. 15, 2016) (Payne, J.); *Lewis v. Casey*, 518 U.S. 343, 395 (1996) (Souter, J., concurring).

Both the Order Denying Defendants' Renewed Motion for Reconsideration and Granting Motion to Amend Class Definition make clear that the Trial Court did consider the inclusion of attorneys in the class, and over Plaintiffs' objection, stated that it had decided to rule that attorneys who paid for a client's medical records but were never repaid for those costs would not be members of this Class. This ruling was carried out in the Amended Class definition, and Petitioners' assertion that the Trial Court failed to follow this Court's instruction in *Gaujot* to consider the inclusion of attorneys is without merit.

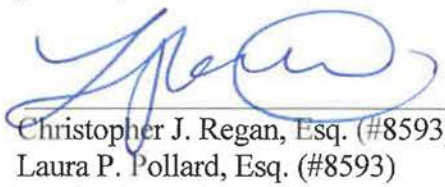
Petitioners argue that an ethical issue arises under W. Va. Prof. Conduct 1.8(i), in that attorneys obtain a personal interest in their client's case if they are included in the class. This is incorrect, as the Amended Class definition makes clear that "attorneys who paid for a client's medical records 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." As such, the attorney has no personal interest in any class member's case, and there is no violation of any of the West Virginia Rules of Professional Conduct. Finally, the question of attorney inclusion or exclusion from the class has been extensively litigated and ruled upon in this matter, yet Petitioners attempt to re-litigate it through the insertion of unnecessary confusion and hypotheticals. None of Petitioners arguments regarding the class definition in any way serve as grounds for Writ of Prohibition, and any further concerns with the class definition may be addressed through amendment or creation of sub-classes.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Respondents, 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, respectfully request that an Order be entered denying the Petitioners' Petition for Writ of Prohibition.

Respectfully submitted,

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,

By: 

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CERTIFICATE OF SERVICE

Service of the foregoing ***Response to Petition for Writ of Prohibition*** was had upon counsel of record herein by mailing a true and exact copy thereof, by regular United States Mail, postage prepaid, this 10th day of November, 2021 as follows:

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