COURT OF APPEALS OF WISCONSIN
DISTRICT I

ELIZABETH HARWOOD,

Plaintiff-Respondent,
v.

Appeal No.: 2018AP1836
Trial Court Case No.: 17CV12998

WHEATON FRANCISCAN SERVICES, INC.,
WHEATON FRANCISCAN MEDICAL GROUP, INC., and
WHEATON FRANCISCAN HEALTHCARE - ST. FRANCIS,INC.,

Defendants-Appellants.

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT ON APPEAL OF A CLASS CERTIFICATION ORDER OF MILWAUKEE COUNTY CIRCUIT COURT, CASE NO. 17CV12998, THE HONORABLE ELLEN R. BROSTROM PRESIDING, DATED SEPTEMBER 4, 2018

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December 20, 2018

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INTRODUCTION

The Circuit Court issued an eleven-page decision which thoroughly explained its reasons to certify a class in this case. Moreover, the Circuit Court Judge had considerable private practice experience around the country with class actions before taking the bench and was familiar with the procedure and law regarding class certifications. (R. App. 000143[1]; Tr. P. 31, ln. 18-24) The decision was well reasoned and based upon an appropriate reading of the law and facts involved.

The Circuit Court certified a class of persons who had all been charged fees in violation of the same statutory provision, Wis. Stat. §146.83. This law prohibits the Defendants from charging certain fees to patients or persons authorized by patients to obtain their records. The prohibition was confirmed by the Wisconsin Supreme Court in *Moya v. Aurora Healthcare, Inc.*, 894 N.W.2d 405, 375 Wis.2d 38, 2017 WI 45, (Wis., 2017). The Circuit Court found that Plaintiff met every requirement to certify a class under the recently amended version of the class action rule, Wis. Stat. §803.08, and a class action was appropriate and necessary to enforce the statutory

[1] Wheaton has designated their appendix "R. App." Harwood will designate her appendix as "P. App." starting at 201.

prohibition and allow the class to recover the illegal fees they had paid. [2]

Defendants have appealed the class certification order contending that the Circuit Court erred because there were factual issues that they thought should preclude certifying a class. Defendants also spend endless pages comparing the Circuit Court's order here to an order certifying classes entered by the Circuit Court in *Moya* that involved the same issues and the same claims.

The Defendants appear to suggest that considering another Judge's decision, standing alone, demonstrates an abuse of discretion. It does not. And, given that this Court denied an Interlocutory Petition in *Moya* which requested review of that class certification order and concluded "that the petition fails to satisfy the criteria for permissive appeal" citing the decision in *State v. Webb*, 160 Wis. 2d 622,632,467 N.W.2d 108 (1991) further erodes the Defendants' argument. [3]

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[2] Whether the amended statute applies to this case was not contested. The parties and Court approached it as if it did apply.

[3] The decision in *Moya v. Aurora Health Care Inc.* was reviewed by the Court in connection with a petition for Interlocutory Review in 2018AP222. This Court rejected the petition and concluded "this court concludes that the petition fails to satisfy the criteria for permissive appeal. *See* Wis. STAT. § 808.03(2) (2015-16); *State v. Webb***,** 160 Wis. 2d 622,632,467 N.W.2d 108 (1991)." March 2, 2018 Order.

The Defendants also complain that the Circuit Court erred by modifying the class definition proposed by the Plaintiffs. This is not an abuse of discretion by the Circuit Court, rather it is an appropriate exercise of the discretion the Circuit Court is vested with when deciding to certify a class.

In short, Defendants do not show the Circuit Court abused its discretion in certifying a class of persons who shared the same statutory claims. The Defendants instead want to contest liability based on their flawed reading of *Moya*, *supra,* and therefore think no class should ever be certified to pursue claims they contend are without merit.

The Defendants view ignores that certification of a class is a procedural decision and does not decide the merits. And, if Defendants are ultimately right on the merits, and they succeed, then the class certification would benefit them since it would resolve all claims against them in a single proceeding rather than many cases that try the same claim for the same relief over and over again. The Circuit Court also recognized this.

But, to resolve this appeal it is sufficient that Defendants cannot show that the Circuit Court abused its discretion and, therefore, the Circuit Court's order should be affirmed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Whether the Circuit Court properly granted Plaintiff's Motion for Class Certification?

Answered by the trial court: Yes

STATEMENT AS TO ORAL ARGUMENT

It is believed that oral argument would not be of assistance to the Court as the plain language of the statutes at issue is clear and the distinction between the competing views of the parties is also clear.

The case law addressing the primary issue on appeal is limited.

STATEMENT ON PUBLICATION

Respondent, Harwood, recommends publication since this case deals with a recently amended statute, an area of law that has limited existing case law and the decision relates to a substantial and continuing public interest – the right of Wisconsin residents to bring class actions to redress harms done to multiple citizens.

STANDARD OF REVIEW

This matter comes before the court on an Interlocutory Appeal. The Circuit Court granted Plaintiff's Motion for Class

Certification. The standard of review on appeal is abuse of discretion.

A circuit court's decision to grant or deny a motion for class certification is committed to the circuit court's discretion. *Ewer v. Lake Arrowhead Ass'n, Inc.*, 817 N.W.2d 465, 477, 342 Wis.2d 194, 219, 2012 WI App 64, ¶ 47 (Ct. App. 2012) On appeal, "a discretionary order of a trial court will be affirmed if there appears any reasonable basis for the trial court's decision. (citation omitted) Furthermore, the party who alleges that a lower court abused its discretion has the burden of showing an abuse of discretion and this court will not reverse unless abuse is clearly shown. (citations omitted)." *Colby v. Colby*, 306 N.W.2d 57, 62, 102 Wis.2d 198, 207–08 (1981).

STATEMENT OF FACTS

Procedural Background

Harwood filed suit on November 22, 2017 against three defendants: (1) Wheaton Franciscan Services, Inc. d/b/a Wheaton Franciscan Healthcare (WFH), (2) Wheaton Franciscan Medical Group, Inc. (WFMG) and (3) Wheaton Franciscan Healthcare - St. Francis, Inc. (WFSF). (R. 1, Complaint) Harwood alleged the

defendants overcharged her and other Wisconsin citizens certification, retrieval or other fees in violation of Wis. Stat. §146.83. (*Id*.)

Defendants answered the Complaint on January 31, 2018. (R. 13) Plaintiff then moved to certify the class on February 23, 2018. (R. 21 and 22)

Defendants moved to stay the proceedings on March 30, 2018 due to an appeal pending in another case before the Wisconsin Court of Appeals District I, *Moya v. Healthport Technologies*, 18AP222. (R. 31)

The Circuit Court, the Honorable Glenn H. Yamahiro, stayed the case pending the resolution of the *Moya v. Healthport Technologies* appeal in 18AP222. (R. 47).

The matter was reassigned to the Honorable Ellen R. Brostrom. (R. 48). On June 15, 2018, the court entered an Order which lifted the stay due to the resolution of the *Moya v. Healthport Technologies* appeal in 18AP222, reset the Plaintiff's motion for class certification for June 29, 2018 and indicated that the Defendant's Summary Judgment Motion and procedural matters would be addressed at that time. (R. 72).

The Motion for Class Certification was rescheduled to July 24, 2018 due to a scheduling conflict. (R. 73). The Circuit Court heard oral argument on the motion.

On August 31, 2018 the Court issued a Decision and Order granting Plaintiff's Motion for Class Certification which was subsequently entered by the Clerk on September 4, 2018. (R. 81). It is this Order which Defendants appeal.

Factual Background

This class action arose from Ms. Harwood's personal injury claim for which she hired Welcenbach Law Offices, S.C. to represent her. (R. 1, Complaint, ¶¶ 24-25). Ms. Harwood authorized her attorney, Robert Welcenbach, to obtain her health care records by signing HIPAA release forms giving authorization to receive her health information. (*Id*. at ¶ 26.)

Attorney Welcenbach subsequently submitted requests for Ms. Harwood's health care records and Defendants when fulfilling the requests, imposed certification charges and fees contrary to what is allowed by Wis. Stat. § 146.83(3f)(b)4.-5. (*See* R. 1, Complaint, ¶¶ 27-31 and *see* R. 28 at P. App. 202, 206 - Defendants' WFMG and WFSF's Responses to Request for Admission No. 3. Welcenbach Aff., Ex. B)

Ms. Harwood's attorney paid the retrieval charges and certification fees for Ms. Harwood and then deducted the costs from the settlement proceeds of her personal injury settlement. (*See* R. 1, Complaint, ¶¶ 32-38.)

Harwood brought suit here and alleged that the Defendants had charged her and other Wisconsin citizens illegal fees under Wis. Stat. §146.83. (*Id.)*

The Defendants are a self-described health care provider across the State of Wisconsin. In 2015, with 8 Hospital Campuses, 3 Long term Care Facilities, 2333 affiliated and employed physicians and 10,511 associates with over one million out patients visits in 2015. (R. 22, Motion for Class Certification, p. 11; see also R. 1, ¶6)

Wheaton Franciscan Services, Inc., d/b/a Wheaton Franciscan Healthcare admittedly was an "umbrella entity." Defendants' Chief Executive Officer, John Oliverio, admitted in an Affidavit dated March 29, 2018, that Wheaton Franciscan Services, Inc. "was the umbrella organization over Wheaton Franciscan entities" up to March 1, 2016. (R. 37)

Most of the invoices presented by Harwood in support of her motion for class certification were sent out under its trade name "Wheaton Franciscan Healthcare". (R. 65; P. App. 291-335). It acted

for the other Wheaton Franciscan entities in responding to the requests for certified healthcare information. (R. 1, Complaint, ¶¶ 2, 5)

Harwood also sued the other Wheaton entities who were the healthcare providers that she requested healthcare records from and whom she was directed to make her check payable to: Wheaton Franciscan Medical Group, Inc. and Wheaton Franciscan Healthcare - St. Francis, Inc. (R. 1, Complaint, ¶¶ 28-35).

In support of her motion for Class Certification, Harwood filed the discovery responses submitted by the Defendants. Harwood asked Defendants WFMG and WFSF to admit:

> Admit that since July 1, 2011, you charged at least 100 persons authorized in writing by the patient a certification, processing, basic or retrieval fee to obtain the patient's medical records.

(R. 28; P. App. 203, 207 - Interrogatory 9.)

The only response provided by Wheaton Franciscan Healthcare- St. Francis and Wheaton Franciscan Medical Group, Inc. was:

> Object to the form, lack of foundation and being beyond the scope of the plaintiff's claim. Subject to the objections, this defendant cannot reasonably ascertain as to whether or not this request is true.

Both were also asked the following interrogatory:

> State whether you contend that you or Wheaton Franciscan made any errors or mistakes in connection with the Wheaton

> Invoices. If so, identify each error or mistake and identify all persons or documents relating to the mistake or error.

(R. 63, P. App. 215-216, Interrogatory 5)

They filed a joint response to the interrogatory:

> Object to the form and foundation. Further object that the interrogatory improperly seeks attorney work product and attorney-client privilege. Subject to the objections, if an error includes an interpretation of the law retrospectively determined to be erroneous; it was made in good faith. Further, Wheaton Franciscan Services, Inc. was not involved in any release of information activities. It did not provide any release of information services, did not set the fee schedule, and did not set policy.

(R. 63, P. App. 215-216, Interrogatory 5)

They were also asked:

> If you contend that you or Wheaton Franciscan had a right to collect either a basic fee, retrieval fee, processing fee or a certification fee as reflected on the Wheaton Invoices, please state all facts to support your contention and identify each person or documents that support your contention.

(R. 63, P. App. 216, Interrogatory 7)

They filed a joint answer to this interrogatory as well:

> Object to the form and foundation, and object as this interrogatory improperly seeks attorney work product privilege. Subject to the objections, if an error includes an interpretation of the law retrospectively determined to be erroneous, it was made in good faith and the charges were based on state Department of Health Services and Wisconsin Health Information Management Association guidance. Deny that these answering defendants charged a basic fee or processing fee. See Exhibits A, B, and C.

(R. 63, P. App. 216, Interrogatory 7)

Wheaton Franciscan Services, Inc. (WFH) for its part claimed no involvement in any of billing but these protestations were hollow since invoices were sent out under its tradename (Harwood filed 32 invoices from "Wheaton Franciscan Healthcare"), the 16 page policy manual for release of information included WFH's tradename "Wheaton Franciscan Healthcare" on the front page and included a screenshot of the mywheaton.org. website. (R. 65, P. App. 291; R. 63, P. App. 238-278). In short, the documents all pointed to WFH's involvement despite WFH's discovery responses that sought to contradict the documentary evidence. (R. 64).

RELEVANT STATUTES

The portions of §803.08 relevant to this appeal are below:

Class Actions

(1) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if the court finds all of the following:
  (a) The class is so numerous that joinder of all members is impracticable.
  (b) There are questions of law or fact common to the class.
  (c) The claims or defenses of the representative parties are typical of the claims or defenses of the class.
  (d) The representative parties will fairly and adequately protect the interests of the class.

(2) Types of class actions. A class action may be maintained if sub. (1) is satisfied and if the court finds that any of the following are satisfied:
  (a) Prosecuting separate actions by or against individual class

members would create a risk of either of the following:

1. Inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class.
2. Adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

(b) The party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

(c) The court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include all of the following:

1. The class members' interests in individually controlling the prosecution or defense of separate actions.
2. The extent and nature of any litigation concerning the controversy already begun by or against class members.
3. The desirability or undesirability of concentrating the litigation of the claims in the particular forum.
4. The likely difficulties in managing a class action.

(3) Certification order.

(a) Time to issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(b) Defining the class; appointing class counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under sub. (12).

(c) Altering or amending the order. An order that grants or denies class certification may be altered or amended before final judgment.

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(11) Interlocutory appeal of class certification.

(a) When practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. If the court finds that the action should be maintained as a class action, it shall certify the action accordingly on the basis of a written decision setting forth all reasons why the action may be maintained and describing all evidence in support of the determination. An order under this subsection may be altered, amended, or withdrawn at any time before the decision on the merits. The court may direct appropriate notice to the class.

(b) An appellate court shall hear an appeal of an order granting or denying class action certification, or denying a motion to decertify a class action, if a notice of appeal is filed within 14 days after entry of the order. During the pendency of an appeal under this subsection, all discovery and other proceedings shall be stayed, except that the trial court shall retain sufficient jurisdiction over the case to consider and implement a settlement of the action if a settlement is reached between the parties.

(12) Class counsel.

(a) Appointing class counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(b)

1. In appointing class counsel, the court must consider all of the following:

a. The work counsel has done in identifying or investigating potential claims in the action.

b. Counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action.

c. Counsel's knowledge of the applicable law.

d. The resources that counsel will commit to representing the class.

2. In appointing class counsel, the court may do any of the following:

a. Consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.

b. Order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs.

c. Include in the appointing order provisions about the award of attorney fees or nontaxable costs under sub. (13).

d. Make further orders in connection with the appointment.

(c) Standard for appointing class counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under sub. (12) (a) and (d). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(d) Interim counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(e) Duty of class counsel. Class counsel must fairly and adequately represent the interests of the class.

ARGUMENT

I. THE CERTIFICATION OF THIS CLASS TO RESOLVE THE SAME CLAIMS UNDER THE SAME LAW FOR SMALL AMOUNTS IS A TEXT BOOK EXAMPLE OF A PROPER CLASS THAT IS IN THE PUBLIC INTEREST

"It is considered to be in the public interest as declared by the legislature to permit class actions when the three prerequisites are met."

Mercury Records Productions, Inc. v. Economic Consultants, Inc., 91 Wis.2d 482, 490 (Ct. App. 1979)

The recent change in the requirements for class actions does not change that class actions continue to be in the public interest. The class action procedures set forth in Wisconsin law, Wis. Stat. §803.08, provide a necessary mechanism that permits the enforcement of laws by private actions. This case demonstrate why class actions are so important to protect consumers and enforce the laws enacted by the legislature to protect the consumers.

The legislature placed limits on what may be charged when a patient or a person authorized in writing by a patient requests copies of the patient's medical records. Wis. Stat. §146.83. Despite this law, the Defendants have ignored the limits and charged fees in violation of the amounts allowed by the law. The illegal charges themselves are relatively minor amounts (approximately $28 each).

A circuit court's decision to grant or deny a motion for class certification is committed to the circuit court's discretion. *Ewer v. Lake Arrowhead Ass'n, Inc.*, 817 N.W.2d 465, 477, 342 Wis.2d 194, 219, 2012 WI App 64, ¶ 47 (Ct. App. 2012). On appeal:

> a discretionary order of a trial court will be affirmed if there appears any reasonable basis for the trial court's decision. (citation omitted) Furthermore, the party who alleges that a lower court abused its discretion has the burden of showing an abuse of discretion and this court

> will not reverse unless abuse is clearly shown. (citations omitted).

Colby v. Colby, 306 N.W.2d 57, 62, 102 Wis.2d 198, 207–08 (1981).

This case is a text book example of an appropriate class action for the following reasons:

1. The claims for the Plaintiff and each class member is based on the same provision of Wisconsin law, Wis. Stat. §146.83(3f)(b)(5). The plain and unambiguous language of the law has been confirmed by the Wisconsin Supreme Court in *Moya*, 2017 WI 45, ¶ 22 ("The statutory language is unambiguous in that it requires only a person with a written authorization from the patient. The plain meaning of the statute does not require that the authorization be an authorization to make health care decisions on behalf of the patient.").
2. The violation for plaintiff and each class member is premised on a specific violation of a specific provision of a statute. It can only be violated one way - by charging certain fees prohibited by the law. Each alleged violation can be shown through invoices that show the illegal charges. (R. 65). There is no "he said, she said" because it is

laid out in black and white and each invoice is admissible as a statement by a party.

3. The amount of the overcharges are relatively small on a per transaction basis - approximately $28. (See e.g., R. 68, p. 2.) It would be difficult if not impossible for a patient to find a lawyer to pursue a claim that starts with an overcharge of $28. As the 7th Circuit noted in *Carnegie v. Household Intern., Inc.*, 376 F.3d 656, 661 (C.A.7,2004) "only a lunatic or a fanatic sues for $30."
4. The statutory damages allowed by the law are uniform and measured by the Defendants' actions. Wis. Stat. §146.84. The common law claims also seek disgorgement of the fees and profits. What the Plaintiff or class members did or did not do is not relevant. The Wisconsin Supreme Court rejected defenses based on the action or inaction of the plaintiff and the class, i.e., voluntary payment and waiver. *Moya,* 2017 WI 45, ¶¶ 32 and 35.
5. The Defendants had a written policy and procedure that specifically set forth how and when the Defendants would make these charges. R. 63).

6. Discovery has already shown the Defendants do not claim they made any mistakes or errors in charging these fees. (R. 63.) And, the Defendants have only identified a single reason for their actions: alleged reliance on guidance. *Id*.

Respectfully, under these facts and the law, the refusal to certify a class would have been an abuse of discretion since all of the factors are present and justify the certification of a class for the public interest of enforcing a statute passed to protect Wisconsin residents from unreasonable and excessive fees. The only benefit served by denying class certification would have been to allow Defendants to keep the illegal fees because class members could not realistically pursue individual claims.

As set forth below, the Circuit Court properly analyzed each requirement and came to the correct conclusion of law before certifying the class. Appellants' complaints about the Circuit Court's ruling do not show any abuse of discretion. Their complaints about discovery and summary judgment are likewise unfounded and, contrary to their concerns, class certification does not deny them the opportunity to address the underlying merits of the case.

II. APPELLANTS MISREAD THE DECISION IN *MOYA*.

The Appellants' merit arguments before this court essentially rest on their interpretation of the Supreme Court decision in *Moya v. Aurora Healthcare, Inc.*, 894 N.W.2d 405, 410–11, 375 Wis.2d 38, 50, 2017 WI 45, ¶ 20 (2017) In *Moya,* the Supreme Court set forth the contentions of the parties succinctly:

> Moya argues that "any person authorized in writing by the patient" in Wis. Stat. § 146.81(5) is "defined broadly by the legislature" and that the plain meaning of the statutory language requires nothing more than a person and a written authorization from the patient. Thus, Moya's attorney qualifies as a "person authorized in writing by the patient" simply because he is a person and has a written authorization from Moya in the nature of the HIPAA release form. Healthport, on the other hand, argues that the context of § 146.81(5) indicates that the person authorized in writing by the patient must (in addition to having authorization to obtain health care records) also be authorized to make health care decisions on behalf of the patient.

2017 WI 45, ¶ 20 (2017),

Appellant contends that the phrase "any person authorized in writing by the patient" is limited to when that "person" is a lawyer. (*See* Appellants' Brief at p. 45.) Appellants effort to limit the statutory provision of "any person" to lawyers is really no different than the failed argument by the Moya defendants that the phrase "any persons" should be read as limited to "any persons who also have authority to make health care decisions for the patient."

Appellants' interpretation is simply wrong and their efforts to limit the phrase "any person" beyond the writing requirement set forth in the statute have no merit.

But it is clear that Appellants' view that the Circuit Court erred is because they see it through the prism of their own erroneous interpretation of the *Moya* decision. As discussed below, in addition to being wrong about the *Moya* decision, Appellants are also wrong that the Circuit Court erred in certifying a class in this case. The Circuit Court correctly analyzed that each requirement to certify a class under the amended version of Wis. Stat. §803.08 was easily met.

III. THE CIRCUIT COURT CORRECTLY FOUND THAT JOINDER OF ALL CLAIMANTS WAS IMPRACTICAL.

The Plaintiff was able to show that there were at least 44 incidences of overcharges by Defendants to the clients of a single lawyer. [4] Most of these include a reference to Wheaton Franciscan Healthcare which is a federal tradename registered to Wheaton

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[4] The Defendants argument that the invoices state "entities that are not parties to this action" on P. 33 of their brief is unsupported by any evidence whatsoever. It is merely argument of counsel, which is not evidence. Of the remaining 12 invoices submitted (i) 2 reference only the "Wheaton Franciscan Medical Group", (ii) 2 reference "Wheaton Franciscan, Inc. – St. Joseph" but there is no legal entity known as Wheaton Franciscan, Inc. and (iii) 9 reference "Wheaton Franciscan" with a reference to a "campus".

Franciscan Services, Inc. (WFH) [5], the entity that Defendants claim had no involvement in any of the transactions. [6] Appellants themselves in their brief admit "Wheaton Franciscan has many medical facilities throughout the Milwaukee metropolitan area". Appellants Brief at p. 45.

Defendants go out on a limb and claim that numerosity cannot be shown, however, evidence of additional illegal charges was thwarted by the Defendants' refusal to provide discovery on the basis that no class had been certified by the court. (R. 68 Response to Request No. 15 "Subject to the objections, **deny that a class has been certified and thus the request is premature**".) The Circuit Court did not abuse its discretion in reaching the conclusion that the class likely includes hundreds if not thousands of people. The Circuit Court had before it:

> (1) a 16 page "WFMG Release of Information" document that set forth specific guidelines for the charges that could be assessed for various medical records requests, which would be an excessive exercise if the Defendants had only charged 44 people the fees;

[5] See public records of US Patent, Trademark Office. http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4804:gdr8zu.2.1

(2) the Defendants responses to request for admissions that the class numbered at least 100 persons, which the Defendants were deemed to have admitted when it offered a non-response that is treated as an admission since under Wis. Stat. §804.11(b): "[a]n answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she had made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny." All that the Defendants said for their response was "the defendant cannot reasonably ascertain as to whether or not this request is true."

3. The presumption that arises when a party like the Defendants had the "power to produce witnesses whose testimony would elucidate the transaction" fails to do so. The Defendants did not provide a single affidavit although it named numerous individuals who had knowledge relating to the plaintiff's claims.

In short, the Defendants position lacks any credibility. The Circuit Court is not required to abandon common sense, ignore

[6] As noted above, WFH's tradename also appears on the cover of the Defendants' policy

evidence before it or disregard presumptions that arise when a party does not offer evidence it fully controls. It is a correct exercise of discretion to make decisions that consider each. The Circuit Court correctly concluded that it would be impractical to join the putative class members in a single action.

IV. THERE ARE COMMON LEGAL AND FACTUAL ISSUES TO CLAIMS BASED ON VIOLATION OF A SPECIFIC STATUTORY PROHIBITION.

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551, 564 U.S. 338, 349–50 (U.S.,2011) the claims asserted on behalf of the plaintiff and the class were the anti-discrimination provisions of 42 U.S.C.A. §2000e, et seq. Under that law, there are a variety of ways that a party can be held liable for discrimination:

> Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company.

As a result of the varied ways the law could be violated:

> Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once.

Id.

Since the claims asserted could vary from class member to class member in the classes reviewed in *Dukes*, the Court ultimately

concluded that commonality could not be shown because "[c]ommonality requires the plaintiff to demonstrate that the class members "have suffered the same injury," *Id.* at 349-350.

Harwood can and has met the commonality required under *Dukes*.

First, Harwood's claim that the Defendants violated §146.83 is pinpointed to the Defendants charging fees that Harwood contends that the Defendants could not charge, e.g., certification and retrieval fees under §146.83(3f)(b)(5). (*See* R. 1; Complaint at ¶¶ 41-42, 51-60.) This is a single claim for a violation of a specific provision of a law, unlike the claims before the *Dukes* court where there were potentially multiply ways to violate the law upon which the claims were based. There is only way to violate this provision of the Wisconsin law that Harwood has sued under – charging the fees to someone who may not be charged the fees. The illegal charging of these fees is the same injury suffered by Harwood and each class member.

The *Dukes* court concluded that the nature of the common issue that can establish commonality under the class action rule:

> That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which

> means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.
> What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

This test is met here. Wis. Stat. §146.83 provides an objective standard for this court to decide: If Defendants illegally charged Harwood certification or retrieval fees, then Defendants also illegally charged each class member. It provides a common answer for all the claims asserted.

It is also important to note that in *Dukes*, another factor mitigating against class certification was whether the law was violated and required an examination of how a particular supervisor treated an employee under circumstances that may be unique. 131 S. Ct. 2541, 2555 ("Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store.")

While in *Dukes*, this may have required individual analysis of all the details to determine if there was discrimination in a particular store by a particular supervisor, the only determination needed here is a review of the Defendants' invoices which show whether or not the Defendants charged these illegal fees.

This case raises claims under the same statute for which a class was certified in *Cruz v. All Saints Healthcare Sys.*, 242 Wis.2d 432, 625 N.W.2d 344, 350 (Ct.App.2001). It is true that the statute before the *Cruz* court was different than the one that governs these claims. However, the difference would suggest a more difficult obstacle to certification in *Cruz* than here.

The statute in effect for the *Cruz* case provided a reasonable limitation on charges made for copies of patient's records. The provision of the statute that Harwood relies on provides a straight forward prohibition on any charges for certain types of fees. The Circuit Court did not abuse its discretion in finding, consistent with case law, and a decision by another Circuit Court that addressed an identical situation, that there are common issues to be decided.

V. THE COMMON ISSUES IN THIS CASE ARE ALSO THE PREDOMINANT ISSUE

The 7th Circuit affirmed the District Court's grant of class certification in *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir.

2010) The issue in *Pella* is analogous to the issue before this Court. In *Pella*, the plaintiffs asserted claims based on an inherent defect in windows sold by Pella when they left the factory. Here, Harwood's claims are based on illegal charges identified under Wisconsin law.

In *Pella*, the court affirmed the certification when there were additional, related issues of (i) whether and when Pella knew of this defect, (ii) the scope of Pella's warranty, (iii) the nature of the ProLine Customer Enhancement Program and (iv) whether it amended the warranty. These additional issues are not present here since the prohibition against these fees are set forth in a statute and all persons are presumed to know the law. For this reason, ignorance of the law does not provide any defense to violation of a statute. And, this issue has already been addressed in *Hannigan v. Sundby Pharmacy, Inc.*, 593 N.W.2d 52, 60–61, 224 Wis.2d 910, 931, (Ct .App.,1999).

In *Hannigan* a pharmacy customer brought action against the pharmacy alleging that the pharmacy failed to comply with Wis. Stat. § 146.83(3) which requires that a medical records custodian note what records are actually released for inspection and the date and time of the inspection. *Hannigan* at 914-915. The Customer also sought exemplary damages §146.84(1)(b).

The Circuit Court granted summary judgment to the pharmacy on grounds that the pharmacy owner was ignorant of his obligations under §146.84(1)(b) and the statutory violations were thus not knowing and willful. The customer appealed. *Id*. The Court of Appeals reversed the Circuit Court and held that:

1. Ignorance of the law was not a defense to the willful and knowing violation of Wisconsin Law, because the defendant was "charged with the knowledge of § 146.83(2) and (3) regardless of their actual ignorance of the statutes they admit to violating." *Hannigan* at 926;

2. The term "willful" as found in Wis. Stat. § 146.84(1)(b) meant "that the act that caused the violation was intentional and voluntary, rather than inadvertent or coerced." *Hannigan* at 931;

3. The term "knowing" as found in Wis. Stat. § 146.84(1)(b) meant "the custodian (of medical records) was aware of the underlying facts that make the act a violation, even though the custodian's actual knowledge of the statute violated is immaterial." *Id*.

The *Hannigan* Court also found that a defendant can only show that their violation of §146.84 was not "knowing and willful" within the meaning of §146.84(1)(b) "if the failure is an unintended

deviation from a custodian's ordinary policies or procedures that comply with the requirements" of Wis. Stat. 146.83: i.e. the deviation was the result of "some accident" that resulted in some inadvertent violation of the Defendants' otherwise legal policies and procedures.

Because the Pharmacy's "ordinary policies or procedures generally complied with [§ 146.83]" the *Hannigan* Court found that issues of material fact precluded summary judgment because the pharmacy owner "stated in his affidavit that the letter requesting access to Hannigan's records, and the release purportedly signed by Hannigan, were 'accidentally disposed of by our office after Sundby Pharmacy completed the record request.'" *Hannigan* at 932. Thus, the Court observed, the affidavit suggests that "without some accident, Sundby Pharmacy would have retained the copies of the request and the release" and the violation could have been accidental rather than "willful" and "knowing." *Id*.

There is a difference between the provisions of §146.84 that existed at the time of the *Hannigan* decision and the statute that is in effect for the time frame of this action. At the time of *Hannigan*, the statute only provided exemplary damages of up to $1,000 for a knowing and willful violation of the law. After *Hannigan* the statute was amended to provide for exemplary damages of up to $1,000 if

the violation of the statute was negligent, meaning that the defendant would have been liable for exemplary damages if it was an accident.

At the same time, the legislature also raised the exemplary damages for a knowing and willful violation from $1,000 to $25,000. Because of this amendment, the *Hannigan* court's suggestion that the defendant before it may not be liable for exemplary damages if it acted negligently, and not knowing and willful, is no longer true. A party is liable for exemplary damages whether the violation was done negligently or intentionally. As a practical matter, the change subjects the negligent actor to the same $1,000 of exemplary damages that were allowed under the statute in effect at the time of *Hannigan*. How the Defendants violated the statute is a common and predominant issue in this case.

The Appellants did not show any unique issues existed as to any alleged defenses to the claims against them. As noted above, Appellants were asked:

> State whether you contend that you or Wheaton Franciscan made any errors or mistakes in connection with the Wheaton Invoices. If so, identify each error or mistake and identify all persons or documents relating to the mistake or error.

The following answer was provided:

> ...if an error includes an interpretation of the law retrospectively determined to be erroneous; it was made in good faith. Further, Wheaton Franciscan Services, Inc. was not involved in any release of information activities. It did not provide any release of information services, did not set the fee schedule, and did not set policy.

There was no contention that there was more than a single interpretation of the law made by the Defendants. Any resolution of this contention would also be a common and predominant issue that can be resolved on a class basis.

VI. HARWOOD'S CLAIM IS TYPICAL OF THE CLASS CLAIMS.

Harwood showed that the Defendants had overcharged her for requests for her health care records. The overcharges were illegal under Wis. Stat. §146.83. Her claims were typical of the class.

VII. HARWOOD IS AN ADEQUATE CLASS REPRESENTATIVE.

Appellant must show that the Court abused its discretion in its finding that Harwood was not an adequate representative for the class. Harwood submitted an affidavit to the Circuit Court that she did not have any interests antagonistic to the class. On appeal, the Appellants do not show that they presented any evidence which contradicted Ms. Harwood's testimony.

Instead, they question how she could know at an early stage of the case. It takes more than Appellants' "question" to show that the

Circuit Court abused its discretion in making the determination that it did. The Circuit Court's decision that Harwood is an adequate representative was not an abuse of discretion.

VIII. APPELLANTS FAIL TO SHOW ANY ERROR IN THE CIRCUIT COURT'S FINDING OF SUPERIORITY.

Appellants do not address any of the factors set forth in Wis. Stat. §803.08 for determining whether a class action is superior. The only challenge to the Circuit's findings that a class is superior in this instance to deal with the same exact claims for the same relief that are held by many people is Appellants contention that more discovery was needed.

Given that the Defendants did not seek any discovery at all in the case, this contention is nothing more than what it appears to be – a baseless claim. It is astounding that Appellants ask this court to hold that the Circuit Court erred and abused its discretion for not allowing discovery which Defendants never even sought.

IX. A PENDING MOTION FOR SUMMARY JUDGMENT BY ONE DEFENDANT DID NOT JUSTIFY DENIAL OF THE CLASS CERTIFICATION. IF ANYTHING, IT PRESENTS ANOTHER COMMON ISSUE FOR THE CLASS THAT CAN BE RESOLVED IN A SINGLE PROCEEDING.

Wheaton Franciscan Services, Inc. (WFH) complains that its motion for summary judgment should have been decided before the procedural motion to certify a class. The motion for summary judgment has not been fully briefed and once the facts relating to the Defendant are shown to the Circuit Court, it will be clear that the Defendant's position, that it somehow was not involved in any of the transactions during the class period, will be shown to be inaccurate.

To begin, WFH concedes that it was an "umbrella entity" until 2016. (R. 37; Oliverio Aff. ¶2) . The class period runs from 2011 through the date of trial. The majority of the invoices presented in this action bear WFH's trademark name.

When WFH describes itself as the umbrella entity, WFH does not give the full picture to the court but its tax filings (that are public records since it is a nonprofit entity) provide what WFH has left out. WFH's 2015 990 filing 7 includes the following description of itself:

[7] Available to the public at available at https://www.guidestar.org/FinDocuments/2016/363/262/2016-363262111-0e2ceea9-9.pdf

> WHEATON FRANCISCAN SERVICES, INC (WFH) is a Catholic, not-for-profit health care and housing organization serving at sites in Wisconsin, Iowa, Illinois, and Colorado The System includes 14 hospital sites, three transitional and extended-care facilities, two home health agencies, more than 2,500 physicians, more than 70 clinical sites with 511 employed physicians, and 2,620 units of assisted living and other housing, and the corporate services offices in Wheaton, Illinois and Glendale, Wisconsin.

Nor does WFH's motion address the use of its trademark, "Wheaton Franciscan Healthcare" on the majority of the invoices submitted by Harwood in support of her motion or the policy manual for release of information.

In short, there are numerous facts that undermine WFH's contention that it had no involvement in the invoices sent during the class period that precludes summary judgment. But, in any event, it does not provide a basis to delay certification of a class so that any common questions as to its liability to the class can be resolved once rather than repeated in numerous cases raising the same issue over and over again.

And if the Court were to assume that WFH was entitled to summary judgment, then certifying the class does not harm WFH. If anything, it would give WFH a ruling in its favor as to any and all class members.

X. THE DEFENDANTS DISCOVERY ARGUMENT IS WITHOUT MERIT. DEFENDANTS SOUGHT NO DISCVOERY AND THE DEFENDANTS HAVE ALL THE RECORDS NECESSARY.

In a rote fashion, the Defendant complain that discovery should have been allowed before the Circuit Court made any decision on class certification. Defendants do not explain what discovery they needed for the class certification motion. This is not merely an oversight. The Defendants are simply unable to credibly explain what information was not available to them that they needed for this motion.

The Defendants never sought any discovery in the case in the months before any stay was entered or after the stay was lifted. It is true that there was a stay entered but the stay was lifted by order dated June 15, 2018, and there was time to request discovery before the Court held a hearing on the motion.

Yet, knowing there was a pending motion to certify a class, Defendants made no effort to conduct any discovery relating to the motion. Why? Because any details of whom the charges were made was already in their possession. They have the records of what patients or authorized persons asked for the records and what charges were made. Given that they held these records but chose not to present any evidence in response to the motion lends itself to the

evidentiary presumption that the records would only hurt their position, not help it.

CONCLUSION

The Defendants have not shown that the Circuit Court abused its discretion in certifying a class so that the class may recover the illegal fees that were charged by Defendants.

The Circuit Court's decision was well reasoned and based upon a correct interpretation of the law.

This court should affirm the Circuit Court's decision and remand so the matter may proceed forward on the merits.

Dated this 20th day of December, 2018.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 7,695 words.

Dated this 20th day of December, 2018.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of December, 2018.

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CERTIFICATION OF THIRD PARTY COMMERCIAL DELIVERY AND CERTIFICATE OF SERVICE

I certify that on December 20, 2018 this brief was picked up by a third-party commercial carrier for delivery to the Clerk of Appeals Court on the same day. I further certify that the brief was correctly addressed and copies were served on all parties by first class mail as follows:

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