Thomas Fotusky v. ProHealth Care, Inc. [Recommended for Publication]

2023 | Cited 0 times | Court of Appeals of Wisconsin | March 15, 2023

COURT OF APPEALS DECISION DATED AND FILED

March 15, 2023 Sheila T. Reiff Clerk of Court of Appeals NOTICE This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports. A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2021AP1395 Cir. Ct. No. 2018CV1829

STATE OF WISCONSIN IN COURT OF APPEALS DISTRICT II

THOMAS FOTUSKY,

PLAINTIFF-RESPONDENT,

V.

PROHEALTH CARE, INC.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: LLOYD CARTER, Judge. Reversed and cause remanded for further proceedings.

Before Gundrum, P.J., Neubauer and Grogan, JJ.

¶1 GROGAN, J. ProHealth Care, Inc. (ProHealth) appeals from a circuit court order certifying a class action lawsuit related to alleged No. 2021AP1395

2 violations of WIS. STAT. § 146.83(3f)(b) (2017-18). 1 On appeal, ProHealth asserts the circuit court erred, not in certifying a class, but rather in certifying this specific class because this class, it says, is overly broad and fails to meet the prerequisites WIS. STAT. § 803.08. Because we conclude Thomas Fotusky cannot, as a matter of law, establish damages pursuant to WIS. STAT. § § 146.83(3f)(b) from December 1, 2015, through May 3, 2017 the time period when the court of appeals decision in Moya v. Aurora Healthcare, Inc. 2 was binding law the circuit court erred in certifying a class that included

certain individuals charged during that time period. Accordingly, the circuit court erred in certifying this class, and we therefore reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

¶2 Fotusky hired Welcenbach Law Offices, S.C. to represent him in regard to a personal injury he sustained in January 2017. During the course of that representation, Fotusky signed a HIPAA 3 form authorizing his attorneys to request copies of his medical records. provided ProHealth

1 All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted. 2 Moya v. Aurora Healthcare, Inc., 2016 WI App 5, 366 Wis. 2d 541, 874 N.W.2d 336 (2015), , 2017 WI 45, 375 Wis. 2d 38, 894 N.W.2d 405. 3 AA ical records. Harwood v. Wheaton Franciscan Servs., Inc., 2019 WI App 53, ¶7 n.5, 388 Wis. 2d 546, 933 N.W.2d 654. No. 2021AP1395

3 about February 23, 2017, and again on or about May 11, 2017. ProHealth charged the attorneys $33.86 and $33.28 for each request, respectively, both of which included certain certification and retrieval fees. charges, and Fotusky thereafter reimbursed his attorneys for those costs.

¶3 On January 30, 2018, Fotusky filed a Summons and Complaint in Milwaukee County Circuit Court case No. 2018CV832 alleging that ProHealth, 4 in charging his attorneys certification and retrieval fees in response to the February and May 2017 requests, had violated WIS. STAT. § 146.83, which allows for certain certification and retrieval fees only when not the patient or a person authorized by the patient 146.83(3f)(b)4-5 (emphasis added). Specifically, Fotusky claimed that: (1) written authorization, ProHealth either negligently or knowingly and willfully violated § 146.83(3f)(b); (2) Fotusky and the proposed class members had incurred actual damages stemming from these violations; and (3) Fotusky and the proposed class members were entitled to recover their actual damages, exemplary damages for each violation, and costs and reasonable attorney fees. Fotusky also asserted a claim for unjust enrichment and sought return of all monies, profit, interest and pre-

¶4 Prior to filing its Answer, ProHealth successfully sought to transfer venue to the Waukesha County Circuit Court and filed a Motion to Dismiss, 5

4 Fotusky initially named Ebix, Inc. as a co-defendant in this matter as well. However, Ebix and Fotusky ultimately settled, and the circuit court approved the class settlement between those parties. Ebix is therefore no longer a party to this action. 5 ProHealth initially filed a Motion to Dismiss prior to the venue transfer. However, it withdrew that motion after the venue transfer and thereafter filed an amended Motion to Dismiss in the Waukesha County Circuit Court. No. 2021AP1395

4 which the circuit court ultimately treated as a motion for summary judgment. The circuit court denied the Motion, ProHealth filed its Answer, and in January 2021, Fotusky filed a motion seeking class certification. In support of his Motion, Fotusky asserted that class certification was appropriate

for numerous reasons, including that: (1) numerous Wisconsin courts had previously certified classes based on the same claims Fotusky raised; (2) the matter satisfied WIS. STAT. § equisites of numerosity, commonality, typicality, and adequacy, as Fotusky and his counsel would adequately represent and protect the interests of the proposed class members; and (3) the proposed class met § predominance and superiority requirements.

¶5 ProHealth raised numerous arguments opposing class certification. It focused largely on its position that the proposed class was overly broad for multiple reasons as well as its position that the proposed class failed to protect both in regard to WIS. STAT. § mens rea requirements (i.e., whether any purported violations of WIS. STAT.

§ 146.83(3f)(b) had been either negligent or knowing and willful).

¶6 As to its argument that the proposed class was overly broad, ProHealth first argued it through their attorneys, but [also] patients who requested their own records[,] which it asserted could lead a jury group (direct patient requests versus patient-authorized attorney requests).

culpability based on when it charged the proposed class members because Moya v. Aurora Healthcare, Inc., 2016 WI App 5, 366 Wis. 2d 541, 874 N.W.2d 336 (2015), , 2017 WI 45, 375 Wis. 2d 38, 894 N.W.2d 405 (Moya I), and Moya v. Aurora Healthcare, Inc., 2017 WI 45, 375 Wis. 2d 38, 894 N.W.2d 405 No. 2021AP1395

5 (Moya II), which reached opposing conclusions in interpreting WIS. STAT. § 146.83(3f), were both in effect during the six-year time period identified in and thus impacted the status of the law during the relevant time period. Next, ProHealth asserted the proposed class was overly broad because it included class members who did not actually pay the charged fees as well as those whose claims it asserted were barred by a two-year statute of limitations. 6 ProHealth also argued the proposed class was overly broad because it was unclear how many proposed class members had been included in previously litigated class action lawsuits involving the same claims. 7

¶7 In addition to arguing that these purported deficiencies rendered the proposed class overly broad, ProHealth also asserted that these deficiencies prevented Fotusky from satisfying WIS. STAT. § 803.08(1) and (2)(c) requirements of commonality, predominance, typicality, and adequacy. Finally,

6 In Hammetter v. Verisma Systems, Inc., 2021 WI App 53, 399 Wis. 2d 211, 963 N.W.2d 874, we rejected the argument that WIS. STAT. § -year statute of limitations applied to WIS. STAT. § 146.84 and instead determined that a six-year statute of limitations applied. Hammetter, 399 Wis. 2d 211, ¶¶35, 38. ProHealth has not pursued this tute of limitations applicable to the statutory claims is 2-years pursuant to WIS. STAT. § 893.93(2)(a)[,] defense in the event the Wisconsin Supreme Court decides the issue in the Rave [v. Ciox Health

LLC, No. 18-CV-305 (E.D. Wis. dismissed June 22, 2020)] or Hammetter ProHealth has not pursued the statute of limitations argument on appeal, we will not address it

further. See State v. Pettit, 171 Wis. declin

Wisconsin Supreme Court denied the petition for review filed in the Hammetter matter in an order dated April 13, 2022, and that the Rave matter does not appear to be pending in the Wisconsin state court system as that matter was filed in the Eastern District of Wisconsin. 7 ProHealth specifically pointed to Moya v. Healthport Technologies LLC, Milwaukee County Circuit Court case No. 2013CV2642, and Rave v. Ciox Health LLC because Ciox Health LLC, a party in each of those cases portion of the time peri ProHealth asserted that it would be

egarding the impact of No. 2021AP1395

6 ProHealth claim via a class action proceeding.

¶8 Class Certification Motion in May 2021, and it issued an oral ruling granting the certification in July 2021. In granting the class certification, the circuit court noted and discussed each of the prerequisites set forth in WIS. STAT. § 803.08(1)(a)-(d) (numerosity, commonality, typicality, and adequacy) as well as in § 803.08(2)(c) (predominance and superiority). In the course of its oral ruling, the court also

based on the pre-Moya I (prior to December 1, 2015), Moya I (December 1, 2015, through May 3, 2017), and Moya II (May 4, 2017, and after) timeframes, as well paid the charged fees as opposed to those who had simply been charged. 8

¶9 On July 30, 2021, the circuit court entered a written order memorializing its oral ruling as required by WIS. STAT. § 803.08(11)(a). 9 Specifically, the order WIS. STAT. § 803.08(1)(a)- and noted that:

potential class size is in the hundreds making joinder ;

8 The circuit court cited to Cruz v. All Saints Healthcare System, Inc., 2001 WI App 67, 242 Wis. 2d 432, 625 N.W.2d 344, as providing authority to broadly include those who were charged, as opposed to only those who had paid the charges. 9 As relevant, WIS. STAT. § 803.08(11)(a) 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 i No. 2021AP1395

7 here is a common question of fact and law as to the legality ;

based on the same facts and law (typicality)

, counsel are adequate based on their experience and knowledge in

class proceedings and the specific claims asserted in this action .

The court further reiterated that:

he common legal and factual issue identified is also the predominant issue for this action under WIS. STAT. § 893.08(2)(c)[,] e dependent on prevailing on e); and

class is superior under WIS. STAT. § when

collected make[] a class proceeding the most efficient method is no indication any other purported class member had filed litigation asserting these claims, class members can opt out, the court i

The written order defined the certified class as follows:

Any patient or person authorized in writing who Prohealth directly, or indirectly through an agent other than Ebix, Inc., charged a basic, retrieval or certification fee to obtain their healthcare records when the records were requested by the patient or by a person authorized by the patient in the six-year period preceding the filing of the

The Class specifically excludes the following persons or entities: (i) Defendant, any predecessor, subsidiary, sister and/or merged companies, and all of the present or past directors, officers, employees, principals, shareholders and/or agents of the Defendant; (ii) any and all Federal, State, County and/or Local Governments, including, but not limited to their departments, agencies, divisions, bureaus, boards, sections, groups, councils and/or any other No. 2021AP1395

8 subdivision, and any claim that such governmental entities may have, directly or indirectly; (iii) any currently-sitting Wisconsin state court Judge or Justice, or any federal court Judge currently or previously sitting in Wisconsin, and the current spouse and all other persons within the third degree of consanguinity to such judge/justice or (iv) any law firm of record in these proceedings, including any attorney of record in these proceedings; and (vi) anyone who has recovered the fee at issue as member of any class in Moya v. HealthPort Technologies, LLC, 13CV2642 (Milwaukee Rave v. Ciox Health LLC, 2:18-CV-00305-LA (E.D. WI.).

¶10 ProHealth subsequently filed this interlocutory appeal pursuant to WIS. STAT. § 803.08(11)(b) asserting that the circuit court erroneously exercised its discretion in certifying the defined class for numerous reasons, including that quately protect class members or and that mens rea WIS. STAT. § 146.84 as it relates to the issues of culpability and exemplary damages for violations of WIS. STAT. §

146.83(3f). Notably, ProHealth does not suggest that class certification, generally speaking, is inappropriate, but rather asserts that the circuit court erred in granting certification for the . For the reasons that follow, we conclude that the circuit court erroneously exercised its discretion when it certified the class identified above.

II. DISCUSSION

¶11 In December 2017, our supreme court repealed and recreated WIS. STAT. § 80 class action Federal Rules of Civil Procedure Rule 2 Harwood v. Wheaton

Franciscan Servs., Inc., 2019 WI App 53, ¶4 n.4, 388 Wis. 2d 546, 933 N.W.2d No. 2021AP1395

9 654. 10 Section or be sued as representative parties on behalf of all members only if the court finds

(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.

The first three prerequisites generally referred to as numerosity, commonality, and typicality, respectively about the proposed class and the representative[.] Harwood, 388 Wis. 2d 546,

¶23. The fourth prerequisite adequacy addresses represent the class. Id. rty seeking class certification bears the burden of showing, by a preponderance of the evidence, that a proposed class meets the requirements of [the class certification statute Steimel v. Wernert, 823 F.3d 902, 917 (7th Cir. 2016). 11

¶12 If a circuit court concludes a plaintiff has established all four prerequisites, the court must then look to WIS. STAT. § 803.08(2) to determine the type of class action. Here, Fotusky relied upon § 803.08(2)(c), which requires that e questions of law or fact common to class members

10 The revision went into effect in July 2018, and the legislature further revised the statute via 2017 Wis. Act 235. See Harwood, 388 Wis. 2d 546, ¶4 n.4. 11 When the supreme court revised WIS. STAT. § 803.08, it instruct to seek guidance from federal case law as it relates to class certification issues. Harwood, 388

Wis. 2d 546, ¶5. No. 2021AP1395

10 predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently [e] and Harwood, 388 Wis. pertinent to

these findings [of predominance

1. 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.

Sec. 803.08(2)(c)1-4.

¶13 Circuit courts determining whether to grant or deny a motion seeking class certification are afforded broad discretion. Harwood, 388 Wis. 2d 546, ¶41. A circuit Id. We will of record and reached a Id. Only where the circuit court

decision. Hammetter v. Verisma Sys., Inc., 2021 WI App 53, ¶9, 399 Wis. 2d 211, 963 N.W.2d 874.

A. WISCONSIN STAT. § 146.83(3f)(b) and Prior Class Action Lawsuits

¶14 Prior to determining whether the circuit court erred in certifying the class in question here, we begin by first reviewing a series of recent court of appeals and supreme court opinions that have interpreted WIS. STAT. § 146.83(3f) No. 2021AP1395

11 and considered that statute in the context of class action proceedings. Section 146.83(3f)(b) provides that:

(b) Except as provided in sub. (1f), a health care provider may charge no more than the total of all of the following that apply for providing the copies requested under par. (a): 1. For paper copies: $1 per page for the first 25 pages; 75 cents per page for pages 26 to 50; 50 cents per page for pages 51 to 100; and 30 cents per page for pages 101 and above. 2. For microfiche or microfilm copies, $1.50 per page.

3. For a print of an X-ray, $10 per image. 4. If the requester is not the patient or a person authorized by the patient, for certification of copies, a single $8 charge. 5. If the requester is not the patient or a person authorized by the patient, a single retrieval fee of $20 for all copies requested. 6. Actual shipping costs and any applicable taxes.

(Emphases added.) Section 146.83(3f)(a) further states that aside from certain exceptions, when provides informed consent, and pays the applicable fess under par. (b), the health

care provider shall provide the person making the request copies of the requested WISCONSIN STAT. § If a

person or entity violates § 146.83, such as by charging certification and retrieval fees that are not statutorily authorized is subject to certain penalties. WIS. STAT. § 146.84(1)(b), (bm). No. 2021AP1395

12 ¶15 The meaning of WIS. STAT. § within the context of WIS. STAT. § 146.83(3f)

was at the heart of the dispute in Moya I. There, this court determined that person authorized by the patient, § 146.83(3f)(b)4-5, did not include an attorney who was charged certification and retrieval fees, even though the attorney had been Moya I, 366 Wis. 2d 541, ¶1. In Moya I, Carolyn Moya retained Welcenbach Law Offices, S.C. regarding a personal injury matter. Id., ¶2. Moya signed HIPAA forms authorizing the law firm to obtain copies of medical records related to the personal injury claim, and upon the records, HealthPort Technologies, LLC (HealthPort) charged the attorney an $8 retrieval fee and a $20 certification fee. Id. The law firm paid the fees, and Moya thereafter filed a class action lawsuit asserting HealthPort had violated § 146.83(3f)(b)4-5 when it charged the fees to her attorney because he had written authorization to obtain her medical records and therefore person authorized by the patient for the purposes of § 146.83(3f). Moya I, 366 Wis. 2d 541, ¶¶2-3.

¶16 The circuit court agreed with Moya; however, we reversed in a split decision. Id., ¶¶1, 3. We said that a person authorized by the patient means

records in place of the patient[,] as opposed to an [his]

obtain copies of her medical records. Id., ¶13. We therefore instructed the circuit court to grant HealthPor Id., ¶16.

¶17 The Wisconsin Supreme Court disagreed with our interpretation, determining , WIS. STAT. § 146.83(3f)(b)4-5, WIS. STAT. No. 2021AP1395

13 § 146.81(5) defines the phrase person authorized by the patient Moya II, 375 Wis. 2d 38, ¶2 (quoting § 146.81(5)). Accordingly, the supreme court concluded that HealthPort violated § 146.83(3f)(b)4- retrieval fees because Moya had provided written authorization for her attorney to

obtain copies of her medical records. Moya II, 375 Wis. 2d 38, ¶38. 12

¶18 Numerous opinions addressing class action lawsuits involving WIS. STAT. § Moya II decision. In August 2019, this court issued its opinion in Harwood, 388 Wis. 2d 546, in which we considered whether the circuit court erred in certifying a class based on alleged violations of § 146.83(3f)(b)4-5. In Harwood, the plaintiff sought certification of a class that included both patients and individuals a patient had authorized in

medical records . Harwood, 388 Wis. 2d 546, ¶1. Among those excluded from the proposed class Id. After applying WIS. STAT. § 803.08, the circuit court certified the class. Harwood, 388 Wis. 2d 546,

¶¶1-4.

¶19 We affirmed the circuit court on appeal, concluding that the circuit court had not erroneously exercised its discretion in certifying the class. Id., ¶66. Specifically, we noted that the circuit court had asked detailed questions about the facts at issue, considered the relevant facts related to the WIS. STAT. § 803.08

12 The supreme court also concluded that neither the doctrine of voluntary payment nor the waiver doctrine applied. Moya v. Aurora Healthcare, Inc., 2017 WI 45, ¶¶34, 37, 375 Wis. 2d 38, 894 N.W.2d 405. No. 2021AP1395

14 prerequisites, and properly applied the statute to those facts in concluding that class certification was appropriate. Harwood, 388 Wis. 2d 546, ¶¶51, 57. In doing so, we determined, inter alia, that a proposed class with forty-two class members was sufficient to satisfy the numerosity requirement. Id., ¶¶55-58. We also concluded that the certified class was consistent with Moya II that attorneys who had obtained written authorization from a patient were not

subject to the fees and charges at issue. Harwood, 388 Wis. 2d 546, ¶53.

¶20 Two years later, we again affirmed a exercise of discretion in granting class certification in Hammetter, 399 Wis. 2d 211, ¶¶1-2, which likewise involved allegations that a health care system had violated WIS. STAT. § 146.83(3f)(b)4-5. There, Derrick J. Hammetter and Antoinette M. Vinkavich had each retained attorneys to represent them in personal injury matters and had signed written authorizations allowing their attorneys to obtain their respective medical records. Hammetter, 399 Wis. 2d 211, ¶2. The attorneys were charged certification and retrieval fees, which they paid, and Hammetter and Vinkavich ultimately reimbursed the attorneys. Id.

¶21 After the supreme court reversed our Moya I decision, Hammetter and Vinkavich filed a class action lawsuit alleging Verisma and Froedert (collectively, had violated WIS. STAT. § 146.83(3f). 13 Hammetter, 399 Wis. 2d 211, ¶5. The circuit court granted the class certification and defined the class as including: (1) persons or entities who had requested their own health records, had authorized another in writing to obtain the records, or had received a

13 The suit also asserted claims for unjust enrichment and conversion and sought both compensatory and punitive damages. Hammetter, 399 Wis. 2d 211, ¶5. No. 2021AP1395

15 individuals in those

those who and ultimately paid the certification and/or retrieval charges Id., ¶6.

¶22 On appeal, Verisma argued the circuit court had erroneously exercised its discretion. Id., ¶1.

More specifically, Verisma argued that its before Moya I, after Moya I but before Moya II, or after Moya II, as well as

whether the requestor had sought his own medical records or if someone sought Hammetter, 399 Wis. 2d 211 ¶12. Verisma, however, failed to provide any evidence suggesting its mental state may have varied depend the person of a

class- was insufficient to defeat class certification. Id., ¶13.

¶23 Verisma also asserted that the proposed class was overbroad because the requirement that class members certification and/or retrieval char the definition of class members. Id., ¶14 (alterations in original). We likewise

rejected this argument, stating that ultimately paid the certification and/or retrieval ly damage. Id., ¶15 (alteration in original). We further explained that the No. 2021AP1395

16 ultimately paid out persons or entities, like [an attorney], that may have simply Id.

¶24 We similarly -Moya I state of mind and thus would not be typical of claims of

Hammetter, 399 Wis. are identical in every way

that Verisma had failed to point to evidence suggesting it had different mental

states based on when the records had been requested and by whom. Id., ¶20. We also noted that WIS. STAT. § 803.08(7) allowed the circuit court to determine whether subclasses might be appropriate at a later point. Hammetter, 399 Wis. 2d 211, ¶20. In rejecting these arguments as well as others Verisma asserted against class certification, we stated subclasses or what verdicts should be utilized at the end of a trial [were] premature

and more appropriately addressed by the circuit court following discovery on the Id., ¶34.

¶25 Just a few months later, we determined in an unpublished opinion, Schuler v. Schubbe Family Chiropractic, Ltd., No. 2020AP1753, unpublished slip op. (WI App Dec. llful, or WIS. STAT. § 146.83(3f)(b)4-5 during the time period after No. 2021AP1395

17 we issued our opinion in Moya I but before our supreme court reversed that decision in Moya II. Schuler, No. 2020AP1753, ¶9. 14

¶26 In Schuler, attorneys retrieval fees on March 21, 2017, when the attorneys, who had obtained

care records pursuant to WIS. STAT. § 146.83. Schuler, No. 2020AP1753, ¶1. The attorneys paid the fees, and Schuler thereafter filed a lawsuit alleging, inter alia, violations of § 146.83, unjust enrichment, and conversion. Schuler, No. 2020AP1753, ¶¶2, 4. Schubbe, referencing Moya I, sought dismissal on the Schuler,

No. 2020AP1753, ¶4. Schuler, in response, argued that Moya I - final and non- Schuler, No. 2020AP1753, ¶4. The circuit court agreed with Schubbe, and Schuler appealed. Id.

¶27 The specific question we addressed in Schuler ha[d] alleged facts that, if true, show a violation of WIS. STAT. § 146.83(3f)(b)4.- 5., thereby entitling Schuler to damages under the provisions of WIS. STAT. § Schuler, No. 2020AP1753, ¶5. We explained that to prevail, Schuler Id. (alterations in original). We concluded that he could not do so

14 Although Schuler v. Schubbe Family Chiropractic, Ltd., No. 2020AP1753, unpublished slip op. (WI App Dec. 22, 2021), is an unpublished opinion and therefore not precedential, we may cite it for its persuasive value pursuant to WIS. STAT. RULE 809.23(3)(b) (2019-20). We further note that in an order dated March 16, 2022, the Wisconsin Supreme Court that matter. No. 2021AP1395

18 because at the ler the certification charges and retrieval fees, the law in effect (Moya I exempt from the charges set forth in WIS. STAT. § 146.83(3f)(b)4.- Schuler, No. nt to the contrary, Moya I was binding law during the relevant time period because WIS. STAT. § Schuler, No. 2020AP1753, ¶6 (sec

published opinion, that opinion binds every agency and every court until it is reversed or modif Id. (quoting State ex rel. Dicks v. Employe Tr. Funds Bd., 202 Wis. 2d 703, 709, 551 N.W.2d 845 (Ct. App. 1996)). Accordingly, we concluded that because Moya I attorneys the certification charges and retrieval fees, the circuit court properly

as a matter of law, Schuler could not establish that Schubbe negligently, much less willfully or knowingly, violated the statute at Schuler, No. 2020AP1753, ¶¶6, 9 (emphasis added).

¶28 In concluding that Schuler could not recover as a matter of law, we also responded to his argument that Moya I had no retroactive precedential value after our supreme court decided Moya II. In doing so, we noted that regardless of whether there had been a violation of WIS. STAT. § 146.83(3f) [was] whether Schuler [could] establish entitlement to damages because Schubbe negligently, willfully, or knowingly Schuler, No. 2020AP1753, ¶8. Citing State ex rel. Buswell v. Tomah Area School District, 2007 WI 71, ¶46, 301 Wis. 2d 178, 732 N.W.2d 804, we explained that Moya II applies retroactively or not is irrelevant as Schubbe could not No. 2021AP1395

19 have committed a negligent, willful, or knowing violation as its conduct was in Schuler, No. 2020AP1753, ¶9. 15

B. The Circuit Court Erred in Certifying this Specifically Defined Class.

¶29 With the relevant law governing class certifications and recent opinions addressing similar claims involving WIS. STAT. § 146.83(3f)(b) class action proceedings in mind court erred in certifying this specific class because it failed to properly account for

potential differences in mens rea based on the status of the law when ProHealth charged the fees at issue and, relatedly, that the circuit court erred in certifying a single class encompassing the pre-Moya I, Moya I, and Moya II time periods as opposed to multiple classes or a single class with multiple subclasses.

¶30 Having reviewed the applicable law and the Record, we conclude that the circuit court erroneously exercised its discretion when it certified the class as defined because the certified class does not comply with the prerequisites set forth in WIS. STAT. § 803.08(1). We reach this conclusion based on Schuler persuasiveness as it relates to the relevant charges ProHealth issued during the

15 In State ex rel. Buswell v. Tomah Area School District, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804, the supreme court noted that there can be no knowing violation of the law Id., ¶¶46-52. No. 2021AP1395

20 time period when Moya I was the law (December 1, 2015, through May 3, 2017). 16

¶31 As noted above, in Schuler, we determined that Schuler ultimately could not prevail on his WIS. STAT. § 146.83(3f)(b)4-5 claim because he could not establish he was entitled to damages pursuant to WIS. STAT. § 146.84. Schuler, No. 2020AP1753, ¶5. This was so, we explained, because at the time of the charges, the law in effect (Moya I § 146.83(3f)(b)4- Schuler, No. 2020AP1753, ¶6. And

Schubbe could neither have negligently nor knowingly and willfully violated the Id.

¶32 Schuler logic likewise applies here to those individuals included in the certified class who were charged certification and retrieval fees after seeking a while Moya I was the law in effect. Consequently, because attorneys did not fall within WIS. STAT. § exceptions for certification and retrieval fees during that time period, such individuals cannot recover damages pursuant to WIS. STAT. § 146.84;

16 To clarify, for purposes of this opinion, the group of people who must be excluded from a certified class because they were charged the fees at issue during the Moya I time period is ritten authorization from the patient to do so as that was the specific group Moya I addressed. Individuals who were charged such fees for requesting their own medical records during the time period Moya I was in effect are not excluded from inclusion in a certified class in this case. This likewise applies within the

Additionally, to the extent Fotusky has suggested that Moya I did not become binding law after its issuance because the Wisconsin Supreme Court accepted the petition for review filed in that matter, Fotusky is incorrect for the reasons set forth in Schuler, No. 2020AP1753, ¶6, and we do not entertain any such argument further. No. 2021AP1395

21 therefore, the circuit court erred as a matter of law when it included such individuals in the certified class. 17

¶33 That does not mean that class certification is ultimately inappropriate in this matter. What it does mean, however, is that it is necessary to remand this matter to the circuit court to reanalyze, with the Moya I individuals identified nalysis, whether Fotusky has established class certification is appropriate under WIS. STAT. § 803.08(1) and (2). To that end, we make multiple observations as to points of consideration for the circuit court on remand.

¶34 First, it does not appear from the Record that ProHealth charged Fotusky or anyone with authorization on his behalf the certification and retrieval fees at issue during the pre-Moya I time period. Thus, the circuit court should consider whether subclasses or separate classes are appropriate. Second, should the circuit court conclude on remand that class certification is appropriate, it should also ensure that the class does not include class members who have already recovered damages in prior litigation addressing the same claims as those addressed here. Finally, because it does not appear that the circuit court

analysis, it is instructed to do so on remand.

17 Because we conclude the circuit court erred by including individuals in the class who cannot, as a matter of law, be included as class members, we need not specifically analyze the each of WIS. STAT. § because that analysis, as a whole, was based on the erroneous inclusion of the Moya I individuals identified herein. For that same reason, we do not need arguments related to § No. 2021AP1395

22 III. CONCLUSION

¶35 In summary, for the reasons set forth herein, we reverse the circuit emand to the circuit court for further consideration Class Certification Motion consistent with this opinion. Additionally, on remand, the circuit court is further instructed to exclude Moya I was in effect as he cannot establish he is entitled to damages pursuant to WIS. STAT. § 146.84 for the fees charged to his attorneys during that time period.

By the Court. Order reversed and cause remanded for further proceedings.

Recommended for publication in the official reports. No. 2021AP1395(C)

¶36 NEUBAUER, J. (concurring). As the Majority notes, ProHealth does not oppose certification of a class in this case, but rather only the specific class certified by the circuit court. Majority, ¶1. I agree with the Majority that the identified authorized individuals who were ch decision in Moya v. Aurora Healthcare, Inc., 2016 WI App 5, 366 Wis. 2d 541, 874 N.W.2d 336 (2015), , 2017 WI 45, 375 Wis. 2d 38, 894 N.W.2d 405, 1 was binding law cannot, as a matter of law, show that ProHealth negligently or knowingly and willfully violated WIS. STAT. § 146.83(3f)(b)4.-5. Because those individuals do not have legally viable claims under that statute, they must be excluded from the class.

¶37 I part with the Majority, however, as to the legal significance of the error, and what it requires of the circuit court on remand. The Majority, without explanation, concludes that, because the class definition should have excluded the Moya I individuals, the court must redo the entire class certification analysis under WIS. STAT. § 803.08(1) and (2). Majority, ¶¶30, 33. I disagree. As explained below, that error can be rectified on remand by amending the certification order to exclude the Moya I indivi

1 Like the Majority, I refer to our decision as Moya I and the Wisconsin Supreme Moya I as Moya II. No. 2021AP1395(C)

2 certification decision still withstands our deferential review 2 as it applies to the pre-Moya I and post-Moya II individuals remaining within the class definition.

¶38 The failure to exclude the Moya I individuals from the class definition means that the definition is overbroad it includes individuals who

denying class Messner v. Northshore Univ. HealthSystem, 669 F.3d the tool for that job. See WIS. STAT. § s or

Hammetter v. Verisma Sys., Inc., 2021 WI App 53, ¶27, 399 Wis. 2d 211, 963

N.W.2d 874. Here, the circuit court on remand must redress the error by amending the certification order to exclude the Moya I individuals from the class definition.

¶39 But the erroneous inclusion of the Moya I individuals does not

to the remaining proposed class members. Under that standard of review, we are correct law, and reached a reasonable decision. Harwood v. Wheaton Franciscan

Servs., Inc., 2019 WI App 53, ¶41, 388 Wis. 2d 546, 933 N.W.2d 654.

2 a class- the

Hammetter v. Verisma Sys., Inc., 2021 WI App 53, ¶9, 399 Wis. 2d 211, 963 N.W.2d 874 (quoting Harwood v. Wheaton Franciscan Servs., Inc., 2019 WI App 53, ¶¶5, 41, 388 Wis. 2d 546, 933 N.W.2d 654). No. 2021AP1395(C)

3 ¶40 Moya I individuals could arguably affect only one of the prerequisites for class certification numerosity. See WIS. STAT. § 803.08(1)(a). As the Majority recounts, the circuit court found Majority, ¶9. As support for this finding, the court cited an affidavit submitted by

sheets produced by ProHealth invoices which include charges that allegedly violate WIS. STAT. § 146.83(3f)(b).

Based upon the dates listed in the spreadsheet, some of the charges appear to have been assessed during the period from December 1, 2015, through May 3, 2017, when Moya I was binding law. Excluding those charges, the spreadsheet still lists more than one hundred allegedly unlawful charges assessed after May 3, 2017 and many more than that before December 1, 2015. Thus, even if the charges assessed during the time Moya I finding that the class potentially numbers in the hundreds is not clearly erroneous. See Royster- , 2006 WI 46, ¶12, 290 Wis. 2d 264, 714 N.W.2d 530 (findings of fact are reviewed for clear error, which means they the same findi Moya I

individuals provide a reason to second- Fotusky established numerosity. See Harwood, 388 Wis. 2d 546, ¶55

(determining that forty-two class members in an action satisfied numerosity requirement).

¶41

under WIS. STAT. § ¶33, we should go on to consider No. 2021AP1395(C)

4 the specific challenges ProHealth raises to the certification order. None shows that the court erroneously exercised its discretion as it pertains to the remaining proposed class members.

¶42 First, ProHealth contends that Fotusky did not establish numerosity because he did not identify how many persons fit within an exclusion in the certification order for individuals who obtained a recovery in two other health record fee cases, Moya v. HealthPort Technologies LLC, Milwaukee County Circuit Court case No. 2013CV2642, and Rave v. Ciox Health LLC, No. 18-CV- 305 (E.D. Wis. dismissed June 22, 2020). This argument does not establish an ination Chapman v. Wagener Equities,

Inc., 747 F.3d 489, 492 (7th Cir. 2014); 1 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 3.13 ([I]t is well settled that a plaintiff need not allege the exact number or specific identity of proposed class members. exercise its discretion in determining that the evidence submitted by Fotusky, even

excluding the Moya I individuals, meets the standard for numerosity. While ProHealth speculates that some individuals may be excluded due to recovery in the prior litigation, it did not submit any evidence to support its suggestion. After discovery, if one or more exclusions ultimately winnow the class (or any subclasses) down to a few individuals, ProHealth can move for decertification. See Reilly v. Century Fence Co., No. 18-CV-315, 2020 WL 1166708, at *8 (W.D. Wis. Mar. 11, 2020).

¶43 ProHealth also argues that Fotusky did not establish the prerequisites of commonality, typicality, and adequacy, see WIS. STAT. § 803.08(1)(b)-(d), and No. 2021AP1395(C)

5 did not establish that issues common to the class predominate over member- specific issues, see § 803.08(2)(c), because ProHealth can be liable for a violation of WIS. STAT. § 146.83(3f)(b)4.- relevant to that issue

will be different for pre-Moya I individuals than for post-Moya II individuals. 3 See WIS. STAT. § 146.84 (1)(b)- makes clear, in both Harwood and Hammetter we affirmed certification of classes

based on the same claims Fotusky raises here, alleged violations of § 146.83(3f)(b)4.-5. Majority, ¶¶19-21. In Hammetter, 399 Wis. 2d 211, ¶¶12- 13, 19-20, we specifically rejected challenges to class certification like those set forth by ProHealth. Namely, we rejected a challenge that the class lacked -

Moya I and post-Moya II time periods. Hammetter, 399 Wis. 2d 211, ¶¶12-13, 19-20.

¶44 Hammetter. As to the issue of commonality, ProHealth seizes on our conclusion in Hammetter that the defendants had Id., ¶13.

ProHealth argues that, unlike the defendants in Hammetter, it did present evidence

the pre-Moya I and post-Moya II requests. Even if discovery bears this out,

3 As the Majority notes, the evidence before the circuit court does not indicate that ProHealth charged Fotusky or anyone authorized by him before our decision in Moya I. Majority, ¶34. No. 2021AP1395(C)

6 class members raise a common question whether ProHealth lawfully charged retrieval and certification fees. And, as we also noted in Hammetter, to the extent litigation of the merits, the establishment of two subclasses as the matter

progresses could address this concern. See Hammetter, 399 Wis. 2d 211, ¶20 (citing WIS. STAT. § 803.08(7)).

¶45 As to the issues of typicality and adequacy, we noted in Hammetter, 399 Wis. 2d 211, ¶¶18- of

those

¶46 As to the issue of predominance, we explained in Hammetter that Id., ¶23

(quoting Beaton v. SpeedyPC Software, 907 F.3d 1018, 1029 (7th Cir. 2018)).

charged illegal fees and the level of Pro[H] g illegal

relevant to the level of culpability does not mean that the common issues identified by the court are not predominant.

¶47 ProHealth also challenges the class definition because it does not limit the class to individuals who actually paid the fees. This is not a sufficient Hammetter, 399 No. 2021AP1395(C)

7 Wis. 2d 211, ¶15, if an individual or his or her authorized representative is ultimately found not to have paid any improper charge, that individual would not have a valid claim. But that does not compel a conclusion that the class is e class members have a valid claim is the issue to be determined after Parko v. Shell Oil Co., 739 F.3d 1083, 1085 (7th Cir. 2014). The salient difference is between individuals Moya I

Messner, 669 F.3d at 824. Only if the class definition

Id.

¶48 Lastly, ProHealth argues that the circuit court failed to address the unjust enrichment claim in the certification order and that the claim is not amenable to class treatment. As to the first point, I disagree wi

WIS. STAT. § 146.83 and unjust

enrichment against ProHealth. Although the circuit court did not specifically address the unjust enrichment claim in its findings, the claim is premised on the same allegedly unlawful charges that underlie the statutory claim. Thus, the order certifies a class as to both claims.

¶49 As to the second point, ProHealth again relies on evidence it contends shows a different state of mind in charging individuals pre-Moya I and post-Moya II. But as we said in Hammetter, 399 Wis. 2d 211, ¶34, in rejecting precisely this same argument as it pertains to the unjust enrichment claim, this No. 2021AP1395(C)

8 discovery, the circuit court has the tools necessary to address it at a later stage of the proceedings.