IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0561

STATE OF WEST VIRGINIA ex rel. DODRILL HEATING & COOLING LLC,

Petitioner,

v.

HON. MARYCLAIRE AKERS, Judge of the Thirteenth Judicial Circuit of the State of West Virginia; and Jerry and Pamela WHITTINGTON, Husband and Wife, individuals and on behalf of all others similarly situated,

Respondents.

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 19-C-466

VERIFIED PETITION FOR WRIT OF PROHIBITION

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QUESTIONS PRESENTED

1. Did the Circuit Court exceed its legitimate powers by committing clear legal error when it certified a class where Plaintiffs and the proposed class lack standing?

2. Did the Circuit Court exceed its legitimate powers by committing clear legal error when it granted Plaintiffs' motion for class certification without conducting a thorough and proper analysis of the predominance requirements of West Virginia Rule of Civil Procedure 23(b)(3)?

3. Did the Circuit Court exceed its legitimate powers by committing clear legal error when it granted Plaintiffs' motion for class certification without conducting a thorough and proper analysis of the superiority requirements of West Virginia Rule of Civil Procedure 23(b)(3)?

INTRODUCTION

Plaintiffs Jerry and Pamela Whittington ("Plaintiffs" or "the Whittingtons") bought an HVAC system for their home from Defendant Dodrill Heating & Cooling LLC ("Defendant" or "Dodrill"), which Plaintiffs financed through a third party. Documents from Defendant included a provision providing that if Defendant had to pursue payment, it could collect attorney and collection fees. Adopting wholesale Plaintiffs' proposed order without even seeing Defendant's, Kanawha County Circuit Court Judge Maryclaire Akers certified a class action under West Virginia Rule of Civil Procedure 23(b)(3) for alleged violations of W. Va. Code § 46A-2-127(g) (Count I of Plaintiffs' Amended Complaint) based solely on the existence of this fee language.

But no allegation exists, and Plaintiffs presented no evidence to the Circuit Court, that Defendant ever attempted to act on this language to seek to collect against Plaintiffs, or anyone else, and such a collection attempt is required before Plaintiffs or other similarly situated customers can seek relief against Defendant under W. Va. Code § 46A-2-127(g). The Circuit Court overlooking the collection requirement is inconsistent with longstanding, settled legal principles

regarding standing. Allowing Plaintiffs and the proposed class to proceed without standing to do so warrants prohibition and absent immediate relief, will irreparably harm Defendant.

Additionally, the Circuit Court erred by failing to conduct the thorough and proper analysis this Court requires for the predominance and superiority requirements of Rule 23(b)(3). This clearly erroneous legal ruling should be addressed through prohibition. The Circuit Court's decision is emblematic of an oft repeated error by trial courts in issuing class certification decisions without the thorough analysis this Court pronounced in *State ex rel. Surnaik Holdings of WV, LLC v. Bedell.*[1]

Given the Circuit Court has certified the class, Defendant has no other adequate, practical means such as direct appeal to obtain the desired relief requested, including decertifying the class. Much of the damage will already have been done. Dodrill will be damaged and prejudiced through its need to face a certified class and accompanying financial, time, and reputational harm.

In sum, the Circuit Court exceeded its legitimate powers, which warrants this Court vacating the Circuit Court's class certification decision, requiring denial of certification upon remand, and, given Plaintiffs' lack of standing, even dismissal of Count I of the Amended Complaint.

STATEMENT OF THE CASE

On May 7, 2019, the Whittington sued Dodrill for claims arising from Dodrill's installation of a residential heating and cooling system.[2] Plaintiffs allege that, soon after its installation, the unit stopped working.[3] The Complaint included counts for negligence and violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA") related to the "Home Improvement

[1] 244 W. Va. 248, 852 S.E.2d 748 (2020).
[2] Appendix ("APP") at APP0037-41.
[3] APP0038 at ¶¶ 8-10.

Rule."[4]

On November 1, 2019, Plaintiffs amended their Complaint, this time filing on behalf of themselves and a putative class consisting of all "West Virginia residents to whom Dodrill provided its Proposal/Agreement or invoice statements in the State of West Virginia from May 7, 2015, through the present."[5] Plaintiffs' Amended Complaint includes a new Count I for violations of W. Va. Code § 46A-2-127(g), titled "Demand for Payment of Attorney's Fees in the Collection of Alleged Debt."[6] Count I alleges that Dodrill's Proposal/Agreement and Work Orders contain a provision entitling Dodrill to reasonable attorney and collection fees *in the event* collection efforts/securing payment efforts became necessary and this provision, by its mere existence, is an actionable violation of the WVCCPA.[7] The Amended Complaint does not allege that Dodrill is a debt collector nor does it allege that Dodrill ever collected or attempted to collect a debt from any person, including the Whittingtons.[8]

On February 7, 2020, in response to the Amended Complaint, Dodrill filed a Motion to Dismiss or Motion for Partial Summary Judgment ("First MPSJ").[9] The First MPSJ included an argument demonstrating that, as a matter of law, Count I fails because W. Va. Code § 46A-2-127(g) applies only to debt collectors and Dodrill is not a debt collector.[10] By Order dated

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[4]Commonly known as the Home Improvement Rule, this legislative rule is set forth in the West Virginia Code of State Rules. W. Va. C.S.R. § 142-5. The Rule's official title is "Legislative rule pertaining to the prevention of unfair or deceptive acts or practices in home improvement transactions." The Home Improvement Rule empowers the West Virginia Attorney General with the exclusive right to bring an action for relief and civil penalties in the event of a violation of the Rule. W. Va. C.S.R. § 142-5-4.

[5] APP0049 at ¶ 54.

[6] APP0045. For the sake of brevity, this Petition will not address Plaintiffs' other claims as certification was ultimately granted only as to Count I of the Amended Complaint.

[7] *Id.* at ¶¶ 24-27.

[8] APP0042-52.

[9] APP0053-100.

[10] APP0065 at § II.a.ii.

May 13, 2020, the Honorable Judge Charles King ruled that the First MPSJ would be held in abeyance as premature.[11] Discovery ensued.

On October 9, 2020, Plaintiffs filed their Motion for Class Certification.[12] Dodrill opposed this motion on several grounds,[13] including (1) Plaintiffs' lack of standing and inability to bring any claims, whether individually or on behalf of the putative class for the reasons set forth in Dodrill's First MPSJ and that would be included in Dodrill's Renewed Motion for Summary Judgment,[14] and (2) Plaintiffs' failure to satisfy their burdens to meet the standards for class certification under West Virginia Rule of Civil Procedure 23.[15]

On November 10, 2020, Dodrill filed its Renewed Motion for Partial Summary Judgment ("Renewed MPSJ").[16] As to Count I, the Renewed MPSJ again demonstrated that, as a matter of law under the plain language of W. Va. Code § 46A-2-127(g), Plaintiffs' claims must fail because Dodrill is not a debt collector and the statute requires a collection or attempted collection, neither of which Dodrill is alleged to have pursued in the Amended Complaint.[17] Circuit Court Judge Charles King held a hearing on the pending motions on December 15, 2020. Sadly, Judge King died two weeks later on December 28, 2020, and Maryclaire Akers was appointed to fill his seat.

On June 8, 2021, after a May 12, 2021 status hearing, Judge Maryclaire Akers (the "Circuit Court") requested that the parties submit proposed class certification orders, among others, by noon on June 18, 2021.[18] Before receipt of Dodrill's submission of its proposed class certification

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[11] APP0025-30.
[12] APP0112-312. The Motion for Class Certification was unclear on which counts of the Amended Complaint Plaintiffs sought certification.
[13] APP0566-776.
[14] APP0570-572.
[15] APP0580-585.
[16] APP0313-565.
[17] APP0326-328 at § I.A-B.
[18] APP0787.

order, on June 17, 2021, the Circuit Court partially granted Plaintiffs' Motion for Class Certification and entered the Class Certification Order at issue, certifying a class only as to the claims comprised in Count I of the Amended Complaint for alleged violation of W. Va. Code § 46A-2-127(g).[19]

The Circuit Court signed the proposed class certification order that Plaintiffs submitted without any additions, subtractions or modifications. In other words, the Circuit Court adopted wholesale Plaintiffs' proposed order as the Class Certification Order (the "Order").[20]

The Order provides in the Procedural History and Background Section that "Mrs. Whittington testified that Dodrill was collecting on her and her husband and that they were threatened with attorney and collection fees multiple times including in work orders."[21] However, the cited portions of Mrs. Whittington's deposition transcript do not contain any testimony that Dodrill ever contacted the Whittingtons to attempt to collect on any debt or threaten them with attorney and collection fees. The only quoted source in the Order to support that "Dodrill was collecting" on the Whittingtons is a bolded citation to Mrs. Whittington's deposition testimony in which she was asked about the "kind of conversations" she and her husband had regarding the heating and cooling system, and she testified that she had a future, potential concern that "we were going to have to pay attorney fees, collection fees."[22]

Despite the assertion in the Order regarding Mrs. Whittington's testimony, her testimony that "Dodrill was collecting" or "threatened" them with attorney and collection fees, is solely based

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[19] APP0001-24. On June 22, 2021, the Circuit Court entered a separate order holding the Renewed MPSJ in abeyance. APP0031-36.

[20] Dodrill was not afforded the opportunity to note objections or exceptions per W. Va. Trial Ct. R. 24. In fact, Dodrill's counsel did not receive Plaintiffs' proposed class certification order until *after* the Circuit Court signed Plaintiffs' order.

[21] APP0003 at ¶ 6.

[22] *Id.* at ¶ 7.

on the language in Dodrill's documents, not any actual conduct by Dodrill.[23] Relevant testimony of Mr. Whittington, not cited in the Order, further confirms that Dodrill made no contact with the Whittingtons to attempt to collect any debt.[24] Relatedly, the Order also fails to note that Plaintiffs did not produce any emails, letters or invoices indicating that they owed a balance to Dodrill, on which Dodrill could have even collected. Dodrill also confirmed that it made no collection efforts against the Whittingtons.[25] The Order further fails to mention that the Whittingtons' purchase of the system was financed through a third-party company, GreenSky, LLC, as confirmed in Mrs. Whittington's deposition, meaning that no funds directly exchanged hands between the Whittingtons and Dodrill.[26]

Notwithstanding the absence of a factual evidentiary foundation, the Order also provides in the Findings of Fact and Conclusions of Law of the Class Certification that "Plaintiffs have met the requirements of Rule 23(a) and 23(b)(3) to maintain this case as a class action."[27] The Rule 23(b)(3) Predominance and Superiority section of the Order contains no citation to *Surnaik*, and includes conclusory findings without any analysis or even a mention of the individualized issues that are present.[28] This section of the Order also contains no analysis evaluating whether a class action is superior.[29]

SUMMARY OF ARGUMENT

The Circuit Court committed clear legal error in several aspects of its Order. First, in certifying the class for an alleged violation of W. Va. Code § 46A-2-127(g), the Circuit Court

[23] APP0793 at 29:17-24; APP0796-798 at 73:17-75:20.
[24] APP0805 at 27:12-15; APP0807 at 51:6-11; APP0808 at 74:11-15.
[25] APP0343-345 at ¶¶ 7-9.
[26] APP0793 at 29:17-24.
[27] APP0008 at ¶ 12.
[28] APP0020-22.
[29] *Id.*

failed to conduct any analysis of Plaintiffs' standing or that of the proposed class. Accordingly, the Circuit Court overlooked that Plaintiffs, who did not allege or demonstrate with evidence that Dodrill acted as a debt collector or attempted to collect any debt claim against them, lacked standing to serve as representatives for a certified class. Class members, who also lack standing, further necessitate the vacating of the Order and denial of class certification. Given the absence of standing for the Whittingtons, dismissal of Count I of the Amended Complaint is also warranted.

Next, in certifying the class, the Circuit Court failed to conduct a thorough and proper analysis of the predominance and superiority requirements of West Virginia Rule of Civil Procedure 23(b)(3). While the Circuit Court included a passing reference to *Surnaik*, the Order does not include the intensive assessment of the Rule 23 factors as this Court required in *Surnaik*. Among other omissions, the Circuit Court failed to recognize the elements of the claims and defenses involved, the individualized assessments required, and the predominance of the individualized questions over common questions. As to superiority, the Circuit Court did not conduct any analysis.

This Court's immediate intervention is required, through the granting of this Writ of Prohibition, to correct the Circuit Court's clear legal errors. Vacating the Order, requiring denial of certification upon remand, and even dismissal of Count I of the Amended Complaint due to Plaintiffs' lack of standing will also permit the proper disposition of this case, avoid a massive and wasteful expenditure of judicial and litigant resources and time, and avoid unnecessary class-wide discovery and administration issues. These remedies will also ensure that this Court's *Surnaik* decision is properly recognized and applied by trial courts throughout West Virginia, and in this particular case, the Circuit Court.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure to aid in the Court's consideration of the important legal issues in this case. The matter should be set for oral argument under Rule 19 as the Order involves assignments of error in the application of settled law. Although the clear error in the Circuit Court's decision is readily apparent, which would support the issuance of a memorandum decision vacating the decision and ordering the denial of class certification on remand (and even dismissing Count I of Plaintiffs' Amended Complaint due to Plaintiffs' lack of standing), oral argument would be beneficial for a more fulsome discussion of the issues raised by the Order.

ARGUMENT

I. LEGAL STANDARD.

"The writ of prohibition shall lie as a matter of right in all cases ... when the inferior court ... exceeds its legitimate powers."[30] When a petitioner contends that the trial court has exceeded its legitimate powers, the Supreme Court of Appeals considers five factors:

1. Whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;

2. Whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;

3. Whether the lower tribunal's order is clearly erroneous as a matter of law;

4. Whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and

5. Whether the lower tribunal's order raises new and important problems or issues of law of first impression.[31]

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[30] W. Va. Code § 53-1-1.

[31] Syllabus Point 3, *Surnaik*, 852 S.E.2d 748. With respect to its citations to *Surnaik*, Petitioner is unable to comply with W. Va. R.A.P., Rule 38(d), which requires full parallel citations to the opinions of this Court. Petitioner is aware that *Surnaik* was reported in the West Virginia Reports

"Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight."[32] A court "commits clear legal error when it incorrectly chooses, interprets, or applies the law."[33]

Specifically applicable to the Supreme Court of Appeals' review of class certification orders, this Court has noted that "[a] circuit court's failure to conduct a thorough analysis of the requirements for class certification pursuant to West Virginia Rules of Civil Procedure 23(a) and/or 23(b) amounts to clear error."[34] Furthermore, as this Court recently noted, "an order awarding class action standing is ... reviewable, but only by writ of prohibition."[35]

II. THE CIRCUIT COURT COMMITTED CLEAR LEGAL ERROR WHEN IT CERTIFIED THE CLASS BECAUSE PLAINTIFFS AND THE PROPOSED CLASS LACK STANDING.

Despite Dodrill challenging the absence of standing in its opposition to Plaintiffs' class certification motion, the Circuit Court does not mention or assess the standing of the Whittingtons or class members in the Order.[36] The Order is factually and legally deficient and the Circuit Court committed clear error in failing to apply the standing requirement. The Whittingtons and class members lack standing, requiring vacating of the Order, denial of certification upon remand, and

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at 244 W. Va. 248 but, at the time of filing this petition, Petitioner is unable to locate a copy of such reported version that includes page numbers. Therefore, Petitioner is only able to provide pinpoint citations to *Surnaik* using the South Eastern Reporter.

[32] *Id.*

[33] *State ex rel. W. Va. Regional Jail Authority v. Webster*, 242 W. Va. 543, 551, 836 S.E.2d 510, 518 (2019) (internal quotations and citations omitted).

[34] Syllabus Point 8, *Surnaik*, 852 S.E.2d 748.

[35] *Surnaik*, 852 S.E.2d at 755 (*quoting State ex rel. W. Va. Univ. Hosps., Inc. v. Gaujot*, 242 W. Va. 54, 61 n.12, 829 S.E.2d 54, 61 n.12 (2019)).

[36] APP0001-24. The Circuit Court also does not address Dodrill's argument that Plaintiffs have failed to provide the W. Va. Code § 46A-5-108(a) notice of the right to cure on behalf of the class. This provision clearly bars an action (and thus the class action) until forty-five days after the consumer has informed the "debt collector" in writing by certified mail return receipt requested, of the alleged violation and the factual basis for the violation.

even dismissal of Count I of the Amended Complaint.

Count I of the Amended Complaint asserts a claim for violations of W. Va. Code § 46A-2-127. This statute provides:

> No debt collector shall use any fraudulent, deceptive, or misleading representation of means to collect or attempt to collect claims or to obtain information concerning consumers. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:
>
> ...
>
> (g) Any representation that an existing obligation of the consumer may be increased by the addition of attorney's fees, investigative fees, service fees or any other fees or charges when in fact such fees or charges may not legally be added to the existing obligation.[37]

The elements set forth in the plain language of the statute require that, in order for any plaintiff to state a claim, the defendant must (1) be a "debt collector," and (2) "collect or attempt to collect claims." Subsection (g) is not at issue until (1) and (2) are established, and this subsection merely provides one example of how a debt collector could wrongfully collect or attempt to collect on a debt that is an "existing obligation." Plaintiffs, however, base their entire lawsuit on the premise that the mere existence of a document containing language potentially implicated by subsection (g) is in itself actionable.[38] Because Plaintiffs cannot even allege that Dodrill is a debt collector or ever attempted to collect on a debt claim, they cannot satisfy their burden of proving that they have standing to bring claims under Count I of the Amended Complaint.

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[37] W. Va. Code § 46A-2-127.

[38] APP0045 at ¶ 27 (alleging in the Amended Complaint that "Threatening attorney's fees regarding an alleged debt in a proposal or written agreement constitutes an unlawful act or practice in violation of W. Va. Code § 46A-2-127"); *see also* APP0126 (stating in Plaintiffs' Memorandum in Support of Class Certification that "The predominant issues in this class ... involve how the defendant provided the class members documents that created predominate factual issues and the present same questions of law.")

Rather than addressing Plaintiffs' standing, the Order simply includes a finding that "Mrs. Whittington testified that Dodrill was collecting on her and her husband and that they were threatened with attorney and collection fees multiple times including in work orders."[39] The sole cited source that Dodrill was "collecting" on the Whittingtons is a bolded citation to Mrs. Whittington's deposition testimony in which she was asked about the "kind of conversations" she and her husband had regarding the unit, and her response that "we were going to have to pay attorney fees, collection fees."[40] In other words, Mrs. Whittington testified that she discussed with her husband the *possibility* of having to pay attorney's fees in the future. The Circuit Court did not cite any evidence, and none exists, that Dodrill was "collecting" on the Whittingtons as the Circuit Court conclusory stated. The sole evidence cited in the Order is language appearing on documents the Whittingtons received from Dodrill regarding the right to collect fees *if* payments were later pursued.[41] In sum, the Circuit Court certified a class action solely based on a bare alleged statutory violation due to language in documents when no evidence exists that Dodrill engaged in any conduct to enforce the language against the Whittingtons or anyone else to implicate the statute.

The Circuit Court's decision lacks the factual finding necessary to reach the legal conclusion that either the Whittingtons or class members can establish standing. Specifically, without a finding that Dodrill collected or attempted to collect on a debt claim, Plaintiffs do not have standing. In *In re Machnic*,[42] a debt collector filed a lawsuit to collect a credit card debt and demanded attorney fees and costs in its suit.[43] Only after *first* finding that the debt collector actually

[39] APP0003 at ¶ 6.
[40] *Id.* at ¶ 7.
[41] APP0003-4 at ¶¶ 9-10.
[42] 271 B.R. 789, 792 (Bankr. S.D.W. Va. 2002).
[43] *Id.*

qualified as a debt collector pursuant to the WVCCPA, did the court address the impermissibility of the debt collector seeking to recover attorney fees and costs in the complaint.[44]

This Court instructively addressed the need for standing in the class action context in *State ex rel. Healthport Techs., LLC v. Stucky*.[45] In *Stucky*, this Court addressed a proposed class action where plaintiff's law firm was charged and paid fees to obtain medical records, which allegedly violated W.Va. Code § 16-29-2(a).[46] There, the plaintiff did not personally pay the fees, his law firm did, and plaintiff had not reimbursed the law firm.[47] In other words, like the Whittingtons, the plaintiff in *Stucky* obtained a certified class action based on an alleged statutory violation without any out-of-pocket loss. This Court observed that "*Article VIII, Section 6 of the West Virginia Constitution* establishes that there must be a justiciable case or controversy — a legal right claimed by one party and denied by another — in order for the circuit court to have subject matter jurisdiction."[48]

This Court recognized that the "burden for establishing standing is on the plaintiff."[49] Among other standing requirements, this Court instructed that "the party attempting to establish standing must have suffered an 'injury-in-fact' — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical."[50] This Court added that "[f]or an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'"[51] For an injury to be "concrete," "it must actually exist," and "must

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[44] *Id.* at 792-93.
[45] 239 W. Va. 239, 800 S.E.2d 506 (2017).
[46] *Id.* at 240-242, 800 S.E.2d at 508-509.
[47] *Id.*
[48] *Id.* at 242, 800 S.E.2d at 509.
[49] *Id.* at 243, 800 S.E.2d at 510.
[50] *Id.*
[51] *Id.*

also be actual or imminent, not conjectural or hypothetical."[52] "Injury in fact is easily established when a litigant demonstrates a 'direct, pocketbook injury.'"[53] This Court decertified the class in *Stucky* because the plaintiff "did not show that he suffered an injury in fact, economic or otherwise," only plaintiff's "lawyers have suffered an out-of-pocket expense caused by the alleged misdeeds" of defendants, and while plaintiff "may become contractually liable to his lawyers for this allegedly unlawful expense at a future date, but until he does, his loss is contingent and conjectural."[54]

This Court's analysis in *Stucky* is directly applicable here. The Whittingtons allege only a hypothetical, "contingent and conjectural" future liability to Dodrill *if* Dodrill had attempted to enforce the allegedly offending fee language. There is no finding or evidence that it did and, in fact, the evidence uncovered in discovery supports the opposite conclusion – that Dodrill *did not* engage in any debt collection against Plaintiffs, or any class member.[55] Accordingly, without such enforcement, there can be no injury and the Whittingtons therefore lacked standing to pursue their case, both personally and on behalf of a class. This requires vacating the Order, requiring denial of certification upon remand, and even dismissal of Count I of the Amended Complaint. The Whittingtons are textbook examples of plaintiffs who lack "injury in fact."[56]

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[52] *Id.*
[53] *Id.*
[54] *Id.* at 243-244, 800 S.E.2d at 510-511.
[55] APP0805 at 27:12-15; APP0807 at 51:6-11; APP0808 at 74:11-15; APP0343-345 at ¶¶ 6-9.
[56] *See also Wilkinson v. W. Va. State Office of the Governor*, _ W. Va. _, 857 S.E.2d 599, 613 n. 22 (W. Va. 2021) (finding that "[a]lthough petitioners' argument, if valid, would also apply to the Wave 1 and Wave 2 transitions that took place in 2015 and 2016, petitioners have no standing to make such an argument since all of them were in the Wave 3 transition in 2017 and allege harm resulting only from that transition") (citing *Stucky*).

The Circuit Court erred in failing to recognize the absence of standing for the Whittingtons. No evidence exists that Dodrill collected any attorney or collection fees from the Whittingtons, or any other class member, or even attempted to do so. Mere words on a document reserving the right to do so do not impute standing absent an injury in fact arising from conduct taken by Dodrill in connection with those words. As the United States Supreme Court recently pronounced in a class action alleging a federal statutory violation, "[e]very class member must have Article III standing in order to recover individual damages. Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."[57] On this basis alone, the Order should be vacated, denial of certification upon remand required, and Count I of the Whittington's lawsuit should be dismissed for lack of standing.

III. THE CIRCUIT COURT COMMITTED CLEAR ERROR WHEN IT FAILED TO CONDUCT A THOROUGH AND PROPER ANALYSIS OF THE PREDOMINANCE REQUIREMENT SET FORTH IN WEST VIRGINIA RULE OF CIVIL PROCEDURE 23(B)(3).

As recently as November 2020, in *Surnaik*, the Supreme Court of Appeals of West Virginia vacated the Circuit Court of Wood County's order granting class certification after the lower court failed to conduct a thorough analysis of the necessary prerequisites supporting class action certification.[58] The Order in this matter must similarly be vacated because the Circuit Court failed to conduct a thorough analysis of the predominance requirement set forth in West Virginia Rule of Civil Procedure 23(b)(3) as required under *Surnaik*.

As this Court found in *Surnaik*:

> [W]e now hold that when a class action certification is being sought pursuant to West Virginia Rule of Civil Procedure 23(b)(3), a class action may be certified only if the circuit court is satisfied, after a thorough

[57] *TransUnion LLC v. Ramirez*, No. 20-297, 2021 U.S. LEXIS 3401, 2021 WL 2599472, at *25 (U.S. June 25, 2021).
[58] *Surnaik*, 852 S.E.2d at 761-764.

> analysis, that the predominance and superiority prerequisites of Rule 23(b)(3) have been satisfied. The thorough analysis of the predominance requirement of West Virginia Rule of Civil Procedure 23(b)(3) includes (1) identifying the parties' claims and defenses and their respective elements; (2) determining whether these issues are common questions or individual questions by analyzing how each party will prove them at trial; and (3) determining whether the common questions predominate ... This analysis must be placed in the written record of the case by including it in the circuit court's order regarding class certification.[59]

The rigorous criteria set forth in *Surnaik* explicitly modified West Virginia law and the prior standards set forth in *In re W. Va. Rezulin Litigation*,[60] in effect overruling, in part, *Rezulin*. As the *Surnaik* court observed, the United States Supreme Court had described West Virginia law under *Rezulin* as "an all-things-considered, balancing inquiry."[61] Indeed, the United States Supreme Court noted that, under then-existing West Virginia law under *Rezulin*, "a 'single common issue' in a case could outweigh 'numerous ... individual questions.'"[62] Rejecting this test as vague and unhelpful to the circuit courts, the *Surnaik* court concluded that "to the extent *Rezulin* simply suggests that there is not much difference between commonality and predominance and that no rigid test is necessary, it must now be modified."[63] Further, a "court's class-certification analysis must be rigorous and may entail some overlap with the merits of the plaintiff's underlying claim. This rigorous analysis applies to both Rule 23(a) and Rule 23(b)."[64]

Despite the inclusion of a passing recognition of the requirement enunciated in *Surnaik* for a thorough analysis,[65] the Circuit Court fails in the Order to actually conduct a thorough analysis

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[59] *Id.* at 761.
[60] 214 W. Va. 52, 585 S.E.2d 52 (2003).
[61] *Surnaik*, 852 S.E.2d at 760 (*quoting Smith v. Bayer Corp.*, 564 U.S. 299, 310-12 (2011)).
[62] *Id.* at 761.
[63] *Id.*
[64] *Id.* at 757 (quoting *In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167, 1178-79 (N.D. Cal. 2013)).
[65] APP0006 at ¶ 6 ("The Court understands that it must conduct a thorough analysis regarding the maintenance of this matters as a class action.")

of the predominance requirement. The Order does not identify the parties' claims and defenses or their respective elements.[66] Instead, the Circuit Court repeatedly and exclusively relies on *Rezulin* in the predominance section of the Order while reaching generalized conclusions.[67] For example, rather than adhering to the comprehensive standards articulated in *Surnaik*, the Order quotes *Rezulin*'s generalized guidance, stating, "[t]he central question in deciding predominance is 'whether adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves.'"[68] Not only has this statement of law since been modified, but its recitation in the Order is nothing more than unapplied references to Rule 23's prerequisites.

Illustratively, the Circuit Court offers a paragraph concluding that "[a]t least one central legal question predominating each of the claims for the proposed class members involves allegations of violations of W. Va. Code § 46A-2-127."[69] This paragraph, however, simply identifies the statute upon which Plaintiffs bring their claims in Count I. It does not identify (1) the elements of Plaintiffs' claims under the statute, (2) the defenses to these claims that Dodrill has asserted, (3) whether the issues that arise from these claims and defenses are common or individualized, and (4) whether the common questions predominate. While the Order also mentions that "[n]o consideration is to be given whatsoever to the litigation's merits," citing to *Rezulin*,[70] this Court in *Surnaik* recognized that "a court's class certification analysis must be

[66] APP0020-22 at ¶¶ 66-79.
[67] *Id.*
[68] APP0020-21 at ¶ 71. The Order even goes so far as to quote (with added emphasis) and rely upon the very text of *Rezulin* that was cited by the United States Supreme Court, prompting the changes in *Surnaik*. APP0021 at ¶ 72.
[69] APP0021-22 at ¶ 75.
[70] APP0019 at ¶ 63.

rigorous and may entail some overlap with the merits of the plaintiff's underlying claim."[71]

The Circuit Court's failure to conduct the thorough analysis required by *Surnaik* is not merely an easily-correctable procedural omission. It is essential to the proper resolution of the class certification determination. Conducting the requisite analysis of the elements of Count I and W. Va. Code § 46A-2-127 demonstrates that, in this case, Plaintiffs cannot meet their burden to satisfy the predominance requirement.

As discussed in Section II of this Argument, above, the elements set forth in the plain language of W. Va. Code § 46A-2-127 require that, in order for any plaintiff to state a claim, the defendant must (1) be a "debt collector," and (2) "collect or attempt to collect claims."[72] Subsection (g) is not at issue until (1) and (2) are established, and this subsection merely provides one example of how a debt collector could wrongfully collect or attempt to collect on a debt that is an "existing obligation." Plaintiffs base their entire lawsuit on the premise that the mere existence of a document containing language potentially implicated by subsection (g) is in itself actionable.[73] Although this premise is incorrect as argued above,[74] the mere existence of these documents is the *only* basis for the Circuit Court's conclusory findings of commonality, typicality,

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[71] *Surnaik*, 852 S.E.2d at 757.

[72] W. Va. Code § 46A-2-127.

[73] APP0045 at ¶ 27 (alleging in the Amended Complaint that "Threatening attorney's fees regarding an alleged debt in a proposal or written agreement constitutes an unlawful act or practice in violation of W. Va. Code § 46A-2-127"); *see also* APP0126 (stating in Plaintiffs' Memorandum in Support of Class Certification that "The predominant issues in this class ... involve how the defendant provided the class members documents that created predominate factual issues and the present same questions of law.")

[74] *See, e.g., In re Machnic*, 271 B.R. at 793-94 (finding first that party filing debt collection lawsuit alleging credit card debt was non-dischargeable and demanding attorney fees and costs in the suit qualified as debt collector, and only after that finding whether language implicated W. Va. Code § 46A-2-127(g)).

and predominance.[75]

As Dodrill set forth in its First MPSJ, under the definition section of the WVCCPA, a "debt collector" is defined as "any person or organization engaging directly or indirectly in debt collection."[76] To establish Dodrill is a debt collector, Plaintiffs would have to at least allege, and then demonstrate, that Dodrill engaged in debt collection. No such allegation appears in the Amended Complaint[77] or the entire record. Dodrill merely sold HVAC systems that were financed through a third party.[78] Plaintiffs did not allege, and no evidence has been adduced, that Dodrill engaged in any act to attempt to enforce the attorney or collection fees provisions in its documents.[79] In fact, the Whittingtons could not point to any Dodrill collection letter or collection phone call,[80] and the invoice they received after the installation of the HVAC system reflects a zero balance, supporting that there was nothing for Dodrill to collect on.[81]

In addition to each class member having to demonstrate that Dodrill was a debt collector, each member would have to prove that Dodrill "collected or attempted to collect" on a debt claim

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[75] APP0011 at ¶ 26 (discussing commonality and stating "The members of the proposed class were subjected to virtually identical conduct by virtue of the same documents, including the same threats of fees"); APP0016 at ¶ 48 (discussing typicality and stating "Dodrill's employees utilized documents that represented attorney fees could be collected against Mr. and Mrs. Whittington, just as Dodrill did against all of the class members in this case"); APP0021-22 at ¶ 75 (discussing predominance and stating "At least one central legal question predominating each of the claims for the proposed class members involves allegations of violations of W. Va. Code § 46A-2-127, which prohibits the threat of increased consumer obligations through the addition of attorney's fees and/or collection costs.").

[76] APP0065 (*citing* W. Va. Code § 46A-2-122(d); *Young v. EOS CCA*, 239 W. Va. 186, 189, 800 S.E.2d 224, 227 (2017)).

[77] APP0042-52.

[78] APP0058 at ¶ 2; APP0065-66; APP0072; JA0073-74.

[79] APP0042-52; APP0343-345 at ¶¶ 7-9; APP0805 at 27:12-15; APP0807 at 51:6-11; APP0808 at 74:11-15.

[80] APP0805 at 27:12-15; APP0807 at 51:6-11; APP0808 at 74:11-15.

[81] APP0344 at ¶¶ 7-9.

against the member.[82] This element will necessarily require at least two individualized determinations: first, whether each member did in fact owe a debt to Dodrill, given that the WVCCPA only protects consumers from debt collectors to whom they actually owe a debt.[83] Second, and essential to the viability of each member's claim, an individualized determination must be made whether Dodrill attempted to collect on such a debt against the particular member. These individualized questions are absent from any mention or analysis in the Order, and outweigh any common issues of law or fact. As in *Surnaik*, the Circuit Court "failed to examine any of the essential elements of the causes of action and failed to discuss whether those elements are capable of individualized or even generalized proof," and accordingly "failed to thoroughly and appropriately determine whether the common issues predominate over individualized issues as required by Rule 23(b)(3)."[84]

The Circuit Court committed clear legal error when it failed to conduct a thorough analysis of the predominance requirement under Rule 23(b)(3). Even if the Circuit Court had undertaken this analysis, a finding is necessitated that predominance cannot be satisfied for the claims brought in Count I of the Amended Complaint. The predominant issues in this case are whether each member owed Dodrill a debt and whether Dodrill then collected or attempted to collect on that claim using violative means. Those issues are not common to the class, warranting this Court vacating the Order and ordering denial of certification upon remand.

IV. THE CIRCUIT COURT COMMITTED CLEAR LEGAL ERROR WHEN IT FAILED TO CONDUCT A THOROUGH AND PROPER ANALYSIS OF THE SUPERIORITY REQUIREMENT SET FORTH IN WEST VIRGINIA RULE OF CIVIL PROCEDURE 23(B)(3).

In addition to its failure to conduct a thorough analysis of the predominance requirement

[82] W. Va. Code § 46A-2-127
[83] *Young*, 239 W. Va. at 189-90, 800 S.E.2d at 227-28.
[84] *Surnaik*, 852 S.E.2d at 763.

in West Virginia Rule of Civil Procedure 23(b)(3), the Circuit Court failed to conduct any analysis of the superiority requirement in Rule 23(b)(3). This failure also constitutes clear legal error, justifying vacating of the Order.

With respect to the superiority requirement, *Surnaik* instructs:

> [W]e now hold that when a class action certification is being sought pursuant to West Virginia Rule of Civil Procedure 23(b)(3), a class action may be certified only if the circuit court is satisfied, after a thorough analysis, that the predominance and superiority prerequisites of Rule 23(b)(3) have been satisfied...This analysis must be placed in the written record of the case by including it in the circuit court's order regarding class certification.[85]
>
> ...
>
> Furthermore, Rule 23(b)(3) also requires a showing "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." As we previously have explained, "[u]nder the superiority test, a trial court must 'compare [ ] the class action with other potential methods of litigation." Cleckley, Davis, & Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23(b)(3)[2][b], at 554 (footnote omitted). *See also Nolan v. Reliant Equity Investors, LLC*)) [2009 U.S. Dist. LEXIS 69765 (N.D.W. Va. Aug. 10, 2009)] ("Superiority requires that a class action be superior to other methods for the fair and efficient adjudication of the controversy." (quotations and citations omitted)); *In re West Virginia Rezulin Litig., 214 W. Va. at 75, 585 S.E.2d at 75* (stating that superiority "requirement focuses upon a comparison of available alternatives"). "Factors that have proven relevant in the superiority determination include the size of the class, anticipated recovery, fairness, efficiency, complexity of the issues and social concerns involved in the case." Cleckley, Davis, & Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23(b)(3)[2][b], at 554 (footnote omitted). In addition, this Court has observed that consideration must be given to the purposes of Rule 23, "'including: conserving time, effort and expense; providing a forum for small claimants; and deterring illegal activities.'" *In re West Virginia Rezulin Litig., 214 W. Va. at 76, 585 S.E.2d at 76* (quoting 2 Conte & Newberg, *Newberg on Class Actions* § 4:32, at 277-78).[86]

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[85] *Id.* at 761.

[86] *Id.* at 763 (*quoting Perrine v. E.I. de Pont de Nemours & Co.*, 225 W. Va. 482, 527, 694 S.E. 2d 815, 860 (2010)).

Recognizing the impact of the heightened standards, this Court in *Surnaik* acknowledged the "current trend toward heightening plaintiffs' burden . . . which has decidedly outpaced concern over providing a mechanism for litigating low-value claims."[87]

In this case, the Order includes no thorough analysis, or indeed any analysis, of the factors relevant to superiority. Instead, in one single paragraph, the Circuit Court simply "CONCLUDES that the management of identical legal issues that predominate and that judicial efficiency and public policy are all consistent with a finding that this matter satisfies Rule 23(b)(3)."[88] The Circuit Court does not even specify what specific public policy this class certification seeks to promote. Nor is it clear how class certification will improve judicial efficiency when, as discussed above, the predominant issues for each class member will be individualized questions whether each owed Dodrill a debt and, if so, whether Dodrill collected or attempted to collect on each debt claim. Furthermore, the Order includes no comparison of the class action with other potential methods of litigation. It also includes no discussion of other relevant factors noted in *Surnaik*, including anticipated recovery, fairness, efficiency, complexity of the issues, and social concerns.[89]

As in *Surnaik*, the Circuit Court's "discussion was conclusory," there "is no substantive analysis as to the other factors that this Court has stated should be considered," and as such, the Circuit Court "failed to make a thorough analysis of the superiority requirement of Rule 23(b)(3) as well."[90] Because the Circuit Court committed clear legal error when it failed to conduct a thorough analysis of the superiority requirement under Rule 23(b)(3), this Court should vacate the Order and order the denial of certification upon remand.

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[87] *Id.* at 757, n.9.
[88] APP0021 at ¶ 73.
[89] *Surnaik*, 852 S.E.2d at 763.
[90] *Id.*

CONCLUSION

For the reasons discussed above, Dodrill respectfully moves this Honorable Court to grant this Petition for a Writ of Prohibition and issue a writ: (1) vacating the Circuit Court's Order; (2) finding that Plaintiffs lack standing to bring the claims sought under Count I of the Amended Complaint either individually or on behalf of the class; (3) finding that Plaintiffs cannot satisfy the predominance or superiority requirements set forth in West Virginia Rule of Civil Procedure 23(b)(3); and (4) vacating the Order and requiring denial of class certification upon remand, and, because Plaintiffs lack standing, dismissing Count I of the Amended Complaint in its entirety.

Dated: July 15, 2021

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VERIFICATION

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX, to wit:

I, Camille E. Shora, counsel for Dodrill Heating & Cooling LLC, being first duly sworn, state that I have read the foregoing Petition for Writ of Prohibition, that the factual representations contained therein are true, except insofar as they are stated to be upon information and belief; and that insofar as they are stated to be on information, I believe them to be true.

Camille E. Shora, Esq. (WV Bar #9176)

Taken, subscribed, and sworn before me this 15 day of July, 2021.

My commission expires: 12-31-2022

Notary Public

Karen Sue Dillinger
Notary Public
Commonwealth of Virginia
Notary No. 7766400

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. _____

DODRILL HEATING & COOLING LLC,

Petitioners,

v.

HON. MARYCLAIRE AKERS, Judge of the Thirteenth Judicial Circuit of the State of West Virginia; and Jerry and Pamela WHITTINGTON, Husband and Wife, individuals and on behalf of all others similarly situated,

Respondents.

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 19-C-466

CERTIFICATE OF SERVICE

I, Camille E. Shora, hereby certify that true and correct copies of the foregoing ***Verified Petition for Writ of Prohibition*** and ***Appendix*** were served upon the following persons as indicated below, this 15th day of July, 2021:

Via U.S. Mail, postage prepaid

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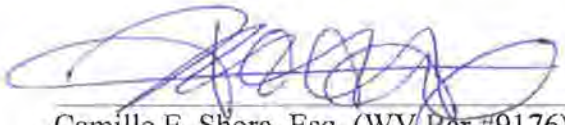

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