IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
DODRILL HEATING & COOLING LLC

Petitioners,

v.

Docket No. 21-0561
Circuit Court of Kanawha County
Underlying Circuit Court No.: 19-C-466

THE HONORABLE 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.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

The following questions were taken verbatim from the Petition for Writ of Prohibition presented by Dodrill Heating & Cooling LLC ("Petitioner" or "Dodrill"), and presented here pursuant to West Virginia Rule of Appellate Procedure 16(g):

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?

Respondents' answer: No. Threatening thousands of individuals with threats of attorney fees and collection fees is prohibited by statute. Standing is not even an issue in this case. Attempting to mimic the facts of *State ex rel. Surnaik Holdings of WV, LLC v. Bedell,* 244 W. Va. 248, 852 S.E.2d 748 (2020), the Petitioner is shoehorning "standing" arguments into this case. The Petitioner's standing arguments are simply transparent attempts to match *Surnaik*, even though factually and legally the cases do not match. To be certain, this is not an environmental disaster case where 90% of the class came across virtually zero microns of pollution in the air. Instead, it is a consumer case where 100% of the West Virginians in the class were subjected to identical unlawful collection forms. There is nothing extraordinary about Petitioner's writ and it is clearly just an attempt to relitigate issues lost in the circuit court. Refusing to accept testimony and facts, as discussed *infra*, and then twisting those facts, is not appropriate in a writ. The relief should be denied and comes nowhere near meeting the standard required to establish clear error.

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)?

Respondents' answer: No. The predominant issues in this case, involving the same threats of fees, is a simple issue that was thoroughly addressed in the circuit court order. In fact, the

Petitioner's conduct of changing its illegal documents in March of 2020, thereby cutting off the class members, indicates that this group of people should be treated uniformly. The predominance analysis of the circuit court did not commit clear error.

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)?

Respondents' answer: No. It would be far superior and efficient to handle this matter pursuant to Rule 23 as opposed to conducting thousands of minitrials regarding the same exact documents that threaten improper collection fees.

II. STATEMENT OF THE CASE

On July 29, 2017, Mr. and Mrs. Whittington ("Whittingtons" or "Respondents") purchased a new heating, ventilation, and air conditioning ("HVAC") unit from Dodrill Heating & Cooling LLC. The unit was later installed on July 31, 2017. (A.R. 0001)[1] The Whittingtons noticed that the unit was not working properly and contacted Dodrill to repair their newly installed unit. Unfortunately, Dodrill did not perform up to its "Fixed Right or It's Free!" motto, and to this day, the Whittingtons' HVAC unit still does not work. Each time that Dodrill failed to repair the unit, it issued documents with illegal threats of fees against Mr. and Mrs. Whittington.[2] During her deposition, Mrs. Whittington noted that she believed she owed a debt, that she was being collected upon, and that she still owed a debt that she believed could be increased with the addition of attorney fees and collection costs.[3] The illegal fees were threatened while Mr. and Mrs.

[1] Respondents' Supplemental Appendix will be referred to as "A.R.___."
[2] A.R. 0002-0004.
[3] A.R. 0005-0011.

Whittington disputed their debt for this unit that never worked. The debt in this case is still outstanding and continues to impact Mr. and Mrs. Whittingtons' credit.

After being repeatedly threatened with illegal fees, being provided a defective unit, and being left with an outstanding debt, the Whittingtons filed this action against Petitioner for two (2) causes of action including Negligence and Violations of the Home Improvement Rule and the WVCCPA. on May 7, 2019.[4] Six (6) months later, the Whittingtons filed their Amended Complaint with five (5) causes of action which included Violations of W. Va. Code § 46A-2-127(g); Violations of the Home Improvement Rule and the WVCCPA; Violations of W. Va. Code § 46A-6-101, *et seq.*; Negligence (Whittingtons Only); and, Negligence (Class).[5] The Amended Complaint brought class allegations against Dodrill Heating & Cooling for its repeated use of attorney fee and collection fee threats against customers. The class was stated as "a class consisting of the group of 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."[6] It should be noted, as it has in many briefings, Dodrill removed the fee threat language from its documents during the course of litigation and prior to filing for this *Writ of Prohibition*. The March 2020 changing of the illegal fee language, effectively limited the group of West Virginians included in the class definition and halted the continued illegal threats of fees prohibited by statute.

On February 7, 2020, Dodrill filed its *Motion to Dismiss or Motion for Partial Summary Judgment* and requested either dismissal of Counts I, II, III, and V of the Amended Complaint or judgment granted for Dodrill on Counts I, II, III, and V of the Amended Complaint.[7] Plaintiffs

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[4] APP0037-41.
[5] APP0042-52.
[6] APP0049 at ¶ 54.
[7] APP0053-100.

responded on February 26, 2020[8] and ultimately during a hearing on March 2, 2020, the Court denied Dodrill's Motion to Dismiss, denied Dodrill's Motion to Strike, and held Dodrill's Motion for Summary Judgment in abeyance as it was premature.[9]

The parties began to conduct extensive discovery over the next few months, including a rolling production of spreadsheets, thousands of pages of documents, and various written supplemental responses.[10] After much time and energy, Plaintiffs had an approximate number for which they could file for class certification on. Therefore, on October 8, 2020, Plaintiffs filed their Motion for Class Certification for roughly 9,000 individuals for a class period of May 7, 2015 through the present.[11]

On November 9, 2020, Dodrill filed its "renewed" motion for partial summary judgment which was a rehash of its previously failed arguments.[12] The Court held hearing in this case on May 12, 2021 in which the parties were instructed to provide orders. The Court further discussed the transcript of previous proceedings in the matter. On June 17, 2021 the Court granted Class Certification.[13] On July 15, 2021, Dodrill filed an extraordinary writ. The writ should be denied.

III. STANDARD OF REVIEW

This is not a case that meets the high standard of an extraordinary writ. Instead, it is a simple consumer case involving illegal threats of collection fees. The Petitioner's attempt to make this case appear anything like *State ex rel. Surnaik Holdings of WV, LLC v. Bedell,* 244 W. Va. 248, 852 S.E.2d 748 (2020), falls short. This case involves the same conduct (threats of improper fees), with the same documents (utilized during every year of the proposed class), by the same

[8] APP0816 – 840.
[9] APP0025-30.
[10] APP0298 – 301.
[11] APP0112-312.
[12] APP0313-565. *See also*, A.R.0012-0022.
[13] APP0001-24.

defendant (Petitioner). A *writ of prohibition* is an extraordinary remedy. It is only available if a Petitioner can show that "...the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1.

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine 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. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. 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

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12 at 14–15, 483 S.E.2d 12 (1996).

Thus, the question is whether the circuit court exceeded its legitimate powers in granting an interlocutory motion. There has been no showing of clear error in this case. If anything, Petitioner's writ reveals that this is exactly the type of case Rule 23 is designed for. Central to the analysis is whether the granting on class certification was "'**clearly erroneous**' as a matter of law" and this has not been demonstrated. *Hoover v. Berger*, at 14–15. As to the high standard applied for that clear error analysis, this Court explained Syl. Pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979)[14] as follows:

> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, **this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate** which may be resolved independently of any disputed facts and only in

[14] Superseded by statute on other grounds.

> cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Id. (emphasis added).

A determination that a finding is "clearly erroneous" requires this Court to find that it has a "**definite and firm conviction** that a mistake has been committed." Syl. Pt. 1, *In re Faith C.*, 226 W. Va. 188, 189, 699 S.E.2d 730, 731 (2010)(emphasis added). This is not the time for Petitioner's changing of facts regarding the sworn testimony regarding collection efforts. Disputing facts cannot meet the extreme burden to carry on this improper challenge attempting to delay this case. Considering the *substantial* deference afforded to circuit courts regarding fact determinations and the high bar this Court has set for w*rits of prohibition*, it is clear the Petitioner's writ should be denied. The Petitioner must show that absolutely no factual issues remain relevant to the ultimate determination, that the issues are solely legal in nature, and that the lower court committed a "substantial, clear-cut, legal error." *State ex rel. Nelson v. Frye*, 221 W. Va. 391, at 395, 655 S.E.2d 137 (2007). The Petitioner has failed to do so.

IV. SUMMARY ARGUMENT

The Petitioner in this case asks this Court to determine a jury-appropriate, factual dispute in its favor and thereby effectively grant its summary judgment. Essentially, the Petitioner, unhappy that the circuit court has refused to hand it victory before its "we didn't do anything wrong" defense is put to a jury, asks this Court to usurp both of those bodies' roles and decide trial issues in its favor. To achieve this spurious goal, Petitioner has couched its grievance under the false light of a standing challenge, and by complaint that the circuit court's *Class Certification Order* did not contain minutiae the absence of which it hopes will lead to success by technicality. It needs be noted that even though one of the Petitioner's objections is the absence of certain language it claims must be present in a would-be, cookie-cutter order certifying a class, the

Petitioner's requested remedy is for this Court to "vacate the Order and order the denial of certification upon remand." *Writ of Prohibition,* pp. 19, lines 17-18 and pp. 21, lines 19-20. The Petitioner, rather than have this Court remand with instruction to include some perceived absence in specificity, asks the Court to forever bar certification of the class. This is an inappropriate and remarkable entreaty, realistically asking this Court to sanction its conduct, hold lawful illegal threats to consumers, and win its entire case for it.

The Petitioner's *Writ of Prohibition* must be denied as failing to meet the exceptionally high standard of that request. The circuit court's Order is supported by fact and law, and therefore cannot be said to be "clearly erroneous." Petitioner's primary argument is that it was not a debt collector collecting debts and therefore cannot have violated the consumer law statute upon which certification was granted. It bears repeating that this is an entirely factual question which is in dispute and has not been ruled upon by the circuit court for that very reason. The Petitioner's insistence that, because of its position on that factual dispute, the Respondents in this case lack *standing* betrays a misunderstanding of that concept. Article III standing, which does not require the type of injury-in-fact that the Petitioner refers to, *see Uzuegbunam v. Preczewski*, 141 S.Ct. 792, 794, 209 L.E.2d 94 (2021), especially in this instance when the injurious conduct is an affront to statutory law, cannot be challenged by a "we didn't do it" defense. Were that the case, literally every single civil claim in which the defending party denies liability would have a standing challenge. The Petitioner's idea that because it – in its position – did not injure the Respondents the Respondents suffered no injury sufficient to confer standing is simply illogical.

However, to the point of Petitioner's defense, the circuit court was presented with evidence that the Petitioner *was* engaging in debt collection, and such evidence clearly supports the decision to certify the class such that it cannot be said to be clearly erroneous. The Petitioner included in

all of its proposals and agreements – its contracts – an illegal threat that failure to pay would result in increased obligations through the application of attorney fees and collection costs.[15] This is in direct violation of W. Va. Code § 46A-2-127(g). Because the unlawful threat appeared on a bilateral contract which created an obligation instantly upon its formation, the Petitioner's argument that the Respondents were never subjected to collection under the threat is groundless.

The Petitioner points often to the relatively recent case of *State ex rel. Surnaik Holdings of WV, LLC v. Bedell,* 244 W. Va. 248, 852 S.E.2d 748 (2020). This is unfounded. Since the opinion of *Surnaik*, litigants in class cases have consistently attempted to shoehorn "standing" arguments into their briefs. These are just transparent attempts to achieve the same result, even if the facts do not match. This is not an environmental disaster case where 90% of the class came across virtually zero microns of pollution. Instead, it is a consumer class where West Virginians were subjected to identical unlawful forms which were made so unlawful by the Legislature of the State in its duty to pass laws for the protection of its citizens. There is nothing extraordinary about Petitioner's writ and it is clearly just an attempt to relitigate issues lost – or, in this case, held in abeyance – in the circuit court. Refusing to accept testimony and facts, and then twisting those facts, is not appropriate in a writ. The relief should be denied and comes nowhere near meeting the standard required.

Regarding the Petitioner's objection that the circuit court did not detail its failure to accept Petitioner's argument to its satisfaction, it asks this Court to do so for it and includes another lengthy discussion that culminates in the proposition that each class member would have to show that they were the target of debt collection to defeat the predominance requirement of Rule 23. As noted, since the threat appeared in Petitioner's contract (and has since been removed by Petitioner),

[15] A.R.0023-0054.

every member of the class which signed a contract with the Petitioner had his or her obligation colored by the coercive threat. This is, in fact, a case which perfectly illustrates the very reason Rule 23 exists. The Petitioner subjected thousands of West Virginians to the exact same conduct using the exact same forms in the exact same way. The circuit court conducted an entirely proper analysis of the predominance factor of Rule 23 and found that, because each then-putative class member was given the identical attorney fee threat, and because Petitioner's universal defense is that it was not acting as a debt collector participating in debt collection when it made those threats, the litigation for each individual class member would be identical. This is precisely what predominance means in a Rule 23 analysis.

Similarly, there can be no better example as to why a class action is the ideal way to handle the litigation as opposed to tying up the courts of this State with over nine thousand separate lawsuits all of which will appear identical to the observer. Again, the Petitioner claims the circuit court's Order does not elucidate that point strongly enough for its liking. That is not a reason to grant the extraordinary remedy that is a *writ of prohibition.*

The Petitioner has asked for an exceptionally strong remedy: that this Court stand in for a jury and decide a clear factual dispute so that it my win the case. That is not this Court's purpose and the Petitioner has no other evidence or aversions that the circuit court's Order was anything nearing "clearly erroneous."

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 16(d)(6), the *Petition for Writ of Prohibition* should be denied without oral argument. The Petitioner's writ ignores the predominant issues in this case and ignores the factual findings of the circuit court. No clear error has been

established and West Virginia Rule of Appellate Procedure 16(d)(6), oral argument would not benefit either party.

VI. ARGUMENT

A. THE CLASS HAS STANDING AND HAS BROUGHT VALID CLAIMS AGAINST THE PETITIONER

Simply wrought, it is the Petitioner's argument that the Respondents lack standing and that the lower court erred because it did not devote, in the Petitioner's mind, enough lines in the order to that question. The Petitioner conversely claims that the circuit court "did not cite any evidence, and none exists, that Dodrill was 'collecting' on the Whittingtons as the circuit court conclusory stated." *Writ of Prohibition*, Page 11, Lines 8-10.[16] In its very next sentence, the Petitioner, having stated the circuit court "did not cite any evidence," leads with "[t]he 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." *Writ of Prohibition*, Page 11, Lines 10-12. (underlined emphasis added only).[17]

Regardless, the principal reason why whole pages of the circuit court's Order were not devoted to the issue of standing should be obvious: The Respondents in this case obviously have standing to bring a claim against the Petitioner for threatening attorney fees and collection fees. This is evidenced by the Petitioner's thousands of invoices sent to the certified class members which contain an illegal attorney fee threat, coupled with the named Respondent's sworn testimony that she received debt collection communications from Dodrill attempting to collect a debt from her and threatening increased costs owing to attorney fees and collection costs, as the circuit court

[16] It is unknown to the Respondents how else a court is to speak in its orders except for "conclusory."
[17] In addition to being contradictory to its own assertion appearing a single sentence prior, this is also wrong, as the lower court also cited Mrs. Whittington's sworn testimony, as the Petitioner recognized earlier in the same paragraph.

recognized and cited.[18] While it seems the Petitioner does not believe sworn testimony given in a deposition should be considered "evidence," it nevertheless is just that. It is wholly reasonable, and certainly not clearly erroneous, for the lower court to have relied upon such evidence to conclude that the Plaintiffs do have claims in this case.

Even beyond that point, the Petitioner's argument that it was not a debt collector seems sourced in some insistence that it never actively engaged in debt collection conduct. This is certainly false, even absent the named Plaintiff's sworn testimony that it had.[19] The crux of the claim which was certified for the current class is that the illegal attorney fee and collection fee threats appeared in Dodrill's agreements and proposals.[20] In other words, in its contracts which promise to provide goods and services in exchange for money. As the Respondents, in customary fashion, signed Dodrill's contracts prior to paying, an "existing obligation"[21] was created instantaneously upon such signature and such debt was contemporaneously attendant to the abusive threat that failure to satisfy any monetary obligation in full would result in the debt being increased by Dodrill's attorney and collection costs. This fact is in addition to the fact that on July 29, 2017, unlawful threats were made, and on August 4, 2017, unlawful threats were made again, and continued twice more, fully support the sworn testimony of Mrs. Whittington that she owed a debt, was being collected on, and still owes a debt that she believes could be increased by attorney

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[18] APP0003 at ¶¶6-8.

[19] While the Petitioner seemingly anticipated the flaw in its argument that class certification is not to account for the merits of the case (*Rezulin*, 214 W. Va. at Syl. Pt. 6), it is important to note regardless that – as illustrated by sworn testimony to the contrary – whether or not Dodrill participated in debt collection conduct is definitively a question of material fact, and therefore a jury issue, and further therefore an examination into the merits of the case inappropriate for class certification. Just because the Petitioner chooses to couch its grievance in terms of standing, and therefore a question of law, does not make such the case when the opposite of its position has been both alleged under Count I of the Amended Complaint and even *testified to* during Mr. & Mrs. Whittingtons' Depositions. *See* Amended Complaint, APP0045 – APP0046, *see also*, Partial Deposition Transcript of Pamela Whittington, A.R.0005-0011.

[20] A.R.0001-0004, A.R.0023-0054.

[21] W. Va. Code § 46A-2-127(g).

fees and collection costs.[22] Since the Petitioner cannot deny it threatened illegal fees (and later since removed these illegal fees), the Petitioner is pretending this case is similar to *Surnaik* where 90% of the class did not have enough microns of pollution in their air. This is not *Surnaik*; 100% of the class members were threatened with illegal threats of fees. *State ex rel. Surnaik Holdings of WV, LLC v. Bedell,* 244 W. Va. 248, 852 S.E.2d 748 (2020).

Petitioner's arguments are antithetical to the plain language of W. Va. Code § 46A-2-127(g), which prohibits the exact conduct in this case. Existing obligations, such as the Whittingtons', cannot be threatened to be increased with payments of attorney fees or collection fees. The facts in this case do not match *Surnaik* and do not match the Petitioner's narrative in its writ. According to the Petitioner, every company should be entitled to include this language in their sales agreements and invoices, so long as they never act upon them. The problem with this approach is that the plain statutory language prohibits the "threat" of the fees, not simply the actual taking of such a fee. Clearly, the Legislature's intent could not have been to limit its prohibition on threatening language only to those who make good on such threats. Otherwise, it would have simply prohibited the conduct underlying the threat – in this case, *actually* increasing a consumer's existing obligation by attorney fee or collection costs. Instead, the Legislature specifically and explicitly prohibited the "*representation* that an existing obligation of the consumer *may be* increased" by such charges. W. Va. Code § 46A-2-127(g)(emphasis added); "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 5, *Barr v. NCB Mgmt. Servs., Inc.*, 227 W. Va. 507, 508, 711 S.E.2d 577, 578 (2011)(quoting Syl. Pt. 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975)). A company which threatens attorney fees instantaneously upon the creation of said

[22] A.R.0001-0011.

obligation (and after), has likewise unquestionably availed itself of the Legislature's clear intent that such conduct be prohibited per W. Va. Code § 46A-2-127(g). This is probably why the Petitioner ceased its illegal threats in March of 2020. Petitioner threatened that an existing obligation – created upon a signature to its proposal or agreement – would be increased by its attorney fees and collection costs, and before money was exchanged for goods and services.[23] The named Respondents, like every member of the certified class, were identically unlawfully threatened on a then-existing obligation before said obligation was satisfied, and therefore undoubtedly have a claim, and have standing, to bring this case in the proper jurisdiction. If this case does not feel like *Surnaik*, it is because it is not. The wildly varying damages and different exposures to pollutants in *Surnaik* resulted in potential standing issues. That is simply not this case.

Regarding the Petitioner's insistence that Mr. and Mrs. Whittington were never the targets of debt collection, the evidence states otherwise. Subsequent work orders, after the creation of the debt, which Dodrill provided Mr. and Mrs. Whittington contained the same attorney fee threat which appeared in their original agreement.[24] The Petitioner's claim that the Whittingtons could never have been the targets of debt collection is not true. The Respondents' debt for this defective unit exists to this day and Mrs. Whittington provided sworn testimony regarding the collection conduct of Petitioner.[25] There has been an obligation throughout all subsequent dealings with Petitioner when the Respondents were likewise threatened with the unlawful increase of this obligation via collection costs and attorney fees.[26]

Even had Mr. and Mrs. Whittington suffered no pecuniary loss, which is untrue, such a loss is simply not necessary. The Supreme Court of the United States (hereinafter "SCOTUS")

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[23] A.R.0001-0004, A.R.0023-0054.
[24] A.R.0001-0004.
[25] A.R.0005-0011.
[26] A.R.0001-0004.

recently opined in this area regarding standing when pecuniary injury is not easily identifiable. In *Uzuegbunam*, the SCOTUS reaffirmed the principle that "the common law avoided the oddity of privileging small-dollar economic rights over important, but not easily quantifiable, nonpecuniary rights." *Uzuegbunam v. Preczewski*, 141 S.Ct. 792, 794, 209 L.E.2d 94 (2021). The District Court dismissed the case, holding that the Mr. Uzeugbunam's claim for nominal damages was insufficient to establish standing. The Eleventh Circuit affirmed and stated because the students did not request compensatory damages, their plea for nominal damages could not by itself establish standing. The US Supreme Court recently reversed reasoning as follows:

> Later courts, however, reasoned that every legal injury necessarily causes damage, so they awarded nominal damages absent evidence of other damages (such as compensatory, statutory, or punitive damages), and they did so where there was no apparent continuing or threatened injury for nominal damages to redress. *See, e.g., Barker* v. *Green*, 2 Bing. 317, 130 Eng. Rep. 327 (C. P. 1824) (nominal damages awarded for 1-day delay in arrest because "if there was a breach of duty the law would presume some damage"); *Hatch* v. *Lewis*, 2 F. & F. 467, 479, 485–486, 175 Eng. Rep. 1145, 1150, 1153 (N. P. 1861) (ineffective assistance by criminal defense attorney that does not prejudice the client); *Dods* v. *Evans*, 15 C. B. N. S. 621, 624, 627, 143 Eng. Rep. 929, 930–931 (C. P. 1864) (breach of contract); *Marzetti* v. *Williams*, 1 B. & Ad. 415, 417–418, 423–428, 109 Eng. Rep. 842, 843, 845–847 (K. B. 1830) (bank's 1-day delay in paying on a check); *id.*, at 424, 109 Eng. Rep., at 845 (recognizing that breach of contract could create a continuing injury but determining that the fact of breach of contract by itself justified nominal damages).

Uzuegbunam v. Preczewski, 141 S.Ct. 792, 794, 209 L.E.2d 94 (2021).

The simple fact is that the circuit court rightfully (or, at the very least, not clearly erroneously) concluded that the Respondents in this case had standing to proceed. This ruling was evidenced by the Complaint, Amended Complaint, the Respondents' sworn testimony, and the Petitioner's own documents which clearly includes unlawful language.[27] Again, the Legislature's intent upon passage of § 46A-2-127(g) was to prohibit the *threat* of increased obligations, not the

[27] APP0037-41, APP0042-52. *See also*, A.R.0005-0011, A.R.0023-0054.

actual taking of those increasing obligations. And because an obligation was created when the Petitioner's proposal or agreement was signed, and before such obligation was satisfied, the Petitioner is clearly afoul of that statute and the certified class, who were those threatened by such unlawful language, are properly represented.

The circuit court was presented with the Petitioner's same rejected arguments regarding standing. Under the deferential standard of extraordinary remedies such as *writs of prohibition*, it cannot be said that its rejection thereof – or, at the very least, its refusal to rule on what is undoubtedly a jury question – is clearly erroneous such to warrant the granting of such an extraordinary remedy.

B. THE CIRCUIT COURT CONDUCTED A PROPER ANALYSIS OF THE PREDOMINANCE REQUIREMENT

At the outset, the Petitioner's insistence upon repeating its grievance that it was unfairly adjudged a debt collector by the plain meaning of this State's consumer law is addressed in the subsection immediate prior, *supra*. To save this Court's time and resources, the Respondents would simply refer to Subsection A of this Section of the Response to answer the Petitioner's repetitive, fact-based arguments on a disputed issue which is very obviously *not* a question of law. Inasmuch as the Petitioner claims that its denial that it was a debt collector collecting debts would be an element which each individual claimant would have to prove such that there can be no predominance, the fact that all of the certified class members received the Petitioner's threats upon the formation of a bilateral contract which instantly created an obligation darkened by coercive threats, the Petitioner's claim is specious and falls far short of that which is necessary for the granting of an extraordinary *writ of prohibition*.

This Court has clarified the predominance requirement of W. Va. R. Civ. Proc. 23(b)(3) in *Surnaik* which stated as follows:

> In addition, circuit courts should assess predominance with its overarching purpose in mind – namely, ensuring that a class action would achieve economies of time, efforts, and expense, and promote uniformity of decision as to person similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. This analysis must be placed in the written record of the case by including it in the circuit court's order regarding class certification.

State ex rel. Surnaik Holdings of WV, LLC v. Bedell, 244 W. Va. 248, 852 S.E.2d 748 (2020).

The instant case firmly meets the standard of predominance articulated by this Court. Certification of this case, with over nine thousand members, would certainly "...promote uniformity of decision as to persons similarly situated." *Id.* Predominance in this case is additionally satisfied as "economies of time, effort, and expense" are better served by certification.

Predominance is met when adjudication of the common questions of law and fact outweigh adjudication of the questions of law and fact specific to individual class members, as is the case in this matter. The predominate issues in this case involve evaluating the virtually identical harm inflicted by the repeated violations of W. Va. Code § 46A-2-127.[28] At its core, this is a very simple case where the same company used the same documents to make the same threats through the same conduct. The Petitioner believed this conduct at least to be not fair as it changed its documents in March 2020. The attempts to create meaningless fact variants does not change the predominate issues at stake in this case.

In his recent concurring Opinion, Justice Hutchison pointed out *exactly* what the defendant is attempting to do in the instant case with desperate attempts to oppose certification:

> **When a trial court or this Court weights a Rule 23 analysis, do not let the trees blind you to the forest: Defendants attempting to avoid class certification will, almost exclusively, overwhelm a circuit judge with the differences between each class member's case**. It is akin to a judge being asked to look at a forest of oak trees and being told the difference between each tree: each tree has a different height, a different color, a different number of leaves, a unique number of branches, a wide variation in the number and size of tree rings, and so on. **The test for the**

[28] A.R.0023-0054.

> **judge, though, is to step back and look at the similarities in class members.** Step back and see the forest. No matter the number of branches or leaves, a collection of oak trees has enough similarities to be called a "class" of oak trees.
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> ...
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> The guy who actually drafted the rule, and who was in the room when the rules committee debated and tweaked and adopted the rule, says **the words "predominate" and "superior" in Rule 23(b)(3) are "like silly putty that can be molded in any way by a judge in a particular context.**
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> ...
>
> **My sense, and the sense of my colleagues, is that a class action is probably the best way to address the alleged injuries to the thousands of residents impacted by the warehouse fire.**

State ex rel. Surnaik Holdings of WV, LLC v. Bedell, 244 W. Va. 248, 852 S.E.2d 748 (2020). *Surnaik* is a case with far more variant damages than the instant case, which includes uniform statutory damages. This consumer case, which includes the same exact illegal documents utilized during the entire class period, is clearly more suitable for class treatment that the facts of *Surnaik.*

Regarding the Petitioner's very general grievance that the circuit court in this case failed to provide a thorough analysis in its order, this is simply not true. Simply because a circuit court tends to avoid needless repetition does not mean that its order is inadequate in light of *Surnaik.* The circuit court's order *does* identify the parties' claims and defenses and their respective elements: Paragraph 36;[29] the circuit court's order *does* determine whether those questions are common or individual: Paragraphs 41, 74, and 75,[30] *inter alia*; and the circuit court's order *does*

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[29] Paragraph 36: "The class members' claims also present the same common question and legal issue. To wit, whether Dodrill violated W. Va. Code § 46A-2-127 by communicating to consumers that any obligation which they may owe to it can be increased by attorney fees and collection costs. That is the common, and as discussed *infra*, predominate issue in this case." APP0014.

[30] Paragraph 75: "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 fees and/or collection costs." APP0015, APP0021, APP0021 – 22.

determine whether the common questions predominate: Paragraph 76, *inter alia*.[31] This case involves the same unlawful threats made thousands of times. Overly complicating legally elegant issues is not mandated by *Surnaik*.

Even were it not the case that the circuit court's *Class Certification Order* is not clearly erroneous, the Petitioner's reliance on *Surnaik* is undoubtedly disingenuous, especially considering the Petitioner's request that this tenuous position warrants the Court's vacating the entire Order and "ordering denial of certification upon remand." *Writ of Prohibition,* Page 19, Line 18. In fact, if the Petitioner were truly aggrieved by a lack of specificity in the lower court's order, it would simply request this Court remand with instruction to include such analysis as it finds lacking in the lower court's findings. However, the Petitioner has instead requested a remarkable remedy from this Court in an attempt to fully subsume the role of the circuit court.

The instant case regards a single consumer claim as to whether the Petitioner unlawfully threatened the consumers to whom it issued undeniable threats of increased obligations by means of attorney fees and collection costs. This issue does not change from each individual class member to another. The Petitioner's defense of "no we didn't" has no elements to analyze, and its insistence that a microscopic examination of a simple question is only an attempt to prolong litigation at the expense of all parties and the Court.

The circuit court conducted an entirely proper analysis of the predominance factor of Rule 23 and found that, because each then-putative class member was given the identical attorney fee threat, and because Dodrill's universal defense is that it was not acting as a debt collector participating in debt collection when it made those threats, the litigation beats from the first individual class member to the nine-thousandth individual class member would be identical. **This**

[31] Paragraph 76. "Thus, the Court further CONCLUDES that the common questions of law as to whether the Defendant violated WVCCPA statutory provisions predominate in this action." APP0022.

is precisely what is meant to be achieved in terms of predominance under Rule 23, and it certainly cannot be said that the circuit court's conclusion or analysis was clearly erroneous as would be necessary for this Court to grant an extraordinary *Writ of Prohibition.*

C. THE CIRCUIT COURT CONDUCTED A THOROUGH AND PROPER ANALYSIS OF THE SUPERIORITY REQUIREMENT

A class action is the superior method of adjudicating the claims in this matter. The defendant has not and cannot demonstrate that filing thousands and thousands of separate lawsuits would be a more efficient method of handling the claims at issue in a single action. Rule 23(b)(3) requires a showing "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In the case at hand, there is no question that the certified class satisfies this requirement and that the circuit court conducted a proper analysis regarding superiority. This class action involves the claims of **thousands** of West Virginia consumers. This Court has recognized that:

> While the management of any complex class action is likely to present a challenge, there is a myriad of management devices available to the circuit court under Rule 23. But **forcing numerous plaintiffs to litigate the alleged misconduct of the defendants in hundreds or thousands of repeated individual trials, especially where a plaintiff's individual damages may be relatively small, runs counter to the very purpose of a class action**:
>
> It must also be remembered that manageability is only one of the elements that goes into the balance to determine the superiority of a class action in a particular case. Other factors must also be considered, as must the purposes of Rule 23, including: conserving time, effort and expense; providing a forum for small claimants; and deterring illegal activities.

In Re W. Virginia Rezulin Litig., 214 W. Va. 52 at 75–76 (citing 2 Newberg on Class Actions, 4th Ed., § 4.32 at 277–78)(internal quotations omitted)(emphasis added).

Years later, this Court further clarified Rule 23(b)(3)'s superiority requirement in *Perrine v. E.I. duPont de Nemours and Co.*, 225 W.Va. 482, 527 (2010) by noting that "[f]actors 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." Ultimately, this Court in *Perrine* upheld the trial court's determination that a "[c]lass action is superior to other methods for adjudicating Plaintiffs' claims. Litigating common issues is far superior to thousands of individual claims." *Id.*

There is no need to address the same legal and fact questions thousands of times. Indeed, such individual actions would, in all likelihood, be prohibitively expensive to litigate and would lead to varying and inconsistent results. The interests of judicial efficiency, fairness, and the conservation of judicial and party time, effort, and expense, as well as the very purpose of Rule 23, all are furthered by certifying the class.

Essentially, this case is the very reason for the necessity of class actions in the first place. **Here is a situation where the size of the class makes it extremely impracticable for any state court to adjudicate each of the thousands of individual claims uniformly, effectively, or with the same judicial efficiency of a Rule 23 action.** In addition, the damages for many class members sought on an individual level may be so low that an injured consumer would decide pursuing a lawsuit not to be worth the time and effort. Therefore, based on each discussion presented *supra*, this matter should clearly be maintained as a class action as it clearly satisfies the very policy underpinning Rule 23 itself.

D. THE PETITIONER FAILS TO MEET THE EXCEPTIONALLY HIGH STANDARD REQUIRED TO BE GRANTED A WRIT OF PROHIBITON

Extraordinary remedies should not be sought when clear precedential opinions exist that instruct lower courts such as *Tabata v. Charleston Area Med. Ctr., Inc.* 233 W. Va. 512, 859 S.E.2d 459 (2014) and *Uzuegbunam v. Preczewski*, 141 S.Ct. 792, 209 L.E.2d 94 (2021). This Court has, on multiple occasions, stated that "[t]o justify this extraordinary remedy, the petitioner[s] ha[ve]

the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy." *State ex rel. Stewart v. Alsop*, 533 S.E.2d 362,364 (W.Va. 2000)(citing *State ex rel. Paul B. v. Hill*, 201 W.Va. 248,254, 496 S.E.2d 198, 204 (1997)(quoting *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 37,454 S.E.2d 77, 82 (1994) (Cleckley, J., concurring))).

This Court has held that, "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers[.]" Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977). Those factors, again, are: "(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." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, at 14–15. This standard has not been met. Attempting to overturn existing law and battle fact disputes over documents produced by the Petitioner to thousands of individuals in the State of West Virginia is not designed for resolution by writ.

The Petitioner cannot, of course, argue that it has **no** other adequate means to obtain its desired relief or that it has been prejudiced in such a way that is not correctable on appeal. First, Petitioner could file a motion to decertify. Second, Petitioner could reserve its arguments attempting to create new law for a direct appeal. Instead, the Petitioner desires this Court to issue what amounts to its highest disapproval of a lower court's decision mid-litigation. *See Suriano v.*

Gaughan, 198 W.Va. 339, at 345("As an extraordinary remedy, this Court reserves the granting of such relief to 'really extraordinary causes.'"). *See also* Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953)("Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari."). *See also* Syl. Pt. 2, *Woodall v. Laurita*, 156 W.Va. 707 ("Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.").

The analysis put forth by this Court in *Woodall* dooms the Petitioner's request. **A circuit court following precedence for which there is no split among the circuits is unquestionably within a circuit court's "legitimate powers."** The "particular facts" which this Court must consider are simply whether the Petitioner may seek remedy by direct appeal, and whether the lower court's decision that the case should proceed on classwide basis was "so flagrant and violative it [its] rights as to make remedy by appeal inadequate." *Id.*

The third factor considered by the *Hoover* Court, and stated to be given the most weight, is whether the lower court's ruling was clearly erroneous. *Hoover*, at 14-15. "Clearly erroneous," is, itself, an exceptionally high standard. Only upon a "definite and firm conviction" that the lower court exceeded its legitimate powers can a writ be granted. *See* Syl. Pt. 1, *In re Faith C.*, 226 W. Va. 188, 189, 699 S.E.2d 730, 731 (2010). The lower court's affirmative decisions, regarding this Petitioner, is that the Respondents clearly presented to the Court that this case should proceed on

a classwide basis on the grounds that Dodrill provided over 20,000 documents to over 9,000 individuals in this State which included threats of collection and attorney fees.[32] Certainly, this Court cannot have a definite and firm conviction that such a ruling is beyond the legitimate powers of the circuit courts of this State. The lower court's rulings following precedence is not *clearly* erroneous.

Again, writs of prohibition are exceptional in nature. Regarding such extraordinary remedies:

> This Court has explained the standard of review applicable to a writ of prohibition, stating that "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va. Code 53-1-1." Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314,233 S.E.2d 425 (1977) ....
>
> **We have held that an extraordinary writ ... is not to be used as a substitute for an appeal.** "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl. pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). In addition, "[t]his Court is 'restrictive in its use of prohibition as a remedy.' *State ex rel. West Virginia Fire Cas. Co. v. Karl*, 199 W.Va. 678,683,487 S.E.2d 336,341 (1997)." *State ex rel. Allstate Ins. Co. v. Gaughan*, 220 W.Va. 113, 118, 640 S.E.2d 176, 182 (2006). In syllabus point 4 of *State ex rel. Hoover v. Berger*, [199 W.Va. 12,483 S.E.2d 12 (1996)], this Court said:

State ex rel. Owners Ins. Co. v. McGraw, 233 W.Va. 776, 779-80, 760 S.E.2d 590, 593-94 (2014) (per curiam) (emphasis added).

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." Syl. Pt. 4, *State ex rel. Jeanette H. v. Pancake*, 529 S.E.2d 865 (W.Va. 2000); *State ex rel. Lambert v. King*, 208 W.Va. 87, 538 S.E.2d 385 (2000). A heavy burden of proof is required to demonstrate that a circuit court's finding is clearly erroneous. As explained by this

[32] A.R.0023-0054.

Court in *State ex rel. Owners Ins. Co. v. McGraw*, 233 W.Va. at 780, 760 S.E.2d at 594: "A finding is 'clearly erroneous' when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. **However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirely**." (quoting Syl. Pt. 1, in part, *In the interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996))(emphasis added). The Petitioner simply does not meet the standard for extraordinary relief it seeks and the circuit court properly followed the precedence of this Court along with the United States Supreme Court.

VI. CONCLUSION

For the reasons set above, the Respondents respectfully requests that Dodrill Heating & Cooling LLC's *Petition for Writ of Prohibition* be denied. The Respondents further requests all such other relief as this Court may deem just and proper.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
DODRILL HEATING & COOLING LLC

Petitioners,

v.

Docket No. 21-0561
Circuit Court of Kanawha County
Underlying Circuit Court No.: 19-C-466

THE HONORABLE 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.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2021, true and accurate copies of the foregoing ***"Response in Opposition to Petition for Writ of Prohibition"*** and ***"Supplemental Appendix"*** was deposited in the U.S. Mail contained in a postage, prepaid, envelope addresses to Respondent, The Honorable Maryclaire Akers and to counsel for the Petitioner as follows:

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