IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21 - 0610

State of West Virginia ex rel.
SURNAIK HOLDINGS OF WV, LLC,

Petitioner,

v.

The Honorable THOMAS A. BEDELL,
sitting by assignment as Judge of the
Circuit Court of Wood County,

Respondent.

PETITION FOR WRIT OF PROHIBITION

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INTRODUCTION

If this brief seems familiar, that's because it is. In 2020, this Court vacated and remanded an order from the same Circuit Court certifying the same class. *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, 244 W. Va. 248, 852 S.E.2d 748, 750 (2020) ("*Surnaik I*"). Specifically, this Court instructed the Circuit Court to conduct a more "thorough analysis" of the class certification requirements, and in doing so, to bring West Virginia's Rule 23 into close conformity with its federal counterpart. Just a few months later, on the same evidence, and for the same reasons, the Circuit Court ignored this Court's instructions and certified the same class again. The Plaintiff's 40-page proposed order — which the Circuit Court entered without modification — contained more words, but no more meaningful analysis than before.

Indeed, the same flaws that plagued the first certification persist. According the Plaintiff's own expert, as many as 90% of the proposed class members suffered no injury at all. Likewise, the Plaintiff concedes that neither liability nor damages can be proven through common evidence on a class-wide basis. And the Plaintiff has no concrete plan for even identifying who the class members are.

In short, nothing has changed. Plaintiff did not offer any additional evidence or expert testimony, nor did he revise the class definition or trial plan to account for the infirmities this Court identified the first time around. He simply recasts the same claims and arguments from *Surnaik I* and hopes the Court will confuse verbosity for substantive analysis. For these reasons and others discussed herein, Surnaik

Holdings of WV, LLC ("Surnaik") is entitled to a writ prohibiting enforcement of the Circuit Court's order granting class certification.

QUESTIONS PRESENTED

1. According to Plaintiff's own expert, as many as 90% of the class members are likely *without injury*. Did the Circuit Court err when it certified a class in which 90% of the class is likely to be uninjured? **Yes.**

2. "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *SER Surnaik Holdings*, 852 S.E.2d at 758-59 (cleaned up). Does Plaintiff's concession that liability cannot be proven through common evidence on a class-wide basis preclude class certification? **Yes.**

3. Because certain cases are particularly ill-suited for class treatment — in particular, personal injury cases in which no single proximate injury applies equally to each class member — Rule 23 requires courts to consider whether a class action is superior to other methods for fair and efficient adjudication. W. Va. R. Civ. P. 23. Is the West Virginia Mass Litigation Panel a more suitable forum for this mass accident case? **Yes.**

4. In order to determine who will receive notice, share in a recovery, and be bound by a final judgment, Rule 23 requires that the class and its members be readily identifiable with reference to objective criteria. Did the Circuit Court err

when it certified a class whose membership cannot be ascertained with reference to objective criteria? **Yes.**

5. A suit to abate a public nuisance cannot be maintained by a private citizen unless he suffered a "special" injury "different in kind from the public in general." *Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348, 354 (W. Va. 1945). Does Rule 23's typicality requirement—which requires that Plaintiff suffer the same injury as the class members he purports to represent—preclude Plaintiff from satisfying the "special" injury requirement, and vice versa? **Yes.**

6. "Only tangible, rather than intangible, invasions are deemed to constitute an actual interference with property." *See Barker v. Surnaik Holdings of WV, LLC, et al.*, 2018 WL 3824376, at *4 (S.D.W. Va. Aug. 10, 2018) (cleaned up). Did the Circuit Court err when it certified a class premised on an intangible invasion of smoke? Likewise, and for the same reasons, did the Circuit Court err when it denied Surnaik's motion to dismiss under West Virginia Rule of Civil Procedure 12(b)(6)? **Yes.**

STATEMENT OF THE CASE

Summary of Claims

On October 21, 2017, a warehouse in Parkersburg caught fire and burned until October 29, 2017. Nearly four years later, the cause of the fire remains unknown. The amended complaint, filed February 3, 2021, alleges only two counts: negligence and nuisance. App. 97-109. Plaintiff alleges that the fire emitted a plume of smoke — consisting of fine particulate matter and fumes — that adversely impacted the

neighboring area. *Id.* As a result of this exposure, Plaintiff alleges three types of harm: personal injury, property damage, and annoyance attributable to unpleasant smells. *Id.* Plaintiff does not seek to recover for any alleged discharge, dispersal, seepage migration, or release of any pollutants such as acids, alkalis, chemicals, noxious odors, waste or other contaminates or toxins. *Id.*

Putative Class Defined

Plaintiff defines the proposed class as follows:

> All lawful residents and possessors of real property located within one of the isopleths . . . who did one or more of the following in October 2017:
>
> (1) Resided on the property within the isopleth; or
>
> (2) Conducted business operations, including those of a non-profit business, on the property within the isopleth; or
>
> (3) Conducted state, county, or municipal government operations on the property within the isopleths.

App. 1-2.

Plaintiff's proposed class definition is premised on the identification of geographical areas where concentrations of fine particles (PM2.5) emitted from the warehouse fire allegedly averaged three micrograms per cubic meter (μg/m3) or more over any 24-hour period following the fire. App. 4 at ¶ 9. These geographical areas are depicted on the maps as "isopleths," which represent the class boundaries. App. 126-28.

To establish the scope of the class, Plaintiff relied on the testimony of three purported experts. *First*, Plaintiff relied on Dr. Michael McCawley to establish the

"critical criteria" of three micrograms of PM2.5 per cubic meter over a 24-hour period. App. 3 at ¶ 8. Plaintiff suggests that "three micrograms of PM2.5 per meter of cubic air over 24 hours is the concentration at which smoke is objectively experienced by reasonable people as unpleasant, annoying and irritating." *Id.* at ¶ 9. *Next*, Mr. William Auberle used "standard air dispersion modeling techniques" to draw the isopleths on the maps within which individuals would have been exposed to the 3 µg/m3 average threshold of PM2.5. *Id.* at ¶ 8. *Lastly*, Mr. Jerry Gilbert used census data to estimate the number of persons who reside within the isopleths. App. 4 at ¶ 11. The class boundaries and the expert testimony upon which they were drawn remain unchanged from *Surnaik I.*

Related Lawsuits

In a race to the courthouse, and before the flames were even extinguished, five separate class action cases related to the fire were filed. Each of those cases — like this one — alleged injury to person and property as a result of smoke exposure. The other four were either dismissed with prejudice by the United States District Court for the Southern District of West Virginia,[1] or were subsequently abandoned by the

[1] *Barker v. Naik*, No. 2:17-cv-04387, 2018 WL 3824376 (S.D.W. Va. Aug. 10, 2018) (dismissing claims for nuisance, negligence, and trespass for, among other reasons, failure to allege a cognizable injury [ECF 40]; remaining NIED claim dismissed for failure to prosecute [ECF 50]); *Callihan v. Surnaik Holdings of WV, LLC*, No. 2:17-CV-04386, 2018 WL 6313012 (S.D.W. Va. Dec. 3, 2018) (dismissing claims for nuisance, trespass, and NIED for, among other reasons, failure to allege a cognizable injury [ECF 78]; remaining negligence claim dismissed for failure to prosecute [ECF 91]).

plaintiffs.[2] This case, which was remanded back to the Circuit Court of Wood County, is the only remaining class action.

Surnaik I

On April 30, 2019, Plaintiff moved to certify an identically defined class of putative plaintiffs. App. 110-143. By order dated November 20, 2020, the Circuit Court certified the class urged by Plaintiff. App. 219-235. On November 4, 2019, Surnaik petitioned for a Writ of Prohibition, seeking to vacate the class certification order.

On November 20, 2020, this Court granted the writ as moulded and vacated the class certification order. *SER Surnaik Holdings*, 852 S.E.2d 748. This Court concluded that the Circuit Court had failed to conduct a "thorough analysis" of Rule 23's requirements. *Id.* In that vein, this Court noted that several issues were either "summarily disposed of" in the certification order or not addressed at all, including: whether a class can be certified when "90% of the class is uninjured," *id.* at 763; whether personal injury claims are suitable for class treatment, *id.* at 763; whether the breadth of federal authority counsels against certification of this personal injury case, *id.*; and whether Plaintiff's claims are typical of the claims asserted on behalf of the class, *id.* at 756. Seeking to narrow the gap between federal and state jurisprudence, this Court instructed that, on remand, West Virginia Rule of Civil

[2] *Mohwish, et al. v. Sirnaik, LLC, et al.*, No. 2:17-cv-4417 (S.D. W.Va.) (voluntarily dismissed); *Snodgrass v. Surnaik Holdings of WV, LLC*, No. 18-C-35 (Cir. Ct. Wood Cnty.) (voluntarily dismissed).

Procedure 23 should be interpreted in close conformity with its federal counterpart. *Id.* at 760-61.

No additional discovery was developed on remand, nor was the class definition revised. No new evidentiary hearing was held. Instead, the parties merely submitted new proposed orders for the Circuit Court's consideration. App. 241-278; 284-302. On June 17, 2021, the Circuit Court entered Plaintiff's proposed order without modification, granting Plaintiff's motion for class certification and certifying the proposed class. App. 1-40. This Writ of Prohibition follows.

SUMMARY OF ARGUMENT

The class action vehicle was created so courts can resolve common claims *en masse*. But that purpose is frustrated when — as here — the class raises more questions than it answers.

First, a class cannot be certified when a significant number of class members — much less an overwhelming majority — are uninjured. On the one hand, class defendants should not be made to defend against a class with untold numbers of uninjured class members. And on the other, individual inquiries of injury and causation necessarily predominate over common questions when the trial court is required to pick apart the class person-by-person in an effort to weed out uninjured class members. Here, Plaintiff's own expert testified that as many as 90% of the class members are unlikely to have experienced any perceptible symptoms (e.g., inflammation, irritation, or annoyance) from smoke exposure. In *Surnaik I*, the Circuit Court summarily "summarily disposed of Surnaik's argument that 90% of the

class is uninjured." *SER Surnaik Holdings*, 852 S.E.2d at 763. On remand, neither the Plaintiff nor the Circuit Court offered anything new. The presence of up to 52,000 potentially uninjured class members in this case is far beyond the outer limits of what federal courts have considered permissible. This Court urged harmony with federal jurisprudence in *Surnaik I*, so this case should be treated no differently.

Second, Plaintiff cannot satisfy Rule 23(b)'s predominance requirement. This Court explained that class certification is inappropriate where proof of an essential element of a claim requires individual treatment. *SER Surnaik Holdings*, 852 S.E.2d at 758-59. Here, because class members necessarily have varying sensibilities to the particulate matter released from the fire, each class member will have perceived the particulate matter differently — if at all. And because there is no uniform injury that can be proven through common evidence on a class-wide basis, every member of the 57,000-member class would need to be reviewed on an individualized basis to see if they sustained any of the three alleged categories of damages and, if so, which ones. This in essence would partition the entire class into individualized actions, frustrating the goals of class treatment. Indeed, Plaintiff conceded that liability cannot be proven on a class-wide basis, so the predominance inquiry should end there.

In *Surnaik I*, the Circuit Court "neglected to take into account any potential issues with the personal injury claims." *Id.* at 763. It does so again here, failing to explain how the trial court will manage an overwhelming number of so-called "mini-trials"—in particular, 57,000 of them.

Third, federal courts have concluded that cases such as this are particularly ill-suited for class treatment—in particular, personal injury cases in which no single proximate injury applies equally to each class member and which liability cannot be proven by common evidence on a class-wide basis. As Plaintiff has already conceded, liability cannot be proven through common evidence on a class-wide basis. This is the very type of case that federal courts have consistently found inappropriate for class resolution. Plaintiff provides no reason that this Court should arrive at a different conclusion.

In *Surnaik I*, the Circuit Court cited a list of cases for the proposition that a mass accident case is appropriate for class treatment. In its opinion, this Court noted that those cases were "non-personal injury" matters and were cited "without any analysis as to why they specifically apply to the facts of the present matter." *SER Surnaik Holdings*, 852 S.E.2d at 763. Despite that, the Circuit Court once again relied on the same line of cases without meaningful analysis.

Fourth, in order to determine who will receive class notice, share in a recovery, and be bound by a final judgment, Rule 23 requires that the class and its members be readily identifiable with reference to objective criteria. Here, Plaintiff fails to satisfy this "ascertainability" requirement because the class definition is loosely defined to include vague categories of persons, such as all "lawful possessors" of real property that "conducted business operations" on the property nearly 4 years ago. Surnaik is left to wonder how the parties are reasonably expected to generate constitutionally-adequate notice to these vague categories of class members.

Inasmuch as the class definition remains unchanged, Plaintiff's class continues to suffer from the same infirmity raised in *Surnaik I.* Most troubling, Plaintiff has still failed to provide a concrete plan for identifying class members.

Fifth, the requirements of standing and typicality preclude Plaintiff from serving as the class representative. Plaintiff was appointed to represent a class of individuals seeking to recover for both personal injury and property damage. However, the class representative, Paul Snider, conceded that he suffered no property damage. Because Plaintiff has not suffered the same *type* of injury as the class (i.e., property damage), the typicality requirement cannot be satisfied. Moreover, in order to prosecute his nuisance claim, Plaintiff must demonstrate a "special" injury "different in kind from the public in general." As such, it is legally impossible for him to represent a class on such a claim.

Sixth, Plaintiff alleges that the migration of smoke into the air spaces of private property is actionable in negligence insofar as this invasion supposedly interfered with the use and enjoyment of that property. It is this injury that, as Plaintiff explains, "binds the class into a cohesive whole." But the United States District Court for the Southern District of West Virginia held, *in dismissing two other class actions arising from the same fire*, that the simple migration of smoke and fumes onto a plaintiff's property is not a tangible invasion giving rise to a claim for interference. This Court should reach a similar conclusion and either (i) find that there is no cognizable class claim within the parameters of Rule 23, or (ii) find that Plaintiff fails to state a claim for relief under Rule 12(b)(6).

STATEMENT REGARDING ORAL ARGUMENT

This petition is suitable for Rule 20 argument because the case involves issues of first impression and fundamental public importance concerning class actions and the proper application of Rule 23.

ARGUMENT

This Court has consistently held that an order awarding class action standing is reviewable by writ of prohibition. Syl. Pt. 2, *McFoy v. Amerigas, Inc.*, 170 W. Va. 526, 532 (1982); *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 242 W. Va. 54, n. 12 (2019); *State ex rel. Erie Ins. Prop. & Cas. Co. v. Nibert*, 2017 WL 564160, at *2 (W. Va. Feb. 13, 2017); *State of West Virginia ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 450 (2004); *SER Surnaik Holdings*, 852 S.E.2d 748. And for good reason: class defendants would otherwise have to wait until after trial to obtain appellate review. At that point, the damage has already been done. In light of this Court's precedent, this Court should grant this Petition because Surnaik will be irreparably harmed if it is forced to litigate a class action case that was certified in contravention of this Court's precedent and West Virginia Rule of Civil Procedure 23. In *Surnaik I*, this Court found that this matter was reviewable by writ of prohibition. Because the circumstances are unchanged and the same issues linger, review is again proper here.

I. The Circuit Court erred by certifying a class in which only 10% of the class is likely to have been injured.

A *de minimis* number of uninjured class members does not necessarily preclude class certification. However, when the number of uninjured class members

exceeds permissible limits, courts invariably deny class certification.[3] This rule stands to reason: when the number of uninjured class members exceeds a *de minimis* level, weeding out uninjured class members becomes an infeasible task and any efficiencies gained through the class mechanism are lost.[4] Although a permissible number of uninjured class members has not been definitively established, courts having addressed this issue indicate that no more than 5% to 6% of uninjured class members is acceptable.[5]

Here, the certified class is fatally deficient because it includes a shocking number of uninjured individuals — up to 90% of the approximately 57,000-member class. Plaintiff defines the proposed class as "[a]ll lawful residents and possessors of real property located within one of the isopleths" depicted on the class maps. App. 1. These isopleths represent the geographical class boundaries, which were drawn to

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[3] *See, e.g., In re Asacol Antitrust Litig.*, 907 F.3d 42, 45 (1st Cir. 2018) (concluding that class certification was improper where 10% of class members were uninjured because individual inquiries would necessarily overwhelm common issues); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 627 (D.C. Cir. 2019) (denying class certification based on number of uninjured class members and concluding that 12.7% of the class is "beyond the outer limits of what can be considered *de minimis* for purposes of establishing predominance"), *aff'd* 934 F.3d 619 (D.C. Cir. 2019); *Vista Healthplan, Inc. v. Cephalon, Inc.*, 2015 WL 3623005, at *20 (E.D. Pa. June 10, 2015) (denying class certification because identifying and removing the large sum of uninjured class members would require extensive individualized inquiry).

[4] Some courts have addressed the problem of uninjured class members from the perspective of constitutional standing rather than Rule 23's predominance requirement. Regardless of the lens applied, the arguments—and the outcome—are the same.

[5] *See, e.g., In re Lidoderm Antitrust Litig.*, 2017 WL 679367, at *12 (N.D. Cal. Feb. 21, 2017) (finding that three uninjured class members out of a class totaling fifty-five members (5.5%) is *de minimis*); *In re Nexium (Esomeprazole) Antitrust Litig.*, 297 F.R.D. 168, 179 (D. Mass. 2013), *aff'd sub nom.*, 777 F.3d 9 (1st Cir. 2015) (concluding that a proposed class with at least 5.8% uninjured members did not defeat predominance).

include all residences having been exposed to at least 3 μg/m3 of particulate matter known as PM2.5. App. 3 at ¶ 8. According to Plaintiff's own expert, however, 3 μg/m3 of PM2.5 is only the *threshold* at which someone *could* experience inflammation or irritation — it does not represent the threshold level at which someone *would* suffer such an injury.[6] Given that Plaintiff's class boundaries are drawn using the lowest concentration levels at which an individual *could possibly* experience the alleged symptoms (e.g., annoying smells), the proposed class unsurprisingly includes a substantial number of individuals that did not experience the alleged symptoms. App. 342, McCawley Dep. 103:4-16 (testifying that some people will not experience any inflammation when exposed to 3 μg/m3 of PM2.5). Indeed, Dr. McCawley testified that, in his expert opinion, as many as 90% of the proposed class members were likely to have been uninjured by exposure to PM2.5. App. 340, McCawley Dep. 94:15-95:5 (when asked if "it could be the case that only 10% of the people are exposed," McCawley responded, "Correct.").

Class certification is invariably denied where 10% of class members are *uninjured.* The Circuit Court's order, however, flips this concept on its head,

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[6] Q. So the number that you are trying to reach is, as we kind of discussed before, what's the threshold at which someone could have inflammation?

A. Correct.

Q. Not the threshold at which a significant number of people would have --

A. Correct.

Q. -- inflammation?

A. Yeah, and that's the difference between the two.

App. 340, McCawley Dep. 94:15-23.

certifying a class of which only 10% of class members are even *possibly injured*. The presence of up to 51,300 potentially uninjured class members in this case — 90% of the class — is far beyond the outer limits of what can be considered *de minimis* for purposes of establishing predominance. *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) ("a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant").

Noting its obvious concerns in *Surnaik I*, this Court granted Plaintiff another bite at the apple. But Plaintiff has done nothing on remand to address this glaring issue — much less resolve it. Plaintiff produced no new evidence or expert testimony regarding the issue, nor did he even attempt to revise the class definition or boundaries to limit the number of uninjured class members. Instead, Plaintiff halfheartedly offers two alternative theories, each suffering from the same infirmities.

First, because Plaintiff cannot dispute Dr. McCawley's testimony — providing that as many as 90% of the class members are without injury — Plaintiff now argues that exposure to 3 μg/m3 of PM2.5 nonetheless "increase[d] the risk of injury." App. 35 at ¶ 72. But this new theory of harm cures nothing. In order to prevail on their negligence and nuisance claims, class members must prove an actual harm — not an "increased risk of injury." *See Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 95 (4th Cir. 2011) (providing that increased risk of harm from toxic exposure, standing alone, is insufficient to establish injury); *Letart v. Union Carbide Corp.*, 461

F. Supp. 3d 391 (S.D.W. Va. May 14, 2020) (same). Although plaintiffs may *sometimes* recover for future effects of a present injury that are reasonably certain to occur, Plaintiff does not make a claim for medical monitoring in this case. *See Letart*, 461 F. Supp. 3d at 396 (providing elements of medical monitoring claim). But even if "increased risk of injury" were a cognizable harm, it remains the case that only a small subset of the approximately 57,000-member class would have been subjected even to this "increased risk" of discomfort.

For example, Plaintiff suggests that exposure to 3 μg/m 3 of PM2.5 increased the risk of "discomfort in an *unknown* but much larger percentage of individuals." App. 35 at ¶ 72 (citing McCawley Dep. at 119-123) (emphasis added). But the cited portion of testimony was based on a hypothetical situation — not born out here — where 0.6% of an undefined population actually dies from PM2.5 exposure. App. 347 (McCawley Dep. 121:4-123:4). By Dr. McCawley's estimation, if exposure is so severe that 0.6% of an undefined population dies from PM2.5 exposure, then 10% of that same population might be at risk of feeling sick, and an additional 20% might be at risk of experiencing discomfort. *Id.* There is no evidence that a single member of the proposed class even sought medical treatment as a result of the fire, much less perished. Nonetheless, even if this hypothetical scenario could be applied to the putative class, only 20% of the undefined population would have been subjected to an increased risk of discomfort, which could mean that even *fewer* actually experienced some form of discomfort. Either way, the fact remains that an overwhelming majority

of the class is without an injury — whether actual or probable — and therefore cannot be certified.

Pivoting yet again, Plaintiff claims alternatively that class members were nonetheless exposed to 100 μg/m3 of something called Total Suspended Particulate ("TSP"), which Plaintiff claims to be a tangible and actionable invasion. App. 35 at ¶ 72. But Plaintiff has not presented any evidence that exposure to 100 μg/m3 of TSP caused injury to him or others. Mr. Auberle — the air dispersion modeler — opined that class members were exposed to 100 μg/m3 of TSP, but Dr. McCawley — the purported environmental health expert — did not opine whatsoever on the human impact from said exposure. That class members were exposed to 100 μg/m3 of TSP is not *ipso facto* evidence of injury. And without evidence that TSP exposure is capable of causing inflammation or irritation at those levels, Plaintiff's claims for negligence and nuisance cannot be premised on such exposure. A year after this Court decided *Surnaik I*, the fact remains that an overwhelming majority of the proposed class is without a cognizable injury and therefore cannot be certified.

II. Even if the overwhelming majority of class members *were* injured, certification is precluded because essential elements of Plaintiff's claims cannot be proven through common, class-wide proof.

This Court's predominance inquiry proceeds in three steps: "(1) identify the parties' claims and defenses and their respective elements; (2) determine whether these issues are common questions or individual questions by analyzing how each party will prove them at trial; and (3) determine whether the common questions predominate." *SER Surnaik*, 852 S.E.2d at 761 (cleaned up).

First, this Court must identify Plaintiff's claims and their respective elements. Plaintiff alleges two claims: negligence and nuisance. To state a claim for negligence, Plaintiff must establish duty, breach, causation, and injury. *See Wheeling Park Comm'n v. Dattoli*, 787 S.E.2d 546, 551 (2016). To state a claim for nuisance, Plaintiff must establish, among other elements, a substantial and unreasonable interference with the private use and enjoyment of another's land. *See Hendricks v. Stalnaker*, 380 S.E.2d 198, 200 (1989).

Whether it be negligence or nuisance, Plaintiff alleges that each member of the approximately 57,000-member class was injured in at least one of three ways: (i) interference with use and enjoyment of property; (ii) personal injury resulting from respiratory irritation or exacerbation of pre-existing conditions; or (iii) property damage resulting from soot, ash, or other particulate matter deposits. App. 21 at ¶ 45.

Next, this Court must determine whether Plaintiff's claims give rise to individual inquiries. The parties agree that the elements of duty and breach likely present common questions subject to generalized, class-wide proof. For example, allegations that Surnaik was negligent in failing to maintain the warehouse's sprinkler system can likely be proven on a class-wide basis through the same testimony and documentary evidence. Duty and breach, however, are only starting points.

To prevail on either of his claims, Plaintiff must also prove injury, which is a substantive element, and injury-in-fact, which is a constitutional prerequisite.[7] And unlike duty and breach, injury is not a common question subject to generalized, class-wide proof. Indeed, Plaintiff concedes this point — because he must.[8]

Again, the proposed class is defined to include all lawful possessors of real property located within one of the isopleths. Because these class boundaries were drawn using the threshold level of PM2.5 at which someone *could* experience inflammation or irritation — rather than the level at which someone *would* experience these symptoms — presence within an isopleth is not *ipso facto* evidence of injury. *Supra*, n.6. As Plaintiff's own expert explains it, class members invariably have differing sensibilities to PM2.5. And because class members necessarily have varying sensibilities to PM2.5, and were exposed to varying intensities, durations, and types of exposure depending on when and where they were exposed within the

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[7] Establishing the existence of a causal injury (i.e., liability) is distinct from quantifying the amount of injury (i.e., damages). Surnaik's analysis focuses on the former. But where the amount of damages varies by member, there must also be a mechanical or formulaic methodology to calculate individualized damages. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 133 S.Ct. 1426 (2013). Here, there is no mechanical or formulaic methodology for established the fact of injury or the amount of injury. And though individual damage calculations do not always preclude class certification, class certification is inappropriate where the existence of a causal injury cannot be established through common evidence on a class-wide basis. *See Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003).

[8] *See* App. 23 at ¶ 50 ("The Court concludes that issues related to damages—questions concerning the existence, degree, and severity of each of the three categories of damages, as well as the quantification of quantifiable special damages—are individual issues requiring individual proof."); App. 24 at ¶ 51 ("Common proof, in the form of a modeling effort to demonstrate the geographical areas of particulate matter contamination at various concentration of concern, and the degree to the particulate matter invaded those geographical areas, neighborhoods, and houses, may aid, but likely will not be dispositive of, the damages issue in any individual case if that case goes to trial.").

isopleth, each class member will have perceived the particulate matter differently — if at all.

Two of the alleged injuries — personal injury and loss of use and enjoyment of property — share a common denominator: each requires a perceptible irritation or discomfort. Whether a class member can prove either injury necessarily turns on individual questions of causation and injury, such as, whether he experienced a perceptible degree of irritation as a result of the fire; whether he was even at home when the fire occurred; and how the exposure infringed upon the use and enjoyment of his property, if at all. Because mere presence within one of the isopleths does not by that fact alone prove personal injury or interference with use and enjoyment of property, these injuries must otherwise be proven through individual testimony, medical records and receipts, and other documentary evidence.

Nor can the third alleged injury — physical property damage — be proven through generalized, class-wide evidence. This point is best illustrated by Plaintiff himself: he resided within one of the isopleths, yet, based on his own testimony, did not sustain any physical damage to property. App. 389 (Snider Dep. 154:24-155:13). Because mere presence within one of the isopleths does not by that fact alone prove property damage, injury must otherwise be proven through individual testimony, photos, and other documentary evidence. Establishing the substantive element of injury-in-fact will thus require individual inquiries — approximately 57,000 of them.

Lastly, this Court must determine whether these individual inquiries overwhelm the class vehicle. Because causation and injury cannot be proven by

common evidence on a class-wide basis, every member of the 57,000-member class would need to be reviewed on an individualized basis to see if they sustained any of the three alleged categories of damages and, if those injuries were proximately caused by the fire and, if so, to what extent. This would in essence partition the entire class into thousands of individualized actions, which would frustrate the goals of class treatment.

Plaintiff downplays the significance of this undertaking, suggesting instead that the Circuit Court could conduct "a series of mini-trials or bellwether-type trials, with the idea being that individuals who experienced similar levels and concentrations of particulate matter and smoke invasion should have had similar experiences and suffered similar inconveniences." App. 21 at ¶ 51. Practically speaking, that is pure fantasy; those cases would clog a circuit court's docket for a decade. But even then, the findings of these "mini-trials" would have no broader application to the class as a whole because, again, even individuals exposed to similar levels of particulate matter *did not* have similar experiences or suffer similar inconveniences.

Plaintiff also suggests that "the individual damages issue will involve, in most cases, little more than the testimony and skillful cross-examination of the claimants themselves as to the impact the event had on their lives." App. 27 at ¶ 58. Plaintiff glosses over the fact that there are approximately 57,000 class members who would have to provide lay and expert testimony and documentary evidence relating to their unique experiences.

In recognition of these very problems, federal courts invariably refuse to certify personal injury claims and other claims for which injury cannot be proven by common evidence on a class-wide basis. *See infra*, ARGUMENT III. And for those same reasons, this Court must likewise decline to certify Plaintiff's putative class, finding that individual issues will necessarily predominate over the single common question of negligence and frustrate the goals of class treatment.

In *Surnaik I*, the Circuit Court "neglected to take into account any potential issues with the personal injury claims." *SER Surnaik*, 852 S.E.2d at 763. It does so again here, failing to explain how the trial court will manage an overwhelming number of so-called "mini-trials" — in particular, 57,000 of them.

III. Federal courts invariably refuse to certify similar personal injury claims.

Plaintiff's case is precisely the type of "mass accident" personal injury tort case that the drafters of Federal Rule 23 identified as generally unsuited for class treatment:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Rules Advisory Committee Notes, 39 F.R.D. 69, 103 (1966); *see also* 7B C. Wright, A. Miller, & M. Kane Federal Practice and Procedure, § 1783, at 76 (1986) ("allowing a class action to be brought in a mass tort situation is clearly contrary to the intent of

the draftsmen of the rule"); H. Newberg, NEWBERG ON CLASS ACTIONS, § 17.11 (1992) ("The claims of the class representative [in a toxic tort suit involving personal injuries] are, by definition, not typical of those of class members in such cases with respect to individual issues of proximate cause and unique unliquidated damages, so the representative cannot adequately represent the class in litigating these individual issues"); *see, e.g., In re MTBE Products Liability Litigation*, 241 F.R.D. 435, 448 (S.D. N.Y. 2007) ("[P]roximate causation often cannot be resolved on a class-wide basis in the case of exposure to a chemical. Thus, class certification is often denied in [personal injury] cases.").

Consistent with the Advisory Committee Notes, many federal courts have recognized that class actions in cases such as this are inappropriate. The denial of class certification for mass tort cases, including those based on alleged environmental contamination, is usually based on a finding that individual issues will predominate.[9]

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[9] *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 241 F.R.D. 435, 449 (S.D.N.Y. 2007) (concluding that the disparities in the personal injuries, and the questions of whether the exposure caused such injuries, were too great to satisfy Rule 23(b)(3)'s predominance requirement); *Philip Morris Inc. v. Angeletti*, 358 Md. 689 (2000) ("A myriad of federal and state courts have shown a predominant, indeed almost unanimous reluctance to certify, or, in the case of appellate courts, to uphold the certification of class actions for mass tobacco litigation."); *In Re Three Mile Island Litigation*, 87 F.R.D. 433 (M.D.Pa.1980) (declining to certify a putative class where the class was one for personal injury and emotional distress because there would have to be an individual determination of proof for each plaintiffs' injury); *Reilly v. Gould, Inc.*, 965 F. Supp. 588, 601 (M.D. Pa. 1997) (emphasizing the unique need for individual proof in environmental toxic tort cases); *Boughton v. Cotter Corp.*, 65 F.3d 823 (10th Cir. 1995) (affirming trial court denial of class certification in an environmental tort case); *Hurd v. Monsanto Co.*, 164 F.R.D. 234 (S.D. Ind. 1995) (environmental tort and personal injury claims based on exposure to PCBs); *Thomas v. Fag Bearings Corp., Inc.*, 846 F. Supp. 1400 (D. Mo. 1994) (environmental tort claims); *McGuire v. International Paper Co.*, 1994 WL 261360 (S.D. Miss. Feb. 18, 1994) (environmental tort claims); *Dahlgren's Nursery, Inc. v. E.I. DuPont de Nemours and Co.*, 1994 WL 1251231 (S.D. Fla. Oct. 30, 1994) (agricultural chemicals products liability);

Like here, plaintiffs in such cases are usually dispersed both geographically and temporally (the time and duration of alleged exposure will vary) and have varying sensibilities to the alleged emissions. Courts have concluded that a class action is not well-suited for those cases in which no one set of operative facts will establish liability and no single proximate cause equally applies to each potential class member. *See, e.g., Mattoon*, 128 F.R.D. at 20-21 (D. Mass. 1989); *Burkhead v. Louisville Gas & Elec. Co.*, 250 F.R.D. 287, 299 (W.D. Ky. 2008) (finding class-wide proof of trespass and nuisance claims would necessarily require individual testimony as to each allegedly damaged class member, precluding certification of a class action); *Cochran v. Oxy Vinyls LP*, 2008 WL 4146383, at *12 (W.D. Ky. Sept. 2, 2008) (finding trespass and nuisance claims were not suited for class action treatment because evidence of causation was based upon highly individualized testimony).

For example, in *Puerto Rico v. the M/V Emily S.*, the district court considered whether to certify a class action for personal injuries allegedly caused by a fuel oil spill from a barge off the coast of Puerto Rico. 158 F.R.D. 9, 14 (D.P.R. 1994). While the oil spill was clearly a discrete event, the court nevertheless concluded that individual issues of injury in fact and causation would predominate at trial, and that the discrete incident did not provide sufficient common class-wide issues to justify class certification. *Id.* Thus, the disparate ways that a mass disaster affects

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Mattoon v. City of Pittsfield, 128 F.R.D. 17, 20 (D. Mass. 1989) (tort claims based on alleged water contamination).

individuals often lead to a conclusion that individual issues predominate when assessing personal injury.

Recognizing the problematic nature of mass toxic tort class certification, a federal district court in Kentucky recently stated that "[f]or complex, mass, toxic tort accidents, no single proximate cause can apply equally to each potential class member, causing individual issues to outnumber common issues. To resolve these controversies, the district court should question the appropriateness of a class action." *Modern Holdings, LLC v. Corning, Inc.*, 2018 WL 1546355 at *7 (E.D. Ky. Mar. 29, 2018).

In this case, the Circuit Court relied on *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988), reasoning that, "where the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy." However, the district court in *Modern Holdings* — itself bound to follow Sixth Circuit precedent — recently raised serious doubts about the continuing vitality of *Sterling*, explaining that

> [The Manual for Complex Litigation (Fourth)], for instance, specifically cautions class-action plaintiffs and courts against reliance on *Sterling v. Velsicol Chem. Corp.*, noting that the opinion "should be read with caution in light of subsequent rulings of the Supreme Court and courts of appeals." In lieu of reliance on cases like *Sterling*, the Manual strongly suggests that district courts analyzing whether a toxic tort is eligible for class action treatment should place their analysis within the parameters established by *Amchem Prods., Inc. v. Windsor*. Since *Amchem Prods., Inc.*, many district courts have refused to certify classes for mass tort claims because of dispersed

> personal injury or property damage. Reasoning varies, but the Manual specifically explains individual issues of exposure, causation, and/or damages can defeat predominance under Rule 23(b)(3), rendering class action trial unmanageable.

Modern Holdings, 2018 WL 1546355 at *14 (cleaned up).

Here, as in the cases cited above, no single or uniform proximate cause applies to each class member's alleged injury because the class members invariably have different sensibilities and are exposed to varying intensities, durations, and types of exposure depending on when and where they were exposed within the isopleth. *See supra*, ARGUMENT II. Thus, variations in exposure, and differences in the amount of exposure and the nexus between exposure and injury lead to different applications of legal rules, including matters of causation, injury, and affirmative defenses, such as comparative fault and assumption of risk,[10] which are applicable to each plaintiff.

Seeking to narrow the gap between federal and state jurisprudence, this Court previously instructed that West Virginia Rule of Civil Procedure 23 be interpreted in close conformity with its federal counterpart. *SER Surnaik Holdings*, 852 S.E.2d 748. The clear weight of federal authority counsel against certification in like cases.

Further, for these reasons, not only would individual issues predominate, but a class action is not a "superior" method for the fair and efficient adjudication of this controversy. *See* W. Va. R. Civ. P. 23(b) (requiring courts to consider whether "a class action is superior to other available methods for the fair and efficient adjudication of

[10] For example, Plaintiff testified that he and others *chose* to sit and watch the fire from their porches. App. 376, 386, Snider Dep. (p. 102-04, 142). They even memorialized the occasion by *moving closer to the fire* for pictures. App. 386, Snider Dep. (pp. 142-43).

the controversy"). Indeed, there is a clearly superior alternative: the West Virginia Mass Litigation Panel, which was created for this very reason. *See* W. Va. Trial Ct. R. 26 (defining "mass litigation" to include cases "involving common questions of law or fact in mass accidents or single catastrophic events in which a number of people are injured" and those "involving common questions of law or fact regarding harm or injury allegedly caused to numerous claimants by multiple defendants as a result of alleged nuisances or similar property damage causes of action"). This case fits comfortably within the definition of "mass litigation." Indeed, the preamble of Trial Court Rule 26 provides that the Mass Litigation Panel was created for the express purpose of "efficiently managing and resolving mass litigation." W. Va. Trial Ct. R. 26.01.

Plaintiff argues that filing fees and other costs associated with bringing individual actions would essentially close the courthouse doors to many of the claimants. But the amount of the civil filing fee is a policy decision made by this Court that applies in any case, and litigants are always forced to consider the economics of potential litigation, weighing the cost of suit against the potential recovery. There is no reason the Plaintiff in this case should be immune from the same economic realities. By requiring individual filing fees, *even in the context of mass litigation*, this Court presumably considered that filing fees would necessarily deter certain low-dollar claims. That these economic considerations may deter the lower value claims does not justify departure from Rule 23's requirements.

IV. The Circuit Court erred by certifying a class with members who are not readily identifiable by reference to objective criteria.

In addition to the explicit criteria of Rule 23(a) and (b), this Court has also recognized an implicit "ascertainability" requirement. Syl. Pt. 3, *State ex rel. Metro. Life Ins. Co. v. Starcher*, 196 W. Va. 519, 474 S.E.2d 186 (1996) ("It is imperative that the class be identified with sufficient specificity so that it is administratively feasible for the court to ascertain whether a particular individual is a member."). That is, to be certified, a class must satisfy the explicit requirements of Rule 23 and be sufficiently ascertainable so as to identify potential class members.

The ascertainability inquiry is two-fold, requiring a plaintiff to show that: (i) the class is readily identifiable with reference to objective criteria; and (ii) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.[11] A precise class definition is necessary to protect absent class members. *First*, an ascertainable class provides notice to potential members, thus allowing an opportunity to opt-out of the class. *Second*, defining a class is necessary to ensure that any damages award is properly allocated to class members at the conclusion of a case. *Third*, having an ascertainable class ensures that the proper individuals are bound by the judgment at the conclusion of a

[11] *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 358-59 (4th Cir. 2014); *Brecher v. Republic of Arg.*, 806 F.3d 22, 24 (2d Cir. 2015); *Karhu v. Vital Pharm. Inc.*, 621 F. App'x 945, 947 (11th Cir. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *Carrera v. Bayer Corp.*, 727 F.3d 300, 307-08 (3d Cir. 2013).

case. Like the other Rule 23 requirements, ascertainability can act as an independent bar to class certification.[12]

Here, class members are not readily identifiable with reference to objective criteria because the class definition is imprecisely defined to include vague categories of persons, such as all "lawful possessors" of real property that "conducted business operations" on the property. Surnaik is left to wonder who qualifies as a "lawful possessor," what constitutes "business operations," and how prospective class members will prove these qualifications on a class-wide basis. Further, given these vague criteria, Surnaik is also left to wonder how class counsel expects to actually identify these class members in order generate notice to absent class members that satisfies constitutional due process requirements. *See In re Veneman*, 309 F.3d 789 (D.C. Cir. 2002) (providing that due process requires that putative class members receive notice and an opportunity to opt out). Indeed, despite having had two chances, the Plaintiff has failed to concretely articulate any such plan. The passage of time will further frustrate the parties' abilities to identify and provide notice to those class members who lawfully possessed class-inclusive property in October 2017 — nearly four years ago.

For these reasons, the class is not sufficiently ascertainable and therefore should not be certified.

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[12] *See also Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 359 (3d Cir. 2013) (explaining that ascertainability and the Rule 23(b)(3) predominance requirement "remain separate prerequisites to class certification"); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 587 (3d Cir. 2012) (explaining that ascertainability is "an essential prerequisite of a class action")

V. Because Plaintiff cannot satisfy the typicality or standing requirements, class certification is inappropriate.

The typicality requirement serves an important purpose: to protect the claims of absent class members. The entire class is disserved if the class claims fail as a result of the representative's atypical situation. In addition to typicality, "a plaintiff must demonstrate standing for each claim he seeks to press" and "for each form of relief' that is sought. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (cleaned up). Likewise, because the class vehicle does not dispense with constitutional standing requirements, "even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong." *Id.* at n.6. (cleaned up). More precisely, where multiple claims are brought, at least one named plaintiff must have standing to pursue each claim alleged. *See, e.g., Wooden v. Bd. of Regents*, 247 F.3d 1262, 1208 (11th Cir. 2001) (holding that a claim cannot be asserted for a class "unless at least one named plaintiff has suffered the injury that gives rise to that claim"); *Griffin v. Dugger*, 823 F.2d 1476, 1483 (11th Cir. 1987); *Thomas v. JPMorgan Chase & Co.*, 811 F. Supp. 2d 781, 790 (S.D.N.Y. 2011).

First, Plaintiff's claims are not typical of the class, nor does he have standing to pursue them on behalf of a class. Plaintiff's Complaint alleges that class members suffered injury to real property as a result of Defendant's supposed negligence and nuisance. App. 97-109. In his deposition, however, Plaintiff conceded that he did not suffer any injury to property as a result of the fire. App. 389, Snider Dep. 153:5-155:13. For example, when presented with a picture of his home and asked to identify

any property damage, Plaintiff responded that, "I don't see any." *Id.* at 155:3. Similarly, when asked why he did not take any pictures of any soot, ash, or other particulate matter deposited on his house, Plaintiff responded that, "I didn't see any." *Id.* at 155:13.

Ultimately, if Plaintiff's property damage claims fail at trial, the other class members will be bound by that verdict. Thus, Plaintiff's concession that his property was not damaged undermines the claims of those individuals who may actually have sustained some. This is the very situation that the typicality requirement is meant to avoid. Because Plaintiff has not suffered any property damage (e.g., physical damage from fallout material), Plaintiff has no standing to pursue these claims on behalf of a class. Likewise, because Plaintiff has not suffered the same type of injury as the class (i.e., property damage), Plaintiff's claims are not typical of the class.

Plaintiff's claims are dissimilar to the class for yet another absolutely critical reason. The class is defined to include businesses and government entities.[13] But smoke exposure will necessarily affect people and businesses differently — for example, legal entities cannot experience inflammation, irritation, or annoyance. Plaintiff's claims are therefore atypical of these class members, as he is unable to testify as to injuries sustained by businesses and government entities. Indeed, the one injury business and government entities are most likely to have sustained —

[13] Plaintiff has failed to address whether he has authority or standing to represent governmental entities. Even more unclear is whether the Court has the authority to adjudicate the rights of Ohio governmental entities, which are necessarily included in Plaintiff's proposed class definition.

physical property damage as a result of fallout material — Plaintiff concedes he did not suffer.

Second, Plaintiff's nuisance claim is incompatible with Rule 23's numerosity and typicality requirements. West Virginia law recognizes to two types of nuisance: private and public. Likely aware that both claims present insurmountable hurdles, Plaintiff alleges "nuisance" generally. App. 102-03 at ¶¶ 31-32. But whether Plaintiff alleges a private or a public nuisance is of no matter, as both claims are incompatible with Rule 23's requirements.[14]

"A private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another's land." Syl. Pt. 2, *Bansbach v. Harbin*, 728 S.E.2d 533 (W. Va. 2012). Critically, a private nuisance "injures one person or a limited number of persons only." *Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348, 354 (W. Va. 1945). This is what distinguishes a private nuisance from a public nuisance. Based on this same distinction, the United States District Court for the Southern District of West Virginia dispensed with private nuisance claims in two other class actions arising from the same fire.[15] Because the plaintiffs alleged injury

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[14] This Court may test the legal sufficiency of Plaintiff's substantive claims. Because class determination generally involves considerations that are enmeshed in factual and legal issues comprising plaintiff's cause of action, analysis as to whether requirements for class certification are met will frequently overlap with merits of plaintiff's underlying claim. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013). In certifying a class, this Court must explain and apply the substantive law governing the plaintiff's claims to the relevant facts and defenses, articulating why the issues are fit for class-wide resolution. *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 546 (5th Cir. 2020).

[15] *See Barker v. Naik*, No. 17-04387, 2018 WL 3824376, at *3 (S.D.W. Va. Aug. 10, 2018); *Callihan v. Surnaik Holdings of WV, LLC*, No. 17-04386, 2018 WL 6313012, at *4 (S.D. W. Va. Dec. 3, 2018).

to broad swaths of the general public — rather than a single or limited number of persons — the district court correctly concluded that the claims were instead public nuisance claims.

Here, Plaintiff's private nuisance claim must suffer a similar fate. As in *Barker* and *Callihan*, Plaintiff purports to certify a class of approximately 57,000 individuals, businesses, and public entities in West Virginia and Ohio. App. 4 at ¶ 11. And because Plaintiff purports to represent large swaths of the general public — principally, the greater Parkersburg area — his private nuisance claim does not accord with the requirement that the injuries be limited to a single or limited number of persons. Because there can be no cause of action for private nuisance, and certification of a 57,000-member class is antithetical to the very concept of a private nuisance, Plaintiff's claim must be properly characterized as one for public nuisance.

A public nuisance arises from an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons." *Sharon Steel Corp. v. City of Fairmont*, 334 S.E.2d 616, 620 (W. Va. 1985). In other words, a public nuisance is an interference with land use and enjoyment that "affects the general public." *Id.* Generally, "a suit to abate a public nuisance cannot be maintained by an individual in his private capacity, as it is the duty of the proper public officials to vindicate the rights of the public." *Id.* Plaintiff is not a public official. There is, however, an exception to this general rule: an individual plaintiff has standing to pursue a public nuisance claim if he has suffered a "special" injury "different in kind from the public in general." *Hark*, 34 S.E.2d at 354. Herein lies the problem: the special injury

requirement for a public nuisance claim is necessarily antithetical to Rule 23's typicality requirement.

The "typicality" requirement of Rule 23(a)(3) requires that Plaintiff's claims be typical of the claims of the class, meaning that he possess the same interest and suffer the same injury as the class members he purports to represent. *See In re Rezulin Litig.*, 585 S.E.2d 52 at 68. However, by arguing that his claims are typical of the class, Plaintiff has also conceded that he has not suffered a "special" injury "different in kind from the public in general." *See Hark*, 34 S.E.2d at 354. For this reason, too, the Circuit Court erred in certifying the class.

VI. Plaintiff's class cannot be certified because he fails to identify a cognizable class injury.

Because Plaintiff's nuisance claim cannot be certified, he must fall back on his negligence claim. Plaintiff alleges that the migration of smoke into the air spaces of private property is actionable in negligence insofar as this invasion supposedly interfered with the use and enjoyment of that property. App. 34 at ¶ 71. It is this injury that, Plaintiff contends, "binds the class into a cohesive whole." App. 35 at ¶ 71. The problem with the Plaintiff's new theory is that "only tangible, rather than intangible, invasions are deemed to constitute an actual interference with property." *Rhodes v. E.I. du Pont de Nemours & Co.*, 657 F. Supp. 2d 751, 771 (S.D.W. Va. 2009) (cleaned up). And as the United States District Court for the Southern District of West Virginia held, *in dismissing two other class actions arising from the same fire,* the simple migration of smoke and fumes onto a plaintiff's property is *not* a tangible invasion giving rise to a claim for interference. *See Callihan v. Surnaik Holdings of*

WV, LLC, No. 17-04386, 2018 WL 6313012, at *4 (S.D. W. Va. Dec. 3, 2018); *Barker v. Naik*, No. 17-04387, 2018 WL 3824376, at *4 (S.D.W. Va. Aug. 10, 2018). Although the District Court's analysis was in the context of the plaintiffs' trespass claims, the analysis and result are the same here because Plaintiff's negligence claim is likewise premised on alleged interference with property.

Plaintiff places special emphasis on this Court's decision in *Harless v. Workman*, 114 S.E.2d 548 (W. Va. 1960), which he cites for the proposition that an invasion of airborne smoke, fumes, or dust that interferes with the use and enjoyment of property is actionable in negligence. App. 34 at ¶ 71. *Harless*, however, is immediately distinguishable because those plaintiffs sought to recover for actual and continuous physical damage to their property resulting from coal dust, which stands in stark contrast to this case where the named plaintiff concedes that he did not suffer any physical damage to property at all. App. 389, Snider Dep. 154:16-155:13. Plaintiff's reliance on *Rinehart v. Stanley Coal Co.*, 163 S.E. 766, 766 (W. Va. 1932) is distinguishable for identical reasons — the plaintiffs in *Rinehart* sought to recover for *physical damage* to property. App. 18 at ¶ 37. Because an intangible invasion of smoke does not constitute a cognizable class injury to person or property, Plaintiff's proposed class cannot be certified.

VII. Alternatively, this Court should conclude that the Circuit Court erred by denying Surnaik's motion under West Virginia Rule of Civil Procedure 12(b)(6).

Despite the foregoing, this Court need not even wade into Rule 23 in order to dispose of this case. Prior to class certification, Surnaik moved to dismiss the

Plaintiff's claims under Rule 12(b)(6). App. 52-73. By Order dated November 7, 2018, the Circuit Court denied Surnaik's motion.[16] App. 75-87. For the reasons that follow, this Court can reverse the Circuit Court's order and dismiss Plaintiff's negligence and nuisance claims.

In this context, the Circuit Court's denial of the motion to dismiss is independently sufficient to justify the issuance of a writ.[17] Notwithstanding that, because an order certifying a class is reviewable only by writ of prohibition, *Gaujot*, 829 S.E.2d 54, 61 n.12, then the interests of efficiency dictate that this Court should exercise its discretion to review the Circuit Court's related denial of the motion to dismiss at the same time.

As the United States District Court for the District of Southern West Virginia already concluded in identical cases arising from the same fire, Plaintiff's claims are legally insufficient. Plaintiff's public nuisance claim fails because (i) he does not have standing to abate a public nuisance and (ii) he fails to allege a special injury different

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[16] Subsequently, by agreed order, the parties stipulated that (i) Plaintiff was granted leave to file an amended complaint, (ii) Defendant was not required to file a new answer or motion to dismiss, and (iii) Defendant's prior answer and motion to dismiss were deemed to apply equally to the allegations in the amended complaint.

[17] In determining whether to entertain and issue a writ of prohibition, this Court will weigh the factors set forth in *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 21, 483 S.E.2d 12, 21 (1996). Those factors, as applied here, counsel in favor of review. Surnaik has no other adequate means, such as direct appeal, for the desired relief. Surnaik will otherwise have to wait until after a lengthy class action trial to obtain appellate review of Plaintiff's legally impermissible claims. And by that point, the damage will have been done. Moreover, the Circuit Court's conclusions of law are "clearly erroneous" as a matter of law. For the reasons explained by the United States District Court for the Southern District of West Virginia, which dismissed nearly identical claims arising from the same fire, Plaintiff's claims are legally deficient.

in kind from the general public. *See* ARGUMENT V. Because Plaintiff's nuisance claim is not viable, Plaintiff recasts the same claim as one in negligence. But Plaintiff's negligence claim also fails because an intangible invasion of smoke does not constitute a cognizable injury to person or property. *See* ARGUMENT VI.

Accordingly, the Circuit Court erred when it denied Surnaik's motion to dismiss.

CONCLUSION

For the foregoing reasons, this Court should grant Surnaik's petition for writ of prohibition and reverse the Circuit Court's order granting class certification.

SURNAIK HOLDINGS OF WV, LLC

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VERIFICATION

Undersigned counsel for Petitioner, in accordance with W. Va. Code § 53-1-1 and West Virginia Rule of Appellate Procedure 16(d)(9), hereby verifies that he is familiar with these proceedings, and that, upon information and belief, the Verified Petition and Appendix constitute a fair and correct statement of the proceedings in the underlying case.

Ryan McCune Donovan (WVSB #11660)

CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that on July 30, 2021, a true copy of the **Petition for Writ of Prohibition** and **Appendix** was served upon all parties of record via US Mail.

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