IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19 - 1006

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

Class action litigation often presents vexing legal issues and tough facts. This is not one of those cases. This case involves foundational principles and candid admissions that are easy to apply.

Perhaps the most fundamental requirement for class treatment is that common issues must predominate over individualized inquires. Yet that cannot be true here, where the Plaintiff's own expert conceded that as many as 90% of the class members are *without injury*. And if predominance is not the cornerstone of class certification, then typicality is. Yet here, the Circuit Court appointed Plaintiff Paul Snider to represent multiple classes of individuals, businesses, and government agencies asserting damages that Mr. Snider admits he did not suffer.

The result of the Plaintiff's cursory approach to certification is a class whose membership—again, by the Plaintiff's own admission—cannot be determined, *if at all*, until after the trial is underway. For these reasons and others discussed herein, Surnaik Holdings of WV, LLC ("Surnaik Holdings") is entitled to a writ of 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 *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. Because certain cases are particularly ill-suited for class treatment—in particular, toxic tort and mass accident cases in which no single proximate cause equally applies to each potential class member—Rule 23 requires courts to consider

whether a class action is superior to other methods for the fair and efficient adjudication. W. Va. R. Civ. P. 23. Is the West Virginia Mass Litigation Panel a more suitable forum for this alleged mass accident case? **Yes.**

3. Despite his admission that he did not sustain any property damage, Plaintiff Paul Snider was appointed to represent a class of individuals seeking to recover for property damage. Do the requirements of standing and typicality preclude Plaintiff from representing a class of which he is not a member? **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 can only be ascertained *after* Phase I of the trial, if at all? **Yes.**

5. A class action may only be certified if the trial court is satisfied, *after a thorough analysis*, that the prerequisites of Rule 23 have been satisfied. Is the Circuit Court's order granting class certification deficient for failure to conduct a thorough analysis of each applicable Rule 23 requirement? **Yes.**

STATEMENT OF THE CASE

On October 21, 2017, a warehouse in Parkersburg caught fire and burned until October 29, 2017. The cause of the fire is yet unknown. In a race to the courthouse, and before the flames were even extinguished, five separate class action cases were filed. Each of those cases—including this case—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 for

failure to allege a cognizable injury,[1] among other reasons, or were otherwise abandoned by the plaintiffs.[2] This case, which was remanded back to the Circuit Court of Wood County, is the only remaining class action.

Similar to the four dismissed cases, Plaintiff Paul Snider alleges claims for (i) negligence; (ii) reckless, willful, and wanton indifference motivated by financial gain; (iii) nuisance; and (iv) trespass. Plaintiff alleges that the fire emitted a plume of smoke—consisting of fine particulate matter and fumes—that adversely impacted the neighboring area. App. 22. As a result of this smoke exposure, Plaintiff alleges three types of harm: personal injury, property damage, and annoyance attributable to unpleasant smells. App. 22.

On April 30, 2019, Plaintiff moved to certify a class of individuals defined as follows:

> All lawful possessors—primarily owners and lessees—of real property located within one of the isopleths [3] . . . 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

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[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]).

[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).

[3] The isopleths are depicted on the maps attached as Exhibits 1-A, 1-B, and 1-C to the Circuit Court's Order Granting Class Certification. App. 144-46.

operations on the property within the isopleths.

App. 21.

On September 12, 2019, the Circuit Court entered Plaintiff's proposed order verbatim, granting Plaintiff's Motion for Class Certification and certifying Plaintiff's proposed class without modification. App. 130-46.

The class definition "is premised on the determination of the geographical areas . . . where concentrations of fine particles [PM2.5] emitted from the [warehouse] fire averaged three micrograms per cubic meter (ug/m3) or more over any 24-hour period following the fire." App. 22. These geographical areas are depicted on maps as "isopleths," which represent the proposed class boundaries. Thus, if an individual possesses real property situated within one of the isopleths, they are included in the proposed class and are presumed to have been exposed to a certain level of smoke—at least 3 ug/m3 of PM2.5.[4]

To establish these class boundaries, 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. 22. According to Plaintiff's own expert, 3 micrograms of PM2.5 per cubic meter is 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. App. 81. Next, Mr. William Auberle used "standard air dispersion modeling techniques" to draw "isopleths" on a map within which individuals would have been

[4] PM2.5 refers to atmospheric particulate matter (PM) that have a diameter of less than 2.5 micrometers.

exposed to PM2.5 at or above this threshold. App. 22. Last, Mr. Jerry Gilbert used census data to estimate the number of persons who reside within the isopleths—approximately 57,782 residents. App. 23. Notably, Plaintiff's experts did not offer any testimony or opinions regarding damage to property, nor were any experts disclosed for that purpose.

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, the certified class fails to satisfy Rule 23(b)'s predominance requirement. A class cannot be certified when a significant number of class members—much less an overwhelming majority—are uninjured. While a small number of uninjured class members will not necessarily preclude class certification, federal courts applying the analogous rule deny class certification where the number of uninjured class members exceeds *de minimis* levels. And for good reason: under such circumstances, common issues are necessarily overwhelmed by individual inquiries of injury and causation. This case should be treated no differently.

Here, Plaintiff's own expert testified that as many as 90% of the class members are unlikely to have experienced any symptoms (e.g., inflammation, irritation, or annoyance) from smoke exposure. The presence of up to 52,000 potentially uninjured class members in this case—90% of the class—is far beyond the outer limits of what can be considered *de minimis*. The Circuit Court will have to basically pick apart the class member by member, taking into consideration circumstances applicable only to

each individual. This in essence would partition the entire class into thousands of individual cases, frustrating the goals of class treatment.

Second, courts have concluded that certain cases are particularly ill-suited for class treatment—in particular, toxic tort and mass accident cases in which no single proximate cause equally applies to each potential class member. Class certification is generally denied in similar cases because they (as in the case here) typically involve individual questions of causation and damages that predominate over (and are more complex than) common class issues. Here, class members will invariably have different sensibilities and medical conditions and are exposed to varying intensities, durations, and types of exposure depending on when and where they were exposed. Cases such as this—that require particularized finding of causation and injury—cannot be proved through common evidence and are therefore not an appropriate subject for class resolution.

Third, the requirements of standing and typicality preclude Plaintiff Paul Snider 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 any property damage, 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), the typicality requirement is also unsatisfied.

Additionally, the class is defined to include businesses and government entities. Exposure to smoke will necessarily affect people and businesses differently—for example, legal entities cannot experience inflammation, irritation, or annoyance. Plaintiff's claims are atypical of these class members, as he is unable to testify as to injuries sustained by businesses and government entities.

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. Surnaik Holdings is left to wonder how it is reasonably expected to generate adequate notice to absent class members if, as the Circuit Court's trial plan acknowledges, class members will not be identifiable until *after Phase I of the trial.*

Fifth, the Circuit Court dispenses with certain Rule 23 requirements in short order, providing only brief, conclusory statements that Plaintiff satisfied his burden. This Court recently vacated a similar class certification order for failure to conduct a "thorough analysis." At a minimum, the Circuit Court's order is deficient because it did not include a "thorough analysis" explaining how Plaintiff satisfied the typicality and ascertainability requirements.

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 long held that "an order awarding class action standing is . . . reviewable, but only by writ of prohibition." *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 242 W. Va. 54, 829 S.E.2d 54, 61 n.12 (2019) (quoting, in part, Syl. Pt. 2, *McFoy v. Amerigas, Inc.*, 170 W. Va. 526, 295 S.E.2d 16 (1982)); *see also State ex rel. Mun. Water Works v. Swope*, No. 19-0404, 2019 WL 5301856, at *5 (W. Va. Oct. 18, 2019) (recognizing that "writs of prohibition offer a procedure . . . preferable to an appeal for challenging an improvident award of class standing").

Moreover, "[b]ecause the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules," this Court "give[s] substantial weight to federal cases . . . in determining the meaning and scope of our rules." *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Federal cases applying Rule 23 should be treated no differently.

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

Plaintiff moved to certify this matter as a class action under Rule 23(b)(3), which permits certification only if "the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members." W. Va. R. Civ. P. 23(b)(3). This "predominance" requirement

is more demanding than the commonality requirement of Rule 23(a): a plaintiff must show that common questions subject to generalized, class-wide proof outweigh any individual questions. *See In Re Rezulin Litig.*, 214 W.Va. at 71, 585 S.E.2d at 71; *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016).

In this case, individualized issues of injury and causation will overwhelm questions common to the class. Specifically, a class cannot be certified when a significant number of class members—much less an overwhelming majority—are uninjured. *See In re Asacol Antitrust Litig.*, 907 F.3d 42, 45 (1st Cir. 2018); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 627 (D.C. Cir. 2019); *Kleen Prods. v. Int'l Paper Co.*, 831 F.3d 919 (7th Cir. 2016). While a *de minimis* number of uninjured class members will not necessarily preclude class certification, Rule 23(b)(3) still requires that common questions *predominate* over individual inquiries.[5] Courts have recognized that when the number of uninjured class members exceed permissible limits, individual inquiries will overwhelm questions common to the class. *See id.* The problem is exacerbated when (as is the case here) the existence of injury and causation cannot be proven by common evidence on a class-wide basis.

Reported decisions addressing this issue indicate that no more than 5% to 6% of uninjured class members is acceptable to support class certification. *See, e.g., In re Lidoderm Antitrust Litig.*, 2017 WL 679367, at *12 (N.D. Cal. Feb. 21, 2017)

[5] 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.

(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). That is because when the number of uninjured members is small, identifying and removing uninjured members is likely to be a manageable process.

However, viewing the issue of uninjured class members through the prism of Rule 23(b)(3) predominance, courts will deny class certification when the number of uninjured class members exceed *de minimis* limits. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14 (D.D.C. 2017) (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) (concluding that a proposed class with approximately 5% uninjured class members combined with the "substantial likelihood" that more class members were also uninjured "indicates that the prevalence of uninjured class members is more than *de minimis*"); *In re Asacol Antitrust Litig.*, 907 F.3d at 45 (concluding that class certification was improper where 10% of class members were uninjured because individual inquiries would necessarily overwhelm common issues).

This rule stands to reason: when the number of uninjured class members exceeds a *de minimis* level, common issues are necessarily overwhelmed by individual

inquiries of injury and causation. Put another way, weeding out so many uninjured class members becomes an unfeasible task and any efficiencies gained through the class mechanism are lost.

Here, the certified class is fatally deficient because it includes a shocking number of uninjured individuals—up to 90% of the class. Plaintiff defines the proposed class as "[a]ll lawful possessors—primarily owners and lessees—of real property located within one [of] the isopleths" depicted on the class maps. App. 21. These isopleths represent the geographical class boundaries, which were drawn to include all residences having been exposed to at least 3 ug/m3 of PM2.5. According to Plaintiff's own expert, however, 3 ug/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. 82, McCawley Dep. (p. 103) (testifying that some people will not experience any

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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?

App. 81, McCawley Dep. (p. 94).

inflammation when exposed to 3 ug/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. 81, McCawley Dep. (pp. 94-95) (when asked if "it could be the case that only 10% of the people are exposed," McCawley responded, "Correct.").

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

Without a means of identifying these uninjured persons using common evidence on a class-wide basis, every class member would need to be reviewed on an individualized basis to see if they were adversely impacted by the smoke exposure. The Circuit Court (and the parties) will have to basically pick apart the class member by member, taking into consideration circumstances applicable only to that individual. This in essence would partition the entire class into individualized actions, which would frustrate the goals of class treatment. The Circuit Court's order ignores this issue entirely.

II. Mass accident and toxic tort cases like this one are inappropriate for class adjudication.

Courts have generally denied class certification in toxic tort and mass accident cases because they (as is the case here) typically involve individual questions of causation and damages that predominate over (and are more complex than) common class issues. 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.[7] Toxic tort claims almost always include allegations that plaintiffs or plaintiffs' property have been exposed and damaged by hazardous substances.

Like here, plaintiffs 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.*,

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

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 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 court in *Modern Holdings*—itself a district court bound to follow Sixth Circuit precedent—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. For example, Plaintiff testified that the smoke affected he and his wife differently—even though they resided in *the same house*. App. 94, Snider Dep. (p. 137). And Dr.

McCawley confirmed that it was not unusual that two people in the house would have varying experiences because all people have varying sensibilities. App. 82, McCawley Dep. (pp. 102-03).

If people living in the same house had disparate reactions to the smoke, it is reasonable to conclude that reactions and impacts would vary significantly across the 8.5-mile class radius. Moreover, Plaintiff testified that he and others chose to sit and watch the fire from their porches. App. 89, 95, Snider Dep. (p. 102-04, 142). They even memorialized the occasion by *moving closer to the fire* for pictures. App. 95, Snider Dep. (pp. 142-43). 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, damages, and affirmative defenses, such as comparative fault and assumption of risk, which are applicable to each plaintiff.

As evidenced by the Circuit Court's trial plan, there will be a single unitary trial to determine whether the warehouse was negligently maintained. App. 140-42. If the jury finds that Surnaik Holdings was negligent, the Circuit Court will conduct "a series of follow-on hearings" where "[i]ndividual plaintiffs would testify to their damages—annoyance and inconvenience, etc.—and experiences in the individual trials." App. 141-42. The Circuit Court's own trial plan thus demonstrates why cases such as this are particularly ill-suited for class resolution.

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 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.

III. Because Plaintiff concedes that he has not suffered any property damage, the requirements of standing and typicality preclude him from representing a class seeking that relief.

The "typicality" requirement demands that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Syl. pt. 12, *In re Rezulin Litig.*, 214 W.Va. 52, 585 S.E.2d 52. Simply put, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (providing that Rule 23 "effectively limits the class claims to those fairly encompassed by the named plaintiff's claims"). While the harm suffered by the representative "may

differ in degree" from that suffered by other members of the class, the harm suffered must be "*of the same type.*" *In Re Rezulin Litig.*, 214 W.Va. at 68, 585 S.E.2d at 68 (emphasis in original). This requirement serves an important purpose: 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). 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).

Plaintiff's Complaint alleges that he suffered injury to real property as a result of Surnaik Holding's supposed negligence, nuisance, and trespass. In his deposition, however, Plaintiff conceded that he did not suffer *any* injury to property as a result of the fire. App. 96-97, Snider Dep. (pp. 153-155). 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 pp. 154-55. 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 p. 155.

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, 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 reason. The class is defined to include businesses and government entities. 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 could incur—property damage as a result of fallout material—Plaintiff conceded he did not suffer.

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

In addition to the explicit requirements of Rule 23(a) and (b), courts have found an "ascertainability" requirement implicit within Rule 23. 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.[8] 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 case. Like the other Rule 23 requirements, ascertainability can act as an independent bar to class certification.[9]

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 Holdings is left to wonder who qualifies as a "lawful possessor," what constitutes "business operations," and how will prospective

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[8] *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).

[9] *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")

class members prove these qualifications on a class-wide basis. And given these vague criteria, Surnaik Holdings is also left to wonder how class counsel expects to 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, the Circuit Court's trial plan acknowledges that class members will not be identifiable until *after* Phase I of the trial, if at all.

Moreover, there is no administratively feasible method for identifying class members, as the process would be overburdened by extensive individual inquiry. Plaintiff's proposed trial plan, which the Circuit Court adopted verbatim, contemplates an initial unitary trial where a jury makes a negligence determination. App. 140. If the jury finds that Surnaik Holdings was negligent, the Circuit Court will conduct "a series of follow-on hearings" where "[i]ndividual plaintiffs would testify to their damages—annoyance and inconvenience, etc.—and experiences in the individual trials." App. 141-42. Indeed, the proposed trial plan acknowledges that class members are impossible to identify without extensive and individualized fact-finding or mini-trials and therefore administratively infeasible. For these reasons, the class is not sufficiently ascertainable and therefore should not be afforded class treatment.

V. At a minimum, because the Circuit Court failed to conduct a "thorough analysis" of the Rule 23 factors, the order granting class certification must be vacated.

The Circuit Court's order should be vacated for any or all of the foregoing reasons. However, at a minimum, the Circuit Court's order is deficient because it did

not conduct a "thorough analysis" explaining how Plaintiff satisfied the requirements of Rule 23—most notably, typicality and ascertainability. Indeed, this Court recently vacated a class certification order for failure to conduct a "thorough analysis," providing that

> A class action may only be certified if the trial court is satisfied, *after a thorough analysis*, that the prerequisites of Rule 23(a) of the West Virginia Rules of Civil Procedure have been satisfied. Further, the class certification order *should be detailed and specific* in showing the rule basis for the certification and the relevant facts supporting the legal conclusions.

State ex rel. Mun. Water Works, 2019 WL 5301856, at *8 (cleaned up) (emphasis in original). This Court also noted that "the text of the order or an incorporated opinion must include (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis." *Id.* Here, the Circuit Court dispensed with the Rule 23 requirements in short order, providing only brief, conclusory statements that Plaintiff satisfied his burden. App. 132-33.

For example, because Plaintiff was exposed to the same smoke and alleges the same "bases for compensation" as absent class members, the Circuit Court summarily concludes that his claims are "typical" of the absent class members alleging property damage. App. 132. The Circuit Court's order does not describe in any certain terms the legal and factual foundations supporting typicality. In fact, the Circuit Court does not even address the obvious infirmity with regard to typicality: Plaintiff

purports to represent individuals and businesses claiming property damage, despite his concession that he sustained no such injury.

Similarly, the Circuit Court's order addresses the ascertainability requirement only in passing, stating only that "[f]or purposes of 'ascertainability' at the class certification phrase—ensuring that putative class members who receive notice of the pending trial can determine whether they are in or out of the class and therefore whether or not they will be bound by the outcome of the trial have standing to object, need to file their own cases, etc.—the proposed methodology for identifying the class boundary and those businesses and individuals who work or live there suffices." App. 141. Again, the Circuit Court does not articulate how the parties will identify injured class members, other than to suggest they will be identified *later* at Phase II of the trial. The Circuit Court's order does not shed any additional light on the parameters of the class.

Even if the class if not decertified for any one of the reasons stated herein, at a minimum, the Circuit Court's order should be vacated for failure to provide a "thorough analysis" of the Rule 23 requirements.

CONCLUSION

For these reasons, this Court should grant Surnaik Holding'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)