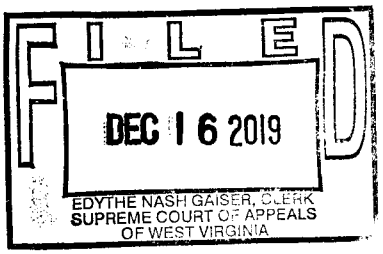
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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, and PAUL SNIDER, on behalf of himself and others,

Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

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INTRODUCTION

This is a class action seeking damages for exposure to smoke and particulate matter at a level 100 times less severe than one might experience when reading a book by a fireplace, and 10,000 times less than burning a piece of chicken on the stove. App. 169-70. At that level, Plaintiff/Respondent Paul Snider's own expert estimates that up to 90% of the proposed class did not experience a perceptible degree of irritation as a result of a fire at Defendant/Petitioner Surnaik Holdings's warehouse. App. 81. Plaintiff's brief is thirty-eight pages long, but he could not in a thousand pages dispute this basic fact. For that reason, and others discussed briefly herein, the Court should grant the *Petition for Writ of Prohibition* and reverse the Circuit Court's order granting class certification.

ARGUMENT

I. Plaintiff's shift to a property-damage theory does not change the fact that 90% of the class is uninjured.

Surnaik Holdings contends that the Circuit Court erred by certifying a class in which, by Plaintiff's own admission, up to 90% of the members were unlikely to even perceive any irritation as a result of the fire. In a bid to salvage his case, Plaintiff counters by abandoning his claims for personal injury and contending that it is now the "invasion of property by smoke" that "binds the class and keeps it cohesive." Resp. 9. As a result, Plaintiff claims that "[Surnaik Holdings's] arguments about the permissible and impermissible percentages of uninjured class members do not apply" because it does not matter whether the class members actually perceived any irritation. *Id.*

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).[1]

If 90% of class members' exposure to the smoke was so insignificant that it cannot form the basis of a personal injury claim, nor can it amount to an actionable interference with the use and enjoyment of a class members' property. Thus, regardless of whether Plaintiff chooses to call this a personal injury case or property case (and even if he continues to switch back and forth), the fact remains that the class contains an impermissible number of uninjured individuals.

[1] Plaintiff places special emphasis on this Court's decision in *Harless v. Workman*, 145 W.Va. 266, 114 S.E.2d 548 (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. Resp. 10. *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. 96-97, Snider Dep. (pp. 153-155).

II. Plaintiff's shift to a property-damage theory does not change the fact that this case presents individualized issues that should preclude class certification.

Surnaik Holdings has cited a long line of cases for the proposition that mass accident and toxic tort cases like this are inappropriate for class adjudication because individualized issues relating to causation and damages overwhelm. In his brief, Plaintiff retorts that "single episode or single accident" cases are in fact particularly well-suited for class treatment. The cases cited by Plaintiff lend no support to his position, however, because each case shares at least two similarities: (1) unlike here, those plaintiffs sought damages that could be established on a class-wide basis; and (2) those courts refused to certify claims that, as here, required individualized proof of injury.

For example, Plaintiff relies on *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003), wherein the court certified a class of nearby homeowners suing a factory owner for soil and groundwater contamination from a leaking storage tank. But *Mejdrech* is easily distinguishable from this case. *First,* the proposed class in *Mejdrech* (approx. 1,000 properties) was significantly smaller than the class here (57,000 residents), making any individual inquiries more administratively feasible. And *second,* the class in *Mejdrech* disclaimed all personal injury, whereas here even the property claims require proof that the class member personally perceived the alleged invasion of smoke. *Mejdrech v. Met-Coil Sys. Corp.*, No. 01 C 6107, 2002 WL 1838141, *4 (N.D. Ill. Aug. 12, 2002). Causation and damages in *Mejdrech* could be established on a class-wide basis by simply determining whether the property

overlapped the area of contamination. If so, the property was deemed contaminated. In this case, on the other hand, Plaintiff's own expert has conceded that simply being within the class radius does not mean a class member or his property was injured. These distinctions compel a different result.

Plaintiff also cites *MTBE Products Liability Litigation*, 241 F.R.D. 435 (S.D.N.Y. 2007), a case arising out of a sudden release of petroleum from a pipeline break. There, the court certified property damage classes but declined to certify a personal injury class. The court reasoned that each member of the class would, as here, need to show that their injuries were proximately caused by exposure, and the disparities in the personal injuries were too great to satisfy Rule 23(b)(3)'s predominance requirement. *Id.* at 449. The Circuit Court below should have done the same.

In *Good v. Am. Water Works Co.*, Judge Copenhaver certified an issues class under Fed. R. Civ. P. 23(c)(4) for certain questions of fault and comparative fault. 310 F.R.D. 274, 299 (S.D.W. Va. 2015). The court noted that "courts have denied certification when individual damage issues are especially complex or burdensome." Nonetheless, the court certified the class because every member was exposed to the same risk of harm. In this case, however, individual exposure and injury are highly variable.

Plaintiff also cites *Crutchfield v. Sewerage & Water Bd. of New Orleans*, 829 F.3d 370 (5th Cir. 2016) for the proposition that class certification is appropriate in single-defendant, single-episode cases. Resp. 19. There, property owners brought a

class action alleging that construction of a flood-prevention culvert damaged and stigmatized their property and caused them mental anguish and emotional distress. *Id.* But the court declined to certify *any* class because individualized proof of causation and injury would predominate over common questions. *Id.* at 377-78. Plaintiff also cites *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112 (E.D. La. 2013) for the same proposition, but because that case involved a settlement-only certification, "trial manageability [was] not a necessary determination" at all. *Id.* at 143.

Plaintiff makes only passing mention of *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010), which certified a property-damage class and a medical-monitoring class. There, again, the plaintiffs specifically disclaimed damages for personal injuries. *Id.* at 501, 694 S.E.2d at 834. And there, again, plaintiffs' claims for medical monitoring and property contamination were susceptible to common, class-wide proof of causation and injury. Otherwise, the opinion in *Perrine* does not discuss predominance in any great detail.

After a review of these cases, the key takeaway is this: courts rarely certify personal injury classes because individual inquiries necessarily predominate over common questions. Because Plaintiff's property claims in this case also require individualized proof that class members experienced a perceptible invasion of smoke, Plaintiff's property damage claims present the same procedural and administrative hurdles that preclude class treatment for personal injury claims.

II. Plaintiff's concession that he has not suffered any physical property damage definitively precludes him from representing a class seeking such relief.

Plaintiff maintains that his claims are typical of the class because he suffered "property damage" and so did others. But not all property damage is the same. Plaintiff claims that he suffered an interference with the enjoyment of his property caused by smoke from Surnaik Holdings's warehouse. But others, at least according to Plaintiff's complaint, seek damages for actual, physical damage to their homes. App. 1-11. Since Plaintiff concedes,[2] however, that he sustained no physical property damage, he cannot represent those who may have.

By requiring sufficiently parallel interests, typicality ensures a vigorous and full representation of all potential claims. *Id.* Otherwise, conflicts abound. For example, in order to bolster his own claims, Plaintiff asks in his brief, "[w]hat evidence has Surnaik offered that others in the class even had visible ash deposits on surfaces following the fire, other than Mr. Snider's own allegations in his complaint?" Resp. 31. This remarkable statement, seemingly undermining the allegations in the Complaint, highlights the very reason the typicality requirement exists. For the sake of his own claim, Plaintiff has conceded away the valuable claims of untold absent class members.

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[2] Plaintiff complains that Snider's deposition transcript was not reproduced, in full, in the appendix. This comes as a surprise, given that neither Plaintiff's motion for class certification nor its reply in support thereof relied on any portion of that testimony. Nonetheless, in order to accommodate Plaintiff's request, Surnaik Holdings supplemented the appendix to include the entirety of Snider's deposition transcript. Unfortunately, this has not stopped Plaintiff from accusing Surnaik Holdings of acting in bad faith. Resp. 30.

IV. The "common answers" approach adopted in *Gaujot* is only part of the required analysis.

Plaintiff suggests that, under this Court's recent opinion in *Gaujot*, the only question relevant to certification is whether class treatment would generate common answers to common questions. *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (2019) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)). Plaintiff, however, identifies just one such common question: whether Surnaik Holdings's fire suppression system was negligently maintained. The answer to this question is but the beginning of the case, and is dwarfed by questions of individual causation and injury, such as, whether any particular class member was even at home when the fire occurred; whether he experienced a perceptible degree of irritation as a result of the fire; and whether and to what extent the class member's pre-existing medical condition may have impacted his response to the smoke.

Thus, the mere existence of one "common answer" may be enough to satisfy the commonality requirement of Rule 23(a)(2), but falls far short of what is demanded by Rule 23(b)(3): that questions of law common to the class must "predominate" over questions affecting individual class members. In this case, the Circuit Court's own trial plan—which calls for thousands of mini-trials on damages following a jury verdict on Plaintiff's "common question" of liability (App. 140-42)—aptly illustrates that such individualized inquiries will predominate here.

CONCLUSION

For these reasons, and the reasons set forth more fully in the *Petition for Writ of Prohibition*, this Court should grant Surnaik Holdings's Petition and reverse the Circuit Court's order granting class certification.

SURNAIK HOLDINGS OF WV, LLC

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