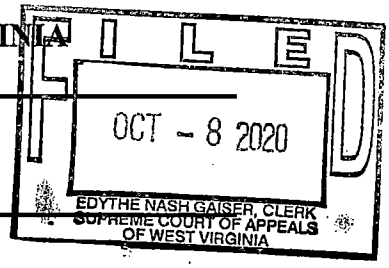
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0676



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STATE OF WEST VIRGINIA *ex rel.* WEST VIRGINIA-AMERICAN WATER COMPANY,

Petitioner,

v.

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THE HONORABLE CARRIE L. WEBSTER; RICHARD JEFFRIES; and COLOURS BEAUTY SALON, LLC,

Respondents.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

The following questions are taken verbatim from the Petition for Writ of Prohibition presented by West Virginia-American Water ("WVAW"), and presented here in accordance with West Virginia Rule of Appellate Procedure 16(g).

1. Did the Circuit Court misapply this Court's guidance in *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (2019), and commit a clear error of law in finding commonality under W. Va. R. Civ. P. 23(a)(2) where (a) liability under the statute and regulations on which Plaintiffs base their claims cannot be determined without consideration of individual water service impact and (b) water service impact cannot be determined on a class-wide basis?

Respondents' Answer:

No. The commonality element of West Virginia Rule of Civil Procedure ("W. Va. R. Civ. P.") 23(a)(2) is easily met in this case. Liability under the statute and regulations on which Respondents base their claims can be determined without consideration of individual water service impact. There are multiplies common issues of law and fact that bind Respondents and the members of the Class.

2. Did the Circuit Court commit a clear error of law when it found typicality under W. Va. R. Civ. P. 23(a)(3) despite the admitted differences in potential water service impact between the named plaintiffs and other class members?

Respondents' Answer:

No. The typicality element of Rule 23(a)(3) is satisfied in this case. Whatever differences in impact did exist among class members does not adversely affect the typicality of Respondents' claims.

3. Did the Circuit Court commit a clear error of law when it certified a liability issue class under W. Va. R. Civ. P. 23(c)(4) without requiring Plaintiffs to demonstrate satisfaction of predominance and superiority under W. Va. R. Civ. P. 23(b)(3) and without clearly identifying the "issue" and standards it applied?

Respondents' Answer:

No. These are false characterizations about the Circuit Court's class certification Order, where findings with regard to Rule 23(b)(3)'s factors of predominance and superiority were clearly addressed. The issue to be tried on a class-wide basis (Petitioner's fault or liability to the Class) is "clearly identified." Petitioner has overstated the scope and breadth of questions that will need to be answered to successfully complete the class-wide (liability) phase of trial.

4. Did the Circuit Court commit a clear error of law in finding predominance under W. Va. R. Civ. P. 23(b)(3) without identifying all of the individualized duty, breach/injury, and causation issues related to water service impact that are inextricably intertwined with any determination of liability or fault and would predominate over the issues to be addressed on a class-wide basis?

Respondents' Answer:

No. The relevant specifics related to water service impact on a class member by class member basis are not "inextricably intertwined" with the issues to be addressed in the class-wide, liability phase of trial.

5. Did the Circuit Court commit a clear error of law in finding superiority when resolution of the liability issues certified will not dispose of the issue of liability or, as conceded by Plaintiff, eliminate the need for individual trials for each class member?

Respondents' Answer:

No. A class action is the superior method of resolving the case and Petitioner's assertions are false and misleading.

6. Did the Circuit Court commit a clear error of law in defining a class that was broader than the court evaluated for ascertainability and by not articulating an administratively feasible method for identifying and providing notice to non-customer class members?

Respondents' Answer:

No. None of these things are true. There are no non-customer members of the Class. The certified class was not broader than contemplated by the Circuit Court's analysis.

II. STATEMENT OF THE CASE

The facts in this case can be summarized as follows. West Virginia-American Water ("Petitioner" or "WVAW") is a for-profit water company that provides potable water to residents living in the Charleston, West Virginia area, including Kanawha County and several surrounding counties. Respondents/Plaintiffs and the members of the Class they represent are WVAW customers, including household residents and businesses.

In Dunbar, West Virginia, in late June 2015, there was a significant main break that resulted in a massive failure in the transmission and distribution system owned and operated by Petitioner. The main break and resulting system failures affected approximately 120,000 customers in the western portion of Petitioner's Kanawha Valley District, including Respondents and the Class. On their own behalf and on behalf of the Class, Respondents allege that these failures occurred as the direct result of WVAW's lack of due care, as well as its violation of its statutory obligations enacted under West Virginia law.

Respondents, on their own behalf and on behalf of the Class, have alleged that the system failure was widespread because the entire Class was singularly dependent on the continuing and undisturbed operation of *one single* large-diameter, 36-inch prestressed concrete cylinder pipe ("PCCP"). The PCCP that failed, as Respondents have alleged and intend to prove, is known to Petitioner to be unreliable and extremely susceptible to failure. Indeed, the water main in question has many instances of failure dating back to the 1980s – more than thirty years of repeated, known failures. Petitioner knew that any failure of this main would leave as many as 25,000 customers without water, and also knew that the situation was unacceptable from an industry standards perspective.

As mentioned above, Respondents and the certified Class they represent are customers of WVAW who live or operate businesses in the area serviced by the water main that broke and the transmission and distribution system that failed. Plaintiff/Respondent Richard Jeffries is a resident of Putnam County, West Virginia, who suffered such low water pressure during the incident that he could not do laundry and was forced to go to a relative's house to shower. He also had to purchase cases of replacement water. Plaintiff/Respondent Colours Beauty Salon, LLC ("Colours"), is a salon with its principal place of business in Kanawha County, West Virginia. As established in the record below, the owner of Colours, Ms. Carolyn L. Burdette, suffered out-of-pocket costs of buying replacement water and was forced to shut down her business for approximately six to eight days, resulting in substantial lost profits because the business had a completely booked appointment calendar. Together, Respondents alleged in their Complaint filed in the Circuit Court that Petitioner violated its statutory duties to its customers, and could have prevented or avoided the main breakage and resulting harm to affected customers by acting with reasonable care and with better precautionary measures – and by using adequate infrastructure reinforcements to allow for redundancy in compliance with industry standards and water rules and regulations promulgated by the Public Service Commission of West Virginia ("PSC").

On July 14, 2020, the Circuit Court certified an "issues" class pursuant to W. Va. R. Civ. P. 23(c)(4). The Circuit Court defined the Class as all WVAW customers, residents and businesses located within the boundaries of the service area served by the 36-inch water main that broke. See the Circuit Court's Memorandum Opinion and Order dated July 14, 2020 ("Class Cert. Order" or "Order") (App. at 4). Pursuant to Rule 23(c)(4), the Circuit Court held that the action be certified and maintained as a class action on particular issues regarding "the overarching issues of whether [WVAW] is liable for breach of contract and negligence, and for actionable violation of its

statutory duties under the West Virginia Code." App. at 14. The Circuit Court appointed Mr. Jeffries and Colours to serve as class representatives and appointed the undersigned attorneys as Lead Counsel for the Class.

III. SUMMARY OF ARGUMENT

Petitioner has failed to satisfy the standards for issuance of a Writ of Prohibition. The Circuit Court did not err as a matter of law in its analysis under Rule 23 of the West Virginia Rules of Civil Procedure. The Circuit Court's Class Certification Order was detailed and specific in showing the basis for class certification and the relevant facts supporting its Conclusions of Law. The Circuit Court's rigorous analysis carefully addressed all of the applicable parameters of Rule 23 and all class certification issues raised by the parties below.

The Circuit Court did not make a clear error of law by finding that the commonality and typicality elements of Rule 23(a) were met. The Circuit Court's Order sets forth that there were numerous common issues of fact and law including, importantly, the fact of the water main break itself. The Court further found that the legal questions raised by Respondents' allegations, which focused on theories of liability, applied equally to all members of the Class. Further, the Order also fully explains why Respondents brought claims typical to the claims of the other members of the Class, as their claims had all the same essential characteristics of the class members' claims, relied on the same key evidence, and were based upon the same behavior by Petitioner directed toward the Class as a whole. The fact that potential differences in damages exist among Class members – or even that some members of the Class may have experienced no damages at all – do not defeat typicality or prevent the certification of a Class. *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003) (affirming district court's decision to certify class even though "not only the amount but the fact of damage might vary from class member to member").

The Circuit Court did not make a clear error or law by certifying an issues class pursuant to W. Va. R. Civ. P. 23(c)(4). By certifying the issues class, the Circuit Court exercised its discretion to isolate for trial the overarching issues of whether Petitioner is liable for breach of

contract and for negligence, and for actionable violation of their statutory duties, streamlining the questions remaining to be adjudicated in accordance with a trial plan common to numerous cases arising out of single event man-made disasters. The Circuit Court materially advanced the litigation by taking advantage of the efficiencies inherent in the class action device, thus providing Respondents and the members of the Class with their day in court.

Nearly all of the arguments in the Petition have a common theme – WVAW maintains again and again that differences in water service impact among the class members is fatal to certification. But the Circuit Court correctly concluded that these differences do not bear on the common issues of fault, they do not cause individual issues to predominate the case, nor do they negate the fact that a class action is the superior means for resolving this dispute. The Circuit Court also correctly noted that the relevant liability evidence in the case in no way depended on a showing of damages on an individual basis, and in no way required an examination of what happened during the event to individual customers.

Thus, as the case is tried, if Respondents cannot prove Petitioner's liability on a class-wide basis, the case ends and Petitioner wins a class-wide liability shield. On the other hand, if Respondents succeed in showing Petitioner's fault for the main break and system outage, Respondents and others like them may proceed to a later phase of trial in order to efficiently introduce proof of the damages they may have suffered, including lost water, substantial annoyance and inconvenience, and any out-of-pocket expenses or lost profits. This procedure saves Petitioner from defending its conduct in thousands of individual cases and the real danger of inconsistent verdicts, while allowing Petitioner to contest individual damage showings. This is a widely-recognized and proper methodology for the trial of the issues certified for class treatment and eventually the case as a whole. *See In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d

599 (7th Cir. 2014) ("it is not hard to frame liability issues suited to class-wide resolution" and there is "wisdom" in subsequently using "buyer-specific hearings" on damages when such remedies match theory of liability).

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents submit that the instant Petition may be resolved and disposed of without oral argument.

V. ARGUMENT

1. Jurisdiction and Standard of Review.

This Court has held that a writ of prohibition "is an extraordinary remedy to be utilized in extremely limited instances." *State ex rel. Vanderra Resources, LLC v. Hummel*, 242 W. Va. 35, 45 n. 34, 829 S.E.2d 35 (2019). It simply is not an opportunity for routine interlocutory appeal. In regard to jurisdiction over a Petition for Writ of Prohibition, this Court has held:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

State ex rel. Chemtall, Inc. v. Madden, 216 W. Va. 443, 607 S.E.2d 772 (2004).

Petitioner gives only lip service to any factor other than the third one. The Petition is unmistakably premised upon a plea that the Circuit Court's ruling should be found to be clearly erroneous as a matter of law, warranting grant of the Writ.

In determining that third factor, this Court employs a *de novo* standard of review with respect to purely legal issues. *State ex rel. Nelson v. Frye*, 221 W. Va. 391, 394, 655 S.E.2d 137 (2007). This Court will use the writ of prohibition only to correct "substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high

probability that the trial will be completely reversed if the error is not corrected in advance." *Id.*, 221 W. Va. at 394, 655 S.E.2d at 141. The prohibition "does not lie to correct mere errors and cannot be allowed to usurp the functions of appeal, writ of error, or certiorari." *Handley v. Cook*, 162 W. Va. 629, 631, 252 S.E.2d 147, 148 (1979).

2. The Circuit Court Did Not Commit a Clear Error of Law By Determining that Common Questions of Law or Fact Exist.

As this Court has recognized, the threshold of commonality is not high and requires only that the resolution of common questions affect all or a substantial number of the class members. *Rezulin*, 214 W. Va. at 57, 585 S.E.2d at 57. Moreover, even a single common question will suffice, if of such a nature that its determination "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*; *see also Gaujot*, *supra* at syl. pt. 3. Here, there are numerous central common issues of law and fact.

Multiple common issues relate to and affect the rights of all members of the Class. First, the Circuit Court proceedings will determine whether WVAW is liable for breach of contract for violating its duty to supply water or for having failed to maintain its facilities in such condition so as to provide an adequate and continuous water service. The proceedings will also resolve common issues of whether WVAW is liable under the West Virginia statutory requirement (giving rise to a cause of action) to "maintain adequate and suitable facilities," W. Va. Code §24-3-1, and reach a conclusion on whether WVAW is liable for failing to exercise reasonable care.

In contesting this prerequisite, Petitioner complains that the Circuit Court did not accept and adopt their position that the fault analysis requires examination of individual impact. *See, e.g.*, Petition at 17-18, 20. Even if Petitioner's position were correct, this does not suggest a clear error of law – indeed, this is the kind of discretion over interpretations and findings based on the factual record that the Circuit Court enjoys. Moreover, these arguments – indeed, all of the

"commonality" arguments presented in the Petition – are simply predominance arguments under W. Va. R. Civ. P. 23(b)(3) in disguise. For example, Petitioner maintains that the Circuit Court committed a substantial and clear-cut legal error by not agreeing with Petitioner that "determining impacts" would supposedly "require a separate trial for each class member." Petition at 15. And Petitioner argues that Respondents cannot prove liability "without inquiry into individual water service impact that cannot be demonstrated on a classwide basis." *Id.* at 21. This is simply not correct. Just as a jury can determine whether a driver was at fault for running a red light (a breach of duty of due care whether or not it results in an accident) without determining the severity of the injuries suffered by the passengers in the other car, so too in this case can a jury determine whether WVAW failed to take adequate precautions against the likelihood of a major main break.

As the Circuit Court concluded based on the record evidence, here, whether or not WVAW failed in the essence of its contractual duties under its water services contract – to maintain adequate facilities – and whether or not WVAW failed to comply with its statutory obligations with respect to how it maintains its facilities, is not changed by differences in service impacts that particular customers suffered. The class as a whole need only raise "at least one" common question of law or fact to meet the commonality requirement, which is "easily met in most cases." *Perrine*, 225 W. Va. at 523, 694 S.E.2d at 856.

Here, the essential, most important fact common to all members of the Class is the main break itself – what happened, how it happened, why it happened, and what could have been done in advance to prevent it. All members of the Class experienced at least the adverse consequence of having to adhere to a boil water advisory, and most suffered some loss in the quality of water service. App. at 487–88. While some Class members inevitably had it worse than others as the result of the pipe break, all customers who suffered even so much as a boil water advisory

experienced a significant disruption in normal service sufficient to support the claims brought herein.[1] A boil water advisory was in effect for all Class members. The Circuit Court did not err in finding that these common issues would routinely bind the Class and be capable of class-wide resolution.

The fact that individual class members may have suffered different consequences from having lost water supply resulting from Defendant's conduct – whether a complete service interruption, or a decrease in pressure making normal activities such as showering impossible, or having to boil water during the period of WVAW's advisory – simply does not change the commonality inquiry. *United Broth. of Carpenters and Joiners of America, Local 899 v. Phoenix Assoc., Inc.*, 152 F.R.D. 518, 522 (S.D. W. Va. 1994) ("The fact that the individual class plaintiffs may have suffered differently from the alleged breach is immaterial for purposes of this prerequisite"); *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 136 (E.D. La. 2013) (variation in harms resulting from a single class-wide incident "does not defeat the commonality inquiry"). The threshold to satisfy the commonality element is not high and it is easily surpassed in this case. The Circuit Court's commonality finding was not plainly in contravention of any clear-cut Rule 23 mandate and thus Petitioner's commonality arguments must be soundly rejected.

3. The Circuit Court Did Not Commit a Clear Error of Law By Determining that Respondents' Claims are Typical of the Claims of the Class.

[1] Petitioner argues that the PSC water rules "specifically recognize a range of acceptable pressure fluctuations." Petition at 20. That this range does not apply to the instant facts is evident from Petitioner's issuance of a boil water advisory, which is an unusual event and serious inconvenience not contemplated by the normal pressure range regulations. In any event, the issue of whether the rules on limits on acceptable variance from standard water pressure during normal operating conditions even applies under the circumstances – since it presupposes regularity of service and only applies to service areas that regularly experience pressure fluctuations – is a common, class-wide issue. Further, if the rule does apply, the issue of whether it serves as a common defense that Petitioner can assert against all members of the Class is yet another common, class-wide issue.

This Court has held that the typicality requirement of W. Va. R. Civ. P. 23(a)(3) requires only that Respondents' claims here be *typical* of the Class they were appointed to represent, not that their claims necessarily be *identical* to the absent members of the Class. *See Rezulin*, 214 W. Va. at 68, 585 S.E.2d at 68. The typicality requirement tests whether Respondents have "sufficiently parallel" interests to the rest of the Class. *Id.*

Here there is no question that Respondents' claims are sufficiently parallel to satisfy the Rule. Petitioner makes no serious challenge to typicality. *See* Petition at 21. Again, Petitioner echoes its predominance arguments asserted elsewhere – that customers within the Class area had substantially different outcomes, the individual examination of which would unduly dominate the resolution of the claims.

This Court has made it clear that the threshold for typicality is a low one. *See Swiger v. United Valley Ins. Co.*, 2016 WL 3383264 at *4 (W. Va. Jun. 17, 2016) ("the threshold requirement of typicality is not high") (quoting *Brown v. Nucor Corp.*, 576 F.3d 149, 153 (4th Cir. 2009). Here, Respondents' claims arise out of the same legal theory as the rest of the Class, and will be based upon the same proofs. In *Rezulin*, this Court found the typicality element satisfied where, as here, the defendant's alleged wrongdoing was directed toward the members of the class as a whole, and not toward individual members of the class. *Rezulin*, 214 W. Va. at 68, 585 S.E.2d at 68. Indeed, the claims here will focus on the *same conduct* by WVAW toward all members of the Class – including its indifference to the risks to which it internally acknowledged customers were exposed. This break was the latest example of known and expected failures of this type of pipe for the company, and this main in particular had been known to fail numerous times in the past 30 years.

WVAW's knowledge of these past failures pertains to all claims, as well as its failure to exercise reasonable care to provide for adequate redundancy in the event of yet another break.

Given that these same proofs will dominate all claims brought by all members of the Class, whatever differences there may be in factual variations in degree of impact among the members of the Class will not affect the typicality analysis. The Class members' claims need not be identical in every respect. Respondents will be well-suited to represent the claims of all harmed Class members vigorously, and provide them fully adequate representation in the suit.

Petitioner unfairly labels the Circuit Court's typicality analysis as a "cursory finding." Petition at 22. Petitioner prefers the focus to be on potential differences in individual impacts, or the contrived possibility of no impact. The problem is not a "cursory" analysis – for Petitioner, the problem is that the Circuit Court simply rejected its arguments. In any event, once again, the differences in impact that Petitioner stresses simply relate to potential variations in the harm suffered, and thus the damages to which Respondents or the Class members might be entitled after values are established at trial for these various categories of harm. These differences do not detract from the main focus of the case, which will be whether WVAW's actions toward the Class as a whole violated the law. Moreover, even the possibility that a member of the Class may ultimately be found not to have suffered any monetary damages at all would not, as Petitioner suggests, be problematic to class certification. At this stage, for each class member, the merits of the legal claim must be assumed *arguendo*. *See Met-Coil*, 319 F.3d at 911 (whether any particular class member suffered any legally compensable harm appropriately reserved for individual hearings); *In re Deepwater Horizon*, 739 F.3d 790, 804 (5th Cir. 2014) ("possibility that some [absent class members] may fail to prevail on their individual claims will not defeat class membership").

Respondents and all members of the Class pursue the same legal claims premised upon identical legal theories, and based on the same key evidence of a widespread outage throughout the Class Area. Under this Court's prior precedents, including *Rezulin*, typicality is easily met.

Since the Circuit Court merely followed this Court's leading authorities, its decision surely cannot be found to be plainly in contravention of the requirements of Rule 23, and thus the writ should be denied.

4. The Circuit Court Did Not Commit a Clear Error of Law By Certifying a Class Under WVRCP 23(c)(4).

The Circuit Court certified an issues class concerning fault and liability pursuant to W. Va. R. Civ. P. 23(c)(4), after concluding that in this case the issue of liability is common to Respondents and all members of the Class, no matter what type of injury was suffered, and thus could be tried on a class-wide basis. This is a commonly utilized practice and hardly an issue of "first impression," as Petitioner falsely suggests. *See* Petition at 12, 14. Many courts, including the United States Court of Appeals for the Fourth Circuit and federal courts within the Fourth Circuit, have found that in a case such as this one, resolving the liability issue on behalf of all claimants through common proof will materially advance the disposition of the litigation and serve the purposes of Rule 23 in gaining efficient and just resolution of claims. *See Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 428 (4th Cir. 2003) (class adjudication of liability issues is an appropriate use of Rule 23(c)(4)); *Good v. American Water Works Company, Inc.*, 310 F.R.D. 274, 295 (S.D. W. Va. 2015) (certifying "issues only" class as to fault and finding this type of use of Rule 23(c)(4) is encouraged by past judicial precedents). Indeed, as the *Good* court noted as part of its routine management of an action just like this one – against the same defendant – this is the very approach urged by such authorities as the Manual for Complex Litigation. *Id.* This methodology of issues class certification on the question of liability is "particularly useful in the mass tort context" to structure complex actions under Rule 23. *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21, 30 (E.D.N.Y. 2001).

Both Petitioner and *amici* urge a different approach to Rule 23(c)(4) than that endorsed and taken by the Fourth Circuit in *Gunnells*, as well as in all other federal circuits that have taken a stance on the subject other than the Fifth Circuit. Both Petitioner and *amici* urge adoption of the "narrow view" of Rule 23(c)(4), advocated by the *Gunnells dissent*, and earlier followed in the Fifth Circuit in *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n. 21 (5th Cir. 1996). *See* Petition at 24; *Amici* Brief at 8-9.[2] However, the Fourth Circuit in *Gunnells* expressly rejected these arguments, reasoning that the *Castano* approach was far too narrow a reading of Rule 23, and stating as follows:

> [T]he Fifth Circuit cases [including *Castano*] do not state, let alone hold, as the dissent would, that 'the entire action,' or 'the action as a whole' – i.e., all causes of action against all parties – must satisfy Rule 23(b)(3)'s predominance requirement before a court can employ Rule 23(c)(4) to certify a class. Rather, the Fifth Circuit cases merely require that 'a cause of action, as whole, must satisfy Rule 23(b)(3)'s predominance requirement' before Rule 23(c)(4) is available. To be sure, there is a circuit conflict as to whether predominance must be shown with respect to an entire cause of action, or merely with respect to a specific issue, in order to invoke (c)(4). But we have no need to enter that fray . . . because, as we have demonstrated within, in this case Plaintiffs' cause of action as a whole against TPCM satisfies the predominance requirements of Rule 23. Thus even if the view adopted by the Fifth Circuit . . . constituted the law of this circuit, our holding here would be in full accordance with the Fifth Circuit view.
>
> In fact, we are aware of no decision by any court that has adopted the dissent's view that in cases such as the one before us, involving more than one cause of action, a court must evaluate predominance in the context of the 'action taken as a whole' or the 'case as a whole.' On the contrary, as discussed above, it is the dissent's approach that would create a direct conflict with all other courts, and abrogate longstanding precedent and practice in the area of class action law.

Gunnells, 348 F.3d at 444-445 (citations and italics omitted)

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[2] *Amici* unabashedly call *Gunnells* "problematic," and rely extensively on arguments taken straight from the dissent. *See Amici* Brief at 8-9.

The Circuit Court followed the relevant case law and declined Petitioner's invitation to depart from precedent and follow the reasoning of the *Gunnells* dissent – in other words, the Circuit Court issued an Order which was faithful to precedent and would not justify the issuance of the extraordinary and limited writ. The certification order was legally sound – consistent with the *Gunnells* approach, the Circuit Court concluded that Rule 23(c)(4) not only allows, but in fact encourages, courts to isolate common issues and proceed with class treatment even where Rule 23(b)(3) predominance or superiority concerns might otherwise prevent certification of the entire action. *See Gunnells*, 348 F.3d at 441. On the other hand, the more stringent approach urged by Petitioner would have limited the Circuit Court to an approach which, as stated in *Gunnells*, no court has adopted. In short, the Circuit Court need not have evaluated predominance in the context of the action as a whole, including how individual damages claims – i.e., the proof of the impact on a class member by class member basis – might be proven in the aggregate. The Circuit Court's predominance and superiority analyses were properly shaped by the fact that class-wide issues would be carved out and efficiently dealt with in the first, initial stage of trial.

The Circuit Court also concluded that the common fault or liability issue certified under Rule 23(c)(4) predominates over the individual issues remaining in the case. App. at 9–11. The Circuit Court therefore concluded that the class action satisfied the more strenuous requirement of predominance under Rule 23(b)(3) in any event. *Id.*

Here, under the Trial Plan submitted to the Circuit Court and consistent with the trial plan approved by Senior Judge Copenhaver in *Good*, once WVAW's liability is preliminarily determined, these individualized damage claims of the Class members may be addressed later, in a separate phase of trial after the liability determination is complete, assuming that the jury returns a liability verdict favorable to Respondents. Thus, there will be no need to retry the issue of

Petitioner's fault repeatedly in thousands of individual cases, a process at least one Court has correctly observed would be "folly." *In re American Continental Corporation/Lincoln Savings and Loan Sec. Litig.*, 140 F.R.D. 425, 431 (D. Ariz. 1992)

Importantly, the Circuit Court's order does not "chart a path to virtually automatic class certification," as Petitioner suggests. Petition at 24. Based on the facts of this case, the Circuit Court found that Respondents' claims of breach of contract and breach of common law and statutory duties were "entirely independent of any damages that flowed from that conduct," because Respondents' proposed proof, such as WVAW's awareness of numerous problems in the past with the water main in question and this type of pipe generally, would not delve into individual inquiries. *See* App. at 10–11. In other cases, including perhaps under the reasonable search fee issue in *Gaujot*, where liability proofs may be found to be dependent on individual circumstances, the separation of the liability issue by way of Rule 23(c)(4) would not be useful to any court in streamlining the case. Here, however, the breach of duty owed to the class and its individual members is not dependent on a showing of whether conduct directed at the individual was reasonable based on individual circumstances, as in *Gaujot.*

A. The Circuit Court Correctly Found that Individual Issues Do Not Predominate.

Bifurcation of the general liability issue for class-wide resolution will allow the Circuit Court to await the outcome of a liability trial before deciding best how to provide opportunities for full relief to individual members of the Class. Petitioner disagrees with the Circuit Court's approach, arguing that the certification of a Class and the plan to focus the initial phases of trial upon liability or fault were clear errors of law because substantive liability adjudications will require determinations based on examination of individual impact. Petition at 5. In other words,

Petitioner argues that impact is a "critical liability question" and thus individual issues predominate over common ones. *Id.* at 31-32. Petitioner is wrong.

Proof of the liability or fault issue central to each class member's claim against WVAW will clearly rely on common class-wide evidence related to WVAW's conduct and what it did, before the break, to erect and maintain an adequate water system that complied with its contractual and statutory duties. *Everything that Petitioner did, which is claimed to be relevant, occurred prior to the June 2015 main break, not after.* In addition, Petitioner's liability defenses will be common to all members of the Class and will similarly involve proofs related to events that occurred prior to the main break – with Petitioner presumably attempting to offer evidence that it complied with PSC water rules and regulations, maintained its system in a condition that would not jeopardize adequate and continuous service, and that it did not refuse to address risk of this pipe failure and the risk of prolonged outages and loss of pressure across the Class area. These will be hotly contested issues between the parties – but none of the evidence on either side will focus on individual differences in the harms suffered by customers because of the break.[3]

Petitioner maintains supposed fact-intensive questions of liability, impact and damages are "intertwined" making this case "similar to *Gaujot*" in that the "fact and degree of impact (whether and for how long a class member lost water . . . is a necessary element." Petition at 18, 29. But *Gaujot* is readily distinguishable. In the first instance, *Gaujot* granted a writ of prohibition because the court below had failed to conduct a sufficiently thorough analysis regarding commonality – the case has no bearing on Rule 23(b)(3) factors and Petitioner's arguments are misplaced.

[3] It is possible that the parties will dispute the expected or anticipated harms from the main break – because the likelihood and expected degree of harm in the event of a future failure is always a factor in the determination of negligence from failing to take precautions against a failure – but not evidence of what actually happened in the event. With respect to the fault issue, evidence about what actually happened would amount to an argument improperly based on hindsight.

More importantly, in *Gaujot*, the allegations involved the alleged illegality of "reasonable" charges made by hospitals to produce copies of medical records. In order to assess the reasonableness of hospitals' conduct directed towards each claimant, it was necessary to measure the reasonableness of the charges asserted in each individual request, which, in turn, arguably required consideration of where individual class members' records were stored and how challenging it was to locate those individual records. *Gaujot*, 242 W. Va. at 59, 829 S.E.2d at 59.[4] Here, in sharp contrast, liability turns on a duty owed and conduct directed to every class member as a whole – they each rely on the main at issue to deliver water - the evidence does *not* depend on a showing regarding the specifics or reasonableness of the defendants' conduct directed to each class member. Indeed, Petitioner's conduct supporting a liability finding, including its breaches of duties, is entirely complete before and independent of any damages that flowed from that conduct.

With respect to Respondents' breach of contract claims, all of the relevant contracts are identical, and incorporate PSC regulations requiring Petitioner to "at all times construct and maintain its entire plant and system in such condition that it will furnish safe, adequate and continuous service," W. Va. C.S.R. §150-7-5.1.a. Respondents' proof will focus on whether WVAW knew or should have known that a serious break along this particular main was so likely and that the scale of the interruption expected following such a break so large, that its failure to take at least some measure to prevent or reduce the likelihood of that outcome constitutes a

[4] In *Gaujot*, hospitals' charges for producing copies of medical records involved a "variety of electronic and/or physical storage systems" that the hospitals had to search to respond to records requests, which often had to be manually "extracted" and separately "copied into a production system." *Gaujot*, 242 W. Va. at 58, 829 S.E.2d at 58. Here, in contrast, identifying class members by location is straightforward – the Class Area covers the western portions of the Kanawha Valley system.

violation of its contractual duties. Respondents' proof will also focus on whether such measures, ranging from installing a continuous monitoring device on the main to measures to ensure redundancy and continuity of service, such as the construction of additional storage tanks or additional mains, were available to Petitioner and feasible to implement. These questions turn on what WVAW knew or should have known – and they have common answers for each and every customer.

With respect to their statutory tort claims, Respondents' proof will again focus on whether Petitioner knew or should have known that a serious break along this particular main was so likely and that the scale of interruption would be so large that its failure to take measures amounted to a violation of its duty to "establish and maintain adequate and suitable facilities" for the safety, security and convenience of the public. W. Va. Code §24-4-7. Again, because this question turns on what WVAW knew or should have known about the likelihood and expected scale of interruption from a break along this critical main, not the actual extent of interruption to any individual customer, the question has a common answer for each and every customer and does not depend on a showing of individual impacts.

Finally, with respect to Respondents' common law negligence claims, similarly, the proof will turn on what WVAW knew or should have known about the likelihood and expected scale of the service interruption – not the actual extent of the interruption to any individual customer. The common liability questions to resolve will be whether what WVAW knew or should have known constituted a violation of its common law duties to exercise reasonable care in the performance of its public and contractual duties to supply water to the territory where it received an exclusive right to be a public water utility provider. These questions, once again, will have common answers across the Class, regardless of impact.

For each of these claims, Respondents will show that WVAW failed to address the edicts of the PSC on the unacceptably high break rates occurring in its transmission main, and failed to take any measures to fortify its distribution system (such as adding storage tanks or additional, redundant water mains) prior to the main break. Nothing about that proof will involve any showing with regard to individual impact after the main break. Respondents will also show that the water main in question broke regularly and repeatedly in the past, with WVAW being aware of the problem and refusing or neglecting to solve the problem – such as by adding storage or another main or an interconnection to supply water to the region in the event of a major break – for purely profit-driven motives. At the same time, as the evidence will show, WVAW had knowledge that repair of the main would take at least 24 hours and it also knew that an outage could potentially disrupt service extensively on the west side of the Kanawha Valley system. Again, nothing about this line of proof will delve into what happened to any one customer in particular.

Thus, this case is very different than *Gaujot,* where reasonableness could only be determined on a case by case, request by request basis. Here, proof of WVAW's fault depends on WVAW's and only WVAW's conduct. It will not depend on individual circumstances. No customer need testify about impact to prove liability, as WVAW's conduct was directed at the Class as a whole.

Damages may vary from class member to class member, but those elements can be proven in each individual case through very brief proceedings, with only a few witnesses. Once fault is established, causation flows naturally and needs no further proof. The occupant or owner himself can testify to what happened, submit his or her receipts, and, in the case of a business owner, possibly offer the testimony of an accountant. In the settlement of *Good*, as in other cases handled by this Court's Mass Litigation Panel process, a streamlined process permitting the defendant to

challenge the proffered evidence of harm was established and aided greatly in resolution of the case. In comparison, the liability issue will require extensive discovery and will necessitate the testimony of expert witnesses on a variety of technical subjects, all of which can be accomplished in one fell swoop. The liability/fault issue therefore obviously predominates over issues affecting only individual members. The Circuit Court's findings on these subjects were not plainly in contravention to established Rule 23 mandates, and thus the writ should be denied.

B. The Circuit Court Correctly Concluded that a Class Action is a Superior Method for Resolving the Dispute.

Petitioner argues that the Circuit Court erred as a matter of law in certifying an issues class because any liability inquiry will require mini-trials to assess the specific and individual impact on any particular water user. Petition at 4. This is simply not true – the liability inquiry, as just discussed above in detail, will not need to delve into issues of individual damages among the Class members. Moreover, Petitioner's argument that a class action is not superior once again overlaps with its arguments throughout the Petition regarding individual impact from the main break. In so doing, Petitioner would have this Court wholly disregard the fundamental nature of a superiority inquiry – the fact that the "negative value" nature of the claims at issue in this case strongly favors use of the class device.

Here, proving the liability issue, due to the abundance of expert witness testimony that will be required as part of that process and the massive amount of evidence regarding WVAW's knowledge of and failure to rectify the main's known problems, together with its reasons for that delay, will involve a considerable expenditure of time and money. No individual class member sustained damages justifying that expenditure of time and money, yet each claim requires that showing. Proof of fault thus clearly overshadows the comparatively small amount of time and money that will be required to prove individual claims regarding damages. For each claimant,

proving fault would require the same exact evidence, at individual rather than class expense, dooming access to justice for all class members. Certainly, the vast majority of damages claims can be presented in streamlined procedures or bellwether trials by groups similarly affected, with each of them taking less than an hour to present in all likelihood.

Rule 23 is structured to provide a vehicle to vindicate the rights of groups of people who individually would be without effective strength to bring their opponents into court at all. *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997); *see id.* ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."); *Good v. Am. Water Works Co.*, 310 F.R.D. 274, 297 (S.D.W. Va. 2015) (holding, in certifying a single episode class action, that "absence of the class device would surely discourage potentially deserving plaintiffs from pursuing their rights under the circumstances here presented"). Petitioner's position nakedly seeks to avoid responsibility entirely by forcing individual lawsuits one at a time, rather than class adjudication of fault. It should be seen and taken for what it is – a ploy.

The impact on the community from this main break was undeniable. Petitioner's position detracts from this overall impact in a self-serving attempt at focusing on unnecessary detail and immaterial differences between the Class members' claims – wholly ignoring, again and again, all the many things that the Class members have in common and their mutual interests in seeing justice done. To be sure, the only practicable means of holding WVAW accountable is through the use of the class device. The Circuit Court's findings were not clearly erroneous as a matter of law and did not depart from any mandates that would justify issuance of a writ that this Court has held should be utilized only in "limited instances." *Vanderra, supra.* Petitioner's superiority arguments must be soundly rejected.

5. The Circuit Court Defined a Class that is Sufficiently Ascertainable.

The Circuit Court certified a Class of WVAW customers objectively defined as located within the boundaries of the WVAW service area served by the 36-inch water main that broke, subject to exclusion of certain persons including WVAW employees and judicial staff assigned to the case. App. at 11; App. at 13. The Circuit Court incorporated by reference the opinion and map of Respondent's expert as to those boundaries. App. at 11. That map provides an objective boundary around the class, in which all of the customers, residents, and businesses are ascertainable. App. at 501. The contours of the Class, and membership therein, are therefore based on objective and easily verifiable facts which are not subject to dispute. At the end of each service pipe branching off the failed main lie customers and class members; WVAW maintains billing records identifying each and every one. It has a service map showing each of them, or at least it should.

Respondents' engineering expert Wayne Lorenz, P.E., created a water service disruption boundary map, which was submitted into the record before the Circuit Court as part of his report attached to Respondents' class motion and reply briefs. App. at 68; App. at 501. Thus, Respondents supported their motion for class certification with expert evidence, including a flowchart of impacted system facilities, demonstrating that the members of the Class could be determined objectively and without examination of individual circumstances. Respondents' expert evidence objectively demonstrates the WVAW customers who are members of the Class. Thus, as it is "administratively feasible" to ascertain who is in the proposed Class and who is not, the class definition was proper. *State ex rel. Metro. Life Ins. Co. v. Starcher*, 196 W. Va. 519, 526, 474 S.E.2d 186, 193 (1996). There is no proper objection that the Class has not been defined by objective criteria.

Petitioner's arguments that the Circuit Court committed a clear error of law with regard to the ascertainability of the class definition are premised on the fallacy that an "amorphous group of non-customers" are included in the Class. Petition at 38. This is not the case. The Complaint in this case was brought on behalf of a class consisting of WVAW's residential and business customers. App. at 31. There is no allegation in the pleadings that would suggest that Respondents – who are themselves customers – ever intended that non-customers be included in the Class, apart from residents of households supplied by WVAW to customers such as the head of household. Consistently, when Respondents filed their Memorandum in Support of Motion for Class Certification, they requested that the Class be defined as "the boundaries of the WVAW service area served by the 36-inch water main that broke," which would include an estimated 120,000 residents and some 2,826 business customers of WVAW. App. at 53–54.

As the Petition notes, the Circuit Court stated in its Memorandum Opinion and Order that Respondents' motion for class certification submitted that certification be granted to "a [requested] Class of WVAW customers." App. at 11. Petitioner's contentions that the Circuit Court failed to identify a segment of the class has no basis. The Class is objectively defined and ascertainable. The WVAW customers that are members of the Class can be readily noticed based on the customers addresses maintained by Petitioner in its ordinary course of business. The Circuit Court did not plainly commit clear legal error and there is therefore no basis for granting this extraordinary and limited writ.

VI. CONCLUSION

The Petition for Writ of Prohibition should be denied.

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Respectfully Submitted,

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