IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PAUL SNIDER, on behalf of himself
And a class of others similarly situated,

Respondent/Plaintiff

v. **Docket No. 21-0610**

SURNAIK HOLDINGS OF WV, LLC,
A West Virginia Limited Liability Company,

Petitioner/Defendant

SUMMARY RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Respectfully Submitted,
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RESPONDENT'S SUMMARY RESPONSE

The Petition for Writ of Prohibition filed by Petitioner Surnaik Holdings of WV, LLC ("Surnaik") begins with a moment of candor when Surnaik admits that it has filed this brief before. In fact, the Petition presents nearly verbatim a litany of successive failed arguments and strays from the issues at hand involving Rule 23 of the West Virginia Rules of Civil Procedure ("W. Va. R. Civ. P."), delving into questions of whether Plaintiff and the Class are likely to win their case on the merits.

Surnaik is right about one thing – this Court should be familiar with this case and the class certification issues presented. Undoubtedly, the Court will be most interested to know whether the Circuit Court followed and adhered to its Order of Remand. The answer is clear – it did just that. Respondent believes a Summary Response is appropriate which focuses on the key points made by this Court when remanding the matter. *See State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, 244 W. Va. 248, 852 S.E.2d 748 (2020) ("*Surnaik I*").

I. On Remand, the Circuit Court Conducted a Thorough Analysis of the Class Certification Requirements of W. Va. R. Civ. P. 23.

In *Surnaik I*, this Court made clear that a class certification order should "be detailed and specific in showing the rule basis for the certification and the relevant facts supporting the legal conclusions." *Surnaik I*, 852 S.E.2d at Syl. Pt. 6, quoting *State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004). On remand, the Circuit Court issued a detailed and specific order which showed the basis for the certification and adequately recited the underlying facts supporting the court's legal conclusions. In particular, the circuit court addressed the

concerns raised by this Court in its Order of Remand, when ruling upon the contested elements of Rule 23 class certification as categorized below.[1]

A. Typicality (W. Va. R. Civ. P. 23(a)(3))

In *Surnaik I*, this Court found the circuit court's previous discussion of the Rule 23(a) requirement of typicality insufficient. The circuit court's latest decision addressed this Court's concerns. On remand, the circuit court considered the nature of Plaintiff's allegations – that he did in fact suffer an injury, specifically, the loss of the use and enjoyment of his property from the smoke invasion of his home for the duration of the fire. *See* App. at 9–10 (the circuit court's second "Order Granting Class Certification"). As will be detailed below, the circuit court thoroughly reviewed the evidence of record in finding that Plaintiff was a typical representative of the Class.

Pursuant to this Court's precedents, the typicality requirement is met when the claims of the proposed class representative arise from the same event or practice or course of conduct that gives rise to the claims of the other class members, and if the claims are based on the same legal theory. *In re W. Va. Rezulin Litig.*, 214 W. Va. 52 at Syl. Pt. 12 (2003). Here, the same event and course of conduct are the Warehouse Fire and Surnaik's willful failure to maintain its fire protection system. Moreover, here, all class claims arise from the same legal theories, based upon

[1] There has been no challenge raised as to the circuit court's findings on numerosity and commonality under WVRP 23(a). The court found that the proposed Class consists of more than 57,000 residents and additional businesses in the area surrounding the Warehouse Fire, making it clear that the numerosity element of Rule 23(a)(1) was satisfied. The circuit court also found a host of common questions of law and fact, including whether Surnaik was negligent in failing to maintain its warehouse sprinkler system, and whether Surnaik knew or should have known that a fire in its warehouse would adversely impact nearby landowners. The circuit court found that the commonality element of Rule 23(a)(2) was readily satisfied, and Surnaik does not challenge that ruling.

the same negligence and nuisance causes of action. In short, the same claims are alleged on behalf of everyone – both Plaintiff and the members of the Class – on the same legal bases.

The types of damages suffered by Plaintiff are also typical of the types of harms alleged to have been caused across the community of class members. The circuit court focused on the evidence in expounding on its new findings. The court found that Plaintiff testified during the eight days of the fire, ***his house was full of smoke***, an "awful" presence which could be smelled as soon as one walked in the door, requiring that he and his wife acquired ***breathing masks to cover their noses and mouths and could not take the masks off in their own home***. App. 10. Ordinary relaxation at home was impossible, and during the entire fire disaster Plaintiff and his wife ***tried to stay away from their own home***, and sometimes ***just drove off and went anyplace to get away from the smoke***. *Id.* (emphasis added)

The circuit court found that if the jury believed Plaintiff's testimony, it would be a "textbook example" of an invasion of property resulting in actionable loss of use, making Plaintiff a typical class representative with respect to his damages claims. App. 10–11. This Court has recently explained that a plaintiff's claim is "typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *State of West Virginia ex rel. Municipal Water Works v. Swope*, 242 W. Va. 258 at Syl. pt. 8 (2019). Following this standard, the circuit court confronted one of Surnaik's arguments and noted that while there was evidence that other class members had visible ash deposits on surfaces following the fire, and while there was no testimony suggesting that Plaintiff had such deposits, this was merely a factual variation that did not defeat typicality under this Court's precedents – particularly given the extensive evidence of Plaintiff's actual loss of use

and enjoyment. App. 11–12. Surnaik's insistence that Plaintiff is not a typical class member on these grounds, repeated here in the Petition, is misguided.

In addition, the circuit court noted Plaintiff's testimony that he developed asthma as the result of breathing smoke from the fire. App. 10–11. This type of personal injury, the circuit court concluded, was certainly sufficient to confer standing on Plaintiff to bring the action, and made Plaintiff a typical class representative for the same reasons. Plaintiff submits that the low bar of typicality is readily satisfied in this case.

B. Adequacy (W. Va. R. Civ. P. 23(a)(4))

This Court found the circuit court's prior order "woefully inadequate regarding the Rule 23 adequacy of representation argument." *Surnaik I*, 852 S.E.2d at 764 n. 14. The circuit court did further analysis and made additional findings of fact relevant to the adequacy issue detailed below. In the current Petition, Surnaik raises no objections that would suggest that the adequacy issue was not thoroughly addressed below. Nonetheless, Plaintiff feels that it is appropriate to briefly discuss how the circuit court responded to this Court's directives on remand.

On remand, the circuit court found that Plaintiff's interests were co-extensive with the absent class members and the court was satisfied that Plaintiff's testimony at the hearing demonstrated sufficient interest in, knowledge of, and involvement with the case, to serve as class representative. App. 14. The court was also satisfied that Plaintiff credibly testified at the hearing on the issue of his social media activity. The evidence reflected that these were posts made by his wife using his account and that Plaintiff did not pay much attention to what she was posting. App. 5. In all, Plaintiff's testimony satisfactorily demonstrated that Plaintiff would have no difficulty working for the benefit of all class members regardless of their race, religion, ethnicity, or national

origin – much as he is able to treat his karate students the same despite their background. App. 14. Again, Surnaik does not challenge these findings.

The circuit court noted that Surnaik did not raise the issue of Plaintiff's alleged racist Facebook posts in its original Petition for Writ of Prohibition, an abandonment of the argument. *See* App. 14. As Surnaik has similarly abandoned the argument in the proceedings on remand and makes no attempt to resurrect these arguments now, Plaintiff respectfully submits that any concerns have been addressed regarding the circuit court's prior adequacy analysis with respect to the credibility of the class representative and the alleged racist and political remarks made on social media. *See Surnaik I*, 852 S.E.2d at 764 n. 14. Plaintiff's adequacy as a class representative is simply no longer a contested issue in the case.

C. Predominance (W. Va. R. Civ. P. 23(b)(3))

In *Surnaik I*, this Court rejected any notion of an "all things considered test that does not give the circuit courts any real guidance" and concluded that when a class is to be certified under Rule 23(b)(3), the certification can occur "only if the circuit court is satisfied, after a thorough analysis, that the predominance and superiority prerequisites of Rule 23(b)(3) have been satisfied." *Surnaik I*, 852 S.E.2d at Syl. Pt. 6. Specifically, this Court explained:

> The thorough analysis of the predominance requirement of West Virginia Rule of Civil Procedure 23(b)(3) includes (1) identifying the parties' claims and defenses and their respective elements; (2) determining whether these issues are common questions or individual questions by analyzing how each party will prove them at trial; and (3) determining whether the common questions predominate. In addition, circuit courts should assess predominance with its overarching purpose in mind—namely, ensuring that a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

Surnaik I, 852 S.E.2d at Syl. Pt. 7.

Here, on remand, the circuit court has conducted a detailed analysis based on these precise criteria and with the overarching purposes of the predominance requirement firmly in mind. The circuit court first identified the parties' claims and defenses and their respective elements.

The circuit court found that Respondent had abandoned his trespass claim and proceeded under just two tort claims, nuisance and negligence, which contained the same common elements: duty, breach of duty, causation, and damages. App. 16–17; *see Carter v. Monsanto*, 212 W. Va. 732, 737, 575 S.E.2d 342, 347 (2002). The court found it compelling that these two causes of action are, in instances such as this, practically inseparable, and the duty and breach of duty elements for both causes of action functionally identical. The circuit court found that under this Court's prior precedents, including *Harless v. Workman*, 145 W. Va. 266, 114 S.E.2d 548 (1960), and *Rinehart v. Stanley Coal Co.*, 112 W. Va. 82, 82, 163 S.E. 766, 766 (1932), it is well-established that airborne smoke, fumes, and dust negligently released from a facility—including smoke resulting from a negligent fire—that migrate into the air spaces of dwellings and other structures on adjoining private property, and thereby interfere with the comfort, enjoyment, or commercial interests of adjoining landowners, is actionable in negligence. App. 19; *Harless*, 114 S.E.2d at 553 ("Where an act and condition can become a nuisance solely by reason of the negligent manner in which it is performed or permitted, there can be no recovery independently of the existence of negligence."). In short, the central problem identified by this Court in *Surnaik I* – that the circuit court's prior order had "very limited, to say the least, discussion of the actual claims and causes of action in this matter" – has been rectified.

Next, the circuit court analyzed whether the issues raised by Plaintiff's claims were common questions or individual questions, by looking at how Plaintiff would prove his claims at trial, as directed by this Court in remanding the case. With two essentially inseparable causes of

action, the court concluded that Plaintiff would be proving his claims at trial through common evidence. App. 19. The circuit court found that liability proof would focus on common questions of whether Surnaik properly maintained its warehouse sprinkler system pursuant to applicable standards of care and state or local laws, as well as on what Surnaik knew or should have known about how a warehouse fire would adversely impact nearby landowners. App. 23. The court also found that common questions, and common class-wide proofs, would be introduced with respect to what Surnaik knew about the chemical storage present in the warehouse, as well as whether storage and maintenance of these chemicals violated applicable standards or regulations. *Id.* The circuit court concluded that there were minor individual questions related to causation and damages with respect to claims for property damage (including loss of use and enjoyment of property during the duration of the smoke invasion). App. 27. Individual questions would also be presented on the elements of causation and damages for claimants alleging bodily injuries, likely requiring medical history review and expert witness testimony. App. 27–28.

Finally, the circuit court addressed whether the common questions predominated over the individual questions. The court found that despite the presence of individual questions of causation and damages, particularly with respect to those claiming bodily injuries, there were also overarching and important common questions of causation for all categories of damages, where the issues of what chemicals were released (and what injuries those chemicals are capable of causing) would be decided. App. 24–25. As for individual questions, these would involve review of medical records and require a doctor's testimony as to the diagnosis and specific causation of the injuries – but on the whole, the court concluded that the difficulties in managing these individual issues would not predominate where the common class-wide resolution of the common duty and breach of duty issues, and common questions of general causation, would be the ultimate predominant issues to

resolve. App. 27-28. In short, the circuit court squarely addressed Surnaik's concerns about proof of individual issues in the context of proving bodily injuries and found that it would be "inefficient to hold a single, class-wide liability trial for all property damage claimants, resolve that identical issue in one fell swoop for them, and then invite the re-litigation of that identical, common issue in potentially hundreds of bodily injury trials." App. 33.

In this respect, the circuit court followed this Court's guidance in *Surnaik I* to assess predominance mindful of its "overarching purpose" to ensure that economies of time, effort, and expense are achieved, and that uniformity of decision is successfully promoted. The circuit court concluded that the time and effort required to present evidence on the individual aspects of those claims paled in comparison to the inefficiencies that would occur were it necessary to present liability evidence in the thousands of individual actions that would be necessary to achieve similar justice for these property owners in the absence of a class action. App. 23–24. The circuit court also found that its chosen course of action, which would resolve the common liability issues "and then make a determination as to whether the bodily injury claims should be cut loose from the Class action mechanism – armed with that liability determination" was permitted under West Virginia Rule of Civil Procedure 23(c)(4). App. 33. These findings are faithful to the *Surnaik I* standards and were thoroughly reasoned.

One last predominance issue was addressed by the circuit court in response to this Court's Order of Remand. In response to footnote 13 of *Surnaik I*, 852 S.E.2d at 762, the circuit court noted that any class members from Ohio must, as a matter of United States Supreme Court precedent and well-established federal law, bring their claims under West Virginia law. App. 15. Federal law requires that the Ohio class members must bring claims at the location of the release rather than the location of the injury. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987)

(plaintiff in one state cannot bring a suit against an alleged polluter in another state, and under the law of the plaintiff's state, for a release occurring in the polluter's state). Because all the claims of all class members must arise under West Virginia law, the presence of class members from Ohio is irrelevant to the predominance requisite.

D. Superiority (W. Va. R. Civ. P. 23(b)(3))

In *Surnaik I*, this Court held that the circuit court must undertake a thorough analysis of the superiority requirement and held that the circuit court's prior order had been "conclusory" and lacking substantive analysis of other precedent in mass accident cases, claimed by Plaintiff to be similar, where classes had been certified. *Surnaik I*, 852 S.E.2d at 764. Both infirmities were addressed by the circuit court on remand.

On remand, the circuit court closely examined prior precedent in mass accident cases cited by the parties and found ample support for class certification in these circumstances. App. 30. The circuit court found that the weight of authority from around the United States, especially in property-based classes, favored a superiority finding to facilitate class-wide treatment and resolution of the common issues of liability. In *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003), the Seventh Circuit upheld certification of a class for determination of common issues of "whether or not and to what extent [the defendant] caused contamination of the area in question." *Id.* at 911. A similar certification was ordered here by the circuit court.

Area of contamination claims from single events are routinely certified as class actions. *See Crutchfield v. Sewerage and Water Board of New Orleans* case 829 F.3d 370, 378 (2016) (mass tort cases in which class certification has been found to be appropriate are cases that "involved single episodes of tortious conduct usually committed by a single defendant"); *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992) (approving district court's decision to certify a class arising out of an

explosion at an oil refinery for resolution of liability and punitive damages issues); *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 141 (E.D. La. 2013) (certifying class arising out of oil spill on grounds that "[p]redominance is more easily satisfied in single-event, single-location mass tort actions such as this because the defendant allegedly caused all of the plaintiffs' harms through a course of conduct common to all class members."); *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) (courts have "recognized the increasingly insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or a single course of conduct"); *Good v. Am. Water Works Co.*, 310 F.R.D. 274, 297 (S.D.W. Va. 2015) (certifying another single event class with potentially small injuries where "absence of the class device would surely discourage potentially deserving plaintiffs from pursuing their rights"). Indeed, Surnaik's own cases where class certification was denied expressly distinguished circumstances such as those present here that involve a single set of operative facts used to establish liability. *See e.g. Hurd v. Monsanto Co.*, 164 F.R.D. 234, 239 (S.D. Ind. 1995) (continuing exposure over twenty years).

The circuit court concluded that even Surnaik's cases were supportive of the use of the class action mechanism in a case such as this one, where area-of-contamination property damage had occurred arising from a single release. App. 31. In Surnaik's case, *In re MTBE Products Liability Litigation*, 241 F.R.D. 435 (S.D.N.Y. 2007), a sudden release of petroleum occurred after a pipeline break. The *MTBE* court certified two of three proposed subclasses involving damages to class members' property. The key analysis from *MTBE* equally applicable here is the fact that it was a case arising out of a single source of harm, and thus, proximate causation could be determined on a class-wide basis. *Id.* at 447–48.

II. The Arguments Highlighted by Surnaik in the Petition Are Without Merit.

A. There is No Basis to Surnaik's Claim that Only 10% of the Class Is Likely to Have Been Injured.

Surnaik argues that predominance of common issues could not have been found in this case by the circuit court because "the number of uninjured class members exceeds permissible limits." Petition at pp. 11-12. Surnaik made the same argument before this Court in *Surnaik I*. In *Surnaik I*, this Court did not express a concern that 90% of the Class members were not injured; instead, the court merely mentioned Surnaik's claim and that the circuit court previously had "summarily disposed" of the argument. *Surnaik I*, 852 S.E.2d at 763. This prior shortcoming has been remedied.

The circuit court concluded that ownership or residence in a house invaded by noxious levels of smoke is a cognizable injury which gives rise to a cause of action against the party that negligently caused the release. *Harless*, 114 S.E.2d at Syl. Pt. 1; *Rinehart*, 112 W. Va. at 82. The injury of property damage binds the class.

Surnaik misunderstands the decision below and essentially concedes that the evidence supports a factual finding that all members of the Class were exposed at levels sufficient to cause interference with use and enjoyment. Surnaik argues "[t]hat class members were exposed to 100 µg/m3 of TSP is not *ipso facto* evidence of injury." Petition at p. 16. It is correct that Plaintiff's expert on air dispersion did present evidence which supported a finding that ***all*** owners and residents within the class boundary were invaded also by at least 100 µg/m3 of total suspended particulate (TSP), a level between three and five times the background levels of total particulate, *see* App. 35–36 (citing Supplemental Disclosure of William Auberle). Surnaik assumes, however, that to have suffered damages because of this, a class member would have to have suffered a personal injury such as "inflammation or irritation." Petition at p. 16. But exposure at this level,

from Plaintiff's example, resulted in an "awful" presence of smoke which could be smelled as soon as one walked in the door of his home, and necessitated breathing masks just to relax at home. Ultimately, the jury will decide whether these levels of exposure across the Class area are sufficient to cause ***an interference with the use and enjoyment of property***, whether they do not, or whether higher levels require a narrowing of the class boundary. *See* App. 36. Under Plaintiff's Trial Plan, the circuit court concluded, the area of contamination is to be tried in a unitary class-wide trial. *Id.*; *see also Mejdrech*, 319 F.3d at 911. For any members within the class boundary, if the jury finds that they are outside of the area of contamination, then have lost their case on the merits.

In addition, the circuit court concluded that based on Plaintiff's expert evidence, smoke and particulate matter of 3 μg/m3 of PM2.5 did increase the ***risk*** of death, asthma, heart attacks and coronary artery thickening in a small percentage of persons subjected to them, and some level of discomfort in a much larger percentage of individuals. *See* App. 35 (citing McCawley Depo. at pp. 119-123). Surnaik focuses on the smaller subset of the Class that may suffer adverse medical effects but ignores the bigger picture: the evidence clearly supports a finding that the entire geographical area that defines the class suffered invasions of noxious smoke at levels that interfered with use and enjoyment. This issue was correctly decided below.

B. Surnaik Fails When Arguing that the Class Members are Not Readily Identifiable.

Once again, Surnaik repeats failed arguments presented in the last Petition that the circuit court erred because the class members are not readily identifiable by reference to objective criteria. *See* Petition at pp. 27-28. Here, the Class is defined by a geographical boundary. It is well-established that courts may certify classes defined by geography. *See e.g. Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 715 (2010); *Collins v. Olin Corp.*, 248 F.R.D. 95, 101 (D. Conn. 2008); *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 385 (D. Colo. 1993); *Boggs v.*

Divested Atomic Corp., 141 F.R.D. 58, 60 (S.D. Ohio 1991). Membership in the Class is defined as maintaining a lawful residence or conducting a business within one of the isopleths depicted on multiple maps presented into evidence.

Plaintiffs' information systems and analysis expert and professional engineer, Seward G. Gilbert, Jr., P.E., described the method that can be used to determine, with respect to any individual or business in the area, whether the person's property, residence, or business is located within the boundaries of one of the isopleths, and therefore whether the person is or is not a member of the Class. App. 5–6. The expert evidence provides a simple tool by which objective and ascertainable criteria may be used to determine class membership and provide notice to the class. The circuit court's finding that notice of the class action will be feasible should not be disturbed, and there is no doubt here that the opt out rights of the class members will be protected.

C. The West Virginia Mass Litigation Panel is not a "Superior Alternative".

Surnaik argues that the circuit court erred in certifying a class because "there is a clearly superior alternative: the West Virginia Mass Litigation Panel." Petition at pp. 25-26. The MLP is not an alternative procedural mechanism as it has never been precluded from using the class action device. The same class certification questions are sure to arise were the matter transferred to the MLP. In any event, Surnaik is simply mistaken that this action would even qualify in meeting the minimal criteria to be sent to the MLP, as there must be two or more civil actions pending. W. Va. Tr. Ct. R. 26.04(a).

Surnaik's argument is simply that Rule 23 should be ignored – left for dead – with West Virginians forced to file individual actions for loss of use and other property damages. In most of those cases individual damage recoveries would likely not justify the filing fees and attorney labor required to pursue the lawsuit. Thus, Surnaik's exposure would be limited to only those cases, if

any, with sufficient damages to justify the risk and expense of individual actions. Such a policy reason for denying class certification would be entirely antithetical to the existence and purpose of Rule 23, which has since it inception been intended to solve the problem that small recoveries do not provide financial incentive for individuals to bring cases on their own behalf. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) (class action provides opportunity for vindication of the rights of groups of people who would individually be without effective strength to bring opponents to court). A class action is clearly a superior mechanism that the filing and litigating of individual cases. Moreover, it ensures that a defendant whose actions disrupted and impacted an entire community must stand to answer for its conduct in full.

D. Surnaik's Argument that an Intangible Invasion of Smoke is Not an Actual Inteference with Property is an Inappropriate Examination of the Merits.

Surnaik's alternative argument that this Court should simply dismiss the case in a reversal of the circuit court's denial of Surnaik's Rule 12(b)(6) motion fails as well. There is no precedent for dismissing claims, based on negligent emission of smoke onto another's private property. The invasion into private air space that interferes with the enjoyment of that property is actionable as a negligence claim. *Harless*, 114 S.E.2d at Syl. Pt. 1 ("In an action to recover for damages caused to the plaintiffs' property by dust resulting from the nearby operation by the defendant of a coal loading tipple and a coal crusher, the trial court did not err in submitting the case to the jury on the basis of the defendant's negligence rather than upon the basis of a nuisance.").

Here, a jury may hear the testimony of Dr. McCawley and Plaintiff's other experts and conclude that some or all of the class had their homes invaded by levels of particulate matter that warrant compensation. Plaintiff has alleged injury in fact to property for all class members and has supported these claims with credible and admissible scientific evidence. Ultimately, the question of how much invasion is necessary to warrant compensation is a jury question.

The Petition for Writ of Prohibition should be denied.

PAUL SNIDER, on behalf of himself and a class of others similarly situated,

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