IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-658

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

Petitioner,

v.

THE HONORABLE CARRIE L. WEBSTER, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, PRESIDING JUDGE; RICHARD JEFFRIES, individually and on behalf of all others similarly situated; and COLOURS BEAUTY SALON, LLC,

Respondents.

REPLY TO SUMMARY RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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I. INTRODUCTION

In their Summary Response in Opposition to the Verified Petition for Writ of Prohibition ("Response or Resp."), Respondents do not focus on WV American's substantive arguments but choose instead to rewrite and summarily dismiss WV American's Questions Presented to better fit their narrative. Respondents specifically downplay the circuit court's reliance on W. Va. R. Civ. P. 23(c)(4), an issue of first impression in this Court that is critical to the certification determination. Respondents' approach, tactically designed to avoid consideration of the substantive issues presented in the Writ Petition, does not comply with the West Virginia Rules of Appellate Procedure.

Respondents devote much of the Response arguing that WV American has changed its position regarding the requirements for proving liability for the underlying claims, which Respondents base on cherry picking the record on a motion to dismiss that was denied and is not on appeal. Contrary to Respondents' argument, the record shows WV American has consistently argued that determining liability requires both an analysis of the reasonableness of service provided to individual customers and the adequacy of facilities maintained for that purpose.

For the reasons described below, the Court should issue a Rule to Show Cause and fairly consider WV American's petition on the full record.

II. ARGUMENT

A. Respondents' Summary Response does not comply with the West Virginia Rules of Appellate Procedure because it fails to respond to WV American's assignments of error.

Although Rule 16(h) of the West Virginia Rules of Appellate Procedure permits summary responses, they must "contain an argument responsive to the questions presented, exhibiting clearly the points of fact and law being presented and the authorities relied on . . . ." W. Va. R.

App. P. 16(h). Instead of addressing each of WV American's Questions Presented in turn, as required by the Rule, Respondents grouped them together, rewrote certain questions in terms favorable to their position, and then generally argued that WV American cannot demonstrate that the circuit court's order constituted clear legal error. This tactic does not comply with the Rule.

1. Rather than respond to WV American's actual Questions Presented, Respondents rewrite both WV American's Writ Petition and the circuit court's order to fit their argument.

Rather than respond to the Writ Petition and WV American's specific Questions Presented as required by Appellate Rule 16(h), Respondents chose to rewrite Questions Presented Nos. 1 and 2. Respondents disparage WV American for using the terms "liable" and "liability," instead of "breach of contract" and "breach of duty," claiming that the purpose for using these terms is to create "ambiguity." Resp. at 8–10. They argue WV American's Questions Presented need to be "re-formulated" with appropriate terminology. And once "the questions are properly formulated, they claim it becomes obvious that the circuit court has not committed clear error." Resp. at 9–10.

Contrary to Respondents' argument, WV American's Questions Presented are based on the express language used in the circuit court's order. Respondents, accusing WV American of using the "wrong" terminology, rewrite Question Presented No. 2 to substitute the phrase "breach of contract term/duty" for "liability" in asking whether the circuit court committed clear legal error in finding commonality under W. Va. Civ. P. 23(a)(2). Resp. at 10. But the circuit court's order—which was drafted and submitted by Respondents[1]—plainly states "[i]t has been held that where, as here, *core issues of liability* are common to all class members, commonality exists

[1] After the remand hearing on class certification, the circuit court directed the parties to file competing orders. App. at 1637. Both parties did so. App. at 1786 (Respondents); App. at 1817 (WV American).

notwithstanding factual variations regarding individual members of the class." App. at 2146 (emphasis added).

Question Presented No. 1—whether the circuit court committed clear legal error in finding that WV American can be liable without a showing of customer service impact (Petition at 1)—is also drawn straight from the circuit court's order. The order provides that "*[t]he fault or liability determination* will rely upon common class-wide evidence related to WV American's conduct *prior to the June 2015 main break*, and what it did or failed to do to maintain an adequate water system that complied with its contractual and statutory duties." App. at 2161 (emphasis added).

By wordsmithing WV American's Questions Presented, Respondents tactically avoid addressing the merits of WV American's arguments. And having argued "liability" and "fault" below—including both in their submitted order—Respondents cannot declare the terminology "wrong" and change their position here.

2. Respondents did not substantively address WV American's arguments.

Respondents either do not address or only briefly mention several of WV American's Questions Presented. Respondents suggest that Question Presented No. 3 hinges on the same "strategic" motives as Questions Presented Nos. 1, 2, and 5, (Resp. at 7), but are silent as to WV American's arguments regarding why the circuit court committed clear legal error when it found typicality under Rule 23(a)(3). They similarly ignore Question Presented No. 5, which addresses issues related to the circuit court finding Rule 23(b)(3)'s predominance and superiority factors were satisfied in relation to class certification under Rule 23(c)(4), brushing it off in a single sentence. Resp. at 10 ("WVAW's fifth Question Presented is also guilty of using the wrong terminology and begging critical questions."). Question Presented No. 6 prompted a similar conclusory response that WV American's argument regarding ascertainably is a "non-starter"

because "[t]he map used to identify class members easily satisfies this requirement" without providing any analysis or arguments in response to the ascertainability issues raised by WV American. Resp. at 15.

3. Due to the deficiencies in the Response, the Court should consider the full record.

Because Respondents did not address each of WV American's assignments of error, they have failed to properly respond to WV American's Writ Petition as required by Appellate Rule 16(h). When parties do not adhere to the Rules of Appellate Procedure, the Supreme Court of Appeals reminds them of their obligations. Quoting Appellate Rule 10(d) (which has the same "must contain an argument responsive to the questions presented" language as Rule 16(h)), the Court has noted that "[i]f the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue." *Funt v. Ames*, No. 21-0157, 2022 WL 1164979, at *7 n.5. (W. Va. Apr. 20, 2022). But the Court has also noted it "decline[s] to rule in petitioner's favor simply because respondent failed to file a response. *Gibson v. Wiley*, No. 21-0319, 2022 WL 1115265, at *1 n.2 (W. Va. Apr. 14, 2022) ("[W]e decline to rule in petitioner's favor simply because respondent failed to file a response."). Whether in a full brief under Appellate Rule 16(g) or summary response under Rule 16(h), Respondents are obliged to respond to each assignment of error. For the reasons stated, the Summary Response—which Respondents chose instead of a full brief—fails do so. As a result, the Court should issue a Rule to Show Cause, examine the full record of this proceeding, and issue an opinion on the merits of WV American's Writ Petition.

B. Respondents fail to respond to WV American's assertion of clear error in the circuit court's application of W. Va. R. Civ. P. 23(c)(4).

The application of Rule 23(c)(4) to certify a narrow "issues" class by the circuit court

presents an issue of first impression for this Court. But Respondents do not address WV American's arguments on this critical issue, ignoring the express focus in Question Presented No. 4 on "[w]hether the circuit court committed clear legal error when it certified a liability 'issues' class under W. Va. R. Civ. P. 23(c)(4)." Petition at 1. Instead, Respondents summarily announce that the circuit court's order complies with the requirements of *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, 244 W. Va. 248, 852 S.E.2d 748 (2020) ("*Surnaik I*") without directing the Court to any points of fact or law supporting their position. Resp. at 14. Respondents then state that the circuit court "simply relied on Rule 23(c)(4) to "underscore[]" its conclusion . . . that Rule 23(b)(3) predominance cannot be defeated where 'the opponent of class certification can simply point to any individual issue.'" *Id.* at 15.

WV American asserts in its Writ Petition that the circuit court's order on remand failed to correct its misapplication of Rule 23(c)(4) and constituted clear error in its reliance on that Rule to exclude complex individualized issues from the required predominance and superiority analysis. Petition at 28–31. Respondents now try to confuse the basis of the circuit court's certification decision by discussing Rule 23(b)(3) rather than Rule 23(c)(4), directly contradicting the circuit court's order and the record. The conclusion of the circuit court's certification order plainly states "[t]his action shall be certified and maintained as a class action pursuant to West Virginia Rule of Civil Procedure 23(c)(4)." *See* App. at 2167. And Respondents asked for certification under Rule 23(c)(4) (because they conceded they could not do so for their claims under Rule 23(b)(3)) and have consistently maintained that request throughout this proceeding. *See* App. at 44 (moving the circuit court to issue an order for the "action to be certified and maintained as a class action with respect to particular issues pursuant to West Virginia Rule of Civil Procedure 23(c)(4)."); App. at 1642 (moving for certification under Rule 23(c)(4) following remand).

In their Summary Response, Respondents chose not to contest WV American's arguments as to why class certification under Rule 23(c)(4) is inappropriate. But WV American's challenge to the circuit court's application of Rule 23(c)(4) to certify a narrow "issues" class presents an issue of first impression and an opportunity for the Court to provide circuit courts with guidance on this important topic.

C. WV American has not taken inconsistent positions regarding the requirements for establishing liability.

Respondents' argument that the Writ Petition should be denied focuses almost exclusively on WV American's prior Motion for Application of the Primary Jurisdiction Doctrine (App. at 1007), which was denied by the circuit court. App. at 1483. Respondents—pulling select quotes from the briefing below—claim that WV American has "switched" from arguing that liability turns on the reasonableness of its own actions, conduct, and practices leading up to the main break, to arguing that the liability analysis must include consideration of water service impact to customers. *See* Resp. at 1–6. Respondents first raised this argument below only when they opposed WV American's motion to file a surreply to their class certification motion on remand. App. at 1778–82.[2] It was not argued in their prior opposition to WV American's Petition for Writ of Prohibition. App. at 1562, nor in their motion for certification or reply on remand. App. at 1640; 1734. Not surprisingly, the argument is not addressed or mentioned in the circuit court's certification order.

Respondents misrepresent the position that WV American took in its primary jurisdiction briefing. Resp. at 1–3. WV American did not argue, as Respondents claim, that "liability issues can be separated and decided based on the reasonableness of WVAW's actions, conduct, and practices before the main break, without regard to the extent of any service disruption." Resp. at

[2] Because Respondents' (Plaintiffs below) reply memorandum raised new issues, WV American moved to file a surreply (App. at 1760), which Respondents opposed. App. at 1776. The circuit court denied the motion. App. at 1784.

1. WV American's position is, and has always been, that the regulatory and statutory provisions on which Respondents rely set forth obligations to provide reasonable water service to customers and maintain adequate facilities for that purpose.

WV American filed its motion to refer Respondents' Complaint to the Public Service Commission ("PSC") in response to Respondents' Complaint which defined "breach" as based solely on the existence of any water service impact. The Complaint alleged that WV American failed to perform its contractual, statutory, and common law duties "when it failed to supply usable tap water or adequate water pressure to approximately 25,000 customers for a period of three or more days." App. at 23; Compl. ¶24. In response to these express allegations,[3] WV American requested referral to the PSC, seeking its expertise in identifying the level of service required (reasonable, not perfect) and defining reasonable service within the context of the system and financial considerations of a regulated utility. App. at 1026 ("WVAW believes that Plaintiffs misinterpret the regulatory provisions that apply to WVAW, particularly to the extent Plaintiffs suggest that any interruption in service creates a contractual breach. While this legal dispute could provide the basis for a motion to dismiss, WVAW believes that the issue should be addressed first by the PSC."); App. at 1025 ("This determination of what constitutes compliance with [the PSC regulations, W. Va. Code § 24-3-1, and general industry standards] cannot be made by simply comparing WVAW's actions against a list of identified requirements.").

WV American did not argue in its primary jurisdiction briefing that liability could be solely determined on whether its pre-break actions, conduct, and practices were "reasonable." Instead, consistent with its current position, WV American argued that a determination of its liability

[3] Respondents say that WV American "took the very position it now derides," Resp. at 1, but wholly ignore the allegations in their own Complaint. Their Response is full of similar rhetoric, which the Court should ignore.

requires consideration of both reasonable service (or unreasonable impact) and the adequacy of the system for providing such service. App. at 1033 ("The standard imposed on utilities is one of reasonable service, as defined by the PSC. The standard is not nor can it be perfection, and the PSC is tasked with ensuring that limited resources are used in in a way that will best ensure reasonable service."); App. at 1033–34 ("While Plaintiffs' proposed standard of perfect, uninterrupted service sound great, the cost of perfection comes at too great a price, which is precisely why the standard for service is one of reasonableness and why that standard should be interpreted (and enforced, if necessary) by the regulatory agency having the insight and expertise necessary to ensure that the limited resources available are directed toward the areas of most need.").

While WV American's position as to liability has remained constant, Respondents' position has not. Their Complaint defined "breach" as based solely on the existence of any water service impact. App. at 23; Compl. ¶24. The Complaint is full of allegations that a three-day water interruption was a breach of contractual, statutory and tort duties by WV American. *See* App. at 23; Compl. ¶29 ("Whether one interprets that provision literally, to mean uninterrupted service, as Plaintiffs believe it should be interpreted, or as a duty to provide service with 'reasonable continuity,' as WVAW will no doubt argue, WVAW clearly failed to fulfill that contractual promise to its customers, including Plaintiffs, when 25,000 customers lost water for three or more days in June 2015."); App. at 28, Compl. ¶38 ("WVAW clearly violated its statutory duty to its customers, including Plaintiffs, when 25,000 customers lost water for three or more days in June 2015."); App. at 28; Compl. ¶39 ("However generously one may interpret that section of the West Virginia Code, an outage impacted 25,000 customers for at least three days does not comport with the duty to provide service that is 'reasonable.'"); App. at 28; Compl. ¶40 ("an outage

impacting 25,000 customers for at least three days does not comport with the duty to provide service that is 'sufficient.'").

Respondents tactically changed their argument below (and here) to justify certification of a narrow issues class on "liability" because they admitted that impact is an individual determination that cannot be proven on a classwide basis. App. at 1663. Respondents now claim water service impact—the prior focus of their Complaint—is solely an injury and damages issue, or simply the harm sought to be prevented. Resp. at 8 ("[I]njuries (damages) can and sometimes do occur without any breach of duty, and breaches of duty can and often do occur without any injury (damages)."). They now argue that WV American "conflate[s] its legal duty (to construct and maintain its system in appropriate condition) with the purpose of the duty (to prevent or minimize events involving loss of water service or loss of pressure)." *Id*. at 7–8. Both the past and present iterations of Respondents' arguments are flawed. Respondents are not entitled to a presumption of liability based on any event that results in an impact on water service. Nor are they entitled to automatic class certification based on any alleged regulatory or statutory violation without a showing of classwide service impact to individual customers. As explained in the Writ Petition, and not rebutted by Respondents, their certification request should have been denied by the circuit court because Respondents cannot demonstrate breach or liability based on classwide proof as required under Rule 23.

Ultimately, this Court should focus on the merits of the arguments presented in the Writ Petition and the appropriate construction of the statutory and regulatory provisions on which Respondents base their claims and their request for class certification. WV American's primary jurisdiction motion was denied by the circuit court and is not subject to review here. Respondents' focus on this briefing is misplaced, wrong, and designed to distract from to the arguments set forth

in WV American's current Writ Petition.

III. CONCLUSION

Through their prior Motion to Remand shortly before oral argument, their Motion to Dismiss the Writ Petition due to the ordering of an Appendix record they approved, and their Summary Response that does not comply with the Appellate Rules, Respondents have at every step tried to stop any review of the circuit court's order. But this Court has long recognized that appellate review of class certification orders by Petitions for Writ of Prohibition is preferable to an appeal because of the "irremediable prejudice" to defendants. *McFoy v. Amerigas*, 170 W. Va. 526, 532, 295 S.E.2d 16, 22–23 (1982) ("Writs of prohibition offer a procedure in West Virginia preferable to an appeal for challenging an improvident award of class standing."). Indeed, this Court issued a Rule to Show Cause and scheduled the case for a Rule 20 argument before remanding. Now, where the Summary Response fails to address not only the Questions Presented, but a myriad of arguments advanced in WV American's brief, this Court should again issue a Rule to Show Cause and schedule oral argument to allow appropriate review of WV American's Writ Petition, and issue an opinion reversing the circuit court's class certification order.

Dated: October 12, 2022

Respectfully submitted,

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