IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

RICHARD JEFFRIES, and COLOURS BEAUTY SALON, LLC, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

Civil Action No. 17-C-765
Judge Carrie L. Webster

WEST VIRGINIA-AMERICAN WATER COMPANY,

Defendant.

ORDER REGARDING CLASS CERTIFICATION AFTER FURTHER CONSIDERATION IN LIGHT OF STATE ex rel. SURNAIK HOLDINGS OF WV, LLC v. BEDELL

INTRODUCTION AND PROCEDURAL HISTORY

Plaintiffs Richard Jeffries and Colours Beauty Salon, LLC, filed a class action complaint on June 2, 2017. Defendant West Virginia-American Water Company ("WV American") filed motions to refer the action to the Public Service Commission and to dismiss under W. Va. R. Civ. P. 12(b)(6) which the Court denied. WV American served an Answer on March 11, 2019. The parties have engaged in discovery and identified their respective class experts within the applicable deadlines.

On February 4, 2020, Plaintiffs moved for certification of an issues class pursuant to Rule 23(c)(4) of the West Virginia Rules of Civil Procedure ("WVRCP"). WV American opposed Plaintiffs' Motion for Class Certification (the "Motion"). On July 14, 2020, this Court issued an Order granting Plaintiffs' class certification motion in part and denying it in part. On August 31, 2020, WV American filed a Verified Petition for Writ of Prohibition (the "Petition") with the

Supreme Court. On September 10, 2020, the Court granted the parties' Joint Motion to stay all proceedings in this matter pending disposition of the Petition.

On November 20, 2020, the Supreme Court issued a decision in *State of West Virginia ex rel. Surnaik Holdings of WV, Inc. v. Bedell*, 244 W. Va. 248, 852 S.E.2d 748 (2020) ("Surnaik I"), which provided guidance for circuit courts in this State with respect to findings and analysis that must be conducted and set forth in class certification orders. On January 12, 2021, Plaintiffs filed a Motion to Remand, seeking to have the case remanded to this Court for further findings. On January 28, 2021, the Supreme Court issued a Remand Order remanded the case to this Court for further consideration in light of *Surnaik I*.

On April 15, 2021, Plaintiffs submitted a Memorandum in Support of Class Certification Following Remand. On April 30, 2021, WV American filed a Response in Opposition to Plaintiffs' Memorandum. On May 12, 2021, Plaintiffs filed a Reply. On July 16, 2021, the Circuit Court conducted a status conference, wherein the parties discussed the recent decision in the *Surnaik* case.

During the pendency of this Court's ruling, the parties have submitted supplemental legal authority, including a recent decision issued by the West Virginia Supreme Court of Appeals on June 8, 2022, denying a petition for writ of prohibition filed by Defendant Surnaik in Case No. 21-0610, Surnaik Holdings of WV, LLC, v. Bedell (hereafter *'Surnaik II*). In its ruling, the Supreme Court determined that the difference between Judge Bedell's new order and his original order granting class certification "was that the circuit court's order clearly contains the appropriate and thorough analysis of predominance and superiority required by our decision in *Surnaik I*." Surnaik II at 6. Other supplemental authority was submitted by the Defendants on December 20, 2021, and by the Plaintiffs on December 27, 2021.

It is now incumbent upon the Court pursuant to the Remand Order to further consider the issues raised by Plaintiffs' Motion for Class Certification in light of the *Bedell* decision. Plaintiffs stand on their previously-filed Motion for Class Certification and do not ask the Court to alter the structure of the proposed Class.

FINDINGS OF FACT

Because discovery on the merits of this action is not complete, the Court makes the following Findings of Fact based on the pleadings and additional materials – deposition excerpts and documents – filed by the parties in support of their respective positions and solely for the purposes of evaluating this class certification motion.

1. Plaintiffs' claims arise from a catastrophic break in WV American's 36-inch diameter prestressed concrete cylinder pipe ("PCCP") transmission main located in Dunbar, West Virginia discovered on June 23, 2015. Plaintiffs submitted evidence with their Motion that the water main that broke serves western Kanawha County, eastern Putnam County, eastern Mason County and northern Lincoln County. Plaintiffs claim the main break caused outages and inadequate water pressure to approximately 25,000 WV American customers.

2. On June 23, 2015, WV American issued a precautionary boil water advisory for customers west of Dunbar in the company's Kanawha Valley system. Customers were advised to bring water used for drinking, cooking, bathing and brushing teeth to a full boil for a minimum of one minute, and then let cool before using. Customers who still had access to water service were advised to limit all non-essential water use until further notice.

3. Initial repair attempts over the next several days were unsuccessful and water service was not restored until June 27, 2015.

4. Plaintiffs claim that on June 29, 2015, another problem developed at the site of the initial break, which caused an additional interruption in service to thousands of the same customers.

5. On June 29, 2015, WV American issued another precautionary boil water advisory for customers in fourteen communities who experienced low water pressure or no water as a result of the ongoing repairs to the main. The notice advised customers that extensive repairs required the shutdown of the main transmission line, which drained several water storage tanks. Again, customers were asked to bring water used for personal consumption and bathing to a full boil before use.

6. Plaintiffs assert that full water service with adequate pressure was not restored to all customers until July 1, 2015.

7. With their Motion, Plaintiffs submitted a report from their expert, Seward G. Gilbert, Jr., that identified a map of impacted and likely impacted areas, across twenty-two zip code areas, based on data from an engineering firm that provided an analysis of the failure event.

8. Plaintiffs allege that the potential loss of water service to these areas was well known to WV American because the areas are left overly dependent on a single, large-diameter main. Further, Plaintiffs allege that the main in question has been known, since its installation in 1971 or 1972, to be unreliable and prone to a disproportionately high number of breaks and leaks over the course of its service time. Further, Plaintiffs allege that it was known to WV American that breaks along this service transmission main could take many days to repair because of the size of the main and its other characteristics.

9. Plaintiffs allege that WV American also knew that it did not have adequate treated water storage in the areas served by this main which could maintain continuous tap water service

during the anticipated extended outage of this single main. Plaintiffs allege that improvements to ensure adequate service along this transmission line were feasible, such as the development of an interconnection with a neighboring water system in Huntington, West Virginia, reinforcing the existing distribution system by adding large capacity mains, or increasing treated water storage in the areas in question.

10. Plaintiffs assert that WV American breached its contractual obligation, under a West Virginia Public Service Commission ("PSC") Water Rule incorporated in WV American's contracts, to at all times construct and maintain its entire plant and system in such condition that it will furnish safe, adequate and continuous service.

11. Plaintiffs claim that WV American knew or should have known for many years prior to the June 2015 main break that its entire plant and system were not so constructed and maintained. Plaintiffs allege that the company was indifferent to the legal and contractual obligations and the needs of its customers, and believed itself to be effectively immune from any consequences of an outage, no matter how significant. At the same time that WV American is alleged to have neglected its transmission system infrastructure, Plaintiffs allege that WV American sought to use the possibility of extended outages as leverage to extract better rates and more favorable capital expenditure recovery terms from West Virginia regulators.

12. Plaintiffs allege that WV American's routine neglect of its system culminated in investigative proceedings before the PSC, which issued an order on October 13, 2011, requiring WV American to increase its main replacement rate, finding that its then-existing 950-year main replacement rate was "unacceptable."

13. Plaintiffs claim a right of action for damages as the result of a violation by WV American of West Virginia Code § 24-3-1, which provides: "Every public utility subject to this

chapter shall establish and maintain adequate and suitable facilities, safety appliances or other suitable devices, and shall perform such service in respect thereto as shall be reasonable, safe and sufficient for the security and convenience of the public."

14. Plaintiffs claim that WV American's facilities, as established and maintained, were not adequate or suitable. Plaintiffs further claim WV American's service - judged from industry standards - was not reasonable or sufficient, and its facilities were not adequate.

15. Plaintiffs assert a claim that WV American failed to exercise reasonable care through its faulty design and construction of the 36" concrete main and its joints; through its failure to address the transmission main's unacceptably high break rate; and through its indifference to 25,000 customers whom it left dependent on a single main with inadequate reinforcements, redundancy or storage reserves. Plaintiffs claim this conduct violated industry standards and Public Service Commission Water Rules and is therefore actionable.

16. Plaintiffs seek compensatory damages including but not limited to damages for annoyance and inconvenience, out-of-pocket expenses and lost profits, and seek punitive damages pursuant to their tort claims.

17. Plaintiffs assert that proof of damages will involve simply identifying the location of the business or residence owned or occupied by the class member, and confirming that it is within the area impacted by the main break. Then, Plaintiffs assert that testimony from the class members about the impact of the service interruption may establish damages. In some cases, particularly in the case of business class members, Plaintiffs claim, this class member testimony may be supplemented by receipts for out-of-pocket expenses or other routine business records.

STANDARD OF REVIEW

1. The Court must conduct a "rigorous analysis" to ensure that all of the prerequisites of class certification have been satisfied. *Bedell*, 852 S.E.2d at 757; *State of West Virginia ex rel. Chemtall, Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772, 782 (2004), quoting *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

2. Before the Court may certify a class action, it first must find that Plaintiffs have satisfied all of the provisions of WVRCP 23(a): numerosity, commonality, typicality and adequacy. When a class action is being sought pursuant to WVRCP 23(b)(3), a class action may be certified only if the Court is satisfied, after a thorough analysis, that the predominance and superiority prerequisites of Rule 23(b)(3) have been satisfied. *Bedell*, 852 S.E.2d 748 at syl. 7. Syllabus point 7 of *Bedell* provides:

> When a class action certification is being sought pursuant to West Virginia Rule of Civil Procedure 23(b)(3), a class action may be certified 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. 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. This analysis must be placed in the written record of the case by including it in the circuit court's order regarding class certification.

3. WVRCP 23(c)(4) provides that when appropriate, "an action may be brought or maintained as a class action with respect to particular issues." As the Fourth Circuit acknowledges with respect to the analogous Federal Rule, Rule 23(c)(4) "contemplates possible class adjudication of liability issues." *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 428 (4th Cir.

2003). The Court enjoys "broad discretion to sever common issues for class adjudication through partial certification" in mass tort cases. *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21, 29 (E.D. N.Y. 2001). In fact, the "language and spirit" of the rules "encourage" the Court to do so to achieve "economies of time, effort, and expense, and promoting uniformity of decision as to persons similarly situated." *Id.*

4. Merits questions are to be considered by the Court only to the extent that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied. *State ex rel. West Virginia University Hospitals, Inc. v Gaujot*, 242 W. Va. 54, 829 S.E.2d 54, 63 (2019).

5. Whether the requisites for a class action exist rests within the sound discretion of the trial court. *Bedell*, 852 S.E.2d at 756.

CONCLUSIONS OF LAW

A. Rule 23(a) Analysis

1. The prerequisites of WVRCP 23(a) are met.

Numerosity

2. First, the Court reaffirms its earlier conclusion that the proposed class is so numerous that joinder of all members is impracticable. WV American does not contest numerosity. The Court has reviewed the record and believes the Class will likely include approximately 120,000 customers and residents, and will include approximately 2,826 business establishments. Plaintiffs have met the numerosity standard, as WV American concedes.

Commonality

3. The Court also reaffirms its earlier finding that there are common issues of both law and fact such that the commonality element of WVRCP 23(a) is satisfied. Plaintiffs' factual allegations regarding WV American's conduct in maintaining its systems prior to the main break

are issues of fact that are relevant to the claims of all of the proposed Class members. The water main that broke likely affected, as mentioned above, in the neighborhood of 20,000 or 25,000 customers, both residential and business customers, and likely as many as 50,000 total residents. The relevant contractual language alleged to have been breached is identical between WV American and all class members, creating additional commonality in the issues of fact to be considered in the case. Moreover, there are issues of law that are common to Plaintiffs and all Class members, including whether WV American breached its contracts for failing to maintain its facilities in such condition to provide an adequate and continuous water service, and whether WV American violated its statutory duties to maintain adequate and suitable facilities. The claims of all Class members will resolve common issues of law. The resolution of all claims will turn upon whether WV American failed to exercise reasonable care in the design, construction, maintenance, and management of its water distribution system. This inquiry will involve the same proof for all members of the Class.

4. The Court is cognizant that there were undoubtedly individual members of the Class that suffered different consequences from having lost water. The bulk of WV American's opposition to class certification is focused upon this point. However, the Court concludes that what are inevitable individual variances among class members, from one customer to the next, do not detract from the fact that the commonality threshold is met. It has been held that where, as here, core issues of liability are common to all class members, commonality exists notwithstanding factual variations regarding individual members of the class. *Leach v. E.I. du Pont de Nemours & Co.*, 2002 WL 1270121 at *11 (W. Va. Cir. Ct. Apr. 10, 2002). The Court once again concludes that commonality is met in this case.

Typicality

5. Again, the Court finds that Plaintiffs' claims are typical of the claims of the proposed Class. While typicality does not require Plaintiffs' claims to be identical to all of the other Class members, here, their claims have the same essential characteristics as the claims of all Class members. It is true, as WV American urges, that potential differences exist in the degree of service interruption experienced from one class member to the next. Nonetheless, even if this is true, the claims remain predicated upon behavior by WV American which was directed toward the Class as a whole. The core issues in the case remain whether WV American's actions toward the class as a whole violated the law. There is no suggestion that any Plaintiff or any class member will pursue any legal claims whatsoever that will not arise out of these same key pieces of factual evidence, or which will not present these same legal theories regarding how WV American's conduct violated its contractual, statutory and regulatory duties. There is no question that typicality, an element of Rule 23 which is not a demanding one, is satisfied.

Adequacy

6. With respect to the final requirement of Rule 23(a), the adequacy requirement of Rule 23(a)(4), the Court once again notes that WV American has not contested the fact that Plaintiffs are adequate class representatives, or that Plaintiffs' counsel has the necessary skills and experience to serve as adequate counsel for the Class. Plaintiffs have testified with regard to the difficulties they experienced having lost water during the incident. They have incurred out of pocket costs. They have no conflict with other Class members when it comes to proving their case. Further, Plaintiffs have retained highly skilled counsel. The Court is once again satisfied that the prosecution of this class action is in capable hands and that Plaintiffs will adequately represent the proposed class of WV American customers. The adequacy requirement is satisfied.

B. Rule 23(c)(4) Analysis

7. Certification of a fault-based issues class under WVRCP 23(c)(4) is appropriate and within the Court's discretion. Numerous courts have found that use of a Rule 23(c)(4) issues class to resolve the liability issue on behalf of all claimants through common proof will materially advance disposition of the litigation. *Good v. American Water Works Company, Inc.*, 310 F.R.D. 274, 295 (S.D. W. Va. 2015); *In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005) ("single hearing" on liability issues "decided first" through Rule 23(c)(4) issues class certification avoids need for litigating class-wide issues of liability "in more than a thousand separate lawsuits"); *Gunnells*, 348 F.3d at 428 (class adjudication of liability issues an appropriate use of Rule 23(c)(4)); *Simon*, 200 F.R.D. at 29 (court enjoys "broad discretion to sever common issues for class adjudication" in mass tort cases).

8. Certification of an issues class which will try WV American's fault or liability on a class-wide basis in an initial phase of trial, consistent with these many prior precedents advocating use of that practice, affords the Court the flexibility to best manage this action through the remaining stages of litigation. Since Plaintiffs have not proposed to prove (by formula or otherwise) that damages can be calculated on a class-wide basis, there will be remaining individual issues to resolve at the conclusion of the initial fault trial – but this is not unusual or unexpected. The Court believes that to sacrifice class adjudication, and essentially leave the many thousands of class members with no remedy other than to pursue negative-value claims on their own, would be inappropriate given that there are driving liability issues in the case that can be dealt with efficiently and effectively if they are tried for the class as a whole.

C. Rule 23(b)(3) Predominance Analysis

9. The Court also finds that traditional WVRCP 23(b)(3) requirements are met. Here, the Court is mindful of the guidance from *Bedell* with respect to thorough analysis of the predominance and superiority requirements. As part of the thorough analysis required by *Bedell*, the Court must (1) identify the parties' claims and defenses and their respective elements; (2) determine whether these issues are common questions or individual questions by analyzing how each party will prove them at trial; and (3) determine whether the common questions predominate. *Bedell*, 852 S.E.2d at 750 syl. 7. Furthermore, the Court has assessed 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." *Id.*

10. Plaintiffs pursue breach of contract, statutory tort, and common-law negligence claims. All of Plaintiffs' and the class members' claims arise under West Virginia law, meaning that there are no complex choice of law difficulties that might detract from the common liability issues that drive the litigation, such as those that existed in WV American's principal case relied upon in its post-remand Response, *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

11. In *Castano*, plaintiffs were smokers who sued defendant tobacco companies for the injury of nicotine addiction on the novel theory that defendants had fraudulently failed to inform consumers that nicotine is addictive, and the fact that defendants manipulated nicotine levels in cigarettes to sustain their addictive nature. The district court had found that the predominance requirement was satisfied for core liability issues, but did so despite having not yet made a choice of law determination, and despite having deferred substantial consideration of how variations in

state law would affect predominance. Reversing the district court's certification of a multistate class, the Fifth Circuit determined that the lower court had "abused its discretion by ignoring variations in state law," because "[p]rior to certification, the district court must determine whether variations in state law defeat predominance."[1] *Id.* at 750, 752. On the superiority analysis, the Fifth Circuit also found that choice of law issues were paramount, and that the complexity of the inquiry made individual adjudication superior to class treatment. *Id.* at 750. Here, in contrast, there are no choice of law issues. The Court finds *Castano* inapposite.

12. The Court finds that Plaintiffs have abandoned the breach of contract claim in Count I of their Complaint. For the three remaining claims—Counts II (breach of contract), III (statutory tort), and IV (common-law tort)—a thorough claim-by-claim analysis of the elements and the necessary common or individual proof follows.

Elements of Breach of Contract – Count II

13. Count II of Plaintiffs' Complaint sets forth a claim for breach of contract. The elements of a breach of contract claim are formation, breach of one or more terms by the other party, and damages. *See Sneberger v. Morrison*, 235 W. Va. 654, 669, 776 S.E.2d 156, 171 (2015) ("A claim for breach of contract requires proof of the formation of a contract, a breach of the terms of that contract, and resulting damages.").

14. *Contract formation.* In the instant case, the formation of a contract between WV American and its customers is not in dispute, all contracts between WV American and its customers are identical with respect to the term alleged to have been breached, and the only proof

[1] The Fifth Circuit in *Castano* relied on *Georgine v. Amchem Prods.*, 83 F.3d 610 (3d Cir. 1996), which had similarly decertified a class because legal and factual differences in the plaintiffs claims were "exponentially magnified by choice of law considerations, eclips[ing] any common issues." *Id.* at 618.

required to show that a contract was formed between WV American and any individual is trivial. Customers can prove that they are customers through WV American's own records. Therefore, this element predominates, as there are no individual issues of anything other than a pro forma nature.

15. *Breach of one or more contract terms.* The critical provision of the contracts alleged to have been breached is a PSC regulation found at W. Va. C.S.R. §150-7.5.1.a, incorporated into the contracts, which provides that "[e]ach utility shall at all times construct and maintain its entire plant and system in such condition that it will furnish safe, adequate and continuous service." The Court concludes that only common proof is relevant to the breach element of Plaintiffs' contract claims. The duty at issue is the duty to "construct and maintain its entire plant and system" in a suitable condition to prevent service interruptions, and WV American breached or did not breach that duty based on the condition that the system was in at the time of the main break, and whether that condition was up to the standard required under the contract, judged before the break occurred. One key consideration is WV American's knowledge or constructive knowledge concerning the likelihood and expected severity of service interruptions given the condition of the main at issue. The other key consideration is the feasibility of reducing that likelihood or severity of service interruptions by making reasonable improvements and undertaking reasonable maintenance (i.e., by "construct[ion] and maint[enance]"), such as by installing a continuous monitoring system on the main in question, or by reinforcing the system. Plaintiffs allege that WV American could have eliminated the risk of an extended service interruption from this predictable main break by taking any one of these steps: constructing an additional main or mains, building more storage tanks, or even creating an interconnection with

another water system. The Court concludes that all of this evidence is common to the claims of all class members.

16. WV American contends that proof of the breach of this contract provision requires consideration of the extent of the impact on individual customers from the actual main break. The Court disagrees. A water system can be "construct[ed] and maintain[ed]" in accordance with this standard and still experience a service interruption through no fault of the utility operator. On the other hand, a system that is poorly constructed and poorly maintained and therefore in violation of the contract provision might nonetheless limp along for years and years without experiencing any service interruptions. This is no different than any other requirement or standard of care. The lack of a guardrail might render one stretch of road unsafe even though no one ever drives off the cliff, while the fact that a driver lost control and was going fast enough to go over or through a guardrail on a different stretch of road does not mean that the guardrail was necessarily inadequate or that the road was unsafe.

17. *Damages*. The Court concludes, and Plaintiffs do not dispute, that this element of Plaintiffs' contract claim (and other claims) requires individual proof. In most instances, that proof will be limited to identifying the location of the business or residence, confirming that it is within the area impacted by the main break, and then testimony from the residents (or managers and accountants) at the address about the impact of the service interruption, in some cases supplemented with receipts and such for substitutes.

18. *Affirmative defenses*. Several of WV American's defenses, such as impracticability and supervening cause, emphasize the collective or common applicability of the company's duty to erect and maintain a reliable system, and are thus a mirror image of Plaintiffs' allegations regarding WV American's legal duties. The Court concludes that WV American does not raise

any affirmative defenses that it claims requires individual analysis. In short, WV American does not have affirmative defenses that impact the predominance analysis.

Elements of Statutory Violation – Count III

19. The elements of a statutory claim for damages depends on the language of the statute in question. In this case, W. Va. Code § 24-3-1 supplies the duty, and W. Va. Code § 24-4-7 supplies the right of action for any "person, firm or corporation claiming to be damaged by any violation of this chapter by any public utility subject to the provisions of this chapter." The elements of Count III of Plaintiffs' Complaint are therefore: statutory duty (supplied by W. Va. Code § 24-3-1), breach of the duty, causation, and damages. These are basically the same elements required for any common-law tort. *See Carter v. Monsanto*, 212 W. Va. 732, 737, 575 S.E.2d 342, 347 (2002) ("[B]efore one can recover under a tort theory of liability, he or she must prove each of the four elements of a tort: duty, breach, causation, and damages.").

20. *Duty*. The Court concludes that the duty at issue in Count III is common to all class members and supplied by West Virginia Code § 24-3-1, which provides, in relevant part: "Every public utility subject to this chapter shall establish and maintain adequate and suitable facilities, safety appliances or other suitable devices, and shall perform such service in respect thereto as shall be reasonable, safe and sufficient for the security and convenience of the public."

21. *Breach of duty*. The Court concludes that proof of the breach of this duty, and all evidence introduced that is relevant to it, will be common proof and common evidence. The analysis is the same in all respects as the analysis for breach of contract terms under the breach of contract claim (Count II), discussed above. WV American's duty is to "establish and maintain adequate and suitable facilities, safety appliances, and other suitable devices." Whether it breached that duty turns on the state of its facilities, safety appliances, and other devices at the time of the

main break, what WV American knew or should have known about the likelihood and likely consequences of a main break, and the feasibility of taking steps to prevent a main break or provide redundancy or reinforcement to the system (e.g., additional storage tanks or water mains) in the event of a main break. The Court concludes that the "breach of duty" element, unlike the damages element, does not in any way turn on what happened following the impact and the extent of the service interruption for any individual customer.

22. *Causation*. The Court concludes that the causation element is trivial for every case. If a customer resided within the area subject to the Boil Water Advisories following the main break, and the customer had to boil his or her water, lost water pressure, or suffered a complete service interruption during the time the Boil Water Advisories were in effect, then it was caused by the main break.

23. *Damages*. The Court concludes that this element requires individual proof. In most instances, that proof will be limited to identifying the location of the business or residence, confirming that it is within the area impacted by the main break, and then testimony from the residents (or managers and accountants) at the address about the impact of the service interruption, in some cases supplemented with receipts and such for substitutes. The time and expense of taking this proof pales in comparison to the time and expense of proving breach of the duty to erect and maintain a suitable system.

24. *Affirmative defenses*. The Court incorporates by reference its discussion above regarding WV American's affirmative defenses and concludes that WV American does not raise any relevant affirmative defenses that require individual analysis.

Elements of Common-Law Negligence – Count IV

25. The elements of Count IV of Plaintiffs' Complaint, common-law negligence, are the same elements required for any common-law tort: duty, breach of duty, causation, and damages. *See Carter v. Monsanto*, 212 W. Va. 732, 737, 575 S.E.2d 342, 347 (2002) ("[B]efore one can recover under a tort theory of liability, he or she must prove each of the four elements of a tort: duty, breach, causation, and damages.").

26. *Duty*. The duty at issue in Plaintiffs' common-law negligence claim is the common-law duty to exercise reasonable care.

27. *Breach of duty*. The proof relating to WV American's breach of this common-law duty of reasonable care, and all evidence introduced that is relevant to it, will be common proof and common evidence. The analysis is the same in all respects as the analysis for breach of contract terms under the breach of contract claim (Count II) and breach of statutory violations (Count III), discussed above. The relevant question is this: Did WV American know or have constructive knowledge that a serious break along this particular main was so likely, and that the consequences of the service 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 violation of its common-law duty to exercise reasonable care in the performance of its public and contractual duties to supply water to the territory for which it requested and received the exclusive right as the public water utility provider? The answer to this question turns on what WV American knew or should have known about the likelihood and expected scale of the service interruption from a break along this critical main, not the actual extent of the service interruption to any individual customer. Therefore, the question has a common answer for each and every customer who was or may have been impacted by the main break, and requires only common proof.

28. *Causation*. The causation element is trivial in each of these cases. If a customer resided within the area subject to the Boil Water Advisories described in Exhibits A and B, and the customer had to boil his or her water, lost water pressure, or suffered a complete service interruption during the time the Boil Water Advisories were in effect, then it was caused by the main break.

29. *Damages*. This element requires individual proof. In most instances, that proof will be limited to identifying the location of the business or residence, confirming that it is within the area impacted by the main break, and then testimony from the residents (or managers and accountants) at the address about the impact of the service interruption, in some cases supplemented with receipts and such for substitutes. As with the other claims, the time and expense of taking this individual proof in any given case is swamped by the proof relating to duty and breach.

30. *Affirmative defenses*. The Court incorporates by references its discussion above regarding WV American's affirmative defenses and concludes that WV American does not raise any relevant affirmative defenses that require individual analysis.

Whether the Common Issues Predominate

31. The next step under *Bedell* is to "determine[e] whether the common questions predominate." 852 S.E.2d at 750, syl. pt. 7. "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." *Id.* The predominance requirement under Rule 23(b)(3) is not a requirement that all issues and all elements of all claims must be common in order to certify a class. This is why the certification issue literally

hinges on whether the common issues predominate over the individual issues, rather than hinging on whether the opponent of class certification can simply point to any individual issue. Rule 23(c)(4) underscores this point, by permitting certification to be limited to resolution of discrete common issues. Whether one regards Rule 23(c)(4) issue-only certification as being subject to the requirements of Rule 23(b)(3), including consideration of issues, claims, and elements for which certification is not sought, Rule 23(c)(4) would be completely pointless if certification of common issues were not permitted in cases where individual issues might remain following the resolution of those common issues.

32. Under the *Bedell* analysis, the Court has carefully considered whether the issues raised by these claims are common questions or individual questions. In so doing, the Court considered how Plaintiffs have proposed to prove these claims at trial, and has carefully examined Plaintiffs' Trial Plan. Plaintiffs have proposed to prove to the jury that WV American knew or should have known that a serious break along this particular main was so likely – and that the consequences of service interruption expected following such a break so great – that its failure to take at least some measure to prevent or reduce the likelihood of that outcome constituted violations in several respects. The jury may then determine that WV American's failures in this regard give rise to liability under both tort and contract, as well as under the West Virginia statute which provides for an independent cause of action in tort. Plaintiffs have provided further detail on how these claims will be proven. Plaintiffs' plan is to prove to the jury that a number of measures were available to WV American, ranging from replacement of the main to installing a continuous monitoring device on the main, but that WV American failed to incorporate any of these precautions, ultimately directly leading to and causing the accident which adversely affected so many of its customers.

33. Having reviewed Plaintiffs' plan to prove their case at trial, the Court concludes that all of the common liability issues, across each and all of the causes of action, turn upon what WV American knew and when it knew it – or, what WV American should have known and when it should have known it – with regard to the likelihood and scale of serious service interruptions from a break of this variety and from the particular PCCP main that is in question.

34. Additional areas of proof which Plaintiffs propose to introduce to support their claims is what WV American knew or should have known about the number of days it would take to repair a main of this size, as well as what the company knew about the lack of availability of a backup supply of water, or redundant mains. Moreover, Plaintiffs propose to introduce evidence at trial that WV American was indifferent to the risks posed to customers by a lack of infrastructure support, adequate treated water storage, and the need for improvements in developing interconnections that would be able to supply water in the event of large main break.

35. Thus, the Court concludes that the next element of the *Bedell* analysis – determining whether common questions predominate – must be answered in favor of Plaintiffs. The common liability issues turn upon WV American's knowledge, or WV American's lack of knowledge about things it should have known about, have common answers no matter which Plaintiff or class member is asserting the claim. For each and every liability issue raised by Plaintiffs' claims, the relevant evidence as proposed by Plaintiffs' plan of proof turns upon what was known by the company as well as what measures were available to it to reduce the likelihood of a catastrophic problem with this particular main.

36. With respect to each of the three remaining claims—for breach of contract, statutory tort, and common-law tort—the breach of duty element requires common proof, while the damages issue requires individual proof. The time, effort, and expense involved in proving the

breach of contract term element for each claim overwhelmingly dwarfs the time, effort, and expense of proving individual damages. Proving breach of duty requires an extensive investigation into what WV American knew or should have known about the likelihood of a main break along this particular main, the expected and foreseeable impacts of such a main break, and the options available to it to monitor or reinforce the system to prevent or reduce the impact of such a main break. This effort involves at least the following time-and effort-consuming and expensive endeavors, before trial: document discovery and review of thousands of documents from WV American and WV American parent company's service company; depositions of witnesses for WV American, including maintenance workers, engineers, and managers; depositions of the service company's engineers and managers; subpoenas for documents and depositions of WV American's engineering and maintenance contractors; and extensive expert witness discovery, including the hiring and preparation of multiple expert witnesses by the plaintiffs, and the deposition and skillful cross-examination of multiple defense experts. All of this evidence relating to breach of duty must then be marshaled and organized and then presented at trial, which is not only time-consuming but also expensive, especially given the number of experts involved (mostly coming from out-of-state). The expense of doing this could easily run into the tens of thousands of dollars, and require thousands of attorney hours, for every case where proof of breach of duty must be separately presented at trial. Another obvious downside to presenting this evidence at thousands of individual trials is the risk of different verdicts even though the issue is identical. Here, employing the class device benefits WV American as WV American, should it prevail, would defeat the claims of the thousands of its customers in the impacted service area in one fell swoop.

37. In contrast, all of the evidence concerning the individual element of damages is within the possession of the individual plaintiff customers and other household members (or businesses and their accountants and employees). It consists of their testimony. In some instances (especially for business plaintiffs), it might involve some review and presentation of records in the possession of the plaintiffs themselves. The cost to the plaintiffs of presenting this damages evidence is nominal, and the attorney time involved (and associated expense to the plaintiffs and defendants) is modest for each individual plaintiff: no more than a few hours.

38. Accordingly, the Court concludes that certifying the instant class action "would achieve economies of time, effort, and expense," the main factor to be considered under *Bedell*. *See* syl. pt. 7. Certifying the duty and breach of duty issues would also "promote uniformity of decision as to persons similarly situated," as it would eliminate entirely the risk of inconsistent verdicts on the identical issues of duty and breach, the other important factor. *Id.* Certifying only the common elements of duty and breach of duty for a class-wide trial under Rule 23(c)(4), while preserving the individual element of damages for follow-on individual or group mini-trials or hearings, eliminates any risk of "sacrificing procedural fairness," the final consideration under *Bedell*. *Id.*

39. The contractual issues and the tort claims raised by Plaintiffs closely resemble each other, with all claims turning on the adequacy of WV American's facilities, and Plaintiffs' proofs with regard to WV American's knowledge that these facilities were not constructed or maintained in such condition to avoid liability. Here, it is clear that the fault or liability issue predominates over issues affecting only individual members, and resolution of the liability issue "will resolve an issue that is central to the validity of each one of the claims in one stroke." Syl. pt. 3, *State ex rel. W. Va. Univ. Hosps., Inc. v. Gaujot*, 829 S.E.2d 54 (2019) (quoting *Wal-Mart*

Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011)). The 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. Moreover, WV American simply has not shown that any of its affirmative defenses raise individual issues of fact that outweigh the many common issues.

40. The Court has assessed the predominance inquiry with the overarching purpose of the requirement in mind. The purposes of the predominance requirement are firmly entrenched in economies of time and effort, and ensuring uniformity of decisions. These goals are well served by class certification in this case. Through use of Rule 23(c)(4), the issue of WV American's liability and its affirmative defenses common to the Class will be isolated for trial and tried first and on a class-wide basis. These common liability questions are all capable of a class-wide resolution that will significantly advance the case. Although the amount of damage suffered by individual members of the Class may not be identical, it is not unfair or undesirable to reserve the issue of damages to later phases of trial, where the Court and the parties may employ mini-trials to resolve any individual damages issues. These proceedings are not, as WV American repeatedly suggests, full blown trials. The Court may choose to manage these proceedings through deployment of special masters or with the assistance from established small claims court procedures.

D. Rule 23(b)(3) Superiority Analysis

41. Following the new *Bedell* guidance, the Court has also conducted a thorough analysis of the superiority requirement of WVRCP 23(b)(3). Under the superiority test, the court must "compare the class action with other potential methods of litigation." *Bedell*, 852 S.E.2d at 763. Factors that have "proven relevant in the superiority determination include the size of the

class, anticipated recovery, fairness, efficiency, complexity of the issues and social concerns involved in the case." *Id.* citing Cleckley, Davis & Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* §23(b)(3)[2][b] at 554. In determining superiority, consideration must be given to the purposes of Rule 23, including conserving time, effort and expense; providing a forum for small claimants; and deterring illegal activities." *Bedell*, 852 S.E.2d at 763, quoting *In re West Virginia Rezulin Litig.*, 214 W. Va. 52, 76 (2003).

42. Here, a class action is also clearly superior to other methods of adjudication, especially in view of the extraordinary difficulties which would be involved if individuals were left to pursue cases by having to repeatedly prove complex central issues of liability. *Good*, 310 F.R.D. at 297 (certifying WVRCP 23(c)(4) issues class, and holding that "absence of the class device would surely discourage potentially deserving plaintiffs from pursuing their rights under the circumstances here presented"). The claims here are small value claims, which present the most compelling rationale for use of the class device. A class action "significantly reduces the overall cost of complex litigation, allowing plaintiffs' attorneys to pool their resources and requiring defendants to litigate all potential claims at one, thereby leveling the playing field between the two sides." *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 240 (S.D. W. Va. 2005).

43. In reaching this decision, the Court has considered WV American's argument that liability issues require assessment of individual impacts, allegedly making individual issues predominate the case and rendering a class action unmanageable. The Court concludes, however, that here, the relevant liability evidence does not depend on a showing of damages on an individual basis or what happened in the event to individual customers. Plaintiffs' claim that whether a breach of contract and the common-law and statutory duties occurred is entirely independent of any damages that flowed from that conduct, and Plaintiffs' proofs such as WV American's awareness

of a problem in the past with the water main in question, will not delve unnecessarily into individual inquiries relevant to particular customers. The "balancing test of common and individual issues is qualitative, not quantitative. Common liability issues may still predominate even when individualized inquiry is required in other areas. At bottom, the inquiry requires a district court to balance common questions among class members with any dissimilarities between class members." *Good*, 310 F.R.D. at 296, citing *Gunnells*, 348 F.3d at 429.

44. In other words, the Court sees no danger of liability proofs becoming dependent on individual circumstances, and thus certification of an issues class dealing with the fault or liability issue will effectively streamline the litigation. WV American's concerns about the need for review of impact should only affect the damages phase of the trial. If some members of the Class ultimately fail to prove up damages or fail to follow the procedures established to efficiently allow for damage claims during this process, this is not, as WV American urges, fatal to certification, nor does it make a class action a less desirable option. Given the enormous benefits of the class device in resolving WV American's fault for many tens of thousands of customers having lost water service and being universally subjected to boil advisories, a class action remains the superior option.

45. The alternative to a class action is a much worse scenario for all parties, even WV American. For Plaintiffs, the complexity of issues factor favors certification since there would be enormous complexity in proving the central issues of liability across the course of thousands of individual trials. Certification of a class action will obviate the need to repeatedly try the issue of WV American's fault as thousands of individual cases proceed to resolution. For WV American, the danger in proceeding with individual claims is that it "makes the defendant vulnerable to asymmetry of collateral estoppel," *Gunnells*, 348 F.3d at 427, since if WV American lost on a

claim to an individual plaintiff, subsequent plaintiffs could use offensive collateral estoppel to prevent WV American from litigating the issue, whereas the opposite may not be true – a non-party plaintiff would not be bound by the result in any prior case. *West Virginia Dep't of Transportation v. Veach*, 239 W. Va. 1, 11 (2017) (allowance of use of offensive collateral estoppel is within a trial court's discretion).

46. Concerns about conservation of time, effort and expense, and providing a forum for small claimants, also strongly favor the superiority of a class action to other methods. The members of the Class have small value claims. With a class action, resources may be pooled and the playing field is leveled between themselves as consumers and WV American as a powerful and well-resourced public utility. *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 240 (S.D. W. Va. 2005).

47. Social concerns also favor the superiority of a class action. For this consideration, *Bedell* expressly noted the deterrence of illegal activities as one of the purposes of Rule 23. With a common class-wide liability finding, Plaintiffs will have their day in court to prove their allegations that WV American failed to maintain adequate and suitable facilities and to perform its legal duties as a utility. If Plaintiffs are successful, and WV American is found to be at fault, it will surely deter future misconduct. Moreover, superiority here compares the use of the class device to other avenues to prosecute the case; in the absence of the class device, it is extremely unlikely that more than a very few of these low-value, yet socially significant claims would be pursued.

48. The Court finds that the Class is sufficiently ascertainable for purposes of certification. Plaintiffs have requested that the Court certify a Class of WV American customers objectively defined as located within the geographical boundaries of the WV American service

area served by the 36-inch water main that broke. *See* Plaintiffs' Reply Memorandum in Support of Motion for Class Certification, at p. 16. Plaintiffs' expert, Mr. Lorenz, was able to objectively demonstrate a water service disruption boundary map. This objectively based evidence will assist the Court, and the precise identity of each class member need not be specifically identified at this early stage. Moreover, WV American can identify the addresses of its own customers within objective boundaries so that notice can readily be provided to the Class.

49. The Court finds compelling the fact that single-event mass accident cases such as this one are widely and historically considered to be well-suited to class action treatment. In *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003), Judge Posner, writing for the panel, held that the district judge's decision to certify a class for determination of the common issues of "whether or not and to what extent [the defendant] caused contamination of the area in question," 319 F.3d at 911, was so sound that he concluded, "[w]e can see, in short, no objection to the certification other than one based on a general distaste for the class-action device." *Id.* at 912. This is the general consensus, and it has been repeated across the United States for at least three decades. *See, e.g., Crutchfield v. Sewerage and Water Board of New Orleans* case 829 F.3d 370, 378 (2016) (noting that the 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); *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("[W]here the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy."); *Deepwater Horizon*,

295 F.R.D. at 141 (certifying class arising out of oil spill on grounds that "[p]redominance is more easily satisfied in a 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."); *In re MTBE Products Liability Litigation*, 241 F.R.D. 435, 442 (S.D.N.Y. 2007) ("[C]ourts have repeatedly recognized that such single-incident mass accidents are suitable for class-wide adjudication."). Accordingly, the Court does not see this as a "doubtful case" for certification where, as WV American wrongly suggests, the Court is inclined to apply a less rigorous and more permissive standard, or put its "thumb on the scale" in favor of certification. *See* WV American's Response Br. at 3. The Court finds the facts underlying this mass accident case, involving a lone defendant and a single incident, particularly suitable for class treatment in order for the Plaintiffs and the proposed Class to achieve justice.

50. Plaintiffs previously proposed that the factfinder in the common-issues trial should also be given the opportunity, depending on the evidence, to award a punitive damages multiplier that would apply to any future awards of individual compensatory damages in subsequent proceedings. Having reviewed the arguments, as part of its Order dated July 14, 2020, the Court concluded that decisions impacting the amount of any potential punitive damages award should not be made without full consideration of the extent of harm caused and other aspects of compensatory damages. The Court re-affirms that ruling and declines to include a punitive damages multiplier among the issues for class-wide resolution in the instant certification.

CONCLUSION

Therefore, for the reasons expressed in this Memorandum Opinion and Order, and after further consideration in light of *Bedell*, *supra*, Plaintiffs' Motion for Class Certification is **GRANTED**. It is hereby **ORDERED** and **ADJUDGED** that a Class is certified pursuant to Rule 23 of the West Virginia Rules of Civil Procedure. The Court **DENIES** Plaintiffs' request to include a punitive damages multiplier among the issues for class-wide resolution in the instant certification.

51. The Class shall be defined as all WV American customers, residents and businesses located within the boundaries of the service area served by the 36-inch water main that broke, but excluding the following:

a. West Virginia American Water Company and its officers, directors, and employees and any affiliates of West Virginia American Water Company, and their officers, directors, and employees;

b. Judicial officers and their immediate family members and associated court staff assigned to this case;

c. Class Counsel and attorneys who have made an appearance for the Defendants in this case; and

d. Persons or entities who exclude themselves from the Certified Class (Opt Outs).

52. This action shall be certified and maintained as a class action pursuant to West Virginia Rule of Civil Procedure 23(c)(4) with respect to the overarching common issues of whether Defendant is liable for breach of contract and negligence, and for actionable violation of its statutory duties under the West Virginia Code.

53. The Court appoints Richard Jeffries and Colours Hair Salon, LLC to serve as representatives of the Class. Stuart Calwell and the law firm of Calwell Luce diTrapano PLLC, and Van Bunch and the law firm of Bonnett Fairbourn Friedman & Balint, P.C., are appointed as Lead Counsel for the Class.

The parties' objections and exceptions to the Court' ruling is noted and preserved.

The Clerk is directed to send a digital copy of this Order to counsel at the following email addresses: Wessels, Blair <blair.wessels@jacksonkelly.com>; Bunch, Van <vbunch@bffb.com>; Stuart Calwell <scalwell@cldlaw.com>; Thompson, Kevin W. <kwthompsonwv@gmail.com>; Brent Jordan <bjordan@bffb.com>; Mary James <mjames@cldlaw.com>; Melissa H. Luce <mluce@cldlaw.com>; Melissa Harrison <mharrison@cldlaw.com>; Kitts, Alexandra <akitts@jacksonkelly.com>; Mayo, Kent <kent.mayo@bakerbotts.com>; drbarneywv@gmail.com; L. Dante' diTrapano <dditrapano@cldlaw.com>; Alex McLaughlin amclaughlin@cldlaw.com; and Hurney, Jr., Thomas J. <THURNEY@jacksonkelly.com. The parties are directed to contact the Circuit Clerk to request a certified copy of the Order

Entered this 5th day of JULY, 2022.

Honorable Carrie L. Webster, Circuit Judge

Prepared by:

/s/Alex McLaughlin
Alex McLaughlin, (WVSB #9696)
THE CALWELL PRACTICE, LC
Law and Arts Center West

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 5 DAY OF July 2022
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA