IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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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.

SUMMARY RESPONSE IN OPPOSITION TO VERIFIED PETITION FOR WRIT OF PROHIBITION

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In its Petition, Petitioner West Virginia-American Water Company ("WVAW"), defendant below, takes the position that the "liability" issues (i.e., the breach of contract and the breach of duty elements) of Respondents' claims cannot be separated and determined without consideration of the "impact" or extent of the service interruption on each individual customer. WVAW's current position in opposing the circuit court's class certification order is, in fact, the exact opposite of the position that it took previously in this very same case.

Whether WVAW's prior position is in any way binding on WVAW is beside the point. The fact that WVAW once took the very position it now derides—that the 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—means that it is absurd for WVAW to argue, as it now must, that the circuit court committed "clear error" in separating the liability issues for class-wide adjudication along those same lines. Yet, that is exactly what WVAW does in its Verified Petition for Writ of Prohibition ("Petition" or "Pet."). Accordingly, WVAW's Petition should be rejected out of hand, with prejudice, and without the issuance of a rule to show cause.

Background – WVAW's About-Face

At the very outset of this case, in briefing before the circuit court on WVAW's own motion to refer the "liability" portion of the case to the West Virginia Public Service Commission ("PSC") under the "primary jurisdiction" doctrine, WVAW argued that the "liability" (or "breach of duty") issues *could be separated* from consideration of the actual service outages and individual damages and referred to the PSC for determination—with the circuit court action stayed, but not dismissed, so that the circuit court could preside over the issue of individual damages in the event that the PSC determined that WVAW was "liable." *See*

Petitioner's Appendix ("PA") at 1007 ("WVAW asks the [circuit court] to defer to the PSC the threshold determination of whether WVAW breached its contract (or any applicable statutory or common law duty) and to stay or hold this case in abeyance during PSC's evaluation."); PA at 1012 n. 3 (arguing that "the determination of tort liability (breach of duty by a utility) as alleged by Plaintiffs here involves application of the same analysis as a breach of contract and requires the same technical expertise residing in the PSC"); PA at 1012 n. 4 (arguing that after "the PSC provides its opinion [with respect to breach of duty], further proceedings can be held in this [circuit court] action, including determinations of . . . damages if necessary"). WVAW went so far as to argue that "[o]utages are expected" and do not create liability. PA at 1010 ("Outages are expected . . . . Utilities cannot and do not guarantee uninterrupted service, nor are they required to.").

Moreover, in its prior briefing on the application of the primary jurisdiction doctrine, WVAW itself argued vehemently that the "liability" issues turn solely on consideration of the "reasonableness" of WVAW's "actions," "conduct," and "practices" in constructing and maintaining its system, not WVAW's "service" or the fact or extent of any resulting service outages. Consider WVAW's own characterization of its request for referral of the liability issues to the PSC in its May 22, 2018, reply brief in support:

> "WVAW is asking the [circuit court] to utilize the PSC's knowledge and expertise in analyzing the reasonableness of WVAW's actions, specifically (1) whether WVAW's conduct constituted a breach of the PSC regulations and approved tariff that make up the contract at issue; and (2) to the extent the tort claims are not dismissed under the gist of the action doctrine, whether WVAW's actions were reasonable under § 24-3-1, consistent with the duty of care for a water utility." PA at 1296.

Thus, in its prior framing, WVAW itself argued that the liability issues in the case only require "analyzing the reasonableness of WVAW's actions." PA at 1296. "[S]pecifically,"

according to WVAW's prior position, the contract liability issue (breach of contract) turns on analyzing whether WVAW's "conduct"—with no mention or consideration of the service provided by WVAW or the outage that resulted from that conduct, just WVAW's "conduct" itself—"constituted a breach of the . . . contract at issue." PA at 1296. The tort liability issues, again according to WVAW itself in its prior briefing, turn on analyzing whether WVAW's "actions"—again, with no mention or consideration of its service or the outage that resulted from those actions, just the "actions" themselves—were "reasonable under [W. Va. Code] § 24-3-1, consistent with the duty of care for a water utility." PA at 1296.

Elsewhere in its briefing on primary jurisdiction, WVAW directly translated (using the phrase "in other words") the liability question—which it defined as "[w]hether a water utility is liable for main breaks leading to a temporary cessation of service or decline in water pressure"—into a question of "whether the utility's practices are reasonable, adequate, and sufficient," with no mention or consideration of the "service" provided by WVAW, or the fact or extent of the service disruption as part of the liability analysis. PA at 1031. Only WVAW's own "practices" need be considered. PA at 1031. WVAW was also clear, in its prior briefing, that the liability issues should turn on WVAW's "proactive management" of its system (or lack thereof)—a phrase that indicates that, in WVAW's former view, the reasonableness of its "actions," "conduct," and "practices" should be evaluated for the period *prior to* the main break, when "proactive management" occurs, not during or after the main break, when *reactive* management occurs. *See id*. at 1032 ("[T]he PSC can and does require water utilities to invest in the replacement of water mains that have served their useful lives, thereby *controlling the risk of service interruption through proactive management*, all within the rate structure and tariff obligations imposed.") (emphasis added).

Indeed, WVAW could not have been clearer, in its earlier primary jurisdiction briefing, that the liability issues should not turn on the actual water service provided or the fact or extent of service interruption. The big danger to be avoided by referring the liability issue to the PSC, WVAW previously argued, was the risk that liability (if decided by a jury instructed by a court) might be predicated on service interruptions, rather than the reasonableness of WVAW's conduct. WVAW warned that higher utility rates would result "[i]f water utilities can be sued by customers for damages every time a main break leads to a service disruption." *Id*.

After WVAW's motion for primary jurisdiction was denied by the circuit court, WVAW opportunistically reversed course. WVAW now argues that the issues and elements in the case cannot be carved along the very lines that it once proposed, with the "breach of contract term/duty" issues determined (in a class-wide trial rather than by the PSC) on the basis of the reasonableness of WVAW's actions, conduct, and practices prior to the main break at issue. WVAW now argues that the extent of each individual's service interruption determines whether WVAW breached its contract or breached a tort duty to that individual. WVAW's current argument is directly and completely undercut by its former argument. Consider the position that WVAW once (incorrectly) attributed to Respondents and derided:

> "At the heart of Plaintiffs' class action lawsuit is the premise that any problem with that extensive infrastructure which results in an interruption in service not only makes WVAW liable in tort and contract, but also subjects this rate-regulated utility to paying virtually unlimited damages for economic losses. This premise is unsupported in the law and untenable in practice. Outages are expected, water mains will break, and tanks and boosters, even where redundant, occasionally will fail. Utilities cannot and do not guarantee uninterrupted service, nor are they required to."

PA at 1010.

Compare that statement, which WVAW made in the course of arguing that the liability issues *should be separated* from consideration of the actual service interruptions and transferred

to the PSC under the primary jurisdiction doctrine, to statements from WVAW's instant Petition about "the heart" of the liability issue: "The service impact to a customer and the degree of any such impact goes directly to the heart of the liability issue, which is whether WVAW provided reasonable water service." Pet. at 19; see also Pet. at 24 ("[T]he extent of any impact to a customer's water service goes to the very heart of liability under the statutory and regulatory provisions upon which Plaintiffs' claims are based."). What WVAW now claims lies at the "heart" of the liability issues—the impact on the water service itself—is the same thing that WVAW formerly (albeit incorrectly) *derided* as being at "the heart of Plaintiffs' . . . lawsuit."

Similarly, WVAW switched from arguing that the liability issues turn on the reasonableness of WVAW's "actions," "conduct," and "practices," judged in terms of its "proactive" management of the water system, to a question of whether WVAW provided "reasonable water service" following the main break. *Compare* PA at 1296 (WVAW summarizing in one sentence the liability issues as involving an analysis of "the reasonableness of WVAW's *actions*," "whether WVAW's *conduct* constituted a breach of . . . the contract," and "whether WVAW's *actions* were reasonable") (emphasis added); *and* PA at 1031 ("Whether a water utility is liable for main breaks leading to a temporary cessation of service or decline in water pressure [can be re-stated as] in other words, whether the utility's *practices* are reasonable, adequate, and sufficient[.]") (emphasis added); *with* Pet. at 19 ("[T]he heart of the liability issue . . . is whether WVAW provided reasonable water *service*.") (emphasis added). Phrases referring to WVAW's "actions" (or omissions), "conduct," and "practices" plainly refer to the very questions that the circuit court referred to as the common questions with common answers in analyzing the elements of breach of contract term and breach of duty in its order of July 5, 2022. *See* PA at 2151-52 (analyzing questions for breach of contract term); PA at 2153-54 (analyzing

questions for breach of duty under W. Va. Code § 24-3-1); PA at 2155 (analyzing questions for breach of duty under common-law negligence).

Assuming *arguendo* that a party is free to change its position in the midst of litigation, it strains credulity to argue, as WVAW now must, that the circuit court committed "clear legal error" by endorsing a position that WVAW itself previously *urged* in extensive briefing in the very same case.

Standard of Review

The factors to be considered in deciding whether to issue a writ of prohibition are well-established. *See* syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). Chief among these factors is the existence or absence of "clear error as a matter of law." *Id*.

These factors apply, with two caveats, with equal force to petitions, such as WVAW's instant Petition, challenging a circuit court's decision to certify a class action under Rule 23 of the West Virginia Rules of Civil Procedure. *See* syl. pt. 4, *State of West Virginia ex rel. Surnaik Holdings of WV, LLC v. Bedell*, 875 S.E.2d 179 (W. Va. 2022) ("*Surnaik II"*); syl. pt. 3, *State of West Virginia ex rel. Surnaik Holdings of WV, LLC v. Bedell*, 244 W. Va. 248, 852 S.E.2d 748 (2020) ("*Surnaik I"*). The first caveat is that "[a] circuit court's failure to conduct a thorough analysis of the requirements for class certification . . . amounts to clear error." Syl. pt. 1, *Surnaik II*, 875 S.E.2d 179; syl. pt. 8, *Surnaik I*, 244 W. Va. 248, 852 S.E.2d 748.

The second caveat is that showing the existence of "clear error as a matter of law" goes from being the chief factor to being, essentially, a requirement. This Court's analysis in *Surnaik II* literally begins and ends with an assessment of the "clear error" question. *See Surnaik II*, 875 S.E.2d at 184 ("With this standard in mind, we examine [petitioner's] arguments to assess, first and foremost, whether the certification order contains 'clear error as a matter of law.'"); *id*. at

186 ("[W]e find no clear error as a matter of law in the circuit court's . . . class certification order. . . . [W]e must, therefore, deny the requested writ of prohibition.").

Argument

In preparing the instant Summary Response under Rule 16(h), Respondents are mindful of the requirement that a "summary response . . . 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). Before turning to WVAW's actual assignments of error, it is important to point out that not one of WVAW's six "Questions Presented" (Pet. at 1-2) questions the thoroughness of the circuit court's analysis. This is important because by far the easiest way to show "clear error as a matter of law" under *Surnaik I* and *Surnaik II* is to show that the circuit court's analysis was insufficiently thorough.

Instead, WVAW places almost all of its "clear error" eggs in the "service impact must be considered as part of the breach of contract term/breach of duty" basket (Pet. at 1-2)—an argument that, as shown in the Respondents' "Background" section, *supra*, plainly contradicts arguments that WVAW made to the circuit court at the outset of the case, prior to thinking through its strategy for opposing class certification. Four of WVAW's six assignments of error fall squarely into this basket. *See* Pet. at 1-2 (Questions Presented Nos. 1-3 & 5).[1] WVAW's fourth and sixth Questions are different, but easily rejected.

A. Questions Presented Nos. 1-3 & 5 Do Not Support a Finding of Clear Error

WVAW's first, second, third, and fifth assignments of error hinge on two main strategic moves. First, WVAW seeks to conflate its legal duty (to construct and maintain its system in

[1] Question Presented No. 4 appears on its face to raise a different point, but the corresponding argument (Pet. at 26-28) shows that it has the same premise—that variations in customer service drive the "liability" issue.

appropriate condition) with the purpose of the duty (to prevent or minimize events involving loss of water service or loss of pressure). All legal duties are intended to serve some purpose—otherwise they are arbitrary and capricious. The purpose of a legal duty, any duty, is usually to avoid some kind of harm by requiring an actor to conform to the duty. Surgeons in West Virginia, for example, have a legal duty to conform to and comply with the standard of care for surgeons, and the hope is that by imposing this duty, bad surgical outcomes will be less likely. However, sometimes surgeons perform surgery in breach of the duty or standard of care and get lucky with the outcome, while other times surgeons conform to the standard of care but still the surgery still goes poorly for the patient. It's easy to come up with other examples. OSHA's presumptive purpose in requiring fall protection and other safety devices is to prevent falls and other workplace accidents, yet sometimes falls and accidents occur despite an employer's strict and meticulous compliance with all OSHA regulations—while not every breach of OSHA's regulations results in a fall or other workplace accident. In other words, injuries (damages) can and sometimes do occur without any breach of duty, and breaches of duty can and often do occur without any injury (damages).

To prevail on a tort claim, of course, a plaintiff ultimately needs to prove both breach of duty and damages (as well the existence of the duty itself and causation). *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."). That brings us to WVAW's second strategic move. WVAW attempts to play on the ambiguity in the words "liable" and "liability" by using those words instead of "breach of contract term" and "breach of duty." The latter terms are more precise and are essentially required under *Surnaik I*, which requires an identification and analysis of the

"respective elements" of "the parties' claims and defenses." Syl. Pt. 7, *Surnaik I*, 244 W. Va. 248, 852 S.E.2d 748.

When lawyers and judges speak of the "elements" of "duty" and "breach of duty" for a tort claim, there is no mistaking their meaning—these "elements" of a claim must be proved by a plaintiff in order to prevail on the claim, but are, by themselves, insufficient to prevail, unless the plaintiff also proves the other elements (causation and damages). On the other hand, lawyers and judges (and insurance companies, and many others) sometimes use the words "liable" and "liability" to refer to an actual *obligation* by one party to pay damages to another, which arises only when a plaintiff proves all four elements of a tort claim, or all three elements of a contract claim (formation, breach, and damages). *Carter v. Monsanto*, 212 W. Va. at 737, 575 S.E.2d at 347 (elements of tort); *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.").

Thus, because the words "liable" and "liability" are often used to refer to an obligation to pay damages to another, rather than just the breach of a duty owed to another, we are all primed to nod in agreement when WVAW alleges that the "circuit court committed clear legal error in finding . . . that WVAW can be liable for breach of contract, common law negligence, and for violating W. Va. Code 24-3-1 without any showing that the . . . class members' water service was impacted." Pet. at 1 (Question Presented No. 1). Therefore, WVAW's first, second, and fifth Questions Presented need to be re-formulated, consistent with *Surnaik I*'s instruction to focus on the "elements" of "the parties' claims and defenses." For example, Question Presented No. 1 should be re-formulated as: "Whether the circuit court committed clear legal error in finding that WVAW can be found to have *breached its respective duties* under contract,

common-law negligence, and W. Va. Code § 24-3-1 without any showing that putative class members' water service was impacted?"

Question Presented No. 2 not only deploys the ambiguous term "liability" instead of the precise and required "breach of contract term/duty" terminology, but also it begs the critical question, which is *whether*—not "where"—breach of a contract term and breach of duty (not "liability") "under the statute and regulations upon which Plaintiffs base their claims cannot be determined without consideration of individual water service impact." Pet. at 1. WVAW's fifth Question Presented is also guilty of using the wrong terminology and begging critical questions.

Once the words "liable" and "liability" are replaced by the appropriate terms for the "respective elements" of Respondents' claims (breach of contract term and breach of duty), and the questions are properly formulated, it becomes obvious that the circuit court has not committed clear error. The circuit court's analysis of whether the proof of these elements will turn at trial on common questions with common answers is unquestionably thorough. PA at 2150-56. The circuit court's analysis of whether the common questions for the breach of duty elements predominate over the individual questions of damages is also unquestionably thorough. PA at 256-61. The same goes for its superiority analysis. PA at 261-62.

The circuit court's thorough analysis of these issues is certainly not clearly wrong. As WVAW itself once argued, in seeking referral of these same issues to the PSC (PA at 1296, 1031), whether or not one party breaches its tort duty to another party typically depends on the reasonableness of the defendant's own "actions," "conduct," and "practices," not on the outcome or result of those actions. The most basic tort duty, for the tort of negligence, is, as the circuit court concluded, the duty to exercise reasonable care. PA at 2155. As WVAW previously argued (PA at 1296, 1031), whether it breached that duty depends on whether it exercised

reasonable care in its "actions" (or omissions), "conduct," and "practices," not whether the harm sought to be avoided by the exercise of reasonable care was or was not avoided in a specific instance, which also depends in every instance on luck—with good luck, a breach of duty may result in no harm; with bad luck, harm can result even without a breach of duty.

WVAW's argument in its Petition (at 16-20) that the "plain language" of the duty clauses in the key statute, W. Va. Code § 24-3-1, and supporting PSC regulation, C.S.R. § 150-7-5.1.a, requires consideration of service impact is not only belied by its own prior arguments in seeking referral of these issues to the PSC, but also by its own admission in its current Petition. WVAW attacks Respondents for arguing, and the circuit court for concluding, that the "duty at issue is the duty to 'construct and maintain its entire plant and system' in a suitable condition to prevent service interruptions," on one page of its Petition (at 17), but then, incredibly, goes on to conclude, at the top of the very next page of its Petition (at 18): "When the regulation is read as a whole, [WVAW]'s duty to construct and maintain its system is for the purpose of furnishing safe, adequate, and continuous service to its customers." Respondents could not have said it any better: "[WVAW]'s duty [is] to construct and maintain its system," and the "purpose" for that duty is to "furnish[] safe, adequate, and continuous service to its customers" (Pet. at 18) or, as Respondents and the circuit court put it, "to prevent service interruptions."

The purpose of any duty, or the harm to be avoided by fulfillment of a duty, informs the requirements of any duty, but based on the foreseeability of harm at the time the potential tortfeasor acts or fails to act, not the actual outcome. Respondents have argued, and the circuit court has held, that what WVAW knew or should have known about the likelihood and extent of *expected* service interruptions from a failure to address a critical and known-to-be-break-prone main is relevant to the actions WVAW should have taken in fulfillment of its "duty to construct

and maintain its system," and whether it breached that duty—just as the *foreseeability* of harm is central to the duty of reasonable care and what reasonable care requires. PA at 2151-2155, ¶¶ 15, 21, & 27.

WVAW follows its "self-own" of defining its duty as the "duty to construct and maintain its system" (Pet. at 18) with a "policy" discussion that is extremely self-defeating (Pet. at 19-20), given the argument it is attempting to make. WVAW argues that its position "simply makes policy sense" because of the "huge and crippling liability that can result from single disruptions in service," including from events such as an "electrical blackout." Pet. at 19-20. That is essentially the same policy argument it made in support of its motion to refer the liability issues to the PSC, where it argued that "[o]utages are expected" and that "[u]tilities cannot and do not guarantee uninterrupted service, nor are they required to." PA at 1010.

But how does that argument make sense in the context of its current position that the fact and extent of a service disruption drives the determination of whether it breached a duty? It is extremely easy to prove the fact and extent of the disruption to each and every customer from an "electrical blackout," one of WVAW's examples (Pet. at 20). Even for a water main break, the fact and extent of disruption is many times easier (orders of magnitude easier for individual customers) to prove than proving that the utility's "actions," conduct," or "practices," judged before the service disruption, were unreasonable under the circumstances. In fact, that's exactly why proving the latter in a single class-action trial would "achieve economies of time, effort, and expense" (or provide "judicial bang for the buck"), such that the common issues predominate. PA at 2158-61, ¶¶ 36-40.

WVAW comes closest to making its play on the ambiguity of the terms "liable" and "liability" explicit in the next paragraph of its Petition (at 20), when it argues that "'negligence in

the air,' . . . has long been recognized as insufficient." The authority it cites for that proposition, and the only authority it cites for that entire paragraph, *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928), pre-dates Federal Rule 23 by roughly a decade, concerns the requirement of "proximate" cause, and has nothing whatsoever to do with class actions, but WVAW's conclusion from that language is that one should not be allowed to certify a class action for a common issues trial on the breach of duty issues without being able to prove damages in the same trial using common proof. In other words, WVAW uses a famous quote, from a case that pre-dates class actions, in order to attack the underlying premise of syllabus point 7 of *Surnaik I*, Rule 23(b)(3), and Rule 23(c)(4)—which is that not all issues or elements of a claim must be common to certify a class action for a common-issues trial, so long as the common issues and elements *predominate* over the individual ones, and resolution of the common issues will advance the litigation.

WVAW's reliance on *State ex rel. W. Va. Univ. Hosp., Inc. v. Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (2019) ("*Gaujot II"*), is also misplaced. First, as already discussed, the breach of duty at issue—WVAW's failure to take reasonable steps to safeguard against the loss of service to customers served by a large, break-pone main given the likelihood that the main would fail—does not require any individualized analysis. Unlike the defendant in *Gaujot II*, WVAW has never, not once, argued that its "actions," "conduct," or "practices" in fulfillment of its duty of "to construct and maintain its system" were "reasonable" with respect to some class members, but not others—only that the level of "water service" provided after the main break varied. For the first time, in the instant Petition WVAW raises the *possibility* that the adequacy of its facilities, in terms of expected redundancy in the event of a main break, might vary among class members. Pet. at 25. However, WVAW has never suggested that it might offer proof of attempts

to reinforce the system for some customers but not others. *See* syl. pt. 7, *Surnaik I* (circuit court's task is to determine common questions by "analyzing how each party will prove them at trial").[2]

A. Questions Presented Nos. 4 & 6 Do Not Support a Finding of Clear Error

The assignment of error in WVAW's fourth "Question Presented"—that the circuit court erred by failing "to require Plaintiffs to demonstrate satisfaction of predominance and superiority under W. Va. R. Civ. P. 23(b)(3) for the action as a whole" (Pet. at 1)—appears to be a leftover from its earlier petition, *before* remand, and makes little sense in light of the circuit court's order of July 5, 2022, after remand. The circuit court's July 5, 2022, order includes only one (lengthy) section on predominance (PA at 2149-61), that section is captioned "Rule 23(b)(3) Predominance Analysis" (PA at 2149), and it leads with (PA at 2149) and conforms precisely and thoroughly to the Rule 23(b)(3) predominance analysis prescribed in syllabus point 7 of *Surnaik I*. *See* PA at 2150-56 (identifying the precise elements of each of Respondents' three claims, and analyzing, for each element, whether the elements present common or individual questions by analyzing the proof required at trial, as required in subparts (1) and (2) of syllabus point 7); PA at 2156-61 (determining whether the common questions predominate with a focus on whether the class action would achieve economies of time, effort, and expense, and promote uniformity of decision, without sacrificing procedural fairness, as required in subpart (3) and by the "overarching purpose" instruction of syllabus point 7).

[2] Moreover, the class could easily be re-defined by reference to WV American's own boil water advisories and boil water advisory maps, thus bringing the instant class within the minimum or "average" analysis upheld in *State ex rel. W. Va. Univ. Hosps., Inc. v. Gaujot*, No. 21-0737, 2022 WL 1222964 (W. Va. Apr. 26, 2022) (denying writ of prohibition because, on remand after *Gaujot II,* the circuit court found that the minimum fee charged for patient record retrieval was unreasonable based on the cost of retrieval of the "average" patient's records). *See* PA at 2140-41, 2154 & 2156 (noting the WVAW issued boil water advisories throughout class area).

WVAW's attempt to make its older argument work in light of the circuit court's newer order hinges on the second half of paragraph 31 of the circuit court's order. *See* PA at 2157.[3] In the second half of paragraph 31 (PA at 2157), far from relying on Rule 23(c)(4) for its actual predominance analysis, the circuit court simply relied on Rule 23(c)(4) to "underscore[]" its conclusion from the first half of the paragraph 31 (PA at 2156), which was based on syllabus point 7 of *Surnaik I*, that Rule 23(b)(3) predominance cannot be defeated where "the opponent of class certification can simply point to any individual issue." PA at 2157; *compare* PA at 2156 ("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.").

The assignment of error in WVAW's sixth "Question Presented"—that the class is not ascertainable—is a non-starter. "Before certifying a class pursuant to Rule 23 of the West Virginia Rules of Civil Procedure, it is imperative that the class be identified with sufficient specificity so that it is administratively feasible for the court to ascertain whether a particular individual is a member." Syl. pt. 9, *State ex rel. W. Va. Univ. Hosps., Inc. v. Gaujot*, No. 21-0737, 2022 WL 1222964, (W. Va. Apr. 26, 2022). The map used to identify class members easily satisfies this requirement. PA at 2164-65.

Conclusion and Relief Sought by Respondent

WVAW's Verified Petition for Writ of Prohibition should be denied, with prejudice, and without the issuance of a rule to show cause.

[3] *See* Pet. at 29 (citing PA 2157 and mistakenly citing PA 2153, which includes nothing about Rule 23(c)(4), for proposition that circuit court relied on Rule 23(c)(4)); Pet. at 30 n. 12 (mistakenly citing PA 2153 for a quotation that actually appears at PA 2157, paragraph 31, that refers to Rule 23(c)(4)).

Dated: September 30, 2022

Respectfully submitted,

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VERIFICATION

I, Alex McLaughlin, counsel for the Respondent Richard Jeffries, individually and on behalf of all others similarly situated; and Colours Beauty Salon, LLC, verify that the factual and legal arguments discussed herein are accurate and true to the best of my belief.

/s/Alex McLaughlin
Alex McLaughlin, (WVSB#9696)

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.

CERTIFICATE OF SERVICE

I, Alex McLaughlin, counsel for the Respondents herein, do herby certify that I have served the foregoing SUMMARY RESPONSE IN OPPOSITION TO VERIFIED PETITION FOR WRIT OF PROHIBITION upon the following via electronic mail and U.S. mail on this the 30th day of September, 2022.

Thomas J. Hurney, Jr., Esquire (via e-file)
Alexandra Kitts, Esquire (via U.S. mail)
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