

Nos. 34334 & 34335

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LENORA PERRINE, et al., Plaintiffs Below, Appellees,

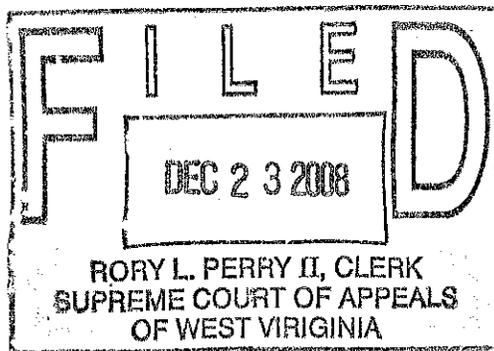
v.

E.I. DUPONT DE NEMOURS AND COMPANY, et al., Defendants Below,

E.I. DUPONT DE NEMOURS AND COMPANY, Appellant.

Honorable Judge Thomas A. Bedell  
Circuit Court of Harrison County  
Civil Action No. 04-C-296-2

BRIEF OF AMICUS CURIAE WEST VIRGINIA CITIZEN ACTION GROUP



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I. The *Amicus Curiae* CAG's Interest in the Instant Case.

The West Virginia Citizens Action Group ("CAG") is a nonprofit organization that works with numerous groups and constituencies to advance the economic, social, and environmental well-being of West Virginians. CAG's members, supporters, and allies have a strong interest in seeing that their right to assert and litigate claims and obtain relief in class action proceedings is not improperly restricted. CAG's perspective on the issues relating to class actions that have been raised in the instant case may be helpful to the West Virginia Supreme Court of Appeals in its consideration of those issues.

II. The Issues Addressed in this Brief.

In this Brief, the *amicus* CAG addresses issues relating to the Appellant's Assignment of Error VI (page 13 of the Appellant's Brief), in which the Appellant asserts that the circuit court erred in "[t]rying this case as a class action[.]"<sup>1</sup> CAG submits that the arguments advanced by the Appellant in connection with this Assignment of Error take an erroneous view of West Virginia law applying to class actions; and that the Appellant's suggested approach to class action law would substantially injure the ability of West Virginians to assert and vindicate their legal rights. CAG respectfully requests that the West Virginia Supreme Court of Appeals (1) find the Appellant's arguments related to the class action aspects of the instant appeal to be unpersuasive; and (2) adhere to its established precedent regarding *West Virginia Rule of Civil Procedure* Rule 23, which governs class actions.

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<sup>1</sup> The *amicus* CAG has not had the opportunity to review the trial court record in the instant case and bases its arguments solely upon the Petitions, Responses, and Briefs filed by the parties.

III. The Rule 23 Class Action Issues Raised by the Appellant:

Pages 50 to 58 of the Appellant's Brief contain most of the Appellant's arguments regarding the Rule 23/class action issues raised by the Appellant in the instant appeal. While the precise basis in the record for some of these arguments is unclear,<sup>2</sup> the Appellant essentially argues that the circuit court erred in certifying a class and conducting a class action trial to determine whether class members were entitled to certain remedies for the exposure of their real property and persons to dangerous and hazardous substances; and that the trial court erred in not allowing the Appellant to pursue its trial strategy of focusing on the individual circumstances of the named plaintiffs/class representatives.

IV. The Position of the *Amicus* CAG.

A. Seeking Remedies for Contamination of Real Property and Personal Exposure to Harmful Substances is Appropriate in Class Actions.

The West Virginia Supreme Court stated in *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 562, 567 S.E.2d 265, 278 (2002):

Litigating common issues is not only far superior to litigating thousands of individual claims, it is often the only way that individuals seeking justice can have practical access to the courts. *Class action relief - including the remedies of damages, rescission, restitution, penalties, and injunction - is often at the core of the effective prosecution of consumer, employment, housing, environmental, and similar cases.* In *McFoy v. Amerigas, Inc.*, 170 W.Va. 526, 533, 295 S.E.2d 16, 24 (1982), this Court stated that: "[i]n general, class actions are a flexible vehicle for correcting

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<sup>2</sup>For example, the Appellant's Brief does not specifically discuss the circuit court's class certification order nor challenge any findings or conclusions made by the trial court in connection with that order. And while the Appellant appears to suggest that at some point the trial court should have decertified the class, the Appellant's Brief does not appear to reference any motions for decertification or trial court ruling(s) thereon.

wrongs committed by large-scale enterprise upon individual consumers[.].” [emphasis added].

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As the United States Supreme Court stated in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 2246, 138 L.Ed.2d 689, 709 (1997), “[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor (citations omitted).” See also *Riverside v. Rivera*, 477 U.S. 561, 575, 106 S.Ct. 2686, 2694, 91 L.Ed.2d 466, 480 (1986): “‘If the citizen does not have the resources, his day in court is denied him; the . . . policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.’ 122 Cong.Rec. 33313 (1976) (remarks of Sen. Tunney).”<sup>3</sup>

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<sup>3</sup>“Rule 23 of the West Virginia Rules of Civil Procedure . . . was adopted with the goals of economies of time, effort and expense, uniformity of decisions, the promotion of efficiency and fairness in handling large numbers of similar claims.” *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 62, 585 S.E.2d 52, 62 (2003). It is well-settled in West Virginia that, as long as the prerequisites to class-certification set forth in Rule 23 are met, a case should be allowed to proceed on behalf of the proposed class. *Mitchem v. Melton*, 167 W. Va. 21, 25, 277 S.E.2d 895, 899 (1981) (“If the requirements of Rule 23 are met, then the class should be allowed.”); *Evans v. Huntington Pub. Co.*, 168 W. Va. 222, 223, 283 S.E.2d 854, 855 (1981). Under Rule 23, the prerequisites to certifying a case to proceed on behalf of a class are that (1) the class is so numerous that joinder of all members is impractical (the “numerosity” requirement); (2) there are questions of law or fact common to the class (the “commonality” requirement); (3) the claims or defenses of the representative parties are typical of those of the class (the “typicality” requirement); (4) the representative parties will fairly and adequately protect the interest of the class (the “adequacy” requirement); and that at least one of the three potential bases for seeking class relief set forth in Rule 23(b) exists. See W. Va. R. Civ. P. 23(a), (b). If appropriate, the Court may allow the action to be brought or maintained as a class action with respect to only particular issues or may allow the class to be divided into subclasses. *Id.* at R. 23(c)(4). In this regard, the Court has the discretion to enter whatever order will best provide for the orderly conduct and management of issues to be handled in a class action proceeding under Rule 23, including entry of an order reserving any “unmanageable” issues for litigation at a later time. See W. Va. R. Civ. P. 16, 23(d).

The trial court is required to perform a “thorough analysis” in determining whether the prerequisites to class certification exist under Rule 23 (a). Syllabus Point 8, *State ex. rel. Chemtall, Inc. v. Madden*, 216 W.Va. 443, 607 S.E.2d 772 (2004). In performing such an analysis, the court’s focus should not be on whether the plaintiffs have stated a cause of action or will prevail on the merits of their claims:

The Appellant argues that the plaintiff class members' claims in the instant case precluded class certification and trial of class claims, because the class members' individual properties and their individual persons had differing degrees of exposure and injury.

However, and pointedly to the contrary, the fact is that when a multitude of persons and/or properties have been allegedly contaminated by and exposed to hazardous and harmful substances, a class action is often *the only practical course of conduct* for a court to address the question of the liability *vel non* of persons or entities that are allegedly responsible for such contamination and exposure; -- and any individual differences among the class members may be readily managed as part of a class action proceeding.

In *In re Paoli Railroad Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994), *cert. denied sub. nom. General Elec. Co. v. Ingram*, 513 U.S. 1190, 115 S. Ct. 1253, 131 L. Ed. 2d 134 (1995), a case whose formulation of medical monitoring law was adopted by the West Virginia Supreme Court in *Bower v. Westinghouse Electric Corp.*, 206 W.Va. 133, 522 S.E.2d 424 (1999), the court concluded that proving significantly increased risk should be done *en masse*:

[W]here experts individualize their testimony to a group of individuals with a common characteristic (*i.e.*, levels of exposure to chemical X above Y amount), we do not think there is a need for

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A circuit court's consideration of a motion for class certification should not become a mini-trial on the merits of the parties' contentions . . . "[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."

*In Re Rezulin* at 63, 63. Rather, the court is to simply decide whether the requirements of Rule 23 are met. *Id.*, citing *Miller v. Mackey Intern., Inc.*, 452 F.2d 424, 427 (5<sup>th</sup> Cir. 1971). Moreover, "Any question as to whether a case should proceed as a class in a doubtful case should be resolved in favor of allowing class certification." *In re Rezulin* at 65, 65, citing *Esplin v. Hirschi*, 402 F. 2d 94, 101 (10<sup>th</sup> Cir. 1968), *cert. denied*, 394 U.S. 928, 89 S.Ct. 1194, 22 L. Ed.2d 459 (1969).

greater individualization so long as they testify that the risk to each member of the group is significant. We fail to see the purpose in requiring greater individualization.

*Paoli*, 35 F.3d at 788.

It is for this reason that mass medical monitoring claims are often certified as class actions. See, e.g., *State ex rel. Chemtall, Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004); *In re Tobacco Litig.*, 215 W. Va. 476, 600 S.E.2d 188 (2004); *State ex rel E. I. Dupont De Nemours & Co. v. Hill*, 214 W. Va. 760, 591 S.E.2d 318 (2003); *Rezulin, supra*.

The Appellant argues that “common issues” did not predominate among the class members. Discussing commonality under Rule 23(a)(2), the West Virginia Supreme Court of Appeals has stated:

The “commonality” requirement of Rule 23(a)(2) requires that the party seeking class certification show that “there are questions of law or fact common to the class.” “A common nucleus of operative fact [or law] is usually enough to satisfy the commonality requirement.” *Rosario v. Livaditis*, 963 F.2d 1013, 1017-18 (7th Cir. 1992). “The threshold of ‘commonality’ is not high,” and “requires only that resolution of the common questions affect all or a substantial number of the class members.” *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir.1986).

Commonality requires that class members share a single common issue. *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir.1994). “However, not every issue in the case must be common to all class members.” *O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311, 330 (C.D.Cal.1998). The common questions need be neither important nor controlling, and one significant common question of law or fact will satisfy this requirement. *Georgia State Conference of Branches of NAACP v. Georgia*, 99 F.R.D. 16, 25 (S.D.Ga.1983). In other words, “[t]he class ‘as a whole’ must raise at least one common question of law or fact to make adjudication of the issues as a class action appropriate to conserve judicial and private resources.” Philip Stephen Fuoco and Robert F. Williams, “Class Actions in New Jersey State Courts,” 24 Rutgers L.J. 737, 752 (1993).

The leading commentator on class action law summarizes the rule in this way:

The Rule 23(a)(2) prerequisite requires only a single issue common to the class. Individual issues will often be present in a class action, especially in connection with individual defenses against class plaintiffs, rights of individual class members to recover in the event a violation is established, and the type or amount of relief individual class members may be entitled to receive. Nevertheless, it is settled that the common issues need not be dispositive of the litigation. The fact that class members must individually demonstrate their right to recover, or that they may suffer varying degrees of injury, will not bar a class action; nor is a class action precluded by the presence of individual defenses against class plaintiffs.

*In re Rezulin*, 214 W. Va. at 68, 585 S.E.2d at 68 (quoting A. Conte and H. Newberg, 1 *Newberg on Class Actions*, 4<sup>th</sup> Ed., § 3:12 at 314-315 (2002)).

Acknowledging the likely presence of individual questions in many class action cases, including individual questions relating to damages and other remedies, *In re Rezulin* emphasized that where a single overriding common issue may be determined and resolved on a class basis, the existence of additional individual determinations does not defeat class certification:

The predominance requirement does not demand that common issues be dispositive, or even determinative; it is not a comparison of the amount of court time needed to adjudicate common issues versus individual issues; nor is it a scale-balancing test of the number of issues suitable for either common or individual treatment. 2 *Newberg on Class Actions*, 4<sup>th</sup> Ed., § 4:25 at 169-173. Rather, “[a] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.” *Id.* at 172. The presence of individual issues may pose management problems for the circuit court, but courts have a variety of procedural options under Rule 23(c) and (d) to reduce the burden of resolving individual damage issues, including bifurcated trials, use of subclasses or matters, pilot or test cases with selected class members, or even class decertification after liability is determined. As the leading treatise in this area states, “[c]hallenges based on . . . causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant’s liability.” 2 *Newberg on Class Actions*, 4<sup>th</sup> Ed., § 4:26 at 241, “That class members may eventually have to make an

individual showing of damages does not preclude class certification.” *Smith v. Behr Process Corp.*, 113 Wash. App. 306, 323, 54 P.3d 665, 675 (2002) (citations omitted).

*In re Rezulin*, 214 W. Va. at 72, 585 S.E.2d at 72.

In other words, the possible necessity of individual determinations at some point in the litigation does not preclude class certification and the trial of common class claims -- and the award of appropriate class-wide relief, subject to subsequent individual determinations.<sup>4</sup>

Thus, in *Olden v. LaFarge Corp.*, 383 F.3d 495 (6<sup>th</sup> Cir. 2004), *cert. denied*, 125 S. Ct. 2990, 162 L. Ed. 2d 910 (2005), the court upheld the certification of a class of residents alleging personal injury and property damage caused by the emission of pollutants from a cement

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<sup>4</sup> Rule 23(a)(2) is satisfied if “there are questions of law *or* fact common to the class” (emphasis added). *In re Rezulin* sets out the requirements for “commonality” under 23(a)(2). The party seeking class certification must show that “there are questions of law or fact common to the class. A common nucleus of operative fact [or law] is usually enough to satisfy the commonality requirement.” *In re Rezulin*, 214 W. Va. at 67, 585 S.E.2d at 67 (quoting *Rossario v. Livaditis*, 963 F.2d 1013, 1017-18 (7<sup>th</sup> Cir. 1992)). “The threshold of ‘commonality’ is not high,” and “requires only that resolution of the common questions affect all or a substantial number of the class members.” *Id.* (quoting *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5<sup>th</sup> Cir. 1986)).

In the instant case, it is clear that there were common questions of both law *and* fact that were more than sufficient – in both quality and quantity -- to meet the “commonality” requirement of Rule 23(a)(2). These common issues included whether the appellant contaminated the class members’ properties and exposed class members to dangerous substances, and whether the Appellant should be liable for cleanup of the affected properties and medical monitoring. These pivotal factual issues were sufficient to satisfy the commonality requirement. It would be an enormous waste of resources to require the class members to repeatedly prove such evidence at countless individual trials on issues that ultimately bear on the appellant’s liability *vel non* to everyone in the class. Adjudication of such common issues on a class-wide basis would be “appropriate to conserve judicial and private resources.” *In re Rezulin* at 67, quoting Philip Stephen Fuoco and Robert F. Williams, *Class Action in New Jersey State Courts*, 24 Rutgers L.J. 737, 752 (1993). Moreover, the Appellees’ claim for punitive damages was clearly best-suited for resolution on a class-wide basis. The Appellant’s alleged knowledge about the off-site hazards posed by their smelter site would be the same as to each class member. In this regard it is important to note that, “When the claim arises out of the same legal theory or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment.” *In Re Rezulin*, Syllabus Point 12.

manufacturing plant. The court held that despite variances among class members in the area of damages, common issues of liability predominated:

[I]ndividual damage determinations might be necessary, but the plaintiffs have raised common allegations which would likely allow the court to determine liability (including causation) for the class as a whole. For instance, although some named plaintiffs admittedly describe a variety of minor personal medical issues . . . which might require individualized damage determinations, the thrust of the plaintiffs' personal injury complaint appears to be related to the general increased risk of the class suffering medical problems in the future. . . . Whether the defendant's negligence caused *some* increased health risk and even whether it tended to cause the class minor medical issues can likely be determined for the entire class. Similarly, although some named plaintiffs present a number of minor examples of specific property damage (roof damage, dead rose bushes, damaged window pane, peeling stain on deck, rusting of automobile), these examples seem to be no more than illustrative of the common argument that the class's properties are regularly covered in cement dust, causing minor property damage and a predictable reduction of property value and enjoyment of the property. Whether the defendant's negligence generally caused minor property damage and cement dust can likely be determined for the entire class as well. [FN5]

FN5. The defendant argues that the plaintiffs' nuisance cause of action requires individualized proof because one must show "significant harm" resulting in an interference with the use of and enjoyment of property. However, if the class can show that their properties were frequently covered by cement dust, this would likely be enough to establish "significant harm." See, e.g., *Adams v. Cleveland Cliffs Iron Co.*, 237 Mich. App. 51, 70, 602 N.W.2d 215, 223 (Mich.Ct.App.1999) ("If the quantity and character of the dust are such as to disturb the ambiance in ways that interfere substantially with the plaintiff's use and enjoyment of the land, then recovery in nuisance is possible."). Further, if the class can show that they are at an increased risk of significant future medical problems, this too would likely constitute "significant harm." See, e.g., *Adkins v. Thomas Solvent Co.*, 440 Mich. 293, 303-04, 487 N.W.2d 715, 720 (Mich.1992) ("There are countless ways to interfere with the use and enjoyment of land including ... [the] threat of future injury that is a present menace and interference with enjoyment."). Once (and if) nuisance liability has been established, the defendant can contest the degree of harm in the damages phase. Of course, if the nuisance claim becomes unmanageable to adjudicate as a class action, the district court can

decertify the class with respect to that claim. *See* Fed.R.Civ.P. 23(c)(1)(C) (“An order under Rule 23(c)(1) may be altered or amended before final judgment.”).

383 F.3d at 508-09; *see also Clark v. Trus Joint MacMillian*, 836 So.2d 454, 461 (La. App. 2002) (“Trus Joist contends class certification must fail because plaintiffs have differing degrees of injury and assert disparate complaints and experiences. However, it is not necessary that all plaintiffs suffer identical damage and ‘individual questions of quantum do not preclude a class action when predominate liability issues are common to the class.’” (citation omitted)).<sup>5</sup>

In the instant case, there were clearly common questions of law or fact among the class members that predominated over individual issues. The pivotal issue in the instant case was liability -- whether contamination and hazardous substances created at the appellant’s smelter

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<sup>5</sup> In *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 65 (S.D. Ohio 1991), the court stated:

Rule 23 provides for a procedural device which allows a district court to achieve efficiencies in the adjudication of similar claims. Its touchstones are fairness and efficiency - the same goals underlying the Federal Rules of Civil Procedure as a whole. The requirements of both Rules 23(a) and 23(b) are, in large measure, benchmarks to be used in evaluating the efficiency and fairness of trying certain types of claims either jointly or separately, and many of them have common theoretical underpinnings. For example, commonality and typicality are closely related, and both are part of an overall inquiry that includes the Rule 23(b) test of whether common issues predominate in the action.

In the latter context, the Sixth Circuit has stated that “the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant’s liability have been resolved does not dictate the conclusion that a class action is impermissible.” *Sterling v. Velsicol Chemical Co.*, 855 F.2d 1188, 1197 (6th Cir.1988). That case, like this one, involved a claim by neighbors of a hazardous industrial facility that renegade materials from the facility had contaminated their properties. Although individualized issues existed, the conduct allegedly giving rise to liability was identical for each plaintiff and class member. The Court noted that “where 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.” *Id.*

operations was culpably dispersed off-site, so as to injure the interests of the class members. *See Olden v. LaFarge Corp., supra; Bolanos v. Norwegian Cruise Lines, Ltd.*, 212 F.R.D. 144, 148 (S.D.N.Y. 2002) (“Courts should particularly ‘focus on the liability issue . . . and if the liability issue is common to the class, common questions are held to predominate over individual questions.’”(citation omitted)).<sup>6</sup>

The Appellant’s alleged liability in the instant case arose out of the same nucleus of operative facts for each plaintiff, and each class member would necessarily rely upon the same evidence to show the culpable conduct of the Appellant. The possible need at some point for an individual determination regarding damages does not preclude class certification under Rule

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<sup>6</sup> In *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 604 (E.D. La. 2006), the court said:

Defendant argues that, particularly from the standpoint of damages, Plaintiffs’ claims do not meet the Rule 23 commonality requirement. According to Defendant, Plaintiffs’ homes and businesses received varying degrees of damage from the hurricane, and received different amounts of oil contamination. In addition, Defendant argues that the proof required for Plaintiffs’ personal injury and mental anguish claims is such that their claims do not share common issues of law or fact: each Plaintiff learned of the damage at different times, returned to the area at different times, and suffered different levels of exposure to the crude oil. Murphy Oil argues that these differences compel the Court to find that the commonality requirement has not been met.

The Court disagrees with Defendant. Rule 23(a)(2) only requires that one issue’s resolution will affect all or most of the potential class members. That requirement is clearly met in this case, which involves a single accident. These are just a few of the central issues that will affect all or most of the class members: whether Murphy Oil failed to properly maintain Tank 250-2, whether Murphy Oil had adequate hurricane safety plans and whether those plans were carried out during Hurricane Katrina, and whether the affected area will experience any long-term contamination. While Plaintiffs’ claims will involve some individualized determinations regarding the amount of damage suffered, if any, there are enough common issues regarding Defendant’s liability that class treatment would be appropriate under Rule 23.

23(b)(3) where, as here, common issues predominate. *Rezulin*, 214 W. Va. at 72, 585 S.E.2d at 72.<sup>7</sup>

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<sup>7</sup>The Supreme Court has affirmed that “[t]he key [in applying Rule 23(b)(2)] is whether the actions of the party opposing the class would affect all persons similarly situated, so that the acts apply generally to the whole class.” *In re Rezulin*, 214 W. Va. at 70, 585 S.E.2d at 70. For example, in *In re Rezulin*, where the plaintiffs asserted the defendants had exposed the class members to the same risks, the allegations not only justified but *required* certification under Rule 23(b)(2):

The plaintiffs assert that all members of the proposed class took the same drug, and were subject to the same risk of possible injuries. The drug was made by the same defendants, and the defendants’ conduct was directed toward a discrete population: the plaintiffs, all West Virginia diabetics who needed medication for control of their condition. . . . [W]e conclude that the plaintiffs have met the initial requirements of Rule 23(b)(2) and shown that the defendants acted, or refused to act, in a manner generally applicable to the entire proposed class. The circuit court therefore erred in holding otherwise.

214 W. Va. at 71, 585 S.E.2d at 71. Additionally, plaintiffs’ sought-for relief in the instant case was analogous to that approved in *In re Rezulin*, Syllabus Point. 14 (“[u]nder Rule 23(b)(2) . . . a court may exercise its equitable powers to establish and administer a court-supervised medical monitoring program to oversee and direct medical surveillance, and provide for medical examinations and testing of members of a class.”). One member of the West Virginia Supreme Court, elaborating on these points, stated:

[T]he bigger the class, the greater the likelihood that the defendant will argue that there is no common problem across the system. Defendants will argue . . . that each plaintiff’s case is different . . .

Defendants attempting to avoid class certification will, almost exclusively, overwhelm a circuit judge with the differences between each class member’s case. It is akin to a judge being asked to look at a forest of oak trees and being told the difference between each tree: each tree has a different height, a different color, a different number of leaves, a unique number of branches, a wide variation in the number and size of tree rings, and so on.

The test for the judge, though, is to step back and look at the similarities in class members. Step back and see the forest. No matter the number of branches or leaves, a collection of oak trees has enough similarities to be called a “class” of oak trees.

*Gulas v. Infocision Mgmt. Corp.* 215 W. Va. 225, 230, 599 S.E.2d 648, 653 (Starcher, J., concurring).

The Appellant relies upon several non-West Virginia cases, including *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331 (4<sup>th</sup> Cir. 1998), as authority for the proposition that the asserted individual differences among the class members in the instant case, particularly regarding the statute of limitations, prohibited treating the case as a class action.

However, *Broussard*, in addition to interpreting federal and not state class action law, has been specifically criticized in the federal jurisprudence as “contradict[ing] the weight of authority and ignor[ing] the essence of the predominance inquiry.” *Waste Management Holdings, Inc.*, 208 F.3d 288, 296 n.4 (1<sup>st</sup> Cir. 2000). See also *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1147-1148 (8<sup>th</sup> Cir. 1999) (distinguishing *Broussard*, holding that “[t]he interests of the various plaintiffs do not have to be identical to the interests of every class member; it is enough that they ‘share common objectives and legal or factual positions.’”<sup>8</sup> Compare *Malloy v. Mortgage America*, 67 F.Supp.2d 601, 614 (S.D.W.Va. 1999) (class action was superior method for adjudication of unconscionable contractual terms claim under West Virginia Consumer Credit Protection Act despite possibility of individualized inquiries concerning class members).

Requiring individual lawsuits by class members in the instant case clearly would have been prohibitively expensive. A class-wide approach to liability and the appropriateness of the remedies of for medical monitoring and property remediation was desirable. The burdens of managing the class action were reasonable in comparison to the onerous and probably impossible

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<sup>8</sup> The Appellant also cites to *Thorn v. Jefferson-Pilot Life Insurance Co.*, 445 F.3d 311 (4<sup>th</sup> Cir. 2006). The *amicus curiae* respectfully direct the West Virginia Supreme Court of Appeals’ attention to the thoughtful dissent by Circuit Judge Blaine Michael in that case, in which dissent he points out that in fact there were common class-wide issues on the statute of limitations in the *Jefferson-Pilot* case; and persuasively describes why class certification was in fact proper in that case. Two Texas cases cited by the Appellant, *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000) and *Stonebridge Life Insurance Co. v. Pitts*, 236 S.W.3d 201 (Tex. 2007) are so far from the approach taken by the West Virginia Supreme Court -- in looking at what constitutes “fatal differences” among the claims of members of a class -- that the Texas cases are simply unpersuasive.

task of trying the hundreds of similar claims separately.<sup>9</sup> Indeed, because of the expense of hiring experts, it is highly doubtful that the class members' relatively small claims could even have been brought without a class action approach. *Cf. SER Dunlap v. Berger, supra.*

The choice faced by the Circuit Court of Harrison County in the instant case -- whether to fragment the class members' common issues and claims into hundreds of individual lawsuits, where each plaintiff would assert the same theories against the same defendant based on the same evidence, or whether to certify a class and try the case as a class action, was a classic "no-brainer."

Citizens, workers, and families throughout West Virginia rely upon and are entitled to access to the courts to assert their legal rights. But if these citizens, workers, and families cannot bring and properly litigate class action cases -- in the face of attacks of defendants who will never -- in *any* case -- concede that a class action is appropriate -- then in many instances those legal rights will be meaningless. That is why the West Virginia Supreme Court of Appeals

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<sup>9</sup> Moreover, when there is a probability of multiple lawsuits over the same matter, defendants run the risk of inconsistent outcomes that could create incompatible standards for them, while plaintiffs run the risk that they may not be able to protect their interests. "The phrase 'incompatible standards of conduct' is thought to refer to the situation where different results in separate actions would impair the opposing party's ability to pursue a uniform course of conduct." Charles A. Wright, et al., *7A Federal Practice & Procedure*, § 1773 at 431 (2d ed. 1986). Rule 23(b)(1) was designed to ameliorate the effects of inconsistent outcomes by providing a mechanism to deliver a uniform remedy. *Boggs, et al. v. Divested Atomic Corp., supra* (Rule 23(b)(1)(A) "allows a single court to fashion an appropriate remedy, and to bring a controversy to a final and complete resolution.") If each nearby resident brought a separate suit, defendants could be subjected to various and inconsistent positions. Appellant could be required to fund or conduct potentially hundreds of cleanup plans differing in scope and degree. Under substantially similar circumstances within the same geographical area, Appellant could be required to remove surface contamination in one case, while in another case be required to remove surface soil and contaminated indoor dust, and in another only be required to pay damages as a result of substantially the same contamination. Moreover, inconsistent outcomes could subject the plaintiffs to a far worse injustice. Separate suits could result in a remediated property lying adjacent to contaminated property. Under this scenario, plaintiffs would still be subject to alleged contaminant exposure, and remediated property could be re-contaminated.

should adhere to its settled jurisprudence and hold that the Circuit Court of Harrison County *did not err* in concluding that a class action was appropriate for the fair and efficient adjudication of the controversy between the class members and the Appellant in the instant case.

B. The Appellant's Arguments Regarding the Named Individual Plaintiffs/Class Representatives Misapprehend the Role Of a Class Representative in the Trial of a Class Action.

In the Appellant's "Petition for Appeal" filed in the instant case, the Appellant states at page 48: "A central component of [the Appellant]'s trial strategy was to offer evidence about each of the 10 class representatives to illustrate the weaknesses of their claims." The Appellant then in its Brief contends that the trial court erred in making evidentiary rulings that frustrated the Appellant's effort to focus the jury's liability determination on the individual circumstances of the named class representatives -- as opposed to on the common circumstances and claims of the certified class.

However, such an approach by the Appellant was contrary to the settled law regarding the trial of class actions; and the trial court did not err in rejecting that approach.

In a class action case, one or more named class representatives file an action on behalf of a group of people. Once a class has been certified, it is the common relevant factual circumstances of the members of the class (including possible subclasses) that establish the factual basis for the claims that are litigated at trial -- not the individual circumstances of the named plaintiffs/class representatives. "A properly certified class has a legal status separate from and independent of the interest asserted by the named plaintiff." *Whitlock v. Johnson*, 153 F.3d 380, 384 (7th Cir. 1998).

As the court stated in *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 124 (3d Cir. 1985):

The class representatives furnish the factual basis to invoke the jurisdiction of the court and provide the outline of the controversy, but the lawyers shape the claims for adjudication by the compilation of factual and expert testimony and the presentation of statistical and documentary evidence.

In *Goodman*, the trial court's judgment on liability was vacated because the class representatives were not "adequate." The appellate court remanded the case for the substitution of "adequate" class representatives, and then possible reinstatement of the trial court's liability findings and judgment -- because the accuracy of the trial court's class-wide findings did not depend upon the individual circumstances of the original class representatives.<sup>10</sup>

Thus, even the complete extinguishment of a sole named class representative's individual cause of action does not operate to moot the claims of the class. "[A]n action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim . . . ." *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 404, 100 S.Ct. 1202, 1212 - 1213, 63 L.Ed.2d 479 (1980). See also *Graves v. Walton County Bd. of Ed.*, 686 F.2d 1135, 1137 (5<sup>th</sup> Cir. 1980); 32B Am.Jur.2d *Federal Courts* Sec 1596.

The *amicus* CAG does not question the self-evident principle that evidence regarding an individual *who happens to be* a named individual plaintiff/class representative *may* be relevant in the trial of a class action lawsuit. For this reason CAG expresses no opinion on the particular rulings complained of by the Appellant -- as to whether certain evidence from or regarding one

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<sup>10</sup> Notably, the class *certification* test for "typicality" under Rule 23(a)(3) is whether the *claims* of the class representatives are typical -- and not whether there is a "typical" class representative or class member. This is more than just a semantic distinction. In *In re Rezulin*, the West Virginia Supreme Court criticized the circuit court's finding that "there can be no 'typical' Rezulin user." *Id.* at 68. The Supreme Court held that the "typicality" requirement was met simply because all class members were, by the face of the complaint, seeking medical monitoring relief necessitated by their exposure to Rezulin.

or more of the individual named plaintiffs/class representatives was or was not properly excluded from the trial of the class claims in the instant case.<sup>11</sup>

But the *amicus* CAG does vigorously oppose as erroneous any suggestion that evidence regarding or from an individual named plaintiff/class representative is legally necessary in the *trial* of a class action; or is somehow superior to and/or more relevant than any other evidence with respect to the merits of the issues that are before the trier of fact. The West Virginia Supreme Court of Appeals should not give any support to this misleading and erroneous notion.

Important issues of workplace and community safety sometimes involve legal claims that may only be properly addressed in the context of a class action. Therefore it is vital to the well-being of West Virginians that this important legal mechanism not be impaired by improper and unwarranted notions that would distort of the type of evidence that is appropriate and necessary at the trial of a class action.

The *amicus curiae* Citizen Action Group urges the West Virginia Supreme Court of Appeals to hold that the Circuit Court of Harrison County *did not err* in refusing to conduct the trial in accord with the Appellant's trial strategy to the effect that that the merits of the class-wide claims in the instant case should be determined by the factual circumstances of the named individual plaintiffs/class representatives.

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<sup>11</sup> Those evidentiary issues were matters of relevance, etc. to be decided by the trial court in light of the issues being determined at trial (for example, were the plaintiffs making a contention about class members' blood levels?).

V. Conclusion.

The *amicus curiae* West Virginia Citizen Action Group thanks the West Virginia Supreme Court of Appeals for its attention to the foregoing and requests that the Court give CAG's submissions due consideration.

Respectfully Submitted,

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Nos. 34334 & 34335

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LENORA PERRINE, et al., Plaintiffs Below, Appellees,

v.

E.I. DUPONT DE NEMOURS AND COMPANY, et al., Defendants Below,

E.I. DUPONT DE NEMOURS AND COMPANY, Appellant.

Honorable Judge Thomas A. Bedell  
Circuit Court of Harrison County  
Civil Action No. 04-C-296-2

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the attached "MOTION OF THE WEST VIRGINIA CITIZEN ACTION GROUP FOR LEAVE TO FILE BRIEF AMICUS CURIAE" and attached "BRIEF OF AMICUS CURIAE WEST VIRGINIA CITIZEN ACTION GROUP" to the following-listed parties on December 23, 2008:

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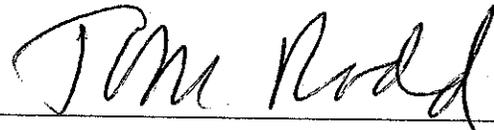
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