BRUCE PATNER, ON HIS OWN BEHALF AND ON BEHALF OF A CERTIFIED DEFENDANT CLASS,	*	IN THE
	*	COURT OF APPEALS
Petitioner,	*	OF MARYLAND
v.	*	September Term, 2016
THE HONORABLE RONALD B. RUBIN,	*	Misc. No. 28
Respondent.	*	

* * * * * * * * *

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

The Honorable Ronald B. Rubin, Associate Judge of the Circuit Court for Montgomery County, through counsel, submits this response to the petition for writ of mandamus filed by Bruce Patner, on his own behalf and on behalf of a certified defendant class. The petition, dated January 20, 2017, objects to the non-final class certification order docketed on November 18, 2016 in *Quan-en Yang, et al. v. G&C Gulf, Inc., et al.* Case No. 403885V, which is pending in the Circuit Court for Montgomery County.

STATEMENT OF THE CASE

This case arises out of a class action complaint filed in the Circuit Court for Montgomery County against towing company G&C Gulf, Inc. ("G&G") alleging predatory and illegal towing practices in violation of Maryland and Montgomery County law. (E. 35-54.) The November 14, 2016 memorandum and order that is the subject of this petition granted plaintiffs' motion to certify a defendant class. (E. 33, docket no. 219; E. 328-50.) Judge Rubin found that plaintiffs had established, as required by Md. Rule 2-231(a)(1), numerosity and the impractical joinder of "at least 573 parking lot owners or

managers" who are putative class members (E. 334), commonality as required under Rule 2-231(a)(2), typicality as required by Rule 2-231(a)(3), and the adequacy of the named class representatives and their counsel as required by Rule 2-231(a)(4). (E. 335-39.) Judge Rubin further concluded that plaintiffs had established that a non-opt-out "defendants' class is properly certifiable under both subsection (b)(1)(A) and subsection (b)(1)(B) [of Md. Rule 2-231]." (E. 350.)

On January 20, 2017, Mr. Patner filed a petition for writ of mandamus in this Court seeking to vacate the defendant class certification order. (Pet. 59.)

REASONS FOR DENYING THE PETITION

The petition should be denied because this matter does not involve the type or severity of circumstances that this Court has deemed necessary to justify the issuance of a writ of mandamus, which is to be granted "'hardly ever.'" *In re Petition for Writ of Prohibition*, 312 Md. 280, 329 (1988) (quoting *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980)). This case presents no principled basis for departing from the final judgment rule because Mr. Patner has an adequate remedy in the form of an appeal following a final judgment and none of the extraordinary circumstances and compelling public interests presented in *Philip Morris Inc. v. Angeletti*, 358 Md. 689 (2000), animate this case.

MANDAMUS RELIEF IS NOT AVAILABLE TO REVIEW INTERLOCUTORY DECISIONS THAT REST WITHIN A TRIAL COURT'S DISCRETION AND THAT ARE REVIEWABLE ON APPEAL FROM A FINAL JUDGMENT.

The issuance of a writ here would run afoul of two important constraints long recognized by this Court: (1) "It is well settled in this State that a writ of mandamus will not be granted where the petitioner has a specific and adequate legal remedy to meet the justice of the particular case . . .," *Philip Morris*, 358 Md. at 712; for example, the writ may not be used as "a substitute for appeal," *In re Petition for Writ of Prohibition*, 312 Md. at 306; and (2) "Ordinarily, the writ will not lie to control the exercise of discretion," and will issue only in "extraordinary circumstances." *Id.* at 306, 327. In this case, the writ is not warranted because Mr. Patner has an adequate legal remedy in the form of an appeal once final judgment is entered by the circuit court, the petition seeks this Court's intervention to control a discretionary matter, and none of the extraordinary circumstances and public and judicial interests at issue in *Philip Morris* are presented here.

Mr. Patner asks this Court to issue the extraordinary prerogative writ of mandamus to undertake immediate review of the circuit court's interlocutory disposition of a class certification issue – a procedural matter committed to the trial court's "sound discretion." *See Frazier v. Castle Ford, Ltd.*, 430 Md. 144, 155 (2013). *See also Marshall v. Safeway, Inc.*, 437 Md. 542, 564 (2014) ("The decision to certify a class (assuming the court has applied the proper standards) . . . [is a] largely discretionary one[] for the trial court."); *Philip Morris*, 358 Md. at 726 ("We review the circuit court's decision to grant or deny class certification for abuse of discretion.") The certification of a defendant class operates as a joinder device and, therefore, is a procedural matter within the trial court's discretion.

In support of his request for this most extraordinary form of interlocutory review, Mr. Patner relies primarily on *Philip Morris*, a decision that, by comparison, both exemplifies and explains why this Court should refrain from issuing the writ requested in this case. In *Philip Morris*, a group of "tobacco manufacturers and related entities" sought a writ of mandamus directing the Circuit Court for Baltimore City to vacate an order certifying two classes of "Maryland residents who, as current or former users of tobacco products, have filed a suit against Petitioners claiming to have been injured by tobacco use or addicted to nicotine." *Philip Morris*, 358 Md. at 699, 702. Suit was brought on behalf of the estates, representatives, administrators, spouses, children, relatives and significant others as heirs or survivors. *Id.* at 700-01. The circuit court certified two plaintiff classes, with six proposed sub-classes, and impliedly approved the plaintiffs' litigation plan, which provided for three phases of trials. *Id.* at 703.

In evaluating whether the extraordinary writ of mandamus should issue, the Court considered "the interests of justice and public policy, the protection of the integrity of the judicial system, the general preferability of the final judgment rule, and the adequacy of other available relief." *Id.* at 713–14. Recognizing the "inordinate size of the class membership," estimated to number in the hundreds of thousands, the "logistical magnitude [of which] alone is staggering and which concomitantly may significantly impact or divert the public resources earmarked for the judiciary for the next several years," the Court concluded that the "truly extraordinary circumstances of the present case warrant our extraordinary attention at this time . . . ." *Id.* at 714-15, 718-19.

Based on its finding that the petitioners lacked "other available, adequate relief as well as the existence of a paramount public and judicial interest that, together, override the preference for the final judgment rule," the Court concluded that the issuance of mandamus was justified in the unique circumstances of that case "in order to protect the integrity of the judicial system in this State." *Philip Morris*, 358 Md. at 714.

A. MERE LEGAL ERROR IS INSUFFICIENT TO JUSTIFY THE ISSUANCE OF A WRIT OF MANDAMUS, WHICH MAY ISSUE WHEN JUDICIAL POWER HAS BEEN USURPED OR THERE IS A CLEAR ABUSE OF DISCRETION.

The power of this Court to issue writs of mandamus in the exercise of its appellate jurisdiction has been recognized for almost 30 years. *In re Petition for Writ of Prohibition*, 312 Md. 280. For that entire time, this Court has limited the circumstances in which such a writ is appropriate to "'only when judicial power has been usurped or if there is a clear abuse of discretion.'" *St. Joseph Med. Ctr., Inc. v. Turnbull*, 432 Md. 259, 269 (2013) (quoting *Petition for Writ of Prohibition*, 312 Md. at 327). In recognizing its authority to issue extraordinary writs in *In re Petition for Writ of Prohibition*, this Court cautioned that the use of such writs should occur only in extraordinary circumstances: "The common law extraordinary writs of mandamus and prohibition are just that – extraordinary; even when the power to issue them exists, whether to take that action is discretionary." *Id.* at 305. "'The power [to issue a prerogative writ] is one which ought to be exercised with great caution'" and normally "a writ will not lie to control the exercise of discretion." *Id.* at 305-06 (citations omitted). Thus, "[s]uch a writ ordinarily will not issue when another

remedy is available, and is not a substitute for appeal or writ of error. Generally speaking, more than mere error must be shown." *Id.* at 306.

The Court refused to grant the writ in that case, stating that even assuming that the lower court's order denying a new trial was an abuse of discretion, "that does not require us to issue an extraordinary writ" because, the Court "reemphasize[d]," "extraordinary writs issue only under extraordinary circumstances." *Id.* at 327. The Court thus agreed with the Supreme Court that "the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Id.* at 328-29 (quoting *Allied Chemical*, 449 U.S. at 34).

This Court further delineated the boundaries of the extraordinary writs in *Goodwich v. Nolan*, in which it stated that "judicial review is properly sought through a writ of mandamus 'where there [is] no statutory provision for hearing or review *and* where public officials [are] alleged to have abused the discretionary powers reposed in them.'" 343 Md. 130, 146 (1996) (citations omitted) (emphasis added in *Goodwich*). Mandamus is therefore generally used "'to compel inferior tribunals, public officials or administrative agencies to perform their function, or perform some particular duty imposed upon them which in its nature is imperative and to the performance of which duty the party applying for the writ has a clear legal right.'" *Goodwich*, 443 Md. at 145 (quoting *Criminal Injuries Comp. Bd. v. Gould*, 273 Md. 486, 514 (1975)). Thus, the "writ ordinarily does not lie where the action to be reviewed is discretionary or depends on personal judgment." *Id.*

In recognition of the discretion appropriately afforded to lower court judges, before entry of final judgment, a writ may be issued to correct an abuse of discretion only when "judicial power has been usurped." *In re Petition for Writ of Prohibition*, 312 Md. at 327.

Accord In re Catawba Indian Tribe, 973 F. 2d 1133, 1136 (4th Cir. 1992) (mandamus only available when there is "an abuse of discretion amounting to a usurpation of the judicial power"); *see also Philip Morris*, 358 Md. at 792 (Cathell, J., dissenting) (abuse of discretion sufficient to justify issuance of an extraordinary writ is "different in magnitude than that required to be shown to obtain reversal on appeal"). Thus, in another case, this Court found a County Administrative Judge's "usurpation of [the trial judge's] authority" to decide whether a trial should be bifurcated to constitute a threat to "the integrity of the judicial system" and, therefore, "the quintessential circumstance that warranted issuance of a writ." *St. Joseph Med. Ctr.*, 432 Md. at 283.

Consistent with these principles, this Court's exercise of its discretionary power to issue prerogative writs has been carefully cabined. *See, e.g., Forster v. Hargadon*, 398 Md. 298, 309 (2007) (declining to issue writ to review use of juvenile form order and noting that "[t]his kind of end run around the normal and available appellate process would do nothing 'to prevent disorder, from a failure of justice, but would, instead, promote such disorder'") (citations omitted); *State v. Manck*, 385 Md. 581, 612-13 (2005) (Harrell, J., dissenting) ("Thus, we strive to restrain ourselves from issuing these writs in deference to our faith that the trial courts ordinarily will fulfill their duties in accordance with judicial precedent and statutory authority, and, when they do not, that we may consider the exercise of those duties on appeal."); *Doering v. Fader,* 316 Md. 351, 361-62 (1989) (finding the circumstances of the case appropriate to issue a writ, but declining to do so in light of the extraordinary nature of the writ and availability of review on appeal).

In sum, this Court has thus far carefully limited its right to issue the extraordinary writ of mandamus to the three narrow sets of circumstances in which the interests of justice

require it to restrain a lower court immediately from (1) acting in excess of its jurisdiction, (2) otherwise grossly exceeding its authority, or (3) failing to act when it ought to act. *In re Petition for Writ of Prohibition*, 312 Md. at 307. That is, "'only when judicial power has been usurped or if there is a clear abuse of discretion.'" *St. Joseph Med. Ctr.*, 432 Md. at 269 (2013) (citation omitted). Here, the allegations of legal error fall far short of demonstrating an abuse of discretion sufficient to justify the issuance of an "extraordinary" writ. In deciding the defendant class certification issue, the circuit court complied with the applicable Maryland Rules in exercising its discretion on an issue that was properly before it, and thus cannot be said to have usurped the power of any other court or judge.

Mr. Patner has therefore not demonstrated any circumstance that would entitle him to a writ of mandamus under this Court's established jurisprudence. Instead, Mr. Patner's arguments center on the legal correctness of the circuit court's decision – arguments that this Court has declined to address through writs of mandamus and that are best decided with the benefit of a full record upon consideration of a final judgment. Whether the circuit court made the correct decision is not yet before this Court.

B. FIDELITY TO THE FINAL JUDGMENT RULE, THE AVAILABILITY OF EFFECTIVE REVIEW ON APPEAL, AND THE CONTINUING ABILITY OF THE CIRCUIT COURT TO REVISE THE CLASS CERTIFICATION ORDER CONFIRM THAT THE WRIT IS UNWARRANTED.

Class certification orders "are ordinarily capable of effective review on appeal from a final judgment." *Philip Morris,* 358 Md. at 714-15. This case presents no basis for deviating from that standard. Here, appellate review after final judgment will afford Mr.

Patner "'a specific and adequate legal remedy to meet the justice of [this] particular case . . . .'" 358 Md. at 712 (quoting *Brack v. Wells*, 184 Md. 86, 90-91 (1944)).

This Court has emphasized that *Philip Morris* "was truly an extraordinary case," and that the Court only undertook its review of the class certification decision in that case because the litigation plan approved by the circuit court would have required such an extraordinary commitment of resources "'of the busiest trial court in the State" that appellate review would necessarily have been "'inadequate and ineffective.'" *Forster*, 398 Md. at 307 (quoting *Philip Morris*, 358 Md. at 714). The extraordinary circumstances that would have made subsequent appellate review ineffective in that case are not present here. The litigation plan contemplated by the class certification order in *Philip Morris* involved two classes, six proposed sub-classes, and three phases of multiple trials involving hundreds of thousands of class members. 358 Md. at 703. By contrast, Judge Rubin's defendant class certification order involves a single class of approximately 573 defendants, hardly requiring "the commitment of [] an extraordinary amount of the judicial and other resources" of the circuit court. (E. 350.) In fact, the order at issue is likely to produce its intended effect of conserving scarce judicial resources and providing a mechanism for managing multiple claims involving multiple parties.

Nor is there any evidence here that "the expense and delay of the trial would [] prejudice[] the [petitioner's] ability to utilize effectively the appellate process." *State v. Manck*, 385 Md. 581, 588–89 (2005). Unlike *Philip Morris*, where "appellate review of the class certification [issue] may actually have [had] to await a trial loss by Petitioners during Phase III," 358 Md. at 715, this case poses no inordinate delay to obtaining appellate

review in the ordinary course. As this Court recognized in *Keene Corp. v. Levin*, 330 Md. 287, 294 (1993), the costs and delay attendant to the normal appellate process do not justify the issuance of a writ of mandamus. Nothing more is at issue here.

This Court's own post-*Philip Morris* decisions demonstrate that Maryland's appellate courts are capable of addressing through "the normal appellate process" questions pertaining to both the granting and the denial of class certification requests. *See, e.g.*, *Frazier*, 430 Md. at 161 (holding "tender of individual relief prior to class certification" did not moot class action and remanding case to circuit court to determine whether plaintiff had an adequate opportunity to file a motion for class certification and, if such motion is permitted, articulate "findings and reasons" as to whether a class should be certified); *Marshall*, 437 Md. at 565 (finding no abuse of discretion in the denial of class certification); *Anne Arundel Cty. v. Halle Dev., Inc.*, 408 Md. 539, 543 (2009) (affirming judgment and concluding that class action was proper means for property owners to obtain refunds of county impact fees); *Creveling v. Gov't Employees Ins. Co.*, 376 Md. 72, 104 (2003) (finding no abuse of discretion where trial court denied request for class certification on basis that cases presented no common questions suitable for class-wide resolution). *See also Bergmann v. Bd. of Regents of Univ. Sys. of Maryland*, 167 Md. App. 237, 289 (2006) (remanding case to circuit court to reconsider whether class certification was warranted but expressing no view on the issue where court's underlying finding that a portion of the university's tuition policy was unconstitutional warranted reversal).

Where, as here, the class certification order is subject to ongoing revision by the trial court in light of developments in the litigation, immediate interlocutory review

undermines the public policy underpinning the final judgment rule. *See* Md. Rule 2-231(c) ("The [class certification] order may be conditional and may be altered or amended before the decision on the merits."); *Snowden v. Baltimore Gas & Electric Co.*, 300 Md. 555, 562 n.5 (1984) (holding denial of class certification not appealable under the collateral order doctrine because the order is subject to revision by the trial court under Rule 2-231(c)) (citing *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 469 (1978)). *Cf. In re Titanium Dioxide Antitrust Litig.*, 962 F. Supp. 2d 840, 860-61 (D. Md. 2013) ("This Court has previously held that a federal district court possesses 'broad discretion in determining whether to modify or even decertify a class.'") (quoting *Wu v. MAMSI Life & Health Ins. Co.*, 256 F.R.D. 158, 163 (D. Md. 2008)).

Immediate review of an order subject to modification is inconsistent with "the underlying purpose of the final judgment rule—to promote judicial efficiency by avoiding piecemeal appeals" and to avoid deciding issues that may be resolved or become moot. *Metro Maint. Sys. S., Inc. v. Milburn*, 442 Md. 289, 298 (2015) (citing *Brewster v. Woodhaven Bldg. & Dev., Inc.*, 360 Md. 602, 616 (2000)). *See* Md. Code Ann., Cts. & Jud. Proc. § 12-303. Moreover, this Court's consideration of the issues raised by the circuit court's procedural rulings, including those that have yet to be made in subsequent stages of the litigation, will be aided by a record that shows the actual, rather than predicted, effects of those rulings on the course of the entire litigation.

C. WHERE NO "PARAMOUNT PUBLIC POLICY INTEREST" SUFFICIENT TO OFFSET THE PREFERENCE FOR THE FINAL JUDGMENT RULE HAS BEEN ESTABLISHED, NO WRIT IS WARRANTED.

Finding a "substantial public interest in a timely resolution" of the "legal propriety of certifying a class action" where the "logistical magnitude alone is staggering and which concomitantly may significantly impact or divert the public resources earmarked for the judiciary for the next several years," the Court accorded the class certification order in *Philip Morris* "earlier than usual attention." *Philip Morris*, 358 Md. at 718. Such unseasonable consideration is not warranted here where no "paramount public policy interest" is implicated by the defendant class certification order. *Id.* at 712-13.

Neither the breadth nor scope of this litigation compares to *Philip Morris*, which the Court described as "extraordinary" because of "the immense amount of time and expense that both the parties and the judicial system of this State will incur should the litigation proceed as a class action, as well as the astronomical number of persons in Maryland whose lives will be affected by our decision either way." *Philip Morris*, 358 Md. at 722. The 573 members of the defendant class impacted by the class certification order at issue here falls far short of the "astronomical" number of persons affected in *Philip Morris*. *See also Ford Motor Co. v. Ferrell*, 188 Md. App. 704, 716-17 (2009) ("This 'astronomical' number [of persons impacted in *Philip Morris*] is a far cry from the five or six thousand potential class members in the present case.")

Nor do the time and resources necessary to litigate this case as a defendant class action compare to the staggering resources implicated in the complex litigation schedule ordered by the circuit court in *Philip Morris*. Mr. Patner contends that this case is

"extraordinary" primarily because the decision to certify a non-opt-out defendant class was, he asserts, incorrect and unprecedented. (Pet. 26.) However, where "more than mere error must be shown" to warrant the issuance of a prerogative writ, allegations of legal error fall short of this standard. *In re Petition for Writ of Prohibition*, 312 Md. at 306. *See also Keene Corp.*, 330 Md. at 291 (only "extraordinary circumstances" justify the interlocutory issuance of a writ of mandamus in complex litigation).

Weighing the "strongly established preference to the final judgment rule" and Mr. Patner's allegations of legal error, his claims fail to reveal a "paramount public policy interest" sufficient to overcome the final judgment rule. Maryland courts are capable of reviewing alleged procedural and due process violations through the "normal appellate process" after final judgment. *See, e.g., State v. Cates*, 417 Md. 678, 701 (2011) (finding no due process violation in reissuing tickets to officers for speeding in police cars where there was no risk of mis-identification of the officer and later review by the circuit court was available).

Petitioner further argues that without this Court's immediate intervention, "the members of the defendant class will be forced to note literally hundreds of appeals to the Court of Special Appeals, further irrevocably wasting 'judicial and other resources.'" (Pet. 26.) Petitioner's attempt to imbue his claim with the imprimatur of protecting limited judicial resources cannot bear the weight he would place on it. First, the argument assumes that the certification order and the posture of the case will remain static, despite the trial court's authority to amend and modify a certification order and the ability of members of the defendant class to intervene or object to Mr. Patner's representation of the class. Md.

Rule 2-231(c); (E. 343) ("If any putative class defendant is worried about or dissatisfied with Patner's representation, it can intervene as of right and mount any defense it has against the plaintiffs' claims.").

Second, the argument likewise falters on the faulty speculation that each member of the defendant class could or would file an independent appeal from an adverse final judgment. Whether such appeals would even be considered by members of the defendant class would necessarily depend on the outcome of the litigation and on whether individual defendants believed their interests were adequately represented by Mr. Patner or another class representative, and multiple appeals could, in any event, be consolidated for appellate consideration. Even an adverse judgment would not, therefore, automatically result in "literally hundreds of appeals."

Where, as here, the petitioner has failed to "demonstrate a paramount public policy interest sufficient to offset the strongly established preference to the final judgment rule," no extraordinary prerogative writ may issue. *Philip Morris*, 358 Md. at 712-13.

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted,

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March 20, 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of March 2017, two copies of the foregoing Response to Petition for Writ of Mandamus were served by first class mail, postage prepaid, and electronic mail to:

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