STATE OF INDIANA	)	ELKHART COUNTY SUPERIOR COURT
	) SS:	
ELKHART COUNTY	)	CAUSE NO. 20D02- 1911-CT-000243 [20D05-2002-CT-25 consolidated into this cause]

LINDA GIEREK, and STEPHEN GIEREK on behalf of themselves and all others similarly situated, Plaintiffs/Counter- Defendants, v. ANONYMOUS 1, ANONYMOUS 2, and ANONYMOUS 3, Defendants/Cross-Defendants, and STEPHEN W. ROBERTSON, Commissioner of the INDIANA DEPARTMENT OF INSURANCE AS ADMINISTRATOR OF THE INDIANA PATIENT'S COMPENSATION FUND Counter-Plaintiff/Cross-Plaintiff.	)	CLASS ACTION

INTRODUCTION

After processing the parties' arguments, both written and oral, it is clear that both sides raise good arguments in support of their position. Defendants are correct that the damage component of the emotional damages is highly specific. Many patients likely had little or no damage, as evidenced by the silence of well over half of the patients. But what this Court keeps coming back to is the burdensome impact even 250 or 300+ nearly identical claims (that will surely be filed) could have on Indiana's Medical Malpractice Act ("MMA" or "Act") system. The medical review panel ("MRP") process would be negatively impacted, and not just for these potential class members. As to these potential class members, individual MRP panels could lead to inconsistent results. And those who happen to be the first ones through the process could negatively impact others prior to their cases getting heard. Other MMA claims, separate and

apart from the ones before this Court, could also be delayed by the effect of hundreds of individual claims.

But the beauty of Trial Rule 23 is that it does not have to be "all or nothing." This matter needs to move forward. The underlying event happened in Fall of 2019, over six years ago. Those who may have truly suffered damage have not even made it through the entryway of our legal system. And while there have been good reasons for the delay, as this case has been the epitome of a "case of first impression," the pace of the case needs to increase for obvious reasons.

In *Gierek, et. al. v. Anonymous 1, et. al.*, 250 N.E.3d 378 (Ind. 2025), the Indiana Supreme Court determined that the MMA applies to emotional-distress claims. The Court also determined that a trial court has jurisdiction to preliminarily determine the issue of class certification. *Id*. at 397-399; see also, *Griffith v. Jones*, 602 N.E.2d 107, 110 (Ind. 1992). This latter determination, as to class certification, was unanimous. This Court has discretion regarding class certification and chooses to do so by attempting to harmonize the goals of the MMA with Trial Rule 23, focusing on efficiency, economy, and allowing opportunities for alternative dispute resolution.

In deciding class certification in an MMA matter, a court should be careful in making its determination. A judge is not allowed to provide instructions to the medical review panel on the form and substance of its opinions. *Gierek* at 397. The MMA states that a court "has no jurisdiction to rule preliminarily upon any affirmative defense or issue of law or fact reserved for written opinion by the medical review panel . . ." Ind. Code § 34-18-11-1(b). In *Griffith v. Jones*, the Court defined those reserved powers as follows: "[T]he trial courts of this State do not have jurisdiction to instruct the medical review panel concerning definitions of terms and phrases used in the Medical Malpractice Act, the evidence that it may consider in reaching its opinion, or the form of substance of its opinion. In other words, the medical review panels should be allowed to operate in the informal manner contemplated by the legislature . . ." *Griffith*, 602 N.E.2d at 111.[1]

---

[1] In *Griffith*, the trial court was reversed after it issued findings of fact and conclusions of law that included directions and instructions to the medical review panel. The trial court impermissibly shaped the case, instructing the panel of what it could or could not do, ordering the panel chairman to instruct the panel concerning specific topics, and directing the panel to determine that there were material issues of fact. *Id*. at 109.

The scope of a MRP is limited. *Id*. at 110. A panel does not conduct a hearing or trial. *Id*. A panel does not render a decision of judgment. *Id*. The panel's job is to conduct "a rational inquiry into the extent and source of the patient's injuries for the purpose of forming its expert opinion." *Id*. As described in *Johnson v. St. Vincent Hospital, Inc.,* 273 Ind. 374, 392, 404 N.E.2d 585, 596 (1980) (overruled on other grounds by *In re Stephens,* 867 N.E.2d 148, 156 (Ind.2007)):

> The statute contemplates that the panel will function in an informal and reasonable manner. It is guided by a trained lawyer who presumptively will not deny to each party a reasonable opportunity to present its evidence and authorities. The scope of the panel's function is limited. It does not conduct a hearing or trial and does not render a decision or judgment . . . the panel is conducting a rational inquiry into the extent and source of the patient's injuries for the purpose of forming its expert opinion.

The MRP's sole duty is to express the panel's expert opinion as to whether the evidence supports the conclusion that the defendants acted or failed to act within the appropriate standard of care as charged in the complaint. *Holsten v. Faur*, 174 N.E.3d 219, 225 (Ind. Ct. App. 2021) (citing Ind. Code § 34-18-10-22(a)). The panel is not allowed to disclose the specific reasons underlying its opinion. *Id*. (citing *McKeen v. Turner*, 61 N.E.3d 1251, 1257 (Ind. Ct. App. 2016)). Indiana Code § 34-18-10-22 gives the MRP four possible options to announce its conclusion:

> (1) The evidence supports the conclusion that the defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint.
>
> (2) The evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care as charged in the complaint.
>
> (3) There is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury.
>
> (4) The conduct complained of was or was not a factor of the resultant damages. If so, whether the plaintiff suffered:
>
> (A) any disability and the extent and duration of the disability; and
>
> (B) any permanent impairment and the percentage of the impairment.

Ind. Code Ann. § 34-18-10-22(b) (2025).

Thus, no specific damage determination is made by the panel. In fact, at trial, the MRP's expert opinion is not conclusive. Ind. Code § 34-18-10-23 (2025). As the Indiana Supreme Court has recognized, a major reason for the MRP process is to promote the settlement of claims, not to weaponize additional jurisdictional barriers that adversely affect a claimant in pursuing a

legal claim. *Gierek*, 250 N.E.2d at 398. In other words, for purposes of an MRP, the fact that the level of damage between various proposed class members could potentially vary wildly is not that concerning. All of the alleged acts preceding the damage are nearly identical. Those actions are the actions that the MRP will look at.

In *Gierek*, the Court stated that the MMA and class actions both promote efficiency and economy of litigation. *Id*. "[J]ust and efficient judicial administration is not served by the sanctioning of a procedure that unnecessarily requires duplicitous multiple trials of the same factual issues, nor by inviting the prospect of inconsistent and contradictory verdicts." *Id*. (citing *Hiland v. Fountain Circuit Court*, 516 N.E.2d 50, 52 (Ind. 1987). Requiring the formation of a MRP for possibly more than 1,000 claimants could potentially be inefficient, strain the resources of the Indiana Department of Insurance, and unduly burden the state's healthcare industry. *Id*. at 398. In other words, when appropriate, a court should consider class actions with regard to the MRP process.

Under Trial Rule 23, the Court's job is to consider preliminary facts for common questions of fact and law, and, if appropriate, make a determination as to the class or classes of individuals. In making these findings, this Court does not do so in order to decide the parties' substantive claims. Also, to be clear, this Court has no intent to dictate to the MRP any conclusions as to any issues to be presented to the MRP. This Court's goal is simply to move this matter forward in an economical and productive way. With that said, the Court finds the Giereks' proposed Order Granting Giereks' Motions for Class Certification more in line with the Court's goals and adopts it as follows:[2]

ORDER GRANTING
GIEREKS' MOTIONS FOR CLASS CERTIFICATION

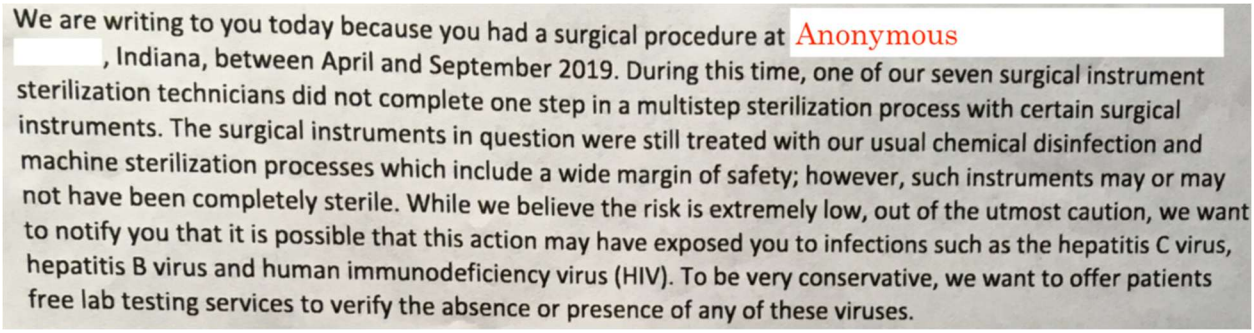
Linda Gierek and Stephen Gierek, having moved to certify two plaintiff classes in this action, the parties having submitted briefing, and the Court having conducted a hearing in this matter on August 19, 2025, and having considered the oral arguments of counsel and the materials filed in connection with such motions, hereby certifies both proposed classes, as more particularly set forth below.

---

[2] This is an unconventional way to handle this order, but it is an unconventional and complex case. There are excellent arguments on both sides of the issues raised in this matter, and this Court felt it necessary to explain the underlying thought process as to why it chooses to substantially adopt the Giereks' proposals.

I. Factual and Procedural Background

These consolidated actions arise out of the revelation by a hospital operated by Anonymous 1, Anonymous 2, and Anonymous 3 (collectively "Anonymous Hospital") that an employee had been missing one of the specified steps in the cleaning and sterilizing process of lumened instruments over a six-month period. On September 30, 2019, Anonymous Hospital discovered the problem, which resulted in Anonymous Hospital sending letters to 1,182 patients who underwent surgical procedures using lumened instruments in that six-month period. In relevant part, the letters stated:


We are writing to you today because you had a surgical procedure at Anonymous , Indiana, between April and September 2019. During this time, one of our seven surgical instrument sterilization technicians did not complete one step in a multistep sterilization process with certain surgical instruments. The surgical instruments in question were still treated with our usual chemical disinfection and machine sterilization processes which include a wide margin of safety; however, such instruments may or may not have been completely sterile. While we believe the risk is extremely low, out of the utmost caution, we want to notify you that it is possible that this action may have exposed you to infections such as the hepatitis C virus, hepatitis B virus and human immunodeficiency virus (HIV). To be very conservative, we want to offer patients free lab testing services to verify the absence or presence of any of these viruses.

Having received one of these letters, surgical patient Linda Gierek initiated a putative class action in this Court on November 22, 2019. Four days later, Mrs. Gierek filed her *Plaintiff's Motion for Class Certification*, seeking to certify a class of similarly situated patients who were sent the same substantive letter that she received. On February 7, 2020, Mrs. Gierek filed her *First Amended Class Action Complaint*. Joining her in the filing was her husband, Stephen Gierek. The *First Amended Class Action Complaint* both added Mr. Gierek as a named plaintiff and advanced claims on behalf of a second proposed class of persons who were spouses of the patients to whom letters were sent. On April 15, 2020, the Giereks filed *Plaintiffs' Supplemental Motion for Class Certification* seeking to certify the second proposed class of spouses.

The Giereks are not the only persons who have brought claims against Anonymous Hospital following receipt of the letters. Consolidated into this action are numerous other individual claims and a second putative class action on behalf of patients filed by Cheyanne Bennett. Also pending before this Court—though not consolidated into this action—is an action filed on behalf of several hundred other persons, most of whom are persons within the proposed definitions of the Giereks' classes, pending under Cause Number 20D02-2104-CT-64.[3] On May

[3] These several hundred other persons are represented by the same counsel as the Giereks. It is the Court's understanding, based upon the representation of their counsel, that the purpose of

11, 2020, Ms. Bennett, independently from the Giereks' motions, also sought to certify a class action on behalf of patients who received the letter.

As these claims were pending, the Indiana Department of Insurance, as administrator of the Indiana Patient's Compensation Fund ("PCF"), was permitted to intervene. Following the PCF's intervention, an issue arose concerning whether these actions were even subject to the dictates of the Indiana Medical Malpractice Act, codified at Indiana Code Article 34-18. After briefing, on April 26, 2022, this Court ruled that the Indiana Medical Malpractice Act applies to these proceedings and that the Giereks' and Ms. Bennett's motions for class certification were not within the Court's jurisdiction to "preliminarily determine" certain matters prior to the issuance of an opinion by a medical review panel.

The Giereks appealed that ruling. Ultimately, in *Gierek v. Anonymous 1*, 250 N.E.3d 378 (Ind. 2025), the Indiana Supreme Court affirmed this Court's conclusion that the Medical Malpractice Act applies to these proceedings but held that class certification is a matter for preliminary determination.

On the same day that the Supreme Court issued its decision, the Giereks filed the *Gierek Plaintiffs' Motion to Lift Stay and Set Hearing on Giereks' Pending Motions for Class Certification* (Jan. 9, 2025), requesting the Court schedule the mandatory Indiana Trial Rule 23(C)(1) hearing. After the parties conferred, a briefing schedule was jointly sought and set by this Court on February 13, 2025. In accordance with that schedule, Anonymous Hospital filed *Defendants' Supplemental Brief in Opposition to Class Certification* on May 22, 2025, which was joined by the PCF. On July 9, 2025, the Giereks filed their *Supplemental Response in Support of Class Certification*. Ms. Bennett did not file a supplemental brief.

---

filing the individual claims arose mostly from the need to preserve their rights to claims should it have been determined that class adjudication was not permissible in the context of Indiana Medical Malpractice Act claims. This uncertainty arose largely because there was a debate in these consolidated proceedings as to the viability of *Ling v. Webb*, 834 N.E.2d 1137 (Ind. Ct. App. 2005). In *Ling*, the Indiana Court of Appeals instructed that medical-malpractice class actions could be pursued as preliminary determinations and, by doing so, trigger tolling in line with *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974). With dispute over whether class certification could be brought in a medical-malpractice action and whether *American Pipe* tolling would apply, as *Ling* instructs that it should, the persons whose claims were filed under Cause Number 20D02-2104-CT-64, but who fall within the scope of the proposed class definitions, have acted to protect their claims without risking forfeit for failure to timely bring claims.

The Court conducted the mandatory class-certification hearing on August 19, 2025. Plaintiffs Linda Gierek and Stephen Gierek appeared by Attorneys Eric Pavlack and Colin Flora; Intervenor Claimants appeared by Attorney Jeffrey Stesiak; Anonymous Defendants and Defendant John Doe appeared by Attorneys Alyssa Stamatakos and James Hough; Indiana Department of Insurance and the PCF appeared by Attorneys Matthew Conner, Wade Fulford, and Megan Hill. The Court heard arguments from the Giereks in support of their certification motions and from Anonymous Hospital and the PCF in opposition. Ms. Bennett did not participate in the class-certification hearing. Following the hearing, the Court invited the parties to address certain legal points raised at the hearing by supplemental briefing to be filed by September 5, 2025, and directed the parties to submit proposed orders by October 6, 2025.

On September 5, 2025, both the Giereks and Anonymous Hospital filed supplemental briefs. The PCF joined in Anonymous Hospital's brief. This supplemental briefing provided two notable adjustments to the proceedings. First, the Giereks, in line with arguments made at the Rule 23(C)(1) class-certification hearing, formally revised their proposed class definitions. Second, Anonymous Hospital, having denied allegations of breaching the standard of care in its February 25, 2020, *Answer to First Amended Complaint*, unilaterally stipulated:

> Anonymous Hospital stipulates that the failure of one of its former employees, K.P., to properly complete one step in the sterile processing of surgical instruments from April 2019 to September 2019 constitutes a breach of the standard of care. Anonymous Hospital further stipulates that this breach of the standard of care caused it to send the "Notification Letter" to those patients who had surgeries at Anonymous Hospital during that time frame.

[*Anonymous Hospital's Supplemental Brief in Opposition to Class Certification*, p.3]. Based upon that stipulation, Anonymous Hospital asserted: "With this stipulation, even Gierek must concede that her argument for class certification fails." *Id*.

To address this development and resulting argument, the Giereks sought and were granted leave to file their *Surreply in Support of the Giereks' Motions for Class Certification* (deemed filed Oct. 1, 2025). Consistent with standard procedures, that filing by the Giereks, as the movants, closed briefing. *See First Tech. Capital, Inc. v. BancTec, Inc.*, No. 5:16-CV-138-REW, 2017 U.S. Dist. LEXIS 97939, at *4, 2017 WL 2734716 (E.D. Ky. June 26, 2017) ("[I]n an ordinary briefing cycle, a movant does have the final word."); *Jackson v. Winn-Dixie, Inc.*, No. 08-0014-WS-C, 2008 U.S. Dist. LEXIS 105006, at *2 n.1, 2008 WL 5401641 (S.D. Ala. Dec. 29, 2008).

II. The Giereks' Proposed Classes

Consistent with the discussion between the Court and the parties at the August 19, 2025, Rule 23(C)(1) class-certification hearing, the Giereks have submitted their revised proposed class definitions as follows:

> **Revised Proposed Class 1 (the "Patients Class")**
>
> All patients of Anonymous Healthcare Provider to whom Anonymous Healthcare Provider sent a letter, identical or substantially similar to the letter it sent to Linda Gierek, informing them that, between April and September 2019, one or more employees of Anonymous Healthcare Provider did not complete all steps in the surgical instrument sterilization process and notifying them that they may have been exposed to infections such as the hepatitis C virus, hepatitis B virus, and human immunodeficiency virus (HIV).
>
> **Revised Proposed Class 2 (the "Spouses Class")**
>
> All persons who were married to a member of Proposed Class 1 at any time between (i) the date on which the corresponding Proposed Class 1 member underwent surgery from Anonymous Healthcare Provider for which a letter was sent regarding possible inadequate sterilization of instruments and potential exposure to infection and (ii) the date on which the letter was sent to the corresponding Proposed Class 1 member spouse.

The Court notes that these definitions differ from those in the Giereks' *First Amended Class Action Complaint*. Such revisions to class definitions during proceedings are consistent with the nature of class-action proceedings and comports with the roles of both the Court and the parties seeking class certification. *See Chapman v. First Index, Inc.*, 796 F.3d 783, 785 (7th Cir. 2015) ("[T]he obligation to define the class falls on the judge's shoulders. . . . The judge may ask for the parties' help[.]"); *Independence Hill Conservancy Dist. v. Sterley*, 666 N.E.2d 978, 982 (Ind. Ct. App. 1996); *Flynn v. FCA US LLC*, 327 F.R.D. 206, 226 (S.D. Ill. 2018).

III. Overview of Trial Rule 23 Class Certification Procedures

Indiana courts have long recognized the value of class action suits to remedy harms suffered by persons on a widespread scale. *Boehne v. Camelot Village Apartments*, 288 N.E. 2d 771, 778, 154 Ind. App. 21, 34 (1972). The recognized "purpose of a class action is to resolve matters as efficiently as possible[.]" *7-Eleven, Inc. v. Bowens*, 857 N.E.2d 382, 389 (Ind. Ct. App. 2006).

Class actions are governed by Indiana Trial Rule 23. In order for a court to certify a class under Rule 23, the plaintiff must first satisfy the requirements of Trial Rule 23(A), and any one of the three standards provided by Rule 23(B). *Ind. Bus. Coll. v. Hollowell*, 818 N.E.2d 943, 948

(Ind. Ct. App. 2004). The Giereks ask the Court to certify a class under subdivision 23(B)(3).

The four requirements of Rule 23(A) are "generally known as numerosity, commonality, typicality, and adequacy of representation[.]" *Core Funding Grp., LLC v. Young*, 792 N.E.2d 547, 552 (Ind. Ct. App. 2003), *trans. denied* (internal citation omitted). Trial Rule 23(B)(3) requires an additional two-part showing of (1) the "predominance" of common questions over individual questions and (2) the "superiority" of a class action over other available methods of adjudication. *Assoc'd Med. Networks, Ltd. v. Lewis*, 824 N.E.2d 679, 682 (Ind. 2005).

Though, "[t]he representative plaintiff[] ha[s] the burden to show that all requirements for class certification have been met[,]" *JK Harris & Co., Ltd. Liab. Co. v. Sandlin*, 942 N.E.2d 875, 885 (Ind. Ct. App. 2011) (citation omitted), *trans. denied*, the plaintiff is not required to establish the likelihood of ultimate success on the merits at this stage of the proceedings. *Hollowell*, 818 N.E.2d at 950 n.3 (citation omitted); *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1031 (7th Cir. 2018) ("certification is largely independent of the merits . . . and a certified class can go down in flames on the merits" (cleaned up)).[4]

In ruling on class certification, "Rule 23 should be liberally interpreted in favor of the maintenance of class actions." *Hazelwood v. Bruck Law Offices SC*, 244 F.R.D. 523, 524 (E.D. Wis. 2007) (citing *King v. Kansas City S. Indus., Inc.*, 519 F.2d 20, 25-26 (7th Cir. 1975)); *see also Szabo v. Bridgeport Machs., Inc.*, 199 F.R.D. 280, 299 (N.D. Ind. 2001) (same); *Barnes v. United States*, 68 Fed. Cl. 492, 502 (2005) (collecting authority and discussing rationale of liberal interpretation in favor of class actions); *Budden v. Bd. of Sch. Comm'rs*, 698 N.E.2d 1157, 1162 (Ind. 1998) ("The class action device has a long and useful history in this State.").

While minimal inquiry into the merits of the case is permissible, it is only "appropriate to the extent that the merits overlap the Rule 23 criteria." *Farno v. Ansure Mortuaries of Ind., LLC*, 953 N.E.2d 1253, 1270-71 (Ind. Ct. App. 2011) (citations omitted). "[A] 'certification hearing is not intended to be a trial on the merits, and Trial Rule 23 does not require a potential class representative to show a likelihood of success on the merits in order to have his claim certified as a class action.'" *Gierek*, 250 N.E.3d at 398 (quoting *N. Ind. Pub. Serv. Co. v. Bolka*, 693 N.E.2d

4 "Because Indiana Trial Rule 23 is based on Rule 23 of the Federal Rules of Civil Procedure, it is appropriate to consider federal court interpretations when applying the Indiana rule." *Chicago Title Ins. Co. v. Gresh*, 888 N.E.2d 779, 782 (Ind. Ct. App. 2008).

613, 617 (Ind. Ct. App. 1998), *trans. denied*).

IV. Issue Certification

An additional issue is that the Giereks request certification of two classes with respect to particular issues. Ind. Trial Rule 23(C)(4)(a) ("When appropriate: (a) an action may be brought or maintained as a class action with respect to particular issues[.]"). Specifically, the Giereks assert that issues of duty, breach, proximate causation, and general causation can be determined on a class-wide basis, reserving questions of specific causation and damages for subsequent proceedings.

The procedure the Giereks invoke is one well founded in class-action caselaw. As the Seventh Circuit summarized:

> Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues. Those solutions include "(1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class."

Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (2004) (citations omitted). "It is well established that, if a case requires determinations of individual issues of causation and damages, a court may bifurcate the case into a liability phase and a damages phase." *McMahon v. LVNV Funding, LLC*, 807 F.3d 872, 876 (7th Cir. 2015); *see also Gunnells v. Healthplan Servs.*, 348 F.3d 417, 429 (4th Cir. 2003) ("[T]o the extent that [Defendant]'s causation argument is that individual inquiry is necessary to establish whether the collapse of the Plan caused Plaintiffs any damages, this is precisely the same argument made by almost all defendants in mass tort cases: determining damages will require an individualized inquiry. Courts have routinely rejected this argument, concluding, as we have in previous cases, that the need for individualized proof of damages alone will not defeat class certification."); 2 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE § 8:2 (9th ed. 2012) ("The most commonly employed bifurcation in class actions and other contexts is the trial of the issue of the defendant's liability in Phase I, followed by determinations of the amount of recovery by individual plaintiffs or class members in follow-on trials."); MICHAEL J. MUELLER & JASON M. BEACH, *Trials*, *in* A PRACTITIONER'S GUIDE TO CLASS ACTIONS 145, 149 (Marcy Hogan Greer ed., 2010) ("One method used by courts to devise a plan for management of remaining individual issues is

severance of issues and separate trials under Rule 23(d) and Rule 42(b). This may be accomplished by structuring trials in sequential segments to determine designated issues or claims, narrowing and limiting issues for jury determination, or deferring such proceedings pending the exhaustion of other procedures as directed by the court." (footnotes omitted)); *see*, *e.g.*, *Mehl v. Canadian Pac. Ry.*, 227 F.R.D. 505, 521-22 (D.N.D. 2005) (presence of individual issues of causation from injury to persons in area surrounding derailed train that released anhydrous ammonia was not sufficient to prevent certification).

> Bifurcation resulting in phased trials[5] is widely applied in mass-tort cases. The procedural device of a Rule 23(b)(3) class action was designed not solely as a means for assuring legal assistance in the vindication of small claims but, rather, to achieve the economies of time, effort, and expense. However, the problem of individualization of issues often is cited as a justification for denying class action treatment in mass tort accidents. While some courts have adopted this justification in refusing to certify such accidents as class actions, numerous other courts have recognized the increasingly insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or a single course of conduct. In mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next. No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action. Consequently, 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 Chem. Corp., 855 F.2d 1188, 1196-97 (6th Cir. 1988) (footnotes omitted); *see*, *e.g.*, *In re Deepwater Horizon*, 739 F.3d 790, 816-17 (5th Cir. 2014).

---

[5] "Phased trials are an extended application of bifurcation. Once bifurcation is permitted, a trial might be viewed as a continuous series of phases. ... In class actions there is also authority under Rule 23(c)(4) to certify classes 'with respect to particular issues,' often referred to as 'issue classes.' Thus, certain phases in a trial could involve certification of 'issue' class actions, while other phases will not involve a classwide trial (as when individual issues such as causation, reliance, affirmative defenses and damages are to be decided in individual or small-group trials or by resort to administrative processes)." EDWARD F. SHERMAN, *Techniques and Devices for Segmenting Aggregate Litigation*, *in* A PRACTITIONER'S GUIDE TO CLASS ACTIONS 687, 705 (Marcy Hogan Greer ed., 2010) (footnotes omitted).

This approach allows courts to resolve questions of duty, breach, proximate causation, and general causation while leaving it to subsequent trials for individuals or groups[6] of class members to prove the conduct caused their specific harm and the appropriate damages to compensate for that harm. *See*, *e.g.*, *id*. at 1199-1200; *see also* EDWARD F. SHERMAN, *Techniques and Devices for Segmenting Aggregate Litigation*, *in* A PRACTITIONER'S GUIDE TO CLASS ACTIONS 687, 698 (Marcy Hogan Greer ed., 2010) ("In cases where causation through exposure to a product, substance, or environmental condition is a centrally disputed issue, courts have approved bifurcating and trying first the issues of general or 'generic' causation (that is, whether the injury could have been caused by the product, substance, or condition) and leaving for later determination the question of individual causation." (footnote omitted)); *Simon v. Philip Morris*, 200 F.R.D. 21, 32 (E.D.N.Y. 2001) ("Bifurcation procedure has evolved to accommodate the modern emphasis on active judicial management of complex cases, particularly in the realm of mass tort disputes.").

This procedure is fully embraced in Indiana. *Bank One Indianapolis, N.A. v. Norton*, 557 N.E.2d 1038, 1041-42 (Ind. Ct. App. 1990); *Connerwood Healthcare v. Estate of Herron*, 683 N.E.2d 1322, 1329 (Ind. Ct. App. 1997), *trans. denied*, *footnote 2 of opinion on appellate procedure overruled by Martin v. Amoco Oil Co.*, 696 N.E.2d 383 (Ind. 1998); *LHO Indianapolis One Lessee, LLC v. Bowman*, 40 N.E.3d 1264, 1277-78 (Ind. Ct. App. 2015). It is precisely the procedure our Court of Appeals approved in *7-Eleven, Inc. v. Bowens*, 857 N.E.2d at 388-89. The same approach affirmed in *7-Eleven* can be applied here. The Court can certify the questions of duty, breach, proximate causation, and general causation while leaving the determination of whether the Defendants' conduct was the specific cause of each class member's harm and the amount to be awarded for that harm for later proceedings.

V. Certification of the Patients Class is Appropriate

The Giereks first ask that the Court certify the Patients Class, with Mrs. Gierek appointed as the class representative. Before beginning the Rule 23 analysis, the Court first pauses to consider cases from other jurisdictions that have addressed class certification in similar

---

[6] A common practice has been to segment trials into "[s]mall ('mini') groups of cases [to be] tried together, one group after another," instead of each member individually. EDWARD F. SHERMAN, *Techniques and Devices for Segmenting Aggregate Litigation*, *in* A PRACTITIONER'S GUIDE TO CLASS ACTIONS 687, 705 n.109 (Marcy Hogan Greer ed., 2010) (cleaned up).

circumstances.

A. Analogous Cases

The parties have identified several cases from jurisdictions beyond Indiana in which class certification was addressed for claims arising from disclosures of unsterilized medical instruments. Anonymous Hospital and the PCF identify three cases in which certification was denied: *Smith-Williams v. United States*, No. 17-cv-823-wmc, 2019 U.S. Dist. LEXIS 70964, 2019 WL 1866316 (W.D. Wis. Apr. 25, 2019), *Doctors Hospital Surgery Center, L.P. v. Webb*, 704 S.E.2d 185 (Ga. Ct. App. 2010), and *Doe v. University Healthcare Systems, LLC*, 145 So.3d 557 (La. Ct. App. 2014). The Giereks identify two cases in which certification was granted: *Diaz v. Griffin Health Services Corp.*, No. X01-CV-15-6029965-S, 2020 Conn. Super. LEXIS 1491, 2020 WL 8130207 (Conn. Super. Nov. 23, 2020); *Creech v. W.A. Foote Memorial Hospital, Inc.*, Nos. 237437-237446, 2004 Mich. App. LEXIS 1404, 2004 WL 1258011 (Mich. App. June 8, 2004) (unpublished), *rev'd in part on reconsideration*, 2006 Mich. App. LEXIS 2532, 2006 WL 2380825 (Mich. App. Aug. 17, 2006) (unpublished).[7]

---

[7] Reconsideration was had on the issue of whether Michigan recognized a cause of action for emotional distress for fear of exposure to a disease that was never ultimately contracted. *Creech*, 2006 WL 2380825. After the Michigan Court of Appeals issued its 2004 opinion, appeal was sought to the Supreme Court of Michigan. *Creech v. W.A. Foote Mem'l Hosp., Inc.*, 695 N.W.2d 68 (Mich. 2005). That appeal was held in abeyance pending a ruling in *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005) (ruling that Michigan does not recognize such emotional distress claims). In light of *Henry*, the Supreme Court of Michigan denied review of the 2004 decision and remanded to the court of appeals. *Creech v. W.A. Foote Mem'l Hosp., Inc.*, 703 N.W.2d 470 (Mich. 2005). The Michigan Court of Appeals then summarily ordered the case remanded to the trial court for further findings prior to issuing a ruling on reconsideration. The Supreme Court of Michigan, however, deemed no further findings were necessary to decide the issue presented by *Henry* and vacated the 2005 order remanding to the trial court, once more directing the Michigan Court of Appeals to issue a ruling in light of *Henry*. *Creech v. W.A. Foote Mem'l Hosp., Inc.*, 713 N.W.2d 257 (Mich. 2006). On reconsideration of the *Henry* issue, the Michigan Court of Appeals granted partial summary disposition, finding, "To the extent that the complaints seek damages based upon the anticipation of a future injury or medical monitoring of that anticipated future injury, or based only upon some future physical injury such as a latent disease or the fear of such a disease, they do not survive *Henry*[.]" *Creech*, 2006 WL 2380825, at *2. Nothing in the reconsideration or subsequent history disturbed the portion of the original decision certifying a class action. That Michigan ultimately determined to not recognize emotional distress damages for fear from potential exposure to disease is of no importance, because Indiana recognizes such claims. *Dollar Inn, Inc. v. Slone*, 695 N.E.2d 185, 188-190 (Ind. Ct. App. 1998), *trans. denied*; *see also Gierek*, 250 N.E.3d at 385 n.1.

After reviewing these five cases, the Court finds the cases cited by the Giereks both better reasoned and to be more consistent with Indiana precedent. With respect to *Webb* from the Georgia Court of Appeals, the opinion is readily distinguishable because it rejects use of bifurcation in class proceedings, directly contrary to the guidance of Indiana appellate courts. *See*, *e.g.*, *7-Eleven*, 857 N.E.2d at 388-89; *LHO*, 40 N.E.3d at 1277-78. *Doe* is also readily distinguishable. First, the majority's opinion relied on *Webb*. Second, because class certification was denied in the trial court, it was subject to a manifest-error standard of review. Even more notably, *Doe* was not a unanimous decision. Despite the onerous standard of review, Judge Belsome dissented and would have certified the class action. Judge Belsome's analysis is consistent with the guidance of the Indiana Court of Appeals.

Finally, *Smith-Williams* is also distinguishable. After finding the requirements of Federal Rule 23(a) satisfied, the Western District of Wisconsin found certification not supported under Rule 23(b)(3). The district court's conclusion was premised on the belief that only individual issues would predominate. As with *Webb* and the *Doe* majority opinion, *Smith-Williams* does not comport with the Indiana class-certification procedures in mass-injury cases.

The Court finds the Michigan Court of Appeals' decision in *Creech*, the Connecticut decision in *Diaz*, and Judge Belsome's dissent in *Doe* both faithfully apply analyses mirroring Indiana caselaw and are more well-reasoned than *Webb*, *Smith-Williams*, and the *Doe* majority decision.

B. The Patients Class Satisfies the Rule 23(A) Requirements

The Patients Class easily satisfies the four requirements of Rule 23(A).

1. T.R. 23(A)(1): Numerosity

In order to satisfy the numerosity requirement, a plaintiff must show that joinder of the would-be plaintiffs is impracticable. *Connerwood Healthcare*, 683 N.E.2d at 1326. While there is no magic number, impracticability of joinder is presumed when there are forty or more members. *Bolka*, 693 N.E.2d at 616 (citation omitted). The parties agree that there are 1,182 patients who were sent letters like the one received by Mrs. Gierek. That easily satisfies numerosity. *Hochschuler v. G. D. Searle & Co.*, 82 F.R.D. 339, 343 (N.D. Ill. 1978) (class of "over 1000" persons "plainly meets" numerosity); *Smith-Williams*, 2019 U.S. Dist. LEXIS 70964, at *5-6 (finding numerosity with 592 patients).

2. T.R. 23(A)(2): Commonality

Commonality requires "that the plaintiffs' claims derive[ ] from a common nucleus of operative fact. A common nucleus of operative fact exists where there is a common course of conduct." *Bolka*, 693 N.E.2d at 616 (citation omitted).

Commonality "is satisfied if the individual plaintiffs' claims are derived from a common nucleus of operative fact," *Connerwood Healthcare*, 683 N.E.2d at 1327 (citation omitted), or "the defendant engaged in 'standardized conduct' toward the members of the proposed class." *Pawelczak v. Fin. Recovery Servs., Inc.*, 286 F.R.D. 381, 385-86 (N.D. Ill. 2012) (citation omitted). "[T]his requirement is satisfied as long as 'the class claims arise out of the same legal or remedial theory[.]'" *Mayflower Transit*, 204 F.R.D. at 145 (quoting *Johns*, 145 F.R.D. at 483).

Commonality is easily satisfied here, as each member of the Patients Class was subject to surgery with improperly sterilized instruments and either received the exact same letter placing him or her on notice of the failures or otherwise had reason to know he or she was exposed to risk of infection. *See Smith-Williams*, 2019 U.S. Dist. LEXIS 70964, at *6-7, *Creech*, 2004 Mich. App. LEXIS 1404, at *10-12; *Diaz*, 2020 Conn. Super. LEXIS 1491, at *12-15.

3. T.R. 23(A)(3): Typicality

Typicality "is satisfied if the representative plaintiffs' claims are neither in conflict with nor antagonistic to the class as a whole." *7-Eleven*, 857 N.E.2d at 392 (citation omitted). It does not require "the Plaintiffs to show that all claims are identical." *Id*. Instead, it is enough that "the claims of the representatives and class members stem from a single event or are based on the same legal theory." *ConAgra, Inc v. Farrington*, 635 N.E.2d 1137, 1141 (Ind. Ct. App. 1994).

Here, the claims of all members of the Patients Class arise from a single event—the systematic failure to properly sterilize lumened surgical instruments and then sending letters following the discovery of the failures—and their legal theories are the exact same. That is all that is required. *See Smith-Williams*, 2019 U.S. Dist. LEXIS 70964, at *7-8; *Creech*, 2004 Mich. App. LEXIS 1404, at *12-16.

4. T.R. 23(A)(4): Adequacy

The final requirement under Rule 23(A) is that "the representative parties will fairly and adequately protect the interests of the class." T.R. 23(A)(4). This requirement is two-fold in that it requires both the named-plaintiffs and class counsel to be adequate. *Hollowell*, 818 N.E.2d at 951 (internal citation omitted).

The Court finds the Giereks' counsel, who have substantial class-action experience and have shown sufficient skill and motivation to prosecute these claims through voluminous briefing and prosecution of the prior appeal, are adequate. The Court further finds that Mrs. Gierek, having sat for a deposition, has demonstrated sufficient interest in prosecuting this action and protecting the interests of absent class members to satisfy the adequacy requirement. *See Smith-Williams*, 2019 U.S. Dist. LEXIS 70964, at *8-9; *Creech*, 2004 Mich. App. LEXIS 1404, at *16-17.

C. The Patients Class Satisfies the Rule 23(B)(3) Requirements

1. *Predominance*

Rule 23(B)(3)'s predominance requirement is met where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Because the Giereks request certification only on the questions of duty, breach, proximate causation, and general causation, common issues predominate.

"There is no mathematical or mechanical test for evaluating predominance." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 814 (7th Cir. 2012). It is not about sorting common issues into one pile, individual issues another, and counting which has more or even "by comparing the time that the common issues can be anticipated to consume in the litigation to the time that individual issues will require." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) ("*Butler II*"); *Assoc. Med. Networks, Ltd. v. Lewis*, 824 N.E.2d 679, 686 (Ind. 2005). "[I]nstead, Indiana Trial Rule 23(B)(3) requires a pragmatic assessment of the entire action and all the issues involved." *7-Eleven*, 857 N.E.2d at 393.

"Predominance is a question of efficiency. Is it more efficient, in terms both of economy of judicial resources and of the expense of litigation to the parties, to decide some issues on a class basis or all issues in separate trials?" *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012), *judgment reinstated on remand*, *Butler II*, 727 F.3d 796. If the court finds that "classwide resolution would substantially advance the case[,]" then predominance is met. *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 761 (7th Cir. 2014). So long as "there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings." *Mejdrech v.*

Met-Coil Sys. Corp., 319 F.3d 910, 911 (7th Cir. 2003).

"The mere existence of individual issues will not be sufficient to defeat certification." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 87 (2d Cir. 2015). The "burden is [only] to establish that common issues predominate, not establish that no individual issues exist." *McGann v. Ne. Ill. Reg'l Commuter R.R. Corp.*, No. 90 C 5374, 1991 U.S. Dist. LEXIS 10452, at *1, 1991 WL 152520 (N.D. Ill. July 29, 1991); *accord Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012). "Indeed, it is inconceivable that in any class action there would be no individual issues." *Gunter v. Ridgewood Energy Corp.*, 164 F.R.D. 391, 399 (D.N.J. 1996).

The requirement that there be common *questions* does not necessitate that there be common *answers* to those questions. *Butler II*, 727 F.3d at 801. Nor does it require "[t]he common questions [] be dispositive of the entire action. In other words, 'predominate' should not be automatically equated with 'determinative.' Therefore, when one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 1778 (3d ed. 2005).

In resolving predominance, it can be helpful to examine the elements of the underlying causes of action. *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1059 (7th Cir. 2016). Mrs. Gierek and the Patients Class assert claims for negligent infliction of emotional distress. In order to sustain a claim for negligent infliction of emotional distress under the modified-impact theory, a plaintiff must establish the elements of negligence and "show that she sustained a direct impact as a result of [that] negligence and as a result of this direct impact that she suffered an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person." *Dollar Inn v. Slone*, 695 N.E.2d 185, 188 (Ind. Ct. App. 1998), *trans. denied*. "[T]he impact need only arise from the plaintiff's direct involvement in the tortfeasor's negligent conduct." *Anonymous Physician v. White*, 153 N.E.3d 272, 282 (Ind. Ct. App. 2020) (cleaned up).

The vast majority of the elements of each claim for the Patients Class can be established on a classwide basis. There is no individualized inquiry needed to establish duty or breach. The conduct toward each member of the Patients Class is uniform in that regard. Each was a surgical

patient who underwent surgery with lumened instruments that were not subject to proper sterilization procedures and who subsequently was sent a letter informing him or her of potential exposure to deadly diseases. *See Diaz*, 2020 Conn. Super. LEXIS 1491, at *15-17; *Doe*, 145 So. 3d at 582-83 (Belsome, J., dissenting).

Nor is there individualized inquiry necessary to establish proximate causation. Proximate cause tests whether the plaintiff's injury is foreseeable in light of the defendant's negligent conduct. A uniform determination can be made on whether severe emotional distress, along with monetary and physical injuries stemming from testing and monitoring, was foreseeable. *See*, *e.g.*, *Alvarado v. United States*, No. 10-22788-Civ, 2011 U.S. Dist. LEXIS 165452, at *8-9, 2010 WL 11553432 (S.D. Fla. Apr. 18, 2011) ("*Alvarado II*"); *Diaz*, 2017 WL 960792, at *3; *Descoteau v. United States*, No. 08-144-P-S, 2009 U.S. Dist. LEXIS 66677, at *24-25, 2009 WL 1491010 (D. Me. May 27, 2009). And, with regard to the emotional distress claim, a uniform determination can be made on whether there was a direct impact. *See*, *e.g.*, *Alvarado v. United States*, No. 10-22788-Civ, 2010 U.S. Dist. LEXIS 153208, at *7-8, 2010 WL 11553432 (S.D. Fla. Oct. 15, 2010) ("*Alvarado I*"); *cf*. *Alexander v. Scheid*, 726 N.E.2d 272, 283-84 (Ind. 2000) (impact rule satisfied by doctor's negligent failure to diagnose cancer).

Seeking to defeat certification, in its post-hearing brief, Anonymous Hospital stipulated:

> Anonymous Hospital stipulates that the failure of one of its former employees, K.P., to properly complete one step in the sterile processing of surgical instruments from April 2019 to September 2019 constitutes a breach of the standard of care. Anonymous Hospital further stipulates that this breach of the standard of care caused it to send the "Notification Letter" to those patients who had surgeries at Anonymous Hospital during that time frame.

[*Anonymous Hospital's Supplemental Brief in Opposition to Class Certification*, p.3].

This stipulation does not, however, defeat certification.[8] There are substantial questions of whether this stipulation can be used beyond these proceedings. Indeed, one of the points of class adjudication is to make sure that determinations such as this be provided both for the utility of parties to the proceedings and the absent class members who may otherwise be deprived of the use of this stipulation in establishing the now-admitted breach of the standard of care. Avoiding complicated questions of application of res judicata is one of the core purposes of class-action

[8] Additionally, that is an issue on the merits, which this Court is not inclined to act on. It is for the MRP to decide standard of care issues. If that is indeed a position that Anonymous Hospital chooses to take with the MRP, it can present it to the MRP.

proceedings under Rule 23. *Donovan v. Univ. of Tex.*, 643 F.2d 1201, 1206-07 (5th Cir. 1981) ("[T]he purpose of Rule 23 is to prevent piecemeal litigation -- to avoid (i) a multiplicity of suits on common claims resulting in inconsistent adjudications and (ii) the difficulties in determining the res judicata effects of a judgment").

2. *Superiority*

Finally, T.R. 23(B)(3) requires that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." "Mass accident class actions achieve the tort system's basic compensation and deterrence goals far more effectively than its traditional disaggregative processes." David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 593 (1987). Professor Rosenberg well explained the advantages to class-adjudication in mass tort actions:

> The case-by-case mode of adjudication magnifies this burden by requiring the parties and courts to reinvent the wheel for each claim. The merits of each case are determined de novo even though the major liability issues are common to every claim arising from the mass tort accident, and even though they may have been previously determined several times by full and fair trials. These costs exclude many mass tort victims from the system and sharply reduce the recovery for those who gain access. Win or lose, the system's private law process exacts a punishing surcharge from defendant firms as well as plaintiffs.
>
> These costs of litigation, which are borne directly by the parties, also cast a broad array of shadow prices that have widespread indirect effects. The redundant adjudication of mass tort claims thus consumes vast quantities of public resources, raising the price of access for other, sporadic, types of tort claims. Moreover, even though most of the claims arising from mass accidents are eventually settled on the basis of recovery patterns projected from relatively few trials, the settlement calculus will reflect the costs of redundant, de novo, particularized adjudication, as well as the incentives of each party to increase the litigation expenses for the other. These conditions generally disadvantage claimants. Because defendant firms are in a position to spread the litigation costs over the entire class of mass accident claims, while plaintiffs, being deprived of the economies of scale afforded by class actions, cannot, the result will usually be that the firms will escape the full loss they have caused and, after deducting their attorneys' shares, the victims will receive a relatively small proportion of any recovery as compensation. As a consequence, the tort system's primary objectives of compensation and deterrence are seriously jeopardized.
>
> The case-by-case mode of adjudication magnifies this burden by requiring the parties and courts to reinvent the wheel for each claim. The merits of each case are determined de novo even though the major liability issues are common to every claim arising from the mass tort accident, and even though they may have been previously determined several times by full and fair trials. These costs exclude many mass tort victims from the system and sharply reduce the recovery for those

> who gain access. Win or lose, the system's private law process exacts a punishing surcharge from defendant firms as well as plaintiffs.

Id. at 563-65 (footnotes omitted); *accord Cook v. Rockwell Int'l Corp.*, 181 F.R.D. 473, 481 (D. Colo. 1998).

Here, in addition to the general advantages of providing uniform and systematic resolution of mass-tort claims, these proceedings provide a further important advantage to the alternative of individual proceedings. As our Supreme Court recognized in the prior appeal:

> [A] class-action proceeding "circumvents the need" for all potential claimants to "file individual claims" with a medical-review panel. . . . [T]he legislature designed the MMA to protect the viability of Indiana's healthcare system by creating measures to mitigate costs of insuring and defending malpractice claims. And that purpose aligns with the purpose of a class-action proceeding—the "promotion of efficiency and economy of litigation" in cases involving multiple parties with similar claims. As this Court stressed in *Hiland*, "just and efficient judicial administration is not served by the sanctioning of a procedure that unnecessarily requires duplicitous multiple trials of the same factual issues, nor by inviting the prospect of inconsistent and contradictory verdicts." **Requiring the formation of an individual review panel for each of the 1,000 or more potential claimants here would sanction such an inefficient procedure—burdening the medical experts that serve on these panels, straining the resources of the DOI, and ultimately taxing the state's healthcare industry.**

Gierek, 250 N.E.3d at 398 (citations omitted; emphasis added).

Class-action adjudication in this manner is superior as it removes redundancies that would arise in multiple independent adjudications. As explained by the United States District Court for the District of North Dakota:

> Given the predominance of common issues surrounding CPR's potential liability in connection to the train derailment, the Court finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The Court notes that if these claims were tried separately, the amount of repetition would be enormous. It would be manifestly inefficient to duplicate the discovery process and to hold multiple trials with juries hearing the same evidence and deciding the same issues. Such repetition would undoubtedly consume more judicial resources than even the daunting nature of this class action. Accordingly, the Court finds that the Plaintiffs have satisfied the requirement of Rule 23(b)(3) that a class action be superior to other available methods for the fair and efficient adjudication of the controversy.

Mehl, 227 F.R.D. at 522. That is also why superiority was not a problem in *Bank One*, *7-Eleven*, or *LHO*.

The Court finds class adjudication of the issues of duty, breach, proximate causation, and

general causation, reserving for later proceedings the questions of specific causation and damages is the superior method of adjudicating the claims of the Spouses Class. *See Creech*, 2004 Mich. App. LEXIS 1404, at *17-21.

VI. Certification of the Spouses Class is also Appropriate

In addition to the Patients Class, the Giereks ask that the Court certify the Spouses Class, with Mr. Gierek appointed as the class representative. As with the Patients Class, the Court finds that the Spouses Class should be certified to address issues of duty, breach, proximate causation, and general causation, reserving for subsequent proceedings questions of specific causation and damages.

A. Analogous Cases

Of the five analogous cases identified by the parties, only one addressed certification of a class of spouses. Notably, it is not uncommon for individual claims of patients in claims for emotional harm resulting from failure-to-sterilize instruments to be brought by both the patient and the patient's spouse. *See*, *e.g.*, *Lukie v. Doctor's Hosp.*, 2019-Ohio-28, at ¶18 (Ohio Ct. App. 2019); *Denisco v. Boardwalk Regency Corp.*, No. 10-3612 (JBS/AMD), 2013 U.S. Dist. LEXIS 6480, at *36-37, 2013 WL 179484 (D.N.J. Jan. 15, 2013); *Ayotte v. Kates*, No. CV97-0569499-S, 1999 Conn. Super. Ct. 14518, 1999 Conn. Super. LEXIS 3010, 1999 WL 1063261, at *1 (Conn. Super. Ct. Nov. 3, 1999) (25 Conn. L. Rptr. 599); *cf*. Molien v. Kaiser Found. Hosps., 616 P.2d 813, 821-23 (Cal. 1980).

Of the cited authority, only the Michigan Court of Appeals' decision in *Creech* addressed class certification that includes spouses. *Creech* found certification to include spouses was appropriate.

B. The Spouses Class Satisfies the Rule 23(A) Requirements

The Spouses Class satisfies the four requirements of Rule 23(A). The precise number of spouses has not been placed before the Court. That is not a problem, however, because "[p]roponents of the class are not required to specify the identities or exact number of persons included in the proposed class[.]" *Bolka*, 693 N.E.2d at 616. In such circumstances, "[a] good faith estimate of the number of class members is sufficient to satisfy the numerosity requirement." *Graham v. Sec. Sav. & Loan*, 125 F.R.D. 687, 690 (N.D. Ind. 1989). Here, based upon population statistical data and the number of members of the Patients Class, the Giereks estimate the Spouses Class to be comprised of at least 470 persons. That number easily satisfies

numerosity.

As with the Patients, the Spouses' claims also arise from the same basic core of operative facts and therefore satisfy commonality. *See Creech*, 2004 Mich. App. LEXIS 1404, at *10-12. Mr. Gierek presents the exact same legal theories arising from the same underlying facts as the other members of the Spouses Class, therefore satisfying typicality. *ConAgra*, 635 N.E.2d at 1141; *Creech*, 2004 Mich. App. LEXIS 1404, at *12-16. And Mr. Gierek, like Mrs. Gierek, has no interests antagonistic to the class he seeks to represent that would prevent adequacy.

C. The Spouses Class Satisfies the Rule 23(B)(3) Requirements

The Spouses Class presents nearly identical circumstances to those of the Patients Class, with the same rationales supporting predominance and superiority. There is one additional aspect unique to the Spouses from the Patients that further supports certification of the Spouses Class. Unlike the claims of the Patients Class, which Anonymous Hospital and PCF do not strenuously contest as viable legal theories, both Anonymous Hospital and PCF do contest whether the Spouses have "a viable claim for negligent infliction of emotional distress as those class members cannot satisfy Indiana's modified impact rule." [*Anonymous Hospital's Supplemental Brief in Opposition to Class Certification*, p.4 n.2].

Ultimately, what Anonymous Hospital and PCF ask is for this Court to make a merits determination and then, if that determination comes out in their favor, deny certification of the Spouses Class. That argument fails for two basic reasons. First, as our Supreme Court instructed in the appeal of these proceedings: "a 'certification hearing is not intended to be a trial on the merits, and Trial Rule 23 does not require a potential class representative to show a likelihood of success on the merits in order to have his claim certified as a class action.'" *Gierek*, 250 N.E.3d at 398 (quoting *Bolka*, 693 N.E.2d at 617). "[C]ertification is largely independent of the merits . . . and a certified class can go down in flames on the merits." *Beaton*, 907 F.3d at 1031 (cleaned up).

Second, that Anonymous Hospital and PCF contest whether the Spouses Class may even advance "a viable claim for negligent infliction of emotional distress," [*Anonymous Hospital's Supplemental Brief*, p.4 n.2 (Sep. 5, 2025)], they demonstrate an important value in class resolution by allowing uniform resolution of whether the members of the Spouses Class do or do not have a viable legal theory. One of the purposes of class adjudication is to avoid "inconsistent and conflicting results" among class members. *Hollowell*, 818 N.E.2d at 951. Where there is a

question as to the viability of a class's legal theory, it is a common question to be resolved uniformly for the class and supports certification. *See*, *e.g.*, *Torres v. Air to Ground Servs., Inc.*, 300 F.R.D. 386, 401 (C.D. Cal. 2014) ("Whether their theory of liability is legally cognizable is a question common to the Class that will need to be addressed in a motion for summary judgment."); *Custom Hair Designs by Sandy v. Cent. Payment Co., LLC*, 984 F.3d 595, 601 (8th Cir. 2020) ("This court does not need to conclude whether the theory of liability is viable. This court denies certification only if the theory of liability 'is a highly individualized question that does not allow class certification under Rule 23(b)(2) and (b)(3).'" (citation omitted)); *McNutt v. Swift Transp. Co. of Ariz., LLC*, No. C18-5668 BHS, 2020 U.S. Dist. LEXIS 119909, at *19-20, 2020 WL 3819239 (W.D. Wash. July 7, 2020) ("Therefore, for the purposes of conditional certification, Plaintiffs and putative class members are similarly situated under Plaintiffs' theory of liability. Whether that theory is viable is a question for a motion on the merits").

The Court finds class adjudication of the issues of duty, breach, proximate causation, and general causation, reserving for later proceedings the questions of specific causation and damages is the superior method of adjudicating the claims of the Patients Class. *See Doe*, 145 So. 3d at 582-83 (Belsome, J., dissenting); *Creech*, 2004 Mich. App. LEXIS 1404, at *17-21; *Diaz*, 2020 Conn. Super. LEXIS 1491, at *17-18.

VII. Cheyanne Bennett's Motion for Class Certification is DENIED.

Finally, because the Court GRANTS certification of the Patients Class and appoints Mrs. Gierek and her counsel as its representatives, the Court DENIES Cheyanne Bennett's pending *Plaintiff's Motion for Class Certification* (filed May 11, 2020). *See Fariasantos v. Rosenberg & Assocs., LLC*, 303 F.R.D. 272, 278 (E.D. Va. 2014) (denying competing, overlapping class certification motion).

To the extent that Ms. Bennett or her counsel seek to be considered for appointment as representatives of the certified Patients Class, the Court observes that it was Mrs. Gierek and her counsel who prosecuted the entirety of the appeal of this matter to both the Indiana Court of Appeals and Supreme Court and, unlike Ms. Bennett and her counsel, have proactively pursued certification since the Supreme Court's ruling in January 2025, having been the only party to file supplemental briefing in support of certification and to have argued in support of certification at the Rule 23(C)(1) certification hearing. As previously noted, Ms. Bennett's counsel was not present during the class certification hearing.

Utilizing the factors provided by Rule 23(g)(1) & (2) of the Federal Rules of Civil Procedure, to the extent Ms. Bennett and her counsel seek to be appointed as the representatives of the Patients Class, the Court DENIES appointment of either Ms. Bennett or her counsel as representatives of the certified Patients Class.

CONCLUSION

The Court, having found that both the Patients Class and the Spouses Class satisfy each of the requirements of Rule 23(A) and the requirements of Rule 23(B)(3), the Court, pursuant to Rule 23(C)(4)(a), hereby certifies the following two classes on the issues of the applicable duty of care, breach of the duty of care, proximate causation, and general causation:

The Patients Class

> All patients of Anonymous Healthcare Provider to whom Anonymous Healthcare Provider sent a letter, identical or substantially similar to the letter it sent to Linda Gierek, informing them that, between April and September 2019, one or more employees of Anonymous Healthcare Provider did not complete all steps in the surgical instrument sterilization process and notifying them that they may have been exposed to infections such as the hepatitis C virus, hepatitis B virus, and human immunodeficiency virus (HIV).

The Spouses Class

> All persons who were married to a member of Proposed Class 1 at any time between (i) the date on which the corresponding Proposed Class 1 member underwent surgery from Anonymous Healthcare Provider for which a letter was sent regarding possible inadequate sterilization of instruments and potential exposure to infection and (ii) the date on which the letter was sent to the corresponding Proposed Class 1 member spouse.

Questions of specific causation and damages for each member of the Patients Class and Spouses Class are reserved for subsequent proceedings.

The Court further orders that Linda Gierek is appointed as the Class Representative of the Patients Class, that Stephen Gierek is appointed as the Class Representative of the Spouses Class, and that the Giereks' counsel are appointed as Class Counsel for both certified classes.

Class Counsel is hereby ordered to propose a form and method of dissemination of notice to the respective class members in accordance with Indiana Trial Rule 23(C) within forty-five (45) days of this order.

Anonymous 1, Anonymous 2, Anonymous 3, and the Indiana Department of Insurance as the Administrator of the Indiana Patient's Compensation Fund may submit a counterproposal as

to a form of notice and a plan for the dissemination of such notice within thirty (30) days thereafter.

Also, within forty-five (45) days of this order, Anonymous 1, Anonymous 2, and Anonymous 3 shall provide to Class Counsel a list identifying, by name and last known address, each person who meets the criteria set forth in the definitions of the certified classes.

SO ORDERED **November 19, 2025**

SO

Andew M. Hicks, Judge
Elkhart Superior Court 2

ELKHART COUNTY COURTS
SEAL
INDIANA

Distribution: All counsel of record