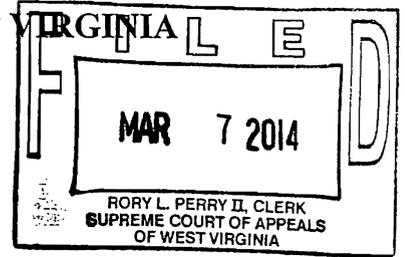


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NUMBER 14-0207



STATE OF WEST VIRGINIA, ex rel. J. C.,
a minor, by and through his mother and
next friend, MICHELLE COOK, et al,

Petitioners,

v.

Underlying:

IN RE: ZOLOFT LITIGATION

Civil Action No: 14-C-7000

THE HONORABLE JAMES P. MAZZONE,
Lead Presiding Judge, Zolofit Litigation,
Mass Litigation Panel, and PFIZER, INC.,
ROERIG, a division of Pfizer, Inc., and
GREENSTONE, LLC f/k/a Greenstone, LTD.

Respondents.

EMERGENCY PETITION FOR WRIT OF PROHIBITION

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III.

ASSIGNMENT OF ERROR

THIS EMERGENCY PETITION IS CRITICAL TO PROTECT THE JURISDICTION OF THE WEST VIRGINIA COURTS TO INTERPRET W.VA. R. CIV. P. RULE 3(A) AND THE INTEGRITY OF RULES 20 AND 21

This emergency petition is necessary to address a sua sponte ruling made by the Mass Litigation Panel at a hearing on March 4, 2014. At the hearing, the Panel ruled that it will treat one civil action with 25 Plaintiff families as 25 separate cases based on its erroneous interpretation of Rule 3(a) of the West Virginia Rules of Civil Procedure.¹ The Panel's action directly contradicts prior rulings in this case from the Wayne County Circuit Court and United States District Court for the Southern District of West Virginia in this case, which held that Rule 3(a) is an administrative rule that does nothing more than ensure filing fees are paid by each plaintiff in a multi-plaintiff case. Rule 3(a) does not affect joinder or severance, which are explicitly governed by Rules 20 and 21 of the West Virginia Rules of Civil Procedure.

Unless this Court acts quickly, the Mass Litigation Panel's interpretation of Rule 3(a) will likely destroy the Petitioners' right to be heard in state court. Defendants have unsuccessfully removed this case to Federal Court twice already. They will rely on the Panel's interpretation of Rule 3(a) to remove the case to federal court for a third time on the basis of diversity jurisdiction. Once this case is removed to federal court for the third time, this Court will be without jurisdiction to properly interpret Rule 3(a).

¹These 25 Plaintiffs families constitute the only Plaintiffs in the Zoloft mass litigation proceeding.

If the Panel's interpretation of Rule 3(a) becomes the law, almost every multi-plaintiff case against non-resident defendants will become removable to federal court. Simply put, an expansive interpretation of Rule 3(a) jeopardizes the very existence of the Mass Litigation Panel for multi-plaintiff cases against foreign defendants. These cases that would normally be appropriate for administration by the Mass Litigation Panel will instead be subject to a Rule 3(a) "severance" and possible removal to federal court, even if the cases meet the joinder requirements of Rule 20. Without question, the relief requested herein has far-reaching implications for the West Virginia judicial system, and merits immediate consideration by this Court.

QUESTION PRESENTED

Did the Mass Litigation Panel exceed its legitimate power when deciding *sua sponte* it will consider the 25 Plaintiffs' claims as separate cases under W.Va. R. Civ. P. Rule 3(a) after the Wayne County Circuit Court and the United States District Court for the Southern District of West Virginia had previously ruled that Rule 3(a) is administrative in nature and that the claims of the 25 Plaintiff families constitute one civil action?

IV.

STATEMENT OF THE CASE²

Petitioners consist of 25 Plaintiffs families who were joined into a single civil action in the Circuit Court of Wayne County, West Virginia. App. 1-2; App. 15. They allege that the infant Plaintiffs suffer from birth defects caused by exposure to Zolofit *in utero*. Zolofit is an anti-depressant manufactured and marketed by Defendants.

The civil action was originally filed by 19 of the 25 current Plaintiff families in July 2012. App. 15-68. Two Plaintiff families are from West Virginia, another was treated and gave birth here, and two families are from New York, the state of corporate residence of Defendants. Despite the clear lack of diversity, Defendants initially removed to Federal Court the claims of the every Plaintiff family except the New York family, arguing that Rule 3(a) dictated that the Plaintiffs' claims were, in fact, 19 separate actions. App. 6. After removal, the Clerk of the Wayne County Circuit Court, Milton Ferguson, provided an affidavit explaining that that the separate docket numbers were assigned to the single complaint for administrative purposes only, the Plaintiffs were not required to file separate complaints, and the matter constituted one case. App 50-60; App. 9. Thereafter, Judge Chambers of the West Virginia Southern District remanded the case to the Circuit Court of Wayne County, confirming that Rule 3(a) is purely administrative

²Under typical circumstances, the facts and record would, perhaps, be more robust. However, Defendants have already unsuccessfully removed this case to federal court twice and unsuccessfully appealed one of the remand orders to the Fourth Circuit Court of Appeals. Plaintiffs suspect that Defendants will immediately remove this case again in an attempt to deprive this Court of the jurisdiction to pronounce the contours of Rule 3(a). Accordingly, time is of the essence.

in nature, and that “Plaintiffs filed a single action in state court and Plaintiffs’ claims were properly joined.” App. 15.³ After remand, Judge Young issued an order consolidating the claims of the 19 Plaintiffs into a single civil action (12-C-146) to alleviate any confusion that there was, in fact, only one civil action. App. 61-62. Judge Young also denied Defendants’ motion to dismiss on *forum non conveniens* grounds, ruling that the case involves a civil action with 19 plaintiffs in one lawsuit and all must be considered in the *forum non conveniens* analysis. App. 63-69. When Defendants appealed that ruling to this Court, their writ of prohibition was denied, confirming once again that the case is a single action and certain plaintiffs cannot be ignored in any analysis of the case, including one for *forum non conveniens*. App. 70-71.⁴

Defendants appealed Judge Chamber’s remand order to the Fourth Circuit and the scope of Rule 3(a) was fully briefed by both parties. The Fourth Circuit ultimately dismissed the appeal for lack of jurisdiction, and refused to cast any doubt on Judge Chamber’s or Judge Young’s interpretation of Rule 3(a). *See J.C. ex rel. Cook v. Pfizer,*

³The sound reasoning of Judge Chambers was confirmed recently in an opinion issued by Judge Berger in another multi-plaintiff pharmaceutical case in which Pfizer (who was represented by the same counsel as this case) attempted to remove every plaintiff except the non-diverse ones. *See Almond, et al. v. Pfizer, Inc.*, 2013 WL 6729438 (S.D. W.Va. December 19, 2013). Judge Young’s remand order was cited extensively by Judge Berger, who utilized its reasoning to remand that case on expedited basis as well. In one particularly salient part of Judge Berger’s order, she writes: “This Court finds Judge Chambers’ reasoning persuasive with respect to the application of West Virginia Rule of Civil Procedure 3(a)

⁴As this Court is aware, Defendants’ motion to dismiss on *forum non conveniens* grounds rested on their contention that the claims of the 19 Plaintiff families were separate cases, and the Court should not consider the West Virginia Plaintiffs’ in the analysis of whether the New York Plaintiffs’ claims should be dismissed. Judge Young rejected this argument, as did this Court when it denied Defendants’ petition for a writ seeking to overrule Judge Young’s ruling.

Inc., 3:12-CV-04103, 2012 WL 4442518 (S.D.W. Va. Sept. 25, 2012) *appeal dismissed*, 722 F.3d 574 (4th Cir. 2013).

Defendants then moved to transfer the case to the Mass Litigation Panel. However, after considering briefing on the issue from both parties, Chief Justice Benjamin held that transfer was not appropriate because there was only one case. App. 72. In other words, this Court agreed with Petitioners' interpretation of Rule 3(a) and rejected that of Defendants (and the Mass Litigation Panel). Otherwise, this Court would have held that there were multiple civil actions and transferred this case to the Mass Litigation Panel in September 2013.⁵

On October 28, 2013, 6 additional Plaintiff families filed a Complaint in Wayne County that was nearly identical to the Complaint filed by the original 19 Plaintiff families. App. 73-121. The same day, Judge Young, pursuant to his power under West Virginia Trial Court Rule 42, consolidated that Complaint with the Complaint filed by the 19 Plaintiff families in July 2012, bringing the total number of Plaintiff families in 12-C-146 to 25. App. 1-2.

Nearly two months later, Defendants removed the case for a second time, cherry-picking for removal every Plaintiff family except one of the non-diverse New York Plaintiff families. Judge Chambers remanded the case again, reiterating that although two complaints were filed, there was only one civil action. App. 122-32. In the meantime, this Court transferred Civil Action 12-C-146 to the Mass Litigation Panel on

⁵ The Panel's intended treatment of Rule 3(a) would directly contradict this Court's September 24, 2013 Order, which recognized there is only one case. App. 72.

January 14 because two complaints (though consolidated into one civil action) had been filed and the criteria for transfer were satisfied. App. 133-34.

Thus, by the time the initial March 4, 2014 status conference with the Mass Litigation Panel occurred, the Wayne County Circuit Court and the United States District Court for the Southern District of West Virginia both agreed that Rule 3(a) is administrative in nature and does not nullify Rules 20 and 21. However, the Mass Litigation Panel interpreted Rule 3(a) differently and transformed each Plaintiff family into a separate case. Based upon the history of this litigation, the Panel's pronouncement will lead to a third removal to federal court by Defendants of all the state court Zoloff claims. If the removal is successful, it will end the Zoloff litigation in the Mass Litigation Panel that was just created to accommodate these cases. Further, if the Mass Litigation Panel's interpretation of Rule 3(a) becomes the law in West Virginia, then it will have the future effect of preventing multi-plaintiff cases against non-resident defendants from being prosecuted in state court. All such future cases will become removable on the basis of diversity jurisdiction.

Petitioners respectfully posit that the Panel may not have been aware that its pronouncement would prompt a quick removal of the case to Federal Court by Defendants, take essentially every West Virginia Mass Tort case out of the Panel, and potentially halt any future filings in state court.⁶ Nonetheless, that will be the effect of

⁶ Given that the issue was raised *sua sponte* without any briefing, it is possible that the Panel may not be aware of the extensive Rule 3(a) analysis that has been undertaken by the state and federal courts that have presided over this case at various times. As such, it

the Panel's erroneous interpretation of Rule 3(a). Indeed, Judge Chambers' first remand ruling addressed the pervasive impact of such an interpretation:

Defendants offer no authority....for the proposition that Rule 3(a) was meant to have the rather severe substantive effect of prohibiting all unrelated persons from proceeding with a mass claim in West Virginia state courts.

App. 6.

An interpretation of Rule 3(a) that effectively ends multi-plaintiff mass claims in West Virginia cannot be, and is not, the law. But, history has shown that this will not stop Defendants from seeking to deprive this Court of the jurisdiction to interpret state procedural rules. As such, emergency relief is warranted.

V.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary to decide the issue raised in this petition. As set forth herein, the proper interpretation of Rule 3(a) has been addressed repeatedly by state and federal courts in this proceeding and others.

VI.

ARGUMENT

**THE MASS LITIGATION PANEL'S STATEMENTS RUN DIRECTLY
COUNTER TO WEST VIRGINIA LAW ON RULE 3(A)**

Rule 3(a) has been consistently interpreted by virtually every Court that has analyzed it: the rule is administrative in nature and was designed solely to ensure that

is understandable that the Panel may not have completely understood the potential import of its statements.

each plaintiff in a multi-plaintiff suit pays a filing fee. It does not affect the joinder or severance analysis under Rules 20 and 21 in any way, and therefore, cannot be used to nullify them. The Mass Litigation Panel's pronouncement directly contravenes West Virginia jurisprudence – plain and simple.

In fact, the Mass Litigation Panel's position was first rejected in *Grennell v. Western Southern Life Ins. Co.*, 298 F.Supp.2d 390 (S.D.W.Va. 2004), which pre-dates Rule 3(a). *Grennell*, involved 2,286 plaintiffs who filed a single complaint in West Virginia state court. The state court Clerk of the Court required each family to pay a separate filing fee and assigned each plaintiff his/her own case number. *Id.* at 392. The *Grennell* defendants argued that “there has been no joinder or consolidation” of the various plaintiffs' claims because each plaintiff was required to pay his/her own filing fee and each plaintiff was assigned a new case. *Id.* at 395. The *Grennell* court rejected the defendants' argument that there had been no joinder of the various claims because of the separate filing fee and separate docket numbers:

As noted, the Mason County plaintiffs filed only one complaint to initiate litigation that included over 2,200 individuals. Defendants are correct that the cases were never formally consolidated. Therefore, if Plaintiffs were not joined in one action, the Circuit Court would have required them to file a separate complaint on behalf of each plaintiff. Defendants also point out that Plaintiffs were required to pay multiple filing fees. As discussed, however, the Mason County Circuit Court Clerk characterizes these as “supplemental filing fees.” This description of the fees supports Plaintiffs' argument that the litigation involved something other than 1,891 separate original actions. Defendants also note that no motion for joinder was made in the Circuit Court action. Under both West Virginia and federal procedural rules, however, no such motion is required where, as in this case, multiple parties are joined at the time of the filing of a complaint.

Furthermore, this Court's treatment of the lawsuits (including assigning multiple case numbers and requiring Defendants to pay multiple filing fees) has no bearing on the nature of the case as it existed in Circuit Court. The Court therefore finds that Defendants have not met their burden of demonstrating that the Mason County Circuit Court litigation involved non-joined plaintiffs.

Id. The state court in *Grennell* was given authority to take this action by the Supreme Court of Appeals of West Virginia in 1998. The authority was not granted to lower courts to prevent joinder of multiple claims or create multiple cases where there had previously only been one case. Instead, the authority was granted to the lower courts to ease the administrative burden on state courts dealing with mass litigation and ensure that they had enough revenue to properly handle the larger dockets. In *Cable v. Hatfield*, 202 W. Va. 638, 644-45, 505 S.E.2d 701, 707-08 (1998), Justice Davis stated:

Our rules of civil procedure permit multiple plaintiffs to join in a single action, under the appropriate circumstances. *See* W.Va.R.Civ.P., Rule 20(a) (“All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.”). Increasingly, numerous parties will join in an action as authorized by Rule 20. The mass litigation that can result imposes a significant burden, financial and otherwise, on circuit clerks’ offices. However, the West Virginia Rules of Civil Procedure are silent with regard to the filing fee to be charged when multiple parties choose to join in one action.

Consequently, we hold that a circuit judge or chief judge of a circuit with more than one judge, shall have the authority to enter an administrative order governing when separate filing fees are required and may require additional filing fees in multiple plaintiff cases until such time as a statewide rule governing filing fees in multiple plaintiff cases is

promulgated.

Thereafter, in 2008 Rule 3(a) was amended to codify the local practices authorized by the Supreme Court in *Cable*, which were the practices analyzed in *Grennell*.

In *Grennell*, the Court noted that the administrative order from the county's chief judge "required each 'family unit plaintiff' to pay a separate filing fee and assigned each [family unit] a case number." 298 F.Supp.2d at 392. Similarly Rule 3(a) as amended provides: "A civil action is commenced by filing a complaint with the court. For a complaint naming more than one individual plaintiff not related by marriage, a derivative or fiduciary relationship, each plaintiff shall be assigned a separate civil action number and be docketed as a separate civil action and be charged a separate fee by the clerk of a circuit court." As the Judge Chambers concluded:

Defendants offer no authority, however, for the proposition that Rule 3(a) was meant to have the rather severe substantive effect of prohibiting all unrelated persons from proceeding with a mass claim in West Virginia state courts. Instead, it seems more likely that the changes to Rule 3(a) were intended to alter the administration of mass claims by the state courts. Plaintiffs provide the affidavit of the Clerk of the Wayne County Circuit Court, Milton Ferguson (Ferguson Affidavit), stating that Plaintiffs in this matter were separated by the state court as directed by Rule 3(a), but that they were not required to file separate complaints, were not considered separate cases, and were all assigned to the same judge. *Id.* A single affidavit may not be dispositive on the question of how to interpret a state rule of civil procedure, but in this case, it illustrates the principle evident from the changes to Rule 3(a) and the principle adopted by this Court in *Grennell*: administrative separation of claims in state court does not determine the propriety of joinder in federal court.

App. 9.

As noted above, this conclusion was echoed by Judge Young following the first remand of this case, who concluded that these cases are a single action for jurisdictional purposes in state court. App. 63-69.

Moreover, this Court has made clear that the rules of civil procedure are to be read together. *Postlewait v. City of Wheeling*, 231 W.Va. 1, 743 S.E.2d 309, 2012 (W.Va. 2012). West Virginia Civil Rule 20(a) allows “all persons” to join in one action together if the requirements of the rule has been met. Rule 20(a) is not limited to the joinder of persons related by marriage, derivative, or fiduciary relationships. The Mass Litigation Panel’s interpretation of Rule 3(a) violates basic canons of construction since it effectively nullifies West Virginia Rule 20 by automatically severing virtually every claim that is joined with claims of other plaintiffs. In other words, its interpretation of Rule 20 would re-write it to read “all persons may join in one action as plaintiffs SO LONG AS THEY ARE FAMILY MEMBERS...” This interpretation is clearly inconsistent with the actual text of Rule 20 which actually allows “*all persons*” to join in one action as plaintiffs -- regardless of whether they are related by blood -- so long as the plaintiffs’ claims: (1) arise out of common transactions or occurrences; and (2) involve a common question of law or fact. W. Va. R. Civ. P. 20(a). In sum, the Panel’s interpretation of Rule 3(a) effectively neuters Rules 20. *See Davies v. West Virginia Office of Ins. Com’r*, 227 W.Va. 330, 336, 708 S.E.2d 524, 530 (2011) (courts have a

“duty to avoid whenever possible” interpretations that are “absurd, unjust, and unreasonable”).⁷

In sum, the Panel’s interpretation of Rule 3(a) runs directly counter to:

- 16 years of West Virginia state court jurisprudence beginning with this Court’s opinion in *Cable v, Hatfield*;
- the ruling of West Virginia federal courts who have dealt with this issue 3 times--twice in this case (App. 3-15; 122-32), and once in the *Almond* case, involving the same issues, same Defendant and same defense counsel;
- Judge Young’s consolidation orders in this case (App. 1-2; 61-62), his oral and written rulings on Defendants’ motion to dismiss (App. 63-69);
- this Court’s rejection of such an interpretation in its denial of Defendants’ Petition for Writ of Prohibition (App. 70-71) in this case and its order denying referral to the Mass Litigation Panel (App. 72) prior to the second Complaint being filed.⁸

⁷ It is important to note that Petitioners are not contending that the Mass Litigation Panel cannot enter orders dictating how papers are filed and things such as *pro hac vice* fees are paid with regard to each Plaintiff family. Petitioners recognize that the Panel has every right to manage its docket administratively. Indeed, that is the very spirit of Rules like 3(a). This petition is filed simply to prevent an interpretation of Rule 3(a) that would extend it far beyond its administrative function.

⁸This Court’s denial of Defendants’ Petition for Writ of Prohibition and attempt to refer the first Complaint filed by the original 19 Plaintiff families to the Mass Litigation Panel established that Rule 3(a) does not create separate cases, just as Judge Young, Judge Chambers, Judge Berger, and Clerk Ferguson and others had previously held. In doing so, this proper interpretation of Rule 3(a) became the law of the case, and cannot be revisited by the Mass Litigation Panel or any other Court. The law of the case doctrine “generally prohibits reconsideration of issues which have been decided in a prior appeal in the same case, provided that there has been no material changes in the facts since the prior appeal, such issues may not be relitigated in the trial court or re-examined in a second appeal.” 5 Am.Jur.2d *Appellate Review* § 605 at 300 (1995) (footnotes omitted). “[T]he doctrine is a salutary rule of policy and practice, grounded in important considerations related to stability in the decision making process, predictability of results, proper working relationships between trial and appellate courts, and judicial economy.” *United States v. Rivera–Martinez*, 931 F.2d 148, 151 (1st Cir.1991). Thus, consistent

There is simply no support in West Virginia jurisprudence for the Panel's interpretation of Rule 3(a). And, if left unchecked by the emergency relief requested herein, this Court may ultimately be deprived of the jurisdiction to address the Panel's statements regarding Rule 3(a) because Defendants' third notice of removal to federal court is imminent. If the anticipated third attempt to remove this case is successful, the Mass Litigation Panel for this litigation (and any other multi-plaintiff cases against an out-of state defendant) will disappear.

VII.

CONCLUSION AND REQUEST FOR RELIEF

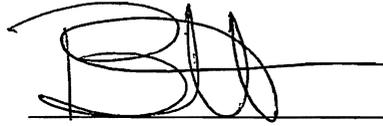
Plaintiffs respectfully request that this Court grant them the emergency relief requested herein and issue the following ruling:

To the extent the Mass Litigation Panel's pronouncements on Rule 3(a) are construed as having severed Petitioners' claims into separate cases and vacating pre-existing orders of consolidation, this Court issues a writ ordering the Mass Litigation Panel to vacate such decision. Rule 3(a) was not meant to have the rather severe substantive effect of prohibiting all unrelated persons from proceeding with a mass claim in West Virginia state courts. Rule 3(a) does not require Plaintiffs to file separate complaints, and multi-plaintiff cases filed pursuant to Rule 3(a) are not considered separate cases. Administrative separation of claims in state court for

with these considerations, this Court has previously held, "[t]he general rule is that when a question has been definitively determined by this Court its decision is conclusive on parties, privies and courts, including this Court, upon a second appeal and it is regarded as the law of the case." *Mullins v. Green*, 145 W.Va. 469, 115 S.E.2d 320 (1960)

purposes of collecting filing fees, *pro hac vice* fees, and facilitating other administrative functions does not determine the propriety of joinder.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'BK', written over a horizontal line.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NUMBER _____

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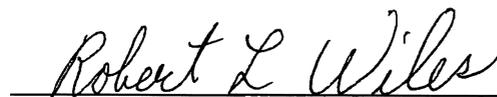
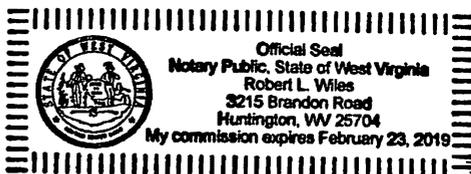
VERIFICATION

I, Bert Ketchum, counsel for Petitioners, in accordance with W.Va. Code § 53-1-3 and Rule 16(d)(9) of the West Virginia Rules of Appellate Procedure, hereby verify that I am familiar with these proceedings, and that the verified Emergency Petition and Appendix hereto and submitted herewith constitute a fair and correct statement of the proceedings of in the civil action identified in this Verified Emergency Petition, based upon information and belief.



Bert Ketchum
Counsel for Petitioners

Taken subscribed and sworn to by *Bert Ketchum* before me.



NOTARY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CERIFICATE OF SERVICE

The undersigned hereby certifies that on **March 7, 2014** he served a true and correct copies of the foregoing **EMERGENCY PETITION FOR WRIT OF PROHIBITION** by sending the same in the U.S. Mail, first class, postage prepaid, upon the following:

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