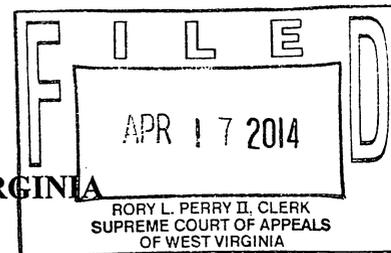


ARGUMENT DOCKET

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET NO. 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.)

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

Respondents.)

Underlying:
IN RE: ZOLOFT LITIGATION
Civil Action No. 14-C-7000

PFIZER INC. AND GREENSTONE LLC'S SUPPLEMENTAL BRIEF ON WRIT OF PROHIBITION

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QUESTIONS PRESENTED

- 1) Should this Court grant an extraordinary writ of prohibition to review a unanimous ruling of the Mass Litigation Panel that Rule 3(a) of the West Virginia Rules of Civil Procedure requires the 25 civil actions filed in this litigation to be treated as separate civil actions?
- 2) Was the Mass Litigation Panel correct in its unanimous interpretation of West Virginia Rule of Civil Procedure 3(a)?

STATEMENT OF THE CASE

I. Procedural History

On July 11, 2012, 19 unrelated families (“Plaintiff Families”) from 14 different states attempted to file a single Complaint in the West Virginia Circuit Court for Wayne County. Appendix to Pfizer Inc. and Greenstone LLC’s Response in Opposition to Petition for Writ of Prohibition (“App.”) 61-103. When filing, however, each Plaintiff Family was assigned a separate civil action number, and each of their individual cases was docketed as a separate civil action pursuant to Rule 3(a) of the West Virginia Rules of Civil Procedure. The Plaintiff Families consist of women (“Mother Plaintiffs”) claiming that they took Zoloft or sertraline, its generic equivalent, during pregnancy and that their minor children (“Minor Plaintiffs”), who were allegedly exposed to Zoloft or sertraline *in utero*, sustained birth defects as a result. App. 63-66.

On August 7, 2012, based on the fact that the cases were docketed as separate actions, only one of which involved a non-diverse plaintiff, Respondents Pfizer Inc. and Greenstone LLC (“Defendants”) removed the diverse cases to federal court in 18 separate removals. The remaining Plaintiff Family, the Dropp Plaintiffs, are New York citizens and are thus not diverse from Pfizer, which has its headquarters in New York. App. 68. Plaintiffs moved for remand, arguing that Rule 3(a) was just an administrative tool to facilitate the collection of fees. Pfizer opposed, arguing that under the unambiguous language of Rule 3(a), the cases were separate actions at the time of removal and, therefore, removable. The federal district court agreed with Plaintiffs and, on September 25, 2012, remanded the cases to state court. *J.C. ex rel. Cook v.*

Pfizer, Inc., 2012 WL 4442518 (S.D.W. Va. Sept. 25, 2012). Defendants appealed this ruling on September 26, 2012. The Fourth Circuit dismissed the appeal solely for lack of jurisdiction. *E.D. ex rel. Darcy v. Pfizer, Inc.*, 722 F.3d 574, 577 (4th Cir. 2013).

Following remand, on October 18, 2012, Judge Young of the Wayne County Circuit Court issued an order *sua sponte* consolidating the claims of the 19 Plaintiff Families into “one civil action number.” App. 104-05. On October 31, 2012, Judge Young issued an order denying Defendants’ motion to dismiss the Dropp Plaintiffs on *forum non conveniens* grounds. App. 106-112. Defendants sought a writ of prohibition to determine whether Judge Young exceeded his authority in denying the *forum non conveniens* motion; this Court denied the writ without opinion, and without discussing whether Judge Young had appropriately consolidated the actions. App. 113-14.

On July 26, 2013, Defendants filed a motion for referral to the Mass Litigation Panel (the “Panel”). Plaintiffs strenuously contested the transfer, arguing that “[t]his case, which involves nineteen plaintiffs joined together under W. Va. R. Civ. P. 20(a) in a single complaint, does not satisfy the first requirement of the definition [of mass litigation] because it is a civil action, not two or more civil actions.” App. 116. On September 24, 2013, then-Chief Justice Benjamin denied Defendants’ Motion to Refer “without prejudice to renew the motion in the event additional state actions are filed.” App. 125. The administrative order did not provide any explanation for this decision. *Id.*

Following issuance of the administrative order, Plaintiffs sought to add the claims of six more Plaintiff Families to the litigation, without filing a second complaint. Plaintiffs first filed a motion to intervene, which Defendants opposed and Plaintiffs inexplicably withdrew the day before oral argument. They then filed a substantially identical motion to amend the original complaint. Finding that it would prejudice Defendants, Judge Young rejected the attempted amendment and directed the Plaintiffs to file a separate complaint. Judge Young then *sua sponte* consolidated the six actions in the new complaint with the consolidated actions in the original complaint. App. 126-27. In this order, Judge Young stated: “The above-styled Complaint and

the Complaint in Civil Action Number 12-C-146 essentially mirror each other, involve common questions of law and fact and assert the same allegations that all claims arise from the same transactions or occurrences.” App. 126. However, he did not explain why the six actions in the new complaint would be consolidated with each other. *Id.*

Just over one month later, *Plaintiffs* filed for transfer to the Mass Litigation Panel on the basis of this second, consolidated complaint. While Plaintiffs’ Motion to Refer was pending, Defendants learned through discovery that the single New York family in the original complaint never used Zoloft or Greenstone sertraline. Defendants removed the original 19 Plaintiff Families, arguing that the New York family was fraudulently joined. However, Plaintiffs argued that there was still no diversity because the group of six new plaintiffs, which had been consolidated with the original 19, also contained a New York family that destroyed diversity.

On February 5, 2014, the federal district court agreed with Plaintiffs and remanded. *J.C. ex rel. Cook v. Pfizer, Inc.*, 2014 WL 495455 (S.D.W. Va. Feb. 5, 2014). While Plaintiffs’ motion to remand was pending, Chief Justice Davis transferred all 25 Plaintiff Families to the Mass Litigation Panel. App. 128.

II. The Mass Litigation Panel’s Unanimous Decision

On March 4, 2014, the Mass Litigation Panel (the “Panel”) held its first Status and Scheduling Conference in *In Re: Zoloft Litigation*. At the outset, Judge Mazzone, the Lead Presiding Judge, addressed an issue of significant dispute between the parties: Does West Virginia Rule of Civil Procedure 3(a) transform a single complaint naming multiple unrelated plaintiffs into separate and independent civil actions? The Panel held that it does:

[W]e did have an opportunity to discuss a couple of other things . . . and in particular, the prior orders of the Circuit Court relative to whether or not these cases will be considered or reviewed as one file or separate filings. Consistent with this panel’s prior orders, we have determined that they will be treated as separate files. That’s how this panel has considered such cases in the past and that’s how we intend to consider this case as well. . . . [T]o the extent that there were any prior orders entered of the Circuit Court inconsistent with that finding, they’re hereby ordered vacated. And that would include, as I understand it there

were two consolidation orders, October 18, 2012 and October 28, 2013? . . .
Those orders would also be considered vacated consistent with the ruling today.

App. 13. Judge Moats emphasized the Panel’s role in bringing about the language for Rule 3(a), and therefore its knowledge of the rule’s meaning: “Rule 3(A) was changed because of this panel. The panel is the one that made the motion to the court to change Rule 3(A). We hashed this out in 2007 for a long, long time. The reason it was changed was because of this panel’s request to the Supreme Court.” App. 37. Judge Moats also made clear that there was “no need to brief” the issue because of the Panel’s knowledge of the amended Rule 3(a). *Id.*

On March 11, 2014, the Panel issued a unanimous order memorializing its March 4, 2014 ruling. App. 58-60. The panel held that “Rule 3(a) is, on its face, a substantive rule of civil procedure, not an ‘administrative rule.’ As such, the plain meaning of Rule 3(a) must be read in conjunction with the other rules of civil procedure . . .” App. 58. In coming to this conclusion, the Panel emphasized its role in proposing the amendment to Rule 3(a) “after extensive discussions regarding Rule 3, and after reviewing numerous public comments regarding the proposed amendment of Rule 3.” App. 59. According to the Panel, the “purpose in proposing the amendment was to achieve consistent treatment of multi-plaintiff complaints filed in the circuit courts of West Virginia, and in litigation assigned to [the] Panel.” *Id.* Thus, based on both the plain meaning of the rule, and the Panel’s familiarity with its history and purpose, the Panel held that “[i]t is irrelevant whether separate complaints are filed, or whether a single complaint is filed . . . [;] all plaintiffs not related by marriage or a derivative or fiduciary relationship must be assigned separate civil action numbers. Each separately assigned civil action number constitutes a separate civil action for any and all substantive purposes, as opposed merely for administrative purposes . . .” *Id.* The Panel reasoned that this construction was necessary to allow the Panel to “analyze individual civil actions for such issue as jurisdiction, venue and the statute of limitations, among other things.” *Id.* On the basis of this holding, the Panel ordered “the 25 civil actions filed in the Zoloft Litigation to be treated as separate civil

actions,” and vacated the two consolidation orders as “inconsistent with the Panel’s prior application of Rule 3(a).” App. 58-60.

III. Petition for Writ of Prohibition

On March 7, 2014, Plaintiffs filed a writ of prohibition with this Court, which Defendants opposed. On March 25, 2014, this Court entered an order directing Defendants to show cause why the writ of prohibition should not be awarded. The Court scheduled the matter for Rule 20 argument, and further directed the parties to submit supplemental briefs.

SUMMARY OF ARGUMENT

Plaintiffs’ petition for a writ of prohibition raises one simple question: Does Rule 3(a) mean what it says when it requires unrelated plaintiffs to bring separate actions? Because the plain meaning of Rule 3(a) is clear, stating that “each plaintiff shall be assigned a separate civil action number and be docketed as a separate civil action,” that should end the inquiry. Moreover, this plain-language interpretation finds support in the history and purpose of Rule 3(a), and it properly balances the interests of plaintiffs, defendants, and the courts. Indeed, all of the members of the Mass Litigation Panel, who proposed the language of the rule, recognized that Rule 3(a) requires unrelated plaintiffs to bring separate cases. Accordingly, this Court should deny Plaintiffs’ petition for an extraordinary writ.

Plaintiffs overcomplicate the issue by suggesting that this Court must accept one of two unpalatable options: (1) restrict Rule 3(a) to so-called “administrative” purposes, even though the rule identifies no such limitation; or (2) allow Rule 3(a) to negate the Rule 20 provision for joinder of plaintiffs. However, there is no such dilemma. Both Rule 3(a) and Rule 20 can be interpreted according to their terms. Rule 3(a) requires that unrelated plaintiffs bring separate cases, and while the cases must begin separately, the court can then consolidate the cases if the Rule 20 requirements for joinder are satisfied. That approach conforms with the language and intent of both rules, and it ensures that plaintiffs can be joined in one case, but only if appropriate under the Rule 20 standard. Because the circuit court failed to follow this approach, its consolidation orders conflicted with Rule 3(a), and the Panel correctly vacated the orders. At a

minimum, there was no clear legal error that would justify the extraordinary remedy of a writ of prohibition.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, this Court has scheduled oral argument for May 6, 2014.

ARGUMENT

I. Plaintiffs Are Not Entitled to the Issuance of a Writ of Prohibition.

Plaintiffs seek a writ of prohibition under West Virginia Code § 53-1-1, but that provision is inapplicable to the circumstances of the Panel's decision. "[W]rits of prohibition . . . provide a drastic remedy to be invoked only in extraordinary situations." *State ex rel. Frazier v. Hrko*, 203 W. Va. 652, 657, 510 S.E.2d 486, 491 (1998) (ellipsis in original; quoting *State ex rel. Allen v. Bedell*, 193 W. Va. 32, 37, 454 S.E.2d 77, 82 (1994) (Cleckley, J., concurring)). In particular, "[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1. As this Court has held, "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." Syl. Pt. 1, *State ex rel. United Hospital Center, Inc. v. Bedell*, 199 W. Va. 316, 484 S.E.2d 199 (1997) (internal citations omitted). Plaintiffs do not suggest that the Panel lacked jurisdiction, instead arguing that the Panel exceeded its legitimate powers. *See* Emergency Petition for Writ of Prohibition ("Petition") at 2.

In deciding whether to grant a writ of prohibition in "cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers," this Court has set forth five factors to consider:

- (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;
- (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
- (3) whether the lower tribunal's order is clearly erroneous as a matter of law;
- (4) whether the lower

tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). Here, the five-factor analysis demonstrates that the writ should be denied. Indeed, Plaintiffs did not consider these requirements at all in their Petition.

Although the Panel's order is not directly appealable, all of the other factors support rejection of the writ. As an initial matter, Plaintiffs will not be damaged or prejudiced by the Panel's order. The Panel's order is not a ruling on the merits of Plaintiffs' claims but instead determines whether procedural rules will apply to the case on a joint or individual basis. The only supposed prejudice Plaintiffs identify is that, if they are separated, most of Plaintiffs' cases could be removed to federal court. *See* Petition at 1-2, 13. However, Plaintiffs fail to explain why removal constitutes prejudice. There is no basis to presume that removal is automatically prejudicial. *See, e.g., Atlanta Shipping Corp. v. Int'l Modular Housing, Inc.*, 547 F. Supp. 1356, 1361 (S.D.N.Y. 1982) ("IMH has not shown how it will be prejudiced by removal."). And there is no prejudice particular to the situation here. In state or federal court, Plaintiffs will still have the opportunity to bring the same claims, and there have been no substantive rulings yet in the state court that would be affected by removal. Thus, the simple fact that their claims might be heard in federal court does not constitute actual prejudice that would warrant the extraordinary remedy of a writ of prohibition.

Additionally, the Panel's order is not clearly erroneous as a matter of law. As set forth more fully below, the Panel's unanimous ruling on the meaning of Rule 3(a) was based on both the plain language of the rule and the history and purposes of the rule, with which the Panel itself had substantial involvement. Further, as the Panel made clear in its order, its decision is consistent with the position it has continually taken on Rule 3(a) since the rule was amended in 2008. Thus, the Panel's interpretation of Rule 3(a), based on the plain language and history of the rule, does not "manifest persistent disregard for either procedural or substantive law." Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). Finally, the last

factor favors refusal of the writ because the Panel's order does not raise a new issue of law but clarifies the meaning of a rule that the Panel has consistently applied since it was adopted.

II. The Panel Correctly Held That This Litigation Constitutes 25 Separate Actions.

A. The plain language of Rule 3(a) requires that unrelated plaintiffs bring their claims in separate cases.

Rule 3(a), by its terms, is a rule of civil procedure that creates separate cases for unrelated plaintiffs. The rule states: "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." W. Va. R. Civ. P. 3(a). Thus, the language clearly requires that the claim of each unrelated plaintiff constitutes "a separate civil action." *Id.* And if they are separate civil actions, then they are obviously not one action. That should be the end of the matter: where, as here, the language of a rule is clear on its face, then it must be interpreted in accordance with its plain meaning. *See, e.g., Harper v. Jackson Hewitt, Inc.*, 227 W. Va. 142, 151, 706 S.E.2d 63, 72 (2010) ("If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." (internal quotation marks omitted)).

Plaintiffs' argument that Rule 3(a) should be treated solely as an "administrative rule" has no support in the plain language of the rule. The rule does not use the word "administrative," and it is designated a rule of civil procedure, not an administrative rule. Indeed, Plaintiffs do not identify any rule of civil procedure that has been treated as merely administrative, or why Rule 3(a) should be the first. As the Panel explained, "Rule 3(a) is, on its face, a substantive rule of civil procedure, not an 'administrative rule.'" App. 58.

While Plaintiffs note that the rule refers to the assignment of a separate civil action number and payment of a separate fee, *see* Petition at 3, 8, they ignore the provision stating that each plaintiff must be docketed as a "separate civil action." And if a case is docketed as a separate civil action, then it *is* a separate civil action. Moreover, the creation of a separate case

number and payment of a separate fee do not purport to be the sole purpose of the rule; rather, they are requirements *in addition to* the docketing of each plaintiff as a separate case.

Plaintiffs' argument that Rule 3(a) should be limited to administrative purposes has several critical flaws. First, Plaintiffs' interpretation simply raises the question of what constitutes "administrative" purposes for which the rule applies. Plaintiffs' answer seems to be anything other than removal to federal court, but there is no basis for Plaintiffs to choose this one particular result that they want to avoid as outside the scope of Rule 3(a). Second, there is nothing in the rule to allow this Court to discern "administrative purposes" because the rule sets no limits on the purposes for which it applies: the unrelated plaintiffs simply have separate actions. Rule 3(a) creates a separate civil action in the same sense as that term is used throughout the Rules of Civil Procedure and West Virginia law. This avoids the unworkable interpretation that would redefine "civil action" differently for different rules of civil procedure and other doctrines. Third, Plaintiffs suggest that the only purpose of the rule is to require payment of an additional filing fee, *see* Petition at 1, but this interpretation renders the docketing language completely meaningless, in conflict with the well established principle that "in the interpretation of a statute significance and effect shall be accorded, if possible, to every section, clause, word or part of the act." Syl. Pt. 3, *State v. Jackson*, 120 W. Va. 521, 199 S.E. 876 (1938). In short, the Panel correctly interpreted the rule such that "[e]ach separately assigned civil action number constitutes a separate civil action for any and all substantive purposes, as opposed merely for administrative purposes, such as fee collection." App. 59.

B. The history and purpose of the amendment to Rule 3(a) supports the Panel's interpretation.

The history and purpose behind Rule 3(a) confirms the Panel's plain-language interpretation. To begin with, the Panel was intimately familiar with the history and purpose of the rule because the 2008 amendment to Rule 3(a), which introduced the language that governs here, was enacted at the Panel's behest. App. 59. Indeed, the Panel "proposed the amendment" to Rule 3(a) "after extensive discussions regarding Rule 3, and after reviewing numerous public

comments regarding the proposed amendment.” *Id.*; *see also* App. 37 (“The panel is the one that made the motion to the court to change Rule 3(A). We hashed this out in 2007 for a long, long time. The reason it was changed was because of this panel’s request to the Supreme Court. . . . It came as a result of the actions of this panel.”). The Panel’s unique role as the author of the rule and the judicial tribunal often charged with applying it to mass-tort scenarios makes the Panel especially well suited to interpret the rule’s meaning and purpose.

The Panel explained that its “purpose in proposing the amendment was to achieve consistent treatment of multi-plaintiff complaints filed in the circuit courts of West Virginia, and in litigation assigned to this panel, where the plaintiffs were not related by marriage or a derivative or fiduciary relationship.” App. 59. In particular, the rule is necessary to ensure that courts can “manage individual civil actions, or conduct hearings pertaining to individual plaintiffs among the multitudes of civil actions in multi-plaintiff complaints.” *Id.* Thus, the purpose of the rule was not merely the administrative function of providing for an additional fee; rather, it was to allow courts to treat separate plaintiffs as bringing separate cases.

III. The Panel’s Interpretation of Rule 3(a) Promotes the Proper Functioning of the West Virginia Courts.

A. Rule 3(a) does not create a conflict with the standard for joinder under Rule 20.

The requirement of Rule 3(a), that unrelated plaintiffs bring separate cases, is perfectly consistent with the rule governing joinder, and there is accordingly no reason to interpret either rule contrary to its plain terms. Rule 3(a) states that unrelated plaintiffs’ cases must be treated as separate actions. Rule 20 states that “[a]ll 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.” W. Va. R. Civ. P. 20. Thus, both rules work together very simply: The claims of unrelated plaintiffs must *begin* as separate cases, and a court can *then* consolidate those cases if the standard for joinder is satisfied.

In other words, Rule 3(a) simply changes the starting point. Without Rule 3(a), unrelated plaintiffs could bring their claims in a single case, and if doing so were inappropriate, the court would have to separate those plaintiffs under the misjoinder standard of Rule 21. *See* W. Va. R. Civ. P. 21 (“Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.”). With Rule 3(a), the plaintiffs must bring separate cases, and the court can join them only if appropriate under Rule 20.

This difference in starting point makes sense because it creates a presumption of joinder in cases when joinder is likely to be appropriate (*i.e.*, when the plaintiffs are related), but requires a showing that the Rule 20 standard is met when joinder may not be appropriate (*i.e.*, when the plaintiffs are unrelated). Moreover, this approach ensures that mass claims – which may have no more in common with each other than the simple fact that they were filed together – can be independently evaluated, up until a decision for referral to the Mass Litigation Panel, or until a circuit court orders consolidation or joinder. It also allows judges greater initial flexibility to decide whether complete joinder or consolidation for pre-trial purposes is more appropriate given the unique circumstances of the litigation. Thus, Rule 3(a) finds a proper balance between the desire of plaintiffs to aggregate their claims and the desire of courts and defendants to ensure that claims are before the proper court and that relevant procedural rules are correctly applied.

Furthermore, because Rule 20 joinder is permitted under the Panel’s interpretation, Plaintiffs’ argument that the Panel’s interpretation will prevent the joinder of all cases with unrelated plaintiffs, *see* Petition at 11, is completely inapposite. The Panel did not suggest that Rule 3(a) prevents any possibility of joinder. There still can be joinder, but it is no longer automatic simply based on plaintiffs’ having filed the case together.

B. The Panel’s interpretation of Rule 3(a) ensures the Panel’s proper authority to hear mass litigation.

Plaintiffs’ interpretation of Rule 3(a) threatens the ability of the Panel to hear mass litigation, as intended under Trial Court Rule 26.06. The rule states that “[a]ny party, judge, or

the Administrative Director of the Courts may seek a referral of actions as Mass Litigation to the Panel.” W. Va. Trial Court R. 26.06(a)(1). Under Plaintiffs’ interpretation of Rule 3(a), there was only a single action here, and Plaintiffs initially opposed transfer to the Panel on the ground that because it is a single action, it does not constitute “actions” that can be transferred under Rule 26.06. App. 115-24. Indeed, it is ironic that Plaintiffs purport to worry that “an expansive interpretation of Rule 3(a) jeopardizes the very existence of the Mass Litigation Panel,” Petition at 2, when Plaintiffs used their contrary interpretation to argue that the Panel could not hear this matter.

Under Plaintiffs’ theory, the question whether the Panel can hear mass litigation in a particular matter would depend entirely on whether the claims happened to be brought at the same time in a single complaint. Specifically, Plaintiffs’ motion for referral to the Panel stated that then-Chief Justice Benjamin properly denied referral of the 19 cases “because the Complaint was one civil action, not two or more civil actions,” but with the addition of the six new plaintiffs, “[t]his litigation is subject to coordinated case management as mass litigation before the West Virginia Mass Litigation Panel because it is two Complaints.” Supplemental Appendix (“Supp. App.”) 131. This result is problematic because the existence of an additional complaint is irrelevant to whether mass litigation is (or is not) appropriate for transfer to the Panel. As the Panel reasoned, it also makes no difference under the language of Rule 3(a):

It is irrelevant whether separate complaints are filed, or whether a single complaint is filed naming multiple plaintiffs who are not related by marriage or a derivative or fiduciary relationship. In either instance the result is the same, that is, all plaintiffs not related by marriage or a derivative or fiduciary relationship must be assigned separate civil action numbers.

App. 59. Indeed, one federal court has recognized that the existence of a single complaint is not dispositive in deciding whether there is actually more than one case for jurisdictional purposes. *See Adkins v. Appalachian Fuels, LLC*, 2013 WL 1412184, at *4 (S.D.W. Va. 2013) (Copenhaver, J.) (“[T]he master complaint is best understood as an administrative device to aid

efficiency and economy and not one upon which the court can, through fictive aggregation, arrive at the jurisdictional amount.”).

In addition, relying on the number of complaints would allow plaintiffs to manipulate the treatment of their cases based only on whether they decided to file the cases in one or more complaints. The Panel’s interpretation of Rule 3(a) will ensure that large groups of plaintiffs cannot avoid the Panel’s jurisdiction by filing a single complaint, the strategy initially adopted by Plaintiffs in this litigation. There is nothing in Rule 3(a) – or basic principles of fairness – to allow such manipulation.

While Plaintiffs argue that the Panel’s interpretation of Rule 3(a) will all but end the existence of the Panel by undercutting its jurisdiction in mass tort cases, those concerns are unfounded and are clearly not shared by the Panel. As the Panel noted, it has consistently treated the amended Rule 3(a) as creating separate actions. This has not stopped the Panel from hearing “all kinds” of cases, including “asbestos cases, tobacco litigation, [and] huge flood cases,” all cases involving West Virginia parties that are appropriately adjudicated by its courts. App. 10. These types of cases will continue to be heard by the Panel under its current interpretation of Rule 3(a).¹

Similarly, while Plaintiffs raise the specter of all West Virginia courts (not just the Panel) losing the ability to decide mass litigation because of removal, *see* Petition at 2, this assertion fails both as a matter of fact and law. As to the facts, the Panel has had the same interpretation of Rule 3(a) since 2008, App. 59, and it is still deciding mass litigation. As to the law, Plaintiffs’ concern seems to be that some plaintiffs’ cases will be removable to federal court if they are separate cases. However, the possibility of removal will not deprive West Virginia courts of the opportunity to hear cases with substantial connections to West Virginia. For example, the Panel

¹ The Panel is hearing several cases without any problem arising from the Panel’s interpretation of Rule 3(a), including: *In re: Univ. Commons Litig.*, No. 13-C-7000 (Cir. Ct. Kanawha Cnty.); *In re: Mountain State Univ. Litig.*, No. 12-C-9000 (Cir. Ct. Kanawha Cnty.); and *In re: Float-Sink Litig.*, No. 11-C-5000000 (Cir. Ct. Raleigh Cnty.).

is currently dealing with numerous cases arising out of the loss of accreditation and closure of Mountain State University in Beckley, West Virginia. *See, e.g., In re: Mountain State Univ. Litig.*, No. 12-C-9000 (Cir. Ct. Kanawha Cnty.). Even if a case is removed, it will remain in West Virginia if the connections with this State are significant. *See, e.g., In Re Ethicon, Inc., Pelvic Repair System Prods. Liability Litig.*, MDL No. 2327 (S.D.W. Va.). Only cases with non-existent or minimal ties to West Virginia will actually leave the State, and this Court has made clear that it does not want state courts to become a target for forum shopping. *See, e.g., McKinney v. Fairchild Int'l, Inc.*, 199 W. Va. 718, 728, 487 S.E.2d 913, 923 (1997); *see also* Supp. App. 142 (Judge Young noting that if the Dropp Plaintiffs had a stand-alone case, he “would find that . . . the more appropriate place is New York” under the *forum non conveniens* analysis of W. Va. Code § 56-1-1a). As for cases that are removed to federal court in West Virginia, there is no reason why a plaintiff should be in West Virginia state court, rather than federal court, solely because there happens to be a different, non-diverse plaintiff who brings a claim in the same complaint. Thus, Plaintiffs have failed to show that any effect on removal would actually be inconsistent with the proper administration of justice.

IV. The Panel Correctly Decided to Vacate the Consolidation Orders.

Based on its interpretation of Rule 3(a), the Panel correctly vacated the circuit court’s orders of consolidation. The circuit court consolidated the 19 cases on October 18, 2012, without any analysis of whether those cases satisfied the joinder standard in Rule 20. App. 105. The only explanation for the consolidation is therefore that the court presumed that because the cases were filed together, they should not be treated as separate cases. However, as discussed above, this presumption conflicts with the plain language of Rule 3(a). Simply put, the circuit court failed to recognize the role of Rule 3(a) in ensuring that Plaintiffs be treated as bringing separate cases unless and until consolidation under Rule 20 is appropriate.

Similarly, the October 28, 2013 consolidation of the 19 original cases with the later-filed six cases violated Rule 3(a). To be sure, in this order, the court did discuss the similarities between the set of 19 cases and the set of six cases. App. 126. Nonetheless, the court failed to

explain why the six new cases should be consolidated with each other in the first place. Rather, the court simply assumed – contrary to Rule 3(a) – that the six cases filed together should be treated as one case. Thus, the Panel correctly held that the consolidation orders should be vacated as inconsistent with Rule 3(a).

In any event, the question whether some or all of the cases here would satisfy the standard for joinder under Rule 20 is not appropriate for resolution on a writ of prohibition. A writ is proper only where “the lower tribunal’s order is clearly erroneous as a matter of law.” Syl. pt. 4, *State ex rel. Hoover*, 199 W. Va. 12, 483 S.E.2d 12. The issue of consolidation is discretionary, see *Anderson v. McDonald*, 170 W. Va. 56, 60, 289 S.E.2d 729, 734 (1982), and there is accordingly no clear legal error in the decision to vacate the consolidation orders here. See Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977) (“A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court.”).

V. All of the Cases Plaintiffs Cite on Rule 3(a) Are Inapposite or Unpersuasive.

There is no persuasive authority that conflicts with the Panel’s decision.

First, the Panel’s decision is the *only* state-court decision interpreting Rule 3(a), aside from the other Panel opinions that the Panel references as consistent with its decision here. See, e.g., *Abbott v. Earth Support Services*, No. 08-C-138 (W. Va. Cir. Ct. Wyo. Cnty. Oct. 22, 2009), Supp. App. 177-78. To begin with, the circuit court made no ruling on Rule 3(a) in this case. In the two consolidation orders, the circuit court did not mention Rule 3(a) at all. And because the consolidation occurred *sua sponte*, there was no argument about the effect of Rule 3(a) on consolidation in that court. Accordingly, there is no indication that the circuit court considered, let alone ruled upon, the meaning of Rule 3(a) in deciding consolidation.

Plaintiffs argue that then-Chief Justice Benjamin’s decision not to transfer the case to the Panel in September 2013 adopted Plaintiffs’ interpretation of Rule 3(a), see Petition at 5, but that administrative order likewise said nothing at all about Rule 3(a). Then-Chief Justice Benjamin’s decision could have rested on his conclusion that the case would not “be resolved more expeditiously by referral to the Panel,” W. Va. Trial Court R. 26.06(a)(2), or simply that he

would not reconsider whether the consolidations were proper in this procedural setting. Similarly, while Plaintiffs point to the circuit court's decision on the *forum non conveniens* issue, Petition at 4 & n.4, that decision did not rest on any conclusion about Rule 3(a), but rather the court's view "[w]hen balancing the private interests of the parties and the public interest of the State of West Virginia." App. 111.² Moreover, this Court's decision that "a rule should not be awarded," in response to Defendants' request for a writ overturning the decision on *forum non conveniens*, was not a decision on Rule 3(a) consolidation, or even a decision that Judge Young's order was correct. App. 113-14 (denying Defendants' petition for a writ of prohibition without explanation, but noting that then-Chief Justice Benjamin would have granted the writ).

Thus, there is no support for Plaintiffs' supposition that the circuit court or then-Chief Justice Benjamin made a *sub silentio* decision on Rule 3(a). And because there is no such decision, Plaintiffs' argument for deeming such a decision "law of the case," Petition at 12-13 n.8, is meritless. See, e.g., *Bartles v. Hinkle*, 196 W. Va. 381, 388 n.5, 472 S.E.2d 827, 834 n.5 (1996) ("Law of the case principles do not bar a trial court from acting unless an appellate decision was issued on the merits of the claim sought to be precluded."). Indeed, the lone West Virginia case Plaintiffs cite on this issue recognized that law of the case applies when "a question has been definitively determined by this Court," Syl. pt. 1, *Mullins v. Green*, 145 W. Va. 469, 115 S.E.2d 320 (1960), and there was no such determination here. Rather, there is only a denial

² The circuit court did mention Rule 3(a) in this decision, but it did so for two completely uncontroversial propositions in describing the procedural history of the case:

- "Pursuant to West Virginia Rules of Civil Procedure 3(a), the Wayne County Circuit Clerk assigned a separate civil action number and charged a separate filing fee for each Plaintiff because each named Plaintiff was unrelated." App. 106.
- "The lawsuit herein was filed by 19 separate Plaintiffs and the Circuit Court of Wayne County assessed separate filing fees to each Plaintiff pursuant to West Virginia Rules of Civil Procedure 3(a)." App. 110.

The court did not decide whether Rule 3(a) required that Plaintiffs be treated as having brought separate cases.

of a writ of prohibition regarding *forum non conveniens* and an order from then-Chief Justice Benjamin not transferring the case to the Panel – neither of which mentioned Rule 3(a).

Second, the rulings that predate the amendment to Rule 3(a) support the Panel’s interpretation. In *Cable v. Hatfield*, 202 W. Va. 638, 505 S.E.2d 701 (1998), this Court stated that the West Virginia Rules of Civil Procedure “permit multiple plaintiffs to join in a single action” and that “[i]ncreasingly, numerous parties will join in an action as authorized by Rule 20.” *Id.* at 644-45. According to the Court, “the mass litigation that can result imposes a significant burden, financial and otherwise,” but that the Rules of Civil Procedure were “silent with regard to the filing fee to be charged.” *Id.* To alleviate this problem, the Court granted circuit courts the authority to “enter an *administrative order* governing when separate filing fees are required.” *Id.* (emphasis added). In short, even before Rule 3(a) was amended, courts could administratively require separate filing fees for additional plaintiffs.

Thus, if Rule 3(a) is to have any meaning, it must require something *more* than additional filing fees, which *Cable* already recognized. Plaintiffs assert that Rule 3(a) was amended to “codify the local practices authorized by the Supreme Court in *Cable*,” Petition at 10, but they offer no support for this proposition, much less any support as persuasive as the construction by the judicial tribunal that proposed the very text of the rule at issue. Moreover, if Rule 3(a) sought to codify *Cable*, then it would make no sense to do so in a rule of civil procedure (rather than the “administrative rule” mentioned in *Cable*) or to add language about treating plaintiffs as separate cases, an issue not mentioned at all in *Cable*.

Similarly, the federal district court’s decision in *Grennell v. W. S. Life Ins. Co.*, 298 F. Supp. 2d 390 (S.D.W. Va. 2004), does not support Plaintiffs’ interpretation of Rule 3(a). In *Grennell*, the removing defendants argued that because the Mason County Circuit Court issued an administrative order charging “supplemental filing fees,” the actions were separately removable. Judge Chambers held that the clerk’s characterization of the filing fees as “supplemental filing fees” and the administrative actions taken by the court did not separate the

single case into 1,891 original actions.³ However, *Grennell* was limited to interpreting an administrative order authorized pursuant to *Cable*. Here, the issue is not the administrative authority to charge separate filing fees, but rather the additional requirement that unrelated plaintiffs be treated as having brought separate cases. Simply put, Plaintiffs conflate the issue of what was allowed prior to the Rule 3(a) amendment and what was *changed* by the amendment.

Third, the two federal district court rulings on the issue are unpersuasive and largely unreasoned. In its September 25, 2012 remand order in this case, the Southern District stated that Rule 3(a) was merely an administrative order and did not create separate civil actions. *See J.C. ex rel. Cook v. Pfizer, Inc.*, 2012 WL 4442518 (S.D.W. Va. Sept. 25, 2012).⁴ The court relied upon the idea that, under Defendants' view, Rule 3(a) would "have the rather severe substantive effect of prohibiting all unrelated persons from proceeding with a mass claim in West Virginia state courts." *Id.* at *3. However, as explained above, Defendants' interpretation would have no such effect, instead allowing joinder of claims that satisfy Rule 20, just as joinder is allowed for cases that are originally filed separately. *See supra* Part III.A. Further, referral to the Mass Litigation Panel remains available in order to consolidate mass tort cases for pre-trial purposes. The district court also relied upon an affidavit from the Clerk of the Wayne County Circuit Court, 2012 WL 4442518, at *3, but such an affidavit is far less persuasive on the meaning of Rule 3(a) than is the unanimous opinion of the Panel (which the district court did not have the benefit of seeing). The only other federal case on the issue, *Almond v. Pfizer Inc.*, 2013 WL 6729438 (S.D.W. Va. Dec. 19, 2013), is likewise unpersuasive. In *Almond*, the court relied principally on the decision in *Cook*, with little further analysis. *See id.* at *4. Most notably, neither *Cook* nor *Almond* explained how to reconcile its decision with the plain language of Rule 3(a). And they did not purport to show that their interpretation of Rule 3(a) was consistent with

³ Nevertheless, Judge Chambers held that the actions had been misjoined and denied the plaintiffs' motion for remand.

⁴ The second remand did not address Rule 3(a), and instead rested solely on Judge Young's October 28, 2013 consolidation order. *See J.C. ex rel. Cook v. Pfizer, Inc.*, 2014 WL 495455 (S.D.W. Va. Feb. 5, 2014).

the history and purpose of the amendment. Accordingly, neither case is persuasive in light of the unanimous conclusion of all six West Virginia Judges on the Panel that Rule 3(a) requires that the cases be separate civil actions.

CONCLUSION

This Court should deny Plaintiffs' petition for a writ of prohibition because Plaintiffs have not demonstrated that the Mass Litigation Panel exceeded its legitimate powers, and the Panel correctly held that Rule 3(a) creates separate civil actions.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 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.)

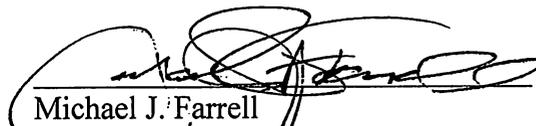
THE HONORABLE JAMES P. MAZZONE,)
Lead Presiding Judge, Zoloft Litigation,)
Mass Litigation Panel, and PFIZER, INC.,)
ROERIG, a division of Pfizer, Inc., and)
GREENSTONE, LLC f/k/a Greenstone, LTD.)

Respondents.)

Underlying:
IN RE: ZOLOFT LITIGATION
Civil Action No. 14-C-7000

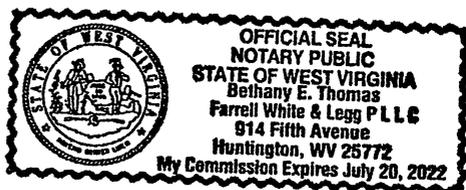
VERIFICATION

I, Michael J. Farrell, counsel for Respondents, 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 Supplemental Brief and Supplemental Appendix hereto and submitted herewith constitute a fair and correct statement of the proceedings in the civil action identified in this Supplemental Brief, based upon information and belief.


Michael J. Farrell
Counsel for Respondents

Subscribed and sworn before me this 15th day of April, 2014.


Bethany E. Thomas
Notary Public



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