

ARGUMENT
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0207

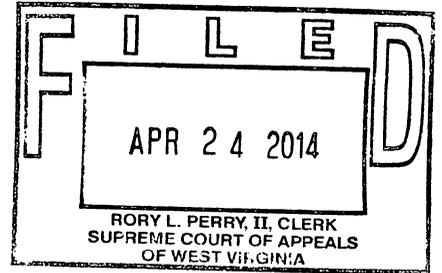
STATE OF WEST VIRGINIA, *ex rel.* J.C.,
a minor, by and through his mother and
next friend, MICHELLE COOK, et al.,

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

RESPONSE OF THE MASS LITIGATION PANEL TO
PETITION FOR WRIT OF PROHIBITION

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At this Honorable Court's request, the Mass Litigation Panel provides its perspective on how the issues raised in the petition will impact the duties of the Panel and the Administration of Mass Litigation in West Virginia.

Procedural History

On March 4, 2014, the Panel Judges assigned to the Zoloft Litigation held a status conference during which, among other things, the Panel: (1) ordered the 25 civil actions referred to the Panel to be treated as separate civil actions; (2) vacated an October 18, 2012 order consolidating Wayne County Civil Action Numbers 12-C-146 through 12-C-164 into Wayne County Consolidated Civil Action Number 12-C-146; (3) vacated an October 28, 2013 order consolidating Wayne County Civil Action Numbers 13-C-229 through 13-C-234 into Wayne County Consolidated Civil Action Number 12-C-146; and (4) vacated any other prior orders inconsistent with the Panel's prior application of Rule 3(a) of the West Virginia Rules of Civil Procedure, as plainly written. (See, March 11, 2014 *Order Memorializing The Court's Rulings During The March 4, 2014 Status Conference* at **Appendix Tab 1**) Thereafter, the underlying plaintiffs filed a petition for a writ of prohibition to the Supreme Court.

Role of the Mass Litigation Panel and Background Regarding Amendment of Rule 3(a)

In 1996, the Supreme Court of Appeals of West Virginia (the Court) recognized our court system needed to facilitate management and resolution of complex mass tort cases in West Virginia. The Court ordered the development of the Mass Litigation Panel (the Panel), and granted the Panel liberal powers to help litigants fairly and expeditiously resolve cases that might otherwise languish because of complexity or the lack of resources in a particular circuit to manage complex cases. (See, November 15, 1996 *Administrative Order* at **Appendix Tab 2**) The Court subsequently adopted Trial Court Rule XIX, which gave the Panel a number of

responsibilities, including, “to develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which may be referred to it by the Chief Justice[.]” (See, *Trial Court Rule XIX*, effective May 1, 1998 at **Appendix Tab 3**; See also, Trial Court Rule 26.05(a), effective October 9, 2008) Trial Court Rule XIX became Rule 26 of the new Trial Court Rules, effective July 1, 1999. (See, June 8, 1999 *Administrative Order* at **Appendix Tab 4**)

In 2007, then Chief Justice Robin Jean Davis directed the Chairman of the Panel to, “forthwith establish a committee to draft proposed rules for consideration by the Supreme Court for the conduct of the business of the Panel[.]” (See, July 10, 2007 *Administrative Order* at **Appendix Tab 5**) The Panel met extensively in 2007 and 2008 and submitted proposed rules for public comment in 2008. After the period of public comment expired, the Panel again met extensively to consider the comments and, ultimately, submitted proposed amendments to Rules 3(a) and 5(e) of the West Virginia Rules of Civil Procedure, and Rules 16.05(a) and 26 of the West Virginia Trial Court Rules for approval by the Court. The Panel also submitted proposed Trial Court Rule 15, a new rule regarding electronic filing in Mass Litigation cases. The Panel’s proposed amendments and proposed new Trial Court Rule 15 were adopted by the Court on October 9, 2008.

Trial Court Rule 26.04(a)(2) defines Mass Litigation as “[t]wo (2) or more *civil actions* pending in one or more circuit courts . . . involving common questions of law or fact in ‘personal injury mass torts’ implicating numerous claimants in connection with widely available or mass-marketed products and their manufacture, design, use, implantation, ingestion, or exposure[.]” (Emphasis added.) Mass Litigation is not determined by the number of complaints filed. It is determined by the number of civil actions pending in one or more circuit courts. This important

distinction is ignored by Petitioners, as evidenced in Petitioners' Motion to Refer in which they argued, "[t]he Circuit Court and the Chief Justice should grant this motion because this litigation clearly involves *two Complaints* involving common questions of law and fact implicating numerous claimants in connection with widely available, mass marketed products and their design, use and ingestion." (Emphasis added.) Respondents' Appendix, p. 000131. Moreover, the amendment to Rule 3(a) states:

Rule 3. Commencement of Action

(a) *Complaint.* – 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.

(Emphasis added.) When read together, Trial Court Rule 26.04(a)(2) and Rule of Civil Procedure 3(a) make clear that separate civil actions, not complaints, are determinative.

Black's Law Dictionary further highlights the distinction between a complaint and a civil action. A complaint is, "[t]he initial pleading that starts a civil action and states the basis for the court's jurisdiction, the basis for the plaintiff's claim, and the demand for relief." BLACK'S LAW DICTIONARY (9th ed. 2009), p. 323. A civil action is, "[a]n action brought to enforce, redress, or protect a private or civil right[.]" *Id.*, p. 34. Both of these definitions are consistent with Rule 3(a), as amended. While there may be one, multi-plaintiff complaint filed on behalf of a number of plaintiffs not related by marriage, a derivative or fiduciary relationship, there are numerous civil actions within one multi-plaintiff complaint, which are to be given separate civil action numbers, docketed as separate civil actions, and treated as separate civil actions. Each plaintiff within a multi-plaintiff complaint has a due process right to prosecute his or her own civil action. By the same token, defendants have a due process right to defend against each individual civil action in a multi-plaintiff complaint.

As the Panel previously held, “Rule 3(a) is, on its face, a substantive rule of civil procedure, not an ‘administrative rule.’” Appendix Tab 1, p. 1. Nowhere in Rule 3 and, indeed, nowhere in the West Virginia Rules of Civil Procedure is a rule designated or described as an “administrative rule.” Nor can a federal court’s interpretation of Rule 3(a) convert it or any other rule of civil procedure into an administrative rule. “An interpretation of the *West Virginia Rules of Civil Procedure* presents a question of law subject to a *de novo* review.” Syllabus Point 2, *In re Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52 (2003); Syllabus Point 4, *Keesecker v. Bird*, 200 W. Va. 667, 490 S.E.2d 754 (1997). As the Court has made clear, “[a] federal case interpreting a federal counterpart to a West Virginia rule of civil procedure may be persuasive, but it is not binding or controlling.” Syllabus Point 3, *In re Rezulin Litigation*; Syllabus Point 3, *Brooks v. Isinghood*, 213 W. Va. 675, 584 S.E.2d 531 (2003). The Court’s reasoning for this rule is “to avoid having our legal analysis of our *Rules* ‘amount to nothing more than Pavlovian responses to federal decisional law.’” *In re Rezulin Litigation*, 214 W. Va. at 61, 585 S.E.2d at 61, citing *Brooks v. Isinghood*, 213 W.Va. at 675, 584 S.E.2d at 531(citation omitted). See also, *Darling v. Champion Home Builders Co.*, 96 Wash.2d 701, 706, 638 P.2d 1249, 1251 (1982) (“Although we may look to federal decisions for guidance in interpreting our civil rules . . . we are by no means bound by those decisions.”)

**Impact of Rule 3(a) on Duties of the Masss Litigation Panel
and Administration of Mass Litigation in West Virginia**

Rule 3(a), as amended, allows the Panel to evaluate each separate civil action filed by unrelated plaintiffs in a multi-plaintiff complaint for dispositive issues such as jurisdiction, venue, forum non conveniens, statute of limitations, proximate cause and summary judgment. Rule 3(a) also facilitates management and tracking of each civil action the Panel is charged with resolving, whether such resolution is by dismissal, summary judgment, trial or settlement.

Equally important, Rule 3(a) helps the Panel determine the answer to the fundamental question – “Who is suing whom for what?”

Independent evaluation, management and tracking of each separate civil action within a multi-plaintiff complaint is critical to the Panel’s ability to resolve these cases. Without the benefit of Rule 3(a), working in conjunction with Trial Court Rules 26 and 15, the Panel could not substantively evaluate and manage Mass Litigation in a meaningful way.

Consistent with the Panel’s charge to resolve “cases with common questions of law or fact where large numbers of individuals have potentially been harmed, physically or economically” the Panel has applied Rule 3(a), as plainly written, since the amendment took effect in 2008. See, *University Commons Riverside Home Owners Association, Inc. v. University Commons Morgantown, LLC*, 230 W.Va. 589, 596, 741 S.E.2d 613, 620 (2013)(citations omitted). In *Abbott v. Earth Support Services*, three Panel judges squarely addressed the amendment to Rule 3(a) when directed by the Chief Justice to make Findings of Fact and a Recommendation regarding defendants’ motion to refer a multi-plaintiff complaint to the Panel. (See, *Findings and Recommendations of the Mass Litigation Panel*, filed on October 22, 2009 in *Richard D. Abbott, et al. v. Earth Support Services d/b/a Micon, Inc., et al.*, Wyoming County Civil Action No. 08-C-138 at **Appendix Tab 6**)

In *Abbott*, a group of 99 unrelated plaintiffs filed a single, multi-plaintiff complaint in Wyoming County Circuit Court on June 11, 2008, alleging exposure to products containing isocyanates while working in underground coal mines in West Virginia. See ¶¶ 1 and 8. The complaint received a single civil action number from the Circuit Clerk of Wyoming County. See ¶ 1. Subsequent to the filing of the complaint, the Supreme Court adopted the amendment to Rule 3(a) on October 9, 2008, effective November 10, 2008. In December 2008, one of the

Abbott defendants moved to refer the litigation to the Panel. Plaintiffs and some of the other defendants opposed the motion arguing, among other things, that the litigation did not consist of two or more civil actions because only one complaint had been filed. See, ¶ 12. Because the *Abbott* complaint was initiated before the effective date of the amendment to Rule 3(a), the Panel agreed *Abbott* was only one civil action pending in one circuit court. See, ¶ 13.

Notwithstanding, the Panel determined:

Had the *Abbott* case been initiated after Rule 3(a) of the West Virginia Rules of Civil Procedure was amended, there would be ninety-nine (99) separate civil actions pending in the Circuit Court of Wyoming County, instead of one, multiple-plaintiff civil action with ninety-nine (99) unrelated plaintiffs. That being said, the *Abbott* complaint was initiated before the effective date of the amendment to Rule 3(a) of the West Virginia Rules of Civil Procedure and, therefore, only one civil action pending in one circuit court is before the Panel.

Id. Upon careful review of the Motion to Refer, the findings of fact and recommendation of the Panel, and the record submitted, then Chief Justice Benjamin entered an Administrative Order denying the Motion to Refer as premature for the reasons set forth in the Panel's October 22, 2009 Order. (See, December 4, 2009 *Administrative Order* at **Appendix Tab 7**)

The Panel separated a number of multi-plaintiff complaints filed in various circuit courts into individual cases to better manage the Flood Litigation. This not only facilitated implementation of electronic filing and service, but more importantly, allowed the Panel to determine, "Who was suing whom for what?" (See July 20, 2009 *Electronic Filing and Service Case Management Order, In Re: Flood Litigation*, MC FLOOD 7/8/2001 at **Appendix Tab 8**) As a result, the Presiding Judges were able to substantively evaluate and better manage the cases within the litigation, and the Resolution Judges were able to conduct more meaningful mediations, which ultimately led to its resolution.

The Panel has evaluated and analyzed separate civil actions in other Mass Litigations to

decide a number of substantive issues. For example, the Presiding Judges assigned to the Digitek Litigation denied motions to dismiss based on the doctrine of forum non conveniens in two separate civil actions. (See April 2, 2010 *Order* at **Appendix Tab 9**) The Presiding Judges assigned to the Float-Sink Litigation denied several motions for summary judgment based on the statute of limitations, subject to re-filing, and made findings of fact and conclusions of law regarding tolling of the statute of limitations for plaintiffs' deliberate intent claims. (See March 9, 2012 *Order* at **Appendix Tab 10**) Based on the Panel's findings, a number of defendants renewed their motions for summary judgment, and most of those motions were granted. (See, for example, July 8, 2012 *Order Granting Defendant Hobet Mining LLC's (On Behalf of Sharples Coal Company) Motion for Summary Judgment on Statute of Limitations Grounds* at **Appendix Tab 11**; and July 6, 2012 *Order Denying the Motions for Summary Judgment of Defendant Eastern Associated Coal, LLC on Statute of Limitations Grounds and the Joinder of Preiser Scientific, Inc. as to Plaintiff Lacy McKinney* at **Appendix Tab 12**)

The Presiding Judges assigned to the Float-Sink Litigation also ruled on a number of motions for discovery sanctions; entered an agreed order dismissing plaintiffs' claims against certain manufacturing defendants; entered agreed orders voluntarily dismissing certain employer defendants; and, after hearing, dismissed with prejudice a number of cases where plaintiffs announced their intent to discontinue their deliberate intent, medical monitoring and product liability causes of action without prejudice. The Panel also granted a motion for summary judgment based on plaintiff's failure to establish that an employer defendant violated any specifically applicable safety regulations or industry safety standards with respect to plaintiff's alleged float-sink chemical exposure, as required to prove a deliberate intent cause of action. (See August 30, 2012 *Order Granting Defendant Litwar Processing Company, LLC's Motion for*

Summary Judgment at Appendix Tab 13)

There is no doubt that West Virginia is on the cutting-edge in developing mechanisms to manage and resolve complex Mass Litigation. Unlike any other state, our Court created a Panel of circuit court judges to manage and expeditiously resolve mass tort cases throughout the State of West Virginia, and gave the Panel the authority to consolidate cases and grant multi-county or multi-jurisdictional relief where there are common issues involving mass torts emanating from separate counties or circuits.

If the Court allows Rule 3(a) to be interpreted as merely “administrative in nature” and “designed solely to ensure that each plaintiff in a multi-plaintiff suit pays a filing fee” parties, such as the plaintiffs in this litigation, will be able to avoid the independent, substantive analysis of their separate civil actions that is critical to the Panel’s process. Petition, pp. 7-8. Petitioners’ interpretation of Rule 3(a) would permit a non-West Virginia plaintiff who suffered personal injury outside the State of West Virginia to sue a non-West Virginia defendant in West Virginia state court, so long as the non-West Virginia plaintiff filed a multi-plaintiff complaint with at least one West Virginia plaintiff unrelated by marriage, or a derivative or fiduciary relationship. If such a suit cannot survive in West Virginia state court as a single complaint, it should not be permitted under the guise of a multi-plaintiff complaint.

The resources provided to the Panel allow for the efficient resolution of all litigants’ claims. However, those resources are not infinite. If Petitioners’ interpretation of Rule 3(a) is accepted, the Panel will be overrun with endless civil actions having absolutely no nexus to West Virginia. This sort of maneuver, if allowed, will cause West Virginia to become a dumping ground for foreign lawsuits, a result West Virginia can ill afford, given its limited judicial resources. To allow the Panel’s process to be appropriated by national or multi-national interests

is not what was contemplated in 1996 when the Panel was created. Petitioners' response to the Panel's inquiry regarding where future Zoloft Litigation cases will be filed is telling on this point:

THE HONORABLE JUDGE SWOPE: Do you have over (sic) Zoloft cases that you filed or are about to file in this state?

MR. ITKIN: Yes, Your Honor.

THE HONORABLE JUDGE SWOPE: Where?

MR. ITKIN: We have not filed them yet, but intend to file more cases.

THE HONORABLE JUDGE SWOPE: Where? Do you know yet?

MR. ITKIN: In West Virginia. Oh, I'm sorry. Where? Yeah, my sense will be we will probably file them in Wayne County and see if the judge there wants to keep them or transfer them to –

THE HONORABLE JUDGE SWOPE: How many more do you have to file?

MR. ITKIN: I mean, I think just understanding our process – I'm not trying to dodge the Court's question, but as the cases come in we screen them to make sure they fit within what is appropriate for filing in this court. And so my sense is on a rolling basis that we're going to file cases every four to six weeks probably in groups of, you know, 6 to 10 cases.

(See, pp. 20-21, Transcript of March 4, 2014, Status Conference at **Appendix Tab 14**)

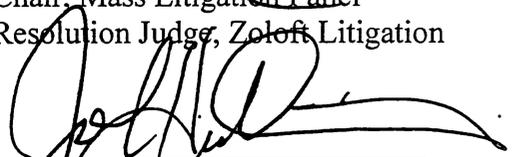
The Panel finds no merit in Petitioner's argument that the Panel's "erroneous interpretation of Rule 3(a)" will "take essentially every West Virginia Mass Tort case out of the Panel, and potentially halt any future filings in state court." Petition, pp. 6-7. Since 2008, the Panel has been referred and has managed numerous Mass Litigations, including the Digitek Litigation, the Mingo County Coal Slurry Litigation, the Float-Sink Litigation, the Mountain State University Litigation and the University Commons Litigation.

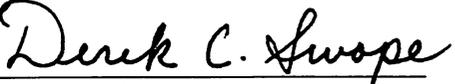
West Virginia must expend its limited judicial resources on cases involving West

Virginia residents and torts that have a nexus to West Virginia. The Court should not allow a narrow and strained interpretation of Rule 3(a) to result in West Virginia becoming a mecca for mass tort litigation because other states or jurisdictions have not adopted the Panel's process. West Virginia and the Panel should not be required to minister to the needs of litigants who are non-residents and do not have a nexus to West Virginia. To do so would be a disservice to our state, our judiciary, and our taxpaying citizens. Rule 3(a), as plainly written, enables the Panel to substantively evaluate and manage each separate civil action in a multi-plaintiff complaint in order to avoid such an absurd result.

Respectfully submitted this 27th day of April, 2014.


Alan D. Moats
Chair, Mass Litigation Panel
Resolution Judge, Zoloff Litigation

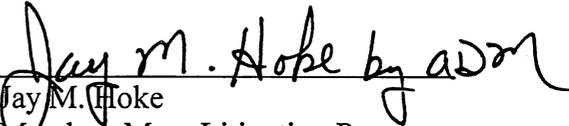

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GREENSTONE, LLC, f/k/a Greenstone, LTD.

Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of April, 2014, a true and correct copy of the foregoing **RESPONSE OF THE MASS LITIGATION PANEL TO PETITION FOR WRIT OF PROHIBITION** and **APPENDIX TO RESPONSE OF THE MASS LITIGATION PANEL TO PETITION FOR WRIT OF PROHIBITION** was served by U.S. Mail, first class, postage prepaid, upon the following:

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