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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION **Civil Action No. 19-C-9000**

THIS DOCUMENT APPLIES TO ALL CASES

ORDER DENYING CERTAIN DEFENDANTS' MOTIONS FOR RECONSIDERATION

Pending before the Mass Litigation Panel are motions to reconsider its February 19, 2020, and March 20, 2020, Orders regarding the Phase I, non-jury trial of liability for public nuisance.[1] Having reviewed and maturely considered the motions and memoranda of law, joinders, Plaintiffs' consolidated response in opposition to the motions (Transaction ID 65666609), and Certain Defendants' reply in support of the motions (Transaction ID 65703538), the Presiding Judges **DENY** the motions for the reasons set forth below.

Procedural History

On February 19, 2020, the Panel found that Plaintiffs' claims for abatement of public nuisance are equitable claims to which a right to a jury trial does not attach. *Order Regarding Trial of Liability for Public Nuisance* ("February 19 Order") (Transaction ID 64739341), p. 9. The Panel ordered a Phase I, non-jury trial on the issue of liability for public nuisance to be conducted as soon as practicable, after a reasonable period of discovery. *Id.*

On March 13, 2020, the Panel conducted a status conference during which it scheduled the Phase I, non-jury trial of liability for public nuisance to begin on March 22, 2021, giving the parties one year to conduct discovery regarding liability for public nuisance. *Order Regarding Rulings Issued During March 13, 2020, Status Conference* (Transaction ID 64846125) entered

[1] *Certain Defendants' Motion for Reconsideration of Order Regarding Trial of Liability for Public Nuisance* (Transaction ID 64819458); and *Certain Defendants' Supplemental Brief and Motion for Clarification or Reconsideration of Orders Regarding Public Nuisance Trial Plan* (Transaction ID 65618638).

on March 20, 2020 ("March 20 Order"), pp. 1-2. The Panel also allowed the parties to conduct discovery of one county, one municipality and one hospital in West Virginia for purposes of determining the costs of abating the alleged public nuisance. *Id.*, p. 2. The Panel selected Harrison County, the City of Clarksburg, and United Hospital for this purpose. *Id.* Although the Panel was not inclined to re-visit its February 19 Order, it allowed the parties to file briefs pertaining to *Certain Defendants' Motion for Reconsideration of Order Regarding Trial of Liability for Public Nuisance* (Transaction ID 64819458). *Id.* p. 1.

Moving Defendants ("Defendants") request the Mass Litigation Panel vacate its February 19, 2020, and March 20, 2020 Orders, contending that: 1) the Panel's plan to conduct a single, Phase I non-jury trial on the issue of liability for public nuisance is contrary to law and fundamentally unworkable; 2) a fair and efficient trial process requires comprehensive discovery on all liability issues, including causation and related defenses, and abatement; and 3) bifurcating the trial and depriving Defendants of their jury trial right is impermissible. *Certain Defendants' Supplemental Brief and Motion for Clarification or Reconsideration of Orders Regarding Public Nuisance Trial* Plan (Transaction ID 65618638). Defendants request the Panel order instead: 1) a unitary jury trial on public nuisance liability (including causation and defenses) and remedies; 2) that the unitary jury trial be a "bellwether" trial involving the public nuisance claims brought by Harrison County and the City of Clarksburg; and 3) that discovery shall include comprehensive discovery into all aspects of the Plaintiffs' claims set for trial, including the scope, nature, and potential cause of the Plaintiffs' alleged injuries. *Id.*, pp. 25-26.

Plaintiffs oppose Defendants' motions on the grounds that: 1) a single Phase I trial on public nuisance liability will significantly advance the Opioid Litigation; 2) the Panel's Orders provide for sufficient discovery for all parties; and 3) a bifurcated non-jury trial on public

nuisance is permissible and appropriate. *All Plaintiffs' Consolidated Memorandum of Law in Opposition* (Transaction ID 65666609).[2] Plaintiffs contend the Panel's Orders do not violate due process; the Panel does not seek to "extrapolate" any Plaintiff's claim to the entire state; the Panel has discretion whether or not to include causation in the Phase I liability trial; a Phase I trial on public nuisance liability is workable; and a bellwether trial would be far less efficient for these cases. *Id.* They further contend Defendants are entitled to discovery commensurate with the Phase I trial issues; bifurcation between liability and abatement of nuisance is appropriate; and there is no right to a jury trial for equitable claims of nuisance abatement. *Id.*

The Mass Litigation Panel Has Broad Discretion to Adopt Procedures to Fairly and Efficiently Resolve Mass Litigation Claims Involving Common Questions of Law or Fact

The Supreme Court of Appeals of West Virginia ("Supreme Court") discussed the creation of the Mass Litigation Panel in *State ex rel. Allman v. MacQueen,* 209 W.Va. 726, 731, 551 S.E.2d 369, 374 (2001):

> Through the creation of a mass litigation panel, it was believed that this State's judicial system and those individuals seeking redress would benefit by permitting the use of innovative means of trial management concerning issues unique to mass litigation, which would in turn encourage a more expeditious resolution of these matters than that permitted by traditional means of case resolution.

The Mass Litigation Panel is charged with developing and implementing, "case management and trial methodologies to fairly and expeditiously resolve Mass Litigation referred to the Panel by the Chief Justice." TCR 26.05(a). The Presiding Judge is authorized, "after considering the due process rights of the parties, to adopt any procedures deemed appropriate to fairly and efficiently manage and resolve Mass Litigation." TCR 26.08(d).

[2] Plaintiffs memorandum of law also responds to *Certain Defendants' Motion for Dismissal of County and Municipal Plaintiffs' Public Nuisance Claims for Lack of Standing* (Transaction ID 65641366) and *Certain Defendants' Motion for Dismissal of the Hospital Plaintiffs' Public Nuisance Claims for Lack of Standing* (Transaction ID 65640626). The Court will address these motions by separate order.

As held by the Supreme Court:

> A creative, innovative trial management plan developed by a trial court which is designed to achieve an orderly, reasonably swift and efficient disposition of mass liability cases will be approved so long as the plan does not trespass upon the procedural due process rights of the parties.

Syllabus Point 3 of *State ex rel. Appalachian Power Co. v. MacQueen,* 198 W.Va. 1, 479 S.E.2d 300 (1996). The Supreme Court has recognized that:

> management of [mass tort] cases cannot be accomplished without granting the trial courts assigned these matters significant flexibility and leeway with regard to their handling of these cases. A critical component of that required flexibility is the opportunity for the trial court to continually reassess and evaluate what is required to advance the needs and rights of the parties within the constraints of the judicial system. Out of this need to deal with "mass litigation" cases in non-traditional and often innovative ways, TCR 26.01 was drafted and adopted. *State ex rel. Mobil Corp. v. Gaughan,* 211 W. Va. 106, 111, 563 S.E.2d 419, 424 (2002).

In re: Tobacco Litigation, 218 W.Va. 301, 306, 624 S.E.2d 738, 743 (2005).

A Phase I Liability Trial of Plaintiffs' Public Nuisance Claims Is Workable and Is Not Contrary to Law

The Panel ordered a Phase I, non-jury trial on public nuisance liability based on: "the complexity of the Opioid Litigation, the number of parties involved, and the magnitude of the public health emergency recognized in West Virginia and the United States." *February 19 Order,* pp. 7-8. As found by the Panel, "[a] Phase I, non-jury trial on the issue of liability for public nuisance will not only maximize the Court's and the parties' resources, but will also promote judicial economy, allow a relatively speedy trial on this issue, and unlike a jury trial, will allow the Presiding Judges to take breaks in order to accommodate their circuit court trial dockets." *Id.*

A Phase I non-jury trial of liability for public nuisance is far more workable and a better use of judicial resources than Defendants' proposed unitary, "bellwether" jury trial on public nuisance liability (including causation and defenses) and remedies involving the public nuisance

claims brought only by one county and one municipality. As the Panel observed:

> [T]his case has the capacity to outlast any case we've ever dealt with. The longest case we've dealt with was 22 years. That was the tobacco litigation that started in 1998. We entered an order . . . that dismissed that . . . litigation in its entirety, after 22 years. Had a tortuous route through our state's Supreme Court, United States Supreme Court, attempts to select juries. And this case has the same capacity.
>
> Now we understand there are disagreements, and there's always going to be disagreements as far as what we've done. I can tell you we are not inclined to revisit the issue of a nonjury trial. Quite frankly, we disagree with the Defendants' position. This is an equitable matter, and if we don't address it, years and years, decades will go by before something as critical as a public health crisis is addressed. We don't believe that's what our law was set up to do. And if we allow this case to languish for 5 years, 10 years, 15, 20, 30 years, then that means our legal system has failed. And we're not going to let that happen.
>
> And so we are not inclined to reconsider this nonjury trial on the public nuisance, because our position is as we said. It's an equitable matter, we believe we have the authority.
>
> Now I am sure the Supreme Court may be asked to tell us we don't. And we understand that. And if they tell us we don't, then we will go back and we'll start at the beginning.

March 13, 2020, Transcript, p. 14, lines 2-24, p. 15, lines 1-7.

The Panel is unpersuaded by Defendants' argument that a statewide trial on public nuisance liability would be unmanageable. *Defs' Supp. Brief,* pp. 10-12. The Panel's Orders are consistent with trial plans in other mass litigation cases where consolidated liability trials have been ordered involving far more claimants than "public nuisance claims brought by over 80 different Plaintiffs across more than 20 complaints against, at a minimum, 90 distinct Defendants." *Id.*, pp. 10-11. Consolidated liability trials have proven workable in mass litigation cases involving thousands of asbestos and tobacco cases.

In *State ex rel. Appalachian Power Co. v. MacQueen,* 198 W.Va. 1, 479 S.E.2d 300 (1996), facility owners filed an action seeking a writ of prohibition to prevent the trial court from implementing a plan for consolidation of all asbestos premises-liability cases against facility owners. The Supreme Court denied the writ holding, in part, that the trial court did not abuse its discretion by formulating a trial management plan whereby all pending asbestos premises-

liability cases would be consolidated and then considered in two separate phases to determine any time periods during which each location was not a reasonably safe workplace; and then to determine plaintiff-specific issues relating to causation, damages, and comparative fault.

In *State ex rel. Mobil Corp. v. Gaughan*, 211 W. Va. 106, 111, 563 S.E.2d 419, 424 (2002), the trial court ordered three consolidated liability-only trials in thousands of asbestos personal injury cases. The Supreme Court denied the petition for writ of prohibition and/or mandamus holding the petition, which alleged potential due process violations because of lack of commonality of issues, and which challenged the potential use of a damages matrix, was premature. As the Court recognized:

> The trial court deserves to be accorded the necessary flexibility to consider and address the issues raised by the parties and, perhaps even more critically, the opportunity to reevaluate the trial plan during its operation and to make necessary modifications when it determines that alterations are warranted. Lending further emphasis to the precipitous nature of this petition is the fact that the trial court simply has not had sufficient opportunity to identify with any finality the issues that are to be tried in common with regard to the liability phase or even to consider how the discovery process might be further tailored to address the issues to be tried at the various phases of the litigation, rather than to require all discovery to be completed by a date that precedes the initial liability trials.

Id. 211 W. Va. at 114, 563 S.E.2d at 427.

Furthermore, in answer to the trial court's certified question in the Tobacco Litigation, the Supreme Court held that *State Farm v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513,155 L.Ed.2d 585 (2003), did not preclude bifurcation of a trial into two phases, wherein certain elements of liability and a punitive damages multiplier are determined in the first phase, and compensatory damages and punitive damages, based on the punitive damages multiplier, are determined for each individual plaintiff in the second phase. *In re: Tobacco Litigation,* 218 W.Va. 301, 306, 624 S.E.2d 738, 743 (2005). The Supreme Court observed that, like *Gaughan,* the petition for writ of prohibition in the Tobacco Litigation was also premature:

> Similarly, in the instant case, any issue beyond that set forth in the certified question is one that this Court will only consider on appeal with the benefit of a fully developed record and a final order. To reiterate, it is clear to this Court that *Campbell* does not eliminate mass tort litigation as provided for in our Trial Court Rule 26. Further, it is significant to us that bifurcated trial plans structured like the one at issue are common in West Virginia as well as other jurisdictions. In sum, absent a clear indication to the contrary, we believe that *Campbell* does not preclude the bifurcated trial plan at issue.

Id., 218 W.Va. at 305, 624 S.E.2d at 742.

A Bifurcated Non-Jury Trial of Liability for Public Nuisance is Permissible

"Generally, trial courts are permitted broad discretion in managing their cases and deciding bifurcation matters." *Rohrbaugh v. Wal-Mart Store, Inc.,* 212 W. Va. 358, 367, 572 S.E.2d 881 (2002). Rule 42(c) of the West Virginia Rules of Civil Procedure provides that, "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim...." Here, the Panel has exercised its discretion to bifurcate liability for public nuisance from the cost of abatement, based on its evaluation of the operative facts of these cases, as well as considerations of convenience, expedition and economy in resolving these consolidated cases. See *February 19 Order,* pp. 7-8.

Defendants' contend a liability trial must require each Plaintiff to prove causation because, "as with other tort claims, causation is a fundamental element of a nuisance claim under West Virginia Law." *Defs' Supp. Brief* at p. 8. They also contend bifurcation of liability for public nuisance and the cost of abatement is inappropriate, because "issues of liability – which necessarily include causation – and injury are not 'totally independent,' but are inextricably intertwined." *Defs' Supp. Brief* at p. 21. Plaintiffs also contend causation should be part of the Phase I liability trial:

> In drawing the bifurcation line for trial of a public nuisance claim between liability and abatement, the federal MDL court accepted that "the existence of an

> opioid crisis in and of itself does not constitute a public nuisance because the analysis must also consider the conduct allegedly creating the nuisance[,]" finding that the "interrelated nature of these elements is evident in the Restatement's use of the phrase 'unreasonable interference' to define both cognizable harm and actionable conduct. *In re Nat' Prescr. Opiate Litig.*, No. 1:17-md-2804, 2019 U.S.Dist. LEXIS 150587, at *65 (N.D. Ohio Sept. 4, 2019) (Doc. 2572) (quoting *Restatement (Second) of the Law of Torts*, § 821B(1)-(2). The Panel should do the same here and rule that causation of the public nuisance in West Virginia is part of the Phase I liability trial.

Pltffs' Consolidated Memorandum at p. 6.

As the Supreme Court has recognized, West Virginia's definition of public nuisance – "an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons" – is consistent with the *Restatement (Second) of Torts* § 821B(1)(1979), which defines a public nuisance as "an unreasonable interference with a right common to the general public." *Duff v. Morgantown Energy Associates,* 187 W. Va. 712, 716, 421 S.E.2d 253, 257 (1992) and footnote 6. Under either definition, liability for public nuisance, by necessity, includes a determination of causation because these elements are interrelated. However, determining whether there is liability for public nuisance does not require the Panel to determine the costs of abatement. If Plaintiffs' prove that one or more Defendants are liable for public nuisance in Phase I, only then will the Panel consider the alleged cost of abatement in Phase II.

Nor do the Defendants have a right to a jury trial on Plaintiffs' claims of liability for public nuisance or the cost of abating a public nuisance. West Virginia has long held that courts of equity have jurisdiction to prevent or abate public nuisance, "Courts of equity have had an ancient and unquestionable jurisdiction to prevent or abate public nuisance, and this alone would give jurisdiction, even if it had not been decided this was a public nuisance ...." *Town of Weston v. Ralston,* 48 W. Va. 170, 36 S.E. 446. 456 (1900). As the Supreme Court stated in *E. Shephersdstown Developers, Inc. v. J. Russell Fritts, Inc.*:

> The merger of law and equity, effected by Rule 2, W.Va. R. Civ. P., abolished the *procedural* distinctions between law and equity. However, it did *not* extend the right of jury trial to civil cases that, before the merger, would have been in equity. In Syl. Pt. 1, *W. Va. Human Rights Commission v. Tenpin Lounge, Inc.*, 155 W. Va. 349, 211 S.E.2d 349 (1975), decided long after the merger of law and equity in West Virginia, this Court made it clear that, "[s]ince equitable issues are generally determined by a court without a jury, one is not entitled, as a matter of right under the law, to a jury trial of such issues . . ."

183 W. Va. 691, 694-95, 398 S.E.2d 517, 520-521(1990) (emphasis in original). Because the plaintiff was seeking the equitable remedy of specific performance, the Supreme Court found the case was one in equity to which the right of jury trial had never attached. *Id.* 183 W. Va. at 695 and 398 S.E.2d at 521. Consequently, "*[a]ll of the findings of fact, as well as the conclusions of law, were for the trial court to make.* The trial court did not need to appoint the advisory jury, nor did it need to listen to the advisory jury." *Id.* (emphasis added). Likewise, where Plaintiffs in the Opioid Litigation are seeking abatement of a public nuisance, their cases are in equity, to which the right of a jury trial does not attach.

As stated in *Mugler v. Kansas*:

> The ground of this jurisdiction . . . is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, *especially where a nuisance affects the health, morals, or safety of the community.* Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury.

123 U.S. 623, 673 (1887) (emphasis added) (citations omitted). Here, Plaintiffs have alleged a public nuisance that affects the health, morals and safety of communities in West Virginia. Thus, the Panel has equitable jurisdiction to determine whether a public nuisance exists and, if so, the cost of abating such nuisance.

Likewise, in the context of private nuisance, the Supreme Court held that "[a] court of equity, having jurisdiction in such case to abate the nuisance, may assess, and enter a decree for, such damages, whether the defendants be jointly or separately liable therefor, taking care to decree them on the basis of the legal liability of the parties; but the jurisdiction so to do is merely incidental to the exercise of the jurisdiction to abate the nuisance." Syllabus, *McMechen v. Hitchman-Glendale Consol. Coal Co.,* 88 W. Va. 633, 107 S.E. 480, 481 (1921). As the Supreme Court explained, "[i]t is well established that equity, having taken jurisdiction to abate a nuisance, may in the same suit assess and decree the resulting damages. Its diverse remedies enable it to award the damages either jointly or separately, according to legal liability." *Id.* 107 S.E. at 483 (internal citations omitted).

As Judge Polster recognized:

> [T]he fact that "nuisance" is sometimes characterized as a variety of "tort" does not change the fact that an equitable claim to abate a nuisance is not a tort claim seeking compensatory damages. Defendants also argue that what Plaintiffs' label as a claim for "abatement costs" is in fact a "claim for damages." (*See* Doc. #: 2540 at 8-9). This point is not well-taken for the reasons explained in the Court's recent Order denying Defendants' motion to exclude Plaintiffs' abatement experts. Unlike tort damages that compensate an injured party for past harm, abatement is equitable in nature and provides a prospective remedy that compensates a plaintiff for the costs of rectifying the nuisance.

In re Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2019 WL 4194272, at *3 (N.D. Ohio Sept. 4, 2019).

The Opioid Litigation concerns a national public health emergency, as recognized by the U.S. Department of Health & Human Services and the Governor of West Virginia. *Determination That a Public Health Emergency Exists,* October 26, 2017; *Gov. Justice Issues Statement on President Trump's National Public Health Emergency,* August 11, 2017. Given the complexity of the Opioid Litigation, the number of parties involved, and the magnitude of the

public health emergency recognized in West Virginia and the United States, a Phase I, non-jury trial on the issue of liability for public nuisance will maximize the Court's and the parties' resources, promote judicial economy, and allow a relatively speedy trial on this issue.

The Panel's Orders Provide for Appropriate Phase I Discovery

Defendants assert they are entitled to discovery on all liability issues, including causation and related defenses; separating abatement and liability discovery is inefficient and unworkable; and they have not received relevant discovery from other proceedings to justify limiting discovery here. Defs' Supp. Brief, pp. 15-17. Plaintiffs contend the Panel's Orders provide for sufficient discovery for all parties; Defendants are entitled to discovery commensurate with Phase I trial issues; bifurcating liability and abatement discovery is efficient; and the Panel is not limiting Defendants' right to liability discovery. *Pltffs' Consol. Resp.*, pp. 9-12.

The Panel's *March 20 Order* scheduled the Phase I trial to begin on March 22, 2021, giving the parties one year to conduct discovery regarding liability for public nuisance. *March 20 Order*, pp. 1-2. In addition, the Panel allowed the parties to conduct discovery of one county, one municipality and one hospital in West Virginia for purposes of determining the costs of abating the alleged public nuisance. *Id.*, p. 2. The Panel selected Harrison County, the City of Clarksburg, and United Hospital for this purpose. *Id.* As observed by the Panel, "this will be the opportunity to conduct discovery to see what kind of costs a typical county, city and hospital say they have incurred, or will continue to have … to abate what they say is a nuisance." March 13, 2020 Hearing Transcript, p. 17, lines 17-21. The Panel further observed that the parties would have the benefit of similar discovery being conducted in Cabell County and Huntington, the federal cases pending in the Southern District of West Virginia. *Id.*, lines 21-22.

As correctly found by the Discovery Commissioner, Defendants "may conduct discovery on the issue of liability from all Plaintiffs but the discovery requests regarding abatement costs must be limited to Harrison County, City of Clarksburg and United Hospital Center." *Order Denying Plaintiffs' Motion for Protective Order WV MLP Discovery Ruling No. 1,* (Transaction ID 65675481), p. 2; *Order Denying Plaintiffs' Joint Objections to WVMLP Discovery Ruling No. 1 Denying Motion for Protective Order* (Transaction ID 65781560). Because it finds the scope of discovery for the Phase I liability trial of public nuisance is appropriate, the Panel will not vacate its March 20 Order.

For the foregoing reasons, the Court **DENIES** *Certain Defendants' Motion for Reconsideration of Order Regarding Trial of Liability for Public Nuisance* (Transaction ID 64819458); and *Certain Defendants' Supplemental Brief and Motion for Clarification or Reconsideration of Orders Regarding Public Nuisance Trial Plan* (Transaction ID 65618638).

The Panel's Order is limited to Plaintiffs' equitable claim for public nuisance, which is the subject of the Phase I non-jury trial, and does not apply to any other causes of action asserted by Plaintiffs. All objections and exceptions to the Panel's Order are noted and preserved for the record. A copy of this Order has this day been electronically filed and served on all counsel of record via File & Serve*Xpress.*

It is so **ORDERED.**

ENTERED: July 23, 2020.

/s/ Alan D. Moats
Lead Presiding Judge
Opioid Litigation

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation