

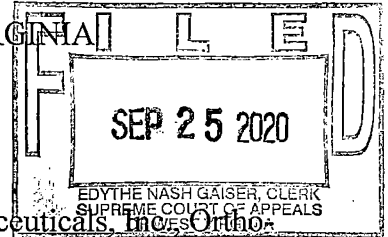
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. ~~20-0742~~
20-0751



STATE of WEST VIRGINIA ex rel. Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho
McNeil-Janssen Pharmaceuticals, Inc. n/k/a Janssen Pharmaceuticals, Inc., Janssen
Pharmaceutica, Inc. n/k/a Janssen Pharmaceuticals, Inc., Teva Pharmaceuticals USA, Inc.,
Cephalon, Inc., Watson Laboratories, Inc., Warner Chilcott Company LLC, Actavis Pharma,
Inc.(f/k/a Watson Pharma, Inc.), Actavis South Atlantic LLC, Actavis Elizabeth LLC, Actavis
Mid Atlantic LLC, Actavis Totowa LLC, Actavis LLC, Actavis Kadian LLC, Actavis
Laboratories UT, Inc. (f/k/a Watson Laboratories, Inc.-Salt Lake City), Actavis Laboratories FL,
Inc. (f/k/a Watson Laboratories, Inc.-Florida), Allergan Finance, LLC f/k/a Actavis, Inc. f/k/a
Watson Pharmaceuticals, Inc., Allergan USA, Inc., and Allergan Sales, LLC,

Petitioners,

v.

The Honorable ALAN D. MOATS, Lead Presiding Judge, Opioid Litigation, Mass Litigation
Panel, and STATE of WEST VIRGINIA ex rel. PATRICK MORRISEY, Attorney General,

Respondents.

*From the Circuit Court of Kanawha County, West Virginia
In re: Opioid Litigation Civil Action No. 19-C-9000*

VERIFIED PETITION FOR WRIT OF PROHIBITION

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QUESTION PRESENTED

Whether the Mass Litigation Panel committed clear legal error when it struck Defendants'¹ notices of non-party fault and ruled that requests for money made as part of public nuisance claims do not qualify as “damages” under West Virginia Code § 55-7-13d(a)(2).

INTRODUCTION

The Mass Litigation Panel (“the Panel”) committed clear legal error when it struck Defendants’ notices of non-party fault related to the State’s² public nuisance claims. The Panel’s ruling mirrors and incorporates a nearly identical order from consolidated proceedings brought by City, County, and Hospital Plaintiffs. As explained in the recently filed Petition for a Writ of Prohibition in those proceedings, the Panel’s ruling derives from the clearly erroneous view that any claim labeled a “public nuisance”—no matter the conduct at issue or the relief sought—is equitable and therefore outside the protections that ordinarily apply to an action for damages. Chief among those protections is West Virginia Code § 55-7-13d(a)(2) (“the 2015 Act”), which prohibits joint and several liability and entitles Defendants to attribute fault to non-parties. But the Panel ignored the State’s admissions that it seeks damages for past harms and future expenses. The Panel also usurped the clear intent of the West Virginia Legislature, ushering in joint and several liability any time a plaintiff frames a request for legal damages as part of a historically equitable claim. The Panel’s focus on form over substance contradicts settled West Virginia law

¹ Defendants are Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc. n/k/a Janssen Pharmaceuticals, Inc., Janssen Pharmaceutica, Inc. n/k/a Janssen Pharmaceuticals, Inc., Teva Pharmaceuticals USA, Inc., Cephalon, Inc., Watson Laboratories, Inc., Warner Chilcott Company LLC, Actavis Pharma, Inc.(f/k/a Watson Pharma, Inc.), Actavis South Atlantic LLC, Actavis Elizabeth LLC, Actavis Mid Atlantic LLC, Actavis Totowa LLC, Actavis LLC, Actavis Kadian LLC, Actavis Laboratories UT, Inc. (f/k/a Watson Laboratories, Inc.-Salt Lake City), Actavis Laboratories FL, Inc. (f/k/a Watson Laboratories, Inc.-Florida); Allergan Finance, LLC f/k/a Actavis, Inc. f/k/a Watson Pharmaceuticals, Inc., Allergan USA, Inc., and Allergan Sales, LLC.

² The “State” or “Plaintiff” is the State Of West Virginia, by its Attorney General, Patrick Morrissey.

and carries the potential to expose Defendants to damages they did not cause and for which they could not have been on notice. As in the Municipality action, a writ is required.

Because the Panel's errors in the Municipality action are identical to the errors it committed in these proceedings, Defendants largely incorporate their previously-filed Petition. If this Court grants a rule to show cause in the Municipality action, it should grant this Petition as well, staying proceedings and allowing all related cases to proceed in a rational and orderly manner based on the correct application of the law.³

STATEMENT OF THE CASE

On August 23, 2019, the State sued Defendants in the Circuit Court of Boone County for their involvement in the manufacture and marketing of prescription opioid medications. The State alleges Defendants created a public nuisance and violated the West Virginia Consumer Credit and Protection Act ("WVCCPA"). JA000047-50. On February 19, 2020, the Lead Presiding Judge entered an Order transferring the suit to the Mass Litigation Panel and joined it with *In re Opioid Litigation*, Civil Action No. 19-C-9000. JA000096.

On June 17, 2020, Defendants filed notices of non-party fault pursuant to West Virginia Code § 55-7-13d(a)(2), identifying the categories of non-parties bearing fault for the asserted damages arising from the alleged public nuisance and WVCCPA violations. JA000309-321;

³ The State is also pursuing separate individual actions against each of Mallinckrodt LLC and SpecGx LLC (together "Mallinckrodt"), Endo Health Solutions Inc. and Endo Pharmaceuticals Inc. (together "Endo"), and Par Pharmaceutical, Inc. ("Par"). The State separately moved to strike the nonparty fault notices filed in these later-filed actions, the briefing for which remains ongoing. Motion to Strike the Defendants' Notices of Nonparty Fault ("Motion to Strike") [Transaction ID 65905257]; Defendants' Response to the State's Motion to Strike the Defendants' Notices of Nonparty Fault [Transaction ID 65946324]. Granting review here thus would provide guidance to the Panel in other cases on this important question. If the Panel rules on Mallinckrodt, Endo, and Par's motion before this Court addresses this writ, these defendants will seek further relief as appropriate.

JA000322-334.⁴ The State moved to strike Defendants’ notices and argued that the claims sought equitable relief or civil penalties and, thus, the 2015 Act did not apply. JA000335-347. Over Defendants’ opposition (JA000350-368), the Panel granted the motion on August 4, 2020. JA000012-15.⁵

With respect to the public nuisance claims, the Panel simply adopted and incorporated an order striking notices of non-party fault in nearly identical public nuisance proceedings brought by City, County, and Hospital Plaintiffs (“Municipality Order”), JA000001-11, where it had ruled that monetary remedies meant to abate a public nuisance are not “damages” within the meaning of the 2015 Act. JA000004-11.⁶ On September 10, 2020, Defendants and other entities named in the Municipality action filed a Petition for Writ of Prohibition explaining the Panel’s clear legal errors and seeking relief from the Municipality Order (“Municipality Petition”). JA000860-902.

SUMMARY OF ARGUMENT

The Panel committed clear legal error. While the State labels its requested public nuisance relief as “abatement,” it admits that it seeks to impose liability upon Defendants for large sums of “damages.” Yet the Panel held that the State seeks equitable relief and denied Defendants the protections of the 2015 Act. The Panel’s decision is contrary to established West Virginia law and the plain language of the 2015 Act. The West Virginia Legislature clearly intended to eliminate

⁴ While Defendants made the non-party fault designations under Section 55-7-13d(a)(2) of the Code, that provision is but one part of the Legislature’s comprehensive 2015 rewriting of the law regarding comparative fault, which is now set forth in Sections 55-7-13a through 55-7-13d of the Code. Thus, the reference to the 2015 Act in this Petition encompasses all of those provisions.

⁵ In addition to arguing that they did not seek “damages” under the 2015 Act, the State argued that the 2015 Act does not apply because their public nuisance claims accrued prior to its effective date of May 25, 2015. The Panel did not address the State’s alternative argument.

⁶ As to the WVCCPA, the Panel held that the State disclaimed compensatory and punitive damages and seeks only civil penalties, which are not “damages” within the meaning of the 2015 Act. JA000012-15. Defendants seek a writ only with respect to the Panel’s public nuisance ruling.

joint and several liability when plaintiffs seek monetary relief, and the Panel's decision undermines that choice. Defendants now face potential monetary liability for harms they did not cause and for which they could not have been on notice. This Court's immediate intervention is necessary to ensure the Panel abides by the Legislature's will and to avoid the massive waste of judicial and litigant resources that will otherwise ensue.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure to aid in the Court's consideration of the important legal issues in this case. The matter should be set for oral argument under Rule 20, as the Panel's decision involves issues of fundamental public importance, constitutional issues regarding the validity of a court ruling, and matters of first impression.

ARGUMENT

I. LEGAL STANDARD

"The 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."⁷ When a petitioner contends that the trial court has exceeded its legitimate powers, this Court considers five factors:

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;

⁷ W. Va. Code § 53-1-1; Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977).

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 issues of law of first impression.⁸

“[A]ll five factors need not be satisfied, [and] it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.”⁹ A court “commits clear legal error when it incorrectly chooses, interprets, or applies the law.”¹⁰

II. THE PANEL COMMITTED CLEAR LEGAL ERROR WHEN IT STRUCK DEFENDANTS' NOTICES OF NON-PARTY FAULT RELATED TO PUBLIC NUISANCE.

The Panel did not offer an independent explanation for its decision to strike Defendants' notices of non-party fault related to the State's public nuisance claims. Instead, the Panel adopted and incorporated the Municipality Order, in which it held that monetary remedies meant to abate a public nuisance are not “damages” within the meaning of the 2015 Act. JA000004-11. Because Defendants already filed a Petition for a Writ of Prohibition explaining the Panel's clear legal errors in reaching that conclusion, JA000860-902, Defendants incorporate and supplement those arguments here:

First, the State characterizes its “abatement” remedy as “damages.” JA000099 (State's Mem. of Law in Supp. of Mot. for Expedited Trial Date at 1 (requesting expedited trial as to public nuisance liability “while the parties are conducting discovery on the issues of damages and abatement of public nuisance.”)); JA000133 (State's Opp. to Teva Mot. to Dismiss at 18 (alleging

⁸ Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

⁹ *Id.*; see *State ex rel. Johnson & Freedman, LLC v. McGraw*, 842 S.E.2d 216, 220 (W. Va. 2020) (writ appropriate when court committed a clear legal error that is “substantial, clear-cut, [and] plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts.”).

¹⁰ *State ex rel. West Virginia Regional Jail Authority v. Webster*, 242 W. Va. 543, 836 S.E.2d 510, 518 (2019) (quotation omitted).

that Defendants “contributed to the opioid crisis and the State’s injuries and damages.”)). Those damages are intended to compensate the State for its “economic losses” and other harms suffered as part of the opioid abuse crisis. JA000089-80 (Janssen Compl., ¶ 135).

Second, no matter how the State labels its requested relief, the pursuit of monetary awards to compensate for past and future losses, including payment for future treatment and services, is a form of compensatory damages. JA000879-884 (Municipality Petition) (collecting authority). None of the cases invoked by the Panel in its Municipality Order support the conclusion that the State’s requests for monetary remedies are actually equitable. JA000884-887; JA000893-899 (Municipality Petition). In fact, the Panel ignored decisions of this Court and the United States Supreme Court that make clear “any distinction that might exist between ‘damages’ and monetary relief under a different label is purely semantic.”¹¹ See JA000882 (Municipality Petition).

Third, the Panel committed clear legal error when it placed form over substance, holding that the State seeks equitable relief because it labels the request as “abatement.” JA000899-901 (Municipality Petition).¹² The State itself describes its requested relief as “damages” and, under the plain language of the 2015 Act, Defendants are entitled to apportion fault. JA000892-893 (Municipality Petition) (collecting authority). The Panel’s decision to the contrary usurps the intent of the West Virginia Legislature, ushering in joint and several liability any time a plaintiff

¹¹ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 49 n.7 (1989); see also *Realmark Devs., Inc. v. Ranson*, 214 W. Va. 161, 164-65, 588 S.E.2d 150, 153-54 (2003) (even if there is an “equitable reason for requiring payment,” a “money judgment” is a legal remedy); *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (“suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for ‘money damages’”); cf. *In Re Opioid Litigation*, Case No. 400000/2017 (Suffolk Cty., Sup. Ct. Mar. 2, 2019) (considering similar apportionment statute and concluding request for “abatement fund” require application of fault-apportionment statute traditionally limited to money damages).

¹² See also Restatement (Third) of Torts § 8 cmt. b (“[a]n action by a public official will commonly lie to abate the nuisance by injunction but may not involve monetary recovery for harm done.”).

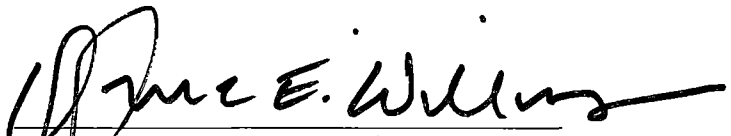
pleads its requests for damages as part of a historically equitable claim. JA000892-893; JA000899-900 (Municipality Petition).

Finally, the Panel's errors in striking Defendants' notices of non-party fault will require complete reversal on appeal and an entirely new trial. The parties should not be compelled to go through an expensive, complex trial and appeal from a final judgment when the issues presented are fundamentally important legal issues and can be resolved independent of disputed facts. JA000901-902 (Municipality Petition). A writ is required.

CONCLUSION

For the reasons discussed above and in the Municipality Petition, Defendants respectfully move this Honorable Court to grant this Petition for a Writ of Prohibition, and issue a writ reversing the Panel's Order Regarding the State's Motion to Strike Defendants' Notices of Non-Party Fault.

Dated: September 25, 2020



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VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF CABELL, to wit:

I, Marc E. Williams, counsel for Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc. n/k/a Janssen Pharmaceuticals, Inc., and Janssen Pharmaceutica, Inc. n/k/a Janssen Pharmaceuticals, Inc., being first duly sworn, state that I have read the foregoing Petition for Writ of Prohibition; that the factual representations contained therein are true, except insofar as they are stated to be upon information and belief; and that insofar as they are stated to be on information, I believe them to be true.

Marc E. Williams

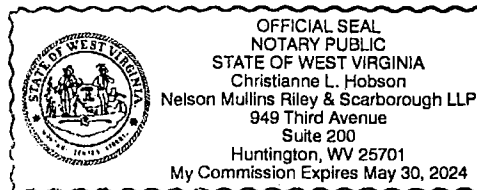
Marc E. Williams (WVSB #4062)

Taken, subscribed, and sworn before me this 25th day of September, 2020.

My commission expires: May 30, 2024.

Christianne L. Hobson

Notary Public



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. _____

STATE of West Virginia ex rel.
Johnson & Johnson, et al.,

Petitioners

v.

The Honorable ALAN D. MOATS, Lead Presiding Judge, Opioid Litigation, Mass Litigation
Panel, and STATE of WEST VIRGINIA ex rel. PATRICK MORRISEY, Attorney General,

Respondents.

CERTIFICATE OF SERVICE

I, Marc E. Williams, hereby certify that true and correct copies of the foregoing *Verified*
Petition for Writ of Prohibition and *Appendix* were served upon the following via electronic mail
and/or by depositing a true copy thereof in the United States mail, postage prepaid, addressed as
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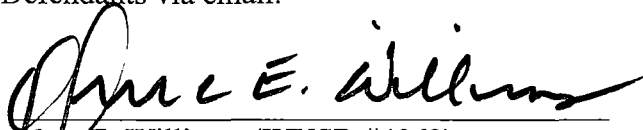
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