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STATE of West Virginia EX REL. AMERISOURCEBERGEN DRUG CORPORATION, et al., Petitioners
v.
The Honorable Alan D. MOATS, Lead Presiding Judge, Opioid Litigation, Mass Litigation Panel, et al., Respondents

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, et al., Respondents

Nos. 20-0694
20-0751

Supreme Court of Appeals of West Virginia.

Submitted: February 17, 2021
Filed: June 11, 2021

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WALKER, Justice:

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Beginning in 2017, various cities, counties, hospitals, and the State of West Virginia sued manufacturers and distributors of prescription opioid pain medication and other defendants. This Opioid Litigation is now more than eighty lawsuits pending before the Mass Litigation Panel. In the consolidated petitions before us, Petitioners are defendants in the Opioid Litigation who ask this Court for extraordinary relief prohibiting enforcement of the Panel's recent rulings that (1) Petitioners do not have a right to a jury trial of Respondents' public nuisance claims (liability only); and (2) those

same public nuisance claims are not subject to the 2015 amendments to West Virginia's comparative fault statute. Respondents, who are plaintiffs in the Opioid Litigation, urge us not to disturb these rulings by the Panel. For the reasons discussed below, we grant in part and deny in part Petition No. 20-0694 and deny Petition No. 20-0751. We conclude that the Panel did not clearly err when it found that the 2015 amendments do not apply to the public nuisance claims. But, we also find that the Panel did clearly err by not safeguarding Petitioners' right to try issues common

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to Respondents' public nuisance claims and their legal claims to a jury.

I. FACTUAL AND PROCEDURAL BACKGROUND

In June 2019, this Court referred five cases filed by West Virginia county commissions against manufacturers and distributors of prescription opioid pain medication and other defendants to the Panel, pursuant to Rule 26.06(c)(3) of the West Virginia Trial Court Rules (the Opioid Litigation).[1] The Panel consists of seven active or senior status circuit court judges, appointed by the Chief Justice with the approval of this Court. Its function is to efficiently manage and resolve mass litigation, like the Opioid Litigation, which now includes more than eighty lawsuits brought by the State of West Virginia, counties, municipalities, and hospitals against several categories of defendants and in various combinations.

All Petitioners are defendants in the Opioid Litigation. All Respondents are plaintiffs in the Opioid Litigation. For the sake of clarity, we refer to Petitioners, collectively as "Defendants," and Respondents, collectively, as "Plaintiffs." Where a particular issue pertains only to the State, or does not pertain to the State, we say so.

During a status conference on December 6, 2019, the Panel proposed that the parties consider resolving all public nuisance claims (liability only) in a non-jury trial, to be conducted before trying remedies for the nuisance claims or any other claims. The Panel acknowledged that *Camden-Clark Memorial Hospital Corp. v. Turner*[2] (*Camden-Clark*) may limit its ability to try an equitable claim before allowing a jury to decide related, legal claims. Specifically, the Panel stated:

> Injunctions regularly are decided by courts. It is an equitable type remedy ordinarily that wouldn't be entitled to a jury trial. It would be decided by the court.
>
> The [c]ourt would determine what the proper abatement is. [The Federal District Court for the Northern District of Ohio] is dealing with that. He took the position, as I understand it, that there is no absolute right to a jury trial, but he decided to give them one.
>
> Well, we haven't decided that. We have a case, [*Camden-Clark*], that says where there are legal issues coupled with injunctive -- a request for injunctive relief, the legal issue, if it is to be tried by a jury, it is to go first.
>
> ***
>
> Now right now the question is well, are our hands tied under [*Camden-Clark*]?
>
> ***
>
> Then we will finish the matter when that is complete and set the rest of it aside for the time being or you can rely on [*Camden-Clark*] and say, no, I am not going to do it, that this is going to be a war to the bitter end.

Still, the Panel encouraged the parties to consider a Phase I Trial.[3] In later filings, Plaintiffs expressed support for a Phase I Trial,

while Defendants rejected the proposal.[4]

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On February 19, 2020, the Panel issued an order, applicable to all cases, formalizing its earlier proposal and ordering the Phase I Trial. The Panel reasoned that West Virginia Rule of Civil Procedure 39(a) empowered it to act on its own initiative to find that a right to a jury trial did not exist as to a particular issue, so that it could order a non-jury trial of Plaintiffs' public nuisance claims (liability only) over Defendants' objections.[5] The Panel concluded that the public nuisance claims sounded in equity, and not law, so article III, § 13 of the West Virginia Constitution —guaranteeing a right to a jury trial in suits at "common law"[6] —did not preclude the Phase I Trial. Finally, the Panel distinguished *Camden-Clark* , which it had previously recognized as a potential bar to the Phase I Trial, as an employment law case that did not outweigh " 'the national public health emergency ... in West Virginia [posed by] opioid and drug addiction.' "[7]

In March 2020, certain Defendants filed a motion, applicable to all cases, urging the Panel to reconsider its February 19, 2020, order.[8] Defendants argued that the Panel could not conduct the Phase I Trial without violating their right to try Plaintiffs' other, legal claims to a jury.[9] Citing this Court's decision in *West Virginia Human Rights Commission v. Tenpin Lounge, Inc .*,[10] along with similar, federal authority,[11] those Defendants asserted that the Panel had to permit a jury to decide all issues common to Plaintiffs' equitable and legal claims before conducting the Phase I Trial; otherwise, the Panel would deprive Defendants of their right to try those issues to a jury. These Defendants also argued that because Plaintiffs sought money to abate the alleged public nuisance, the public nuisance claims are legal claims that must be tried to a jury.[12] In May 2020, certain Defendants filed a "Supplemental Brief and Motion

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for Clarification or Reconsideration of Orders Regarding Public Nuisance Trial Plan," applicable to all cases, and renewed their arguments that the Phase I Trial violated their right to a jury trial.[13]

Meanwhile, certain Defendants filed notices of nonparty fault under the 2015 Act.[14] In June 2020, Plaintiffs—excluding the State—moved to strike the notices of nonparty fault.[15] Plaintiffs argued that the 2015 Act did not apply to their public nuisance claims because those claims accrued before the 2015 Act took effect. And, even if the public nuisance claims accrued after the Act's effective date, they argued that it would still not apply to the public nuisance claims because those claims are equitable and do not seek damages—a prerequisite to the 2015 Act's application. For the same reason, they argued that a predecessor to the 2015 Act did not apply to their public nuisance claims, either. Defendants responded that Plaintiffs' claim accrual argument was a "judicial admission that their nuisance claims are time-barred." Defendants also argued that the public nuisance claims sought damages, and not equitable relief, so the 2015 Act applied to those claims.

Also in June 2020, Defendants in the State's case filed notices of nonparty fault. The next month, the State moved to strike those notices. The State argued that the notices did not identify the nonparties alleged to be at fault with the specificity required by the 2015 Act. The State also argued that the 2015 Act did not apply to its claims seeking abatement of public nuisance and for equitable relief and civil penalties for alleged violations of the West Virginia Consumer Credit and Protection Act (WVCCPA).[16] Finally, the State argued that its public nuisance claim had accrued before the effective date of the 2015 Act. Defendants in that case responded that the State's claim accrual argument amounted to an admission that its public nuisance claim was time-barred and that the State sought damages for its public nuisance and WVCCPA claims, meaning that the 2015 Act applied and that they could pursue a theory of nonparty fault.

On July 23, 2020, the Panel denied certain Defendants' pending (1) motion for reconsideration and (2) motion for clarification

or reconsideration of the Panel's orders regarding the Phase I Trial. The Panel emphasized its broad authority to adopt procedures to fairly and efficiently manage and resolve matters, such as the Opioid Litigation, and rejected Defendants' proposal to conduct a bellwether trial of one city's and one county's public nuisance claims (liability and remedies). A state-wide trial, the Panel explained, was conducted in the Tobacco and Asbestos Litigations and had worked. The Panel found Defendants' bifurcation argument equally unpersuasive and clearly communicated its

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commitment to a non-jury trial of the public nuisance claims (liability only), as those claims and the abatement remedy were equitable, so that Defendants had no right to try them to a jury.[17] Finally, the Panel found that its trial plan provided for sufficient discovery.

The Panel granted Plaintiffs' (excluding the State) motion to strike Defendants' notices of nonparty fault on July 29, 2020. The Panel recounted its February order regarding the non-jury trial of Plaintiffs' public nuisance claims (liability only) and reiterated its determination that those public nuisance claims are equitable. The Panel distinguished the equitable remedy of abatement from the damages remedy to which the 2015 Act applies.[18] The Panel recognized Defendants' argument that abatement is traditionally accomplished by injunctive relief—not payment of money—but found that its powers to fashion equitable relief are broad, and that nothing precludes it from ordering Defendants to pay the costs associated with abating the alleged public nuisance (assuming any Defendants are found liable). Because the Panel decided the question based on its determination that the public nuisance claims are equitable, it did not reach Plaintiffs' claim accrual argument and Defendants' responsive, statute of limitations argument. The Panel then entered an order on August 4, 2020, incorporating its July 29, 2020, order, and granting the State's motion to strike notices of nonparty fault as to its public nuisance and WVCCPA claims.

These petitions followed. In Petition No. 20-0694, Defendants challenge the Panel's February 19, 2020, and July 23, 2020, orders (relating to jury trial of the public nuisance claims); and July 29, 2020 order (relating to applicability of 2015 Act to cities', counties', and hospitals' public nuisance claims). In Petition No. 20-0751, Johnson & Johnson and additional defendants—sued by the State—challenge the Panel's August 4, 2020, order relating to applicability of the 2015 Act to the State's public nuisance claim.[19] Pursuant to the Rule to Show Cause, entered December 3, 2020, the petitions were consolidated for purposes of oral argument, consideration, and decision.

II. STANDARD OF REVIEW

"This Court is restrictive in the use of prohibition as a remedy."[20] "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. W. Va. Code 53-1-1."[21] "[E]xtraordinary remedies are reserved for 'really extraordinary causes,' "[22] and not "as a substitute for an appeal."[23] "[P]rohibition may be invoked when it clearly appears that the trial court is without jurisdiction or has exceeded its legitimate powers"[24] —for example, "when [the trial court] denies a jury trial to one entitled thereto who makes a proper demand therefor."[25]

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In cases that do not involve an allegation that the lower court has acted without jurisdiction, we consider five factors to determine whether to issue the discretionary writ of prohibition. These factors are:

> (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. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.[26]

It bears repeating that those "factors are general guidelines that serve as a useful starting point for determining whether a *discretionary* writ of prohibition should issue."[27]

III. ANALYSIS

Defendants contend that the Panel committed several clear errors of law that mandate this Court's intervention by extraordinary writ. Defendants argue that the Panel misapplied state and federal law to find that Plaintiffs' public nuisance claims are "equitable," rather than "legal." Similarly, they assert that the Panel fundamentally misunderstood the nature of the abatement remedy claimed by Plaintiffs. It is not, they argue, an equitable remedy; it is a claim for damages. According to Defendants, those clear legal errors have impacted the Opioid Litigation in two ways. First, they claim that the errors resulted in the erroneous denial of Defendants' right to try Plaintiffs' public nuisance claims (liability only) to a jury. And, second, Defendants contend that the errors led to the Panel's erroneous conclusion that the 2015 Act does not apply to Plaintiffs' public nuisance claims and alleged abatement remedy. Additionally, and alternatively, Defendants argue that the Panel clearly erred when it found that the Phase I Trial would not deprive Defendants of their right to try Plaintiffs' other, legal claims to a jury. We address Defendants' arguments regarding the nature of Plaintiffs' public nuisance claims and alleged remedy, before turning to Defendants' alternative argument.

A. Nature of the Public Nuisance Claims and Abatement Remedy

The nature of Plaintiffs' public nuisance claims and abatement remedy matters for two reasons: Defendants' right to try those claims (liability only) to a jury and the applicability of the 2015 Act to the claims. We outline each of those contexts before addressing Defendants' arguments.

"Prior to the introduction of the Rules of Civil Procedure, a right to a jury trial existed in an action at law. In an equitable dispute, however, the right to a jury trial did not exist."[28] Law and equity merged in 1960,[29] but that merger "did *not* extend the right of jury trial to civil cases that, before the merger, would have been in equity,"[30] and the legal-equitable distinction still matters for purposes of the jury trial right. "In determining whether an action is legal or equitable in nature, both the issues involved and the remedy sought are examined,"[31] but we give greater weight to the remedy

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sought.[32] In short, the right to a jury trial "applies where the legal remedy of damages is full and adequate and can do complete justice between the parties."[33]

As for the 2015 Act, it provides that "[i]n any action for damages, the liability of each defendant for compensatory damages[34] shall be several only and may not be joint."[35] Under § 55-7-13c(a), a defendant may "be liable only for the amount of compensatory damages allocated to that defendant in direct proportion to that defendant's percentage of fault[.]"[36] The Legislature has provided that when "assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged damages," including nonparties.[37] Under West Virginia Code § 55-7-13d(a)(2) and (3), when a defendant has properly raised the question of nonparty fault, and the jury assesses a percentage of fault to that nonparty, "any

recovery by a plaintiff shall be reduced in proportion to the percentage of fault chargeable to such nonparty."[38] So, whether Plaintiffs' public nuisance claim is a "legal" claim that seeks "damages" is one key consideration for both the jury trial right and applicability of the 2015 Act.

Under our decision in *Realmark v. Ranson* , the determination of whether a claim is legal or equitable requires examination of "the issues involved and the remedy sought[.]"[39] As to the issue in this case—public nuisance—we observe that "[c]ourts of equity have an ancient and unquestionable jurisdiction to prevent or abate public nuisance[.]"[40] But, we also observe the opposite. For example, while one court found that the public nuisance claim before it was equitable, it noted that nuisance claims seeking damages had, in some cases, been heard by a jury before the merger of law and equity.[41] As to the remedy sought by Plaintiffs—abatement—we have recognized that injunctive relief is frequently the means by which a public nuisance is prevented or abated.[42] But, other courts have recognized that an injunction may entail the payment of money by a defendant.[43] Defendants analogize Plaintiffs' public nuisance claims and abatement remedy to other claims and remedies ultimately found to be legal for purposes of the jury-trial right, including a claim for unjust enrichment, [44]

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a claim for front pay (rather than reinstatement) under the Whistle-Blower Law,[45] an action to recover sums fraudulently transferred out of a bankruptcy estate,[46] a suit for damages couched as one to enforce an employee benefit plan's reimbursement provision pursuant to § 502(a)(3) of the Employee Retirement Income Security Act of 1974,[47] and a suit seeking damages in fraud that was essentially a tort action.[48] These cases include language supportive of Defendants' position, generally—that monetary payments are damages—but they do not arise in the context of a public nuisance claim or abatement remedy. And, general statements may also be found that support the contrary proposition.[49]

Defendants have provided orders from actions pending in other states' courts and a federal district court analyzing public nuisance claims brought against prescription opioid manufacturers and distributors, among others. The Federal District Court of the Northern District of Ohio has ruled that similar, public nuisance claims are equitable.[50] The Supreme Court of the State of New York has ruled that similar, public nuisance claims are legal.[51] And, in a one-page order, the District Court of Cleveland County, State of Oklahoma, found that the State of Oklahoma's public nuisance claim was equitable.[52] Defendants have not brought to our attention a decision by any appellate court reviewing these orders.

We grant the extraordinary remedy of prohibition "to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts[.]"[53] In view of the conflicting authorities outlined above, we cannot say now that the Panel's ruling—that Plaintiffs' public nuisance claims are not legal claims for damages that would trigger the constitutional jury trial right, or that are subject to the 2015 Act—is so clear-cut, or so plainly in contravention of a clear legal mandate as to merit issuance of the extraordinary remedy of prohibition on those grounds.[54] For that reason, we deny the writ requested by Petition No. 20-0751, challenging the Panel's August 4, 2020, order as it relates to the applicability of the 2015 Act to the State's public nuisance claim. And, we deny in part the writ requested in Petition in No. 20-0694, insofar as it seeks relief from (1) the Panel's July 29, 2020, order granting

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Plaintiffs' motion to strike notices of non-party fault and (2) the portions of the Panels' orders of February 19, 2020, and July 23, 2020, denying Defendants' requests for a jury trial of Plaintiffs' public nuisance claims (liability only) on the grounds that those claims are legal, and not equitable.

But, the preceding analysis does not dictate a blanket denial of the writ requested in Petition

No. 20-0694. There, Defendants make an alternative argument against the Panel's Phase I Trial: that the Panel cannot conduct a bench trial on liability for Plaintiffs' public nuisance claims without violating Defendants' right to try Plaintiffs' *other* , indisputably legal claims to a jury.[55] For the reasons discussed below, we find that Defendants are entitled to a writ, as moulded, on this alternative ground.[56]

B. Overlapping Issues

West Virginia Rule of Civil Procedure 18(a) enables joinder of legal and equitable claims.[57] Consequently, a single action may include claims that require a jury trial (i.e., claims for legal relief) and claims that do not. The question becomes then, in what order shall those claims be tried when they share a common issue? We addressed the effect of joinder of legal and equitable claims upon the jury trial right in *Tenpin Lounge* . In that case, the West Virginia Human Rights Commission filed suit seeking specific performance of a conciliation agreement with Tenpin Lounge.[58] Tenpin denied the allegations and demanded a jury trial.[59] The Commission moved, essentially, to strike the jury demand, and the circuit court denied the motion. The parties tried the case to a jury, which found for Tenpin Lounge. The Commission appealed the judgment order and argued, in part, that the circuit court erred when it had allowed the Commission's specific performance claim to go to a jury.

We first stated that "generally [ ] one is not entitled to a jury trial of equitable issues."[60] So, the circuit court did not err when it allowed the Commission's equitable claim to go to a jury because the Commission did not have a right to a non-jury trial of that claim.[61] We explained that:

> This matter may be summed up by the following quote from 2B Barron and Holtzoff, *Federal Practice and Procedure* , § 873, p. 32 (Rules ed. 1961) : "The usual practice is to try the legal issues to the jury and to try the equitable issues to the court. Where there are some issues common to both the legal and equitable claims, the order of trial must be such that the jury first determines the common issues. The court may, if it chooses, submit all the issues to the jury. There is no constitutional right to a trial without a jury and reversible error cannot be predicated upon the submission of equitable issues of fact to a jury." We adhere to the principles so expressed and accordingly find that the plaintiff's position is without merit. See *Hurwitz v. Hurwitz* , 78 U.S.App.D.C. 66, 136 F.2d 796, 148 A.L.R. 226 (1943) ; Lugar

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> & Silverstein, W.Va.Rules, p. 308; Wright & Miller, *Federal Practice and Procedure* : Civil § 2334.[62]

Tenpin Lounge preserves the trial court's flexibility to order the trial, so long as a jury first decides the issues common to the legal and equitable claims.

Defendants argue here that common issues pervade the determination of public nuisance liability and Plaintiffs' legal claims. For example, the pleadings included in the appendix for Petition No. 20-0694 bear this out.[63] The complaint filed by the Monongalia County Commission, the Marion County Commission, the Doddridge County Commission, the Randolph County Commission, and the Upshur County Commission—included in its entirety in the appendix—contains ten claims: public nuisance, unjust enrichment, fraud by concealment, negligence and negligent marketing, fraud and intentional misrepresentation (manufacturer defendants), negligence and misrepresentation, negligence, malicious and intentional conduct, negligence or medical malpractice, and negligence and intentional diversion and distribution. Each claim expressly incorporates the hundreds of factual allegations that precede it. Importantly, Plaintiffs do not disagree with Defendants' characterization of the overlap of their public nuisance claims (liability only) and legal claims,

nor do they contend that those other claims are equitable and not legal. And, they do not protest that the legal claims are entirely independent of their public nuisance claims (liability only).[64] Without that opposition, we are left to conclude that Defendants have, in fact, identified overlapping issues among Plaintiffs' public nuisance (liability only) and legal claims. Applying *Tenpin Lounge* , a jury must decide those overlapping issues.

Plaintiffs contend that the Phase I Trial does not infringe on Defendants' jury trial rights because they will get to try Plaintiffs' legal claims to a jury—at some point. But that argument doesn't account for the logic that underpins *Tenpin Lounge* and similar, federal authority: the danger that a "prior judicial determination of the equitable claim effectively *may* well defeat the jury trial right on the legal claim because the determination of the claim's equitable aspects would prevent any relitigation of those issues, either through res judicata or collateral estoppel, whichever doctrine bears on the particular legal claim."[65] Plaintiffs suggest that those concerns "will not become ripe unless and until there is a Phase III trial on damages claims (following the nuisance liability and abatement remedy proceedings) or other causes of action that do not sound in equity." Again, we are not persuaded. If a court waits, as Plaintiffs suggest, then it acts in a fashion opposite to this Court's guidance in *Tenpin Lounge* , and undervalues this Court's statement that "reversible error cannot be predicated upon the submission of equitable issues of fact to a jury."[66]

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Finally, Plaintiffs argue that the Panel may exercise its discretion to craft an efficient trial plan, and that the Panel appropriately exercised that discretion when it ordered the Phase I Trial. We agree that courts managing highly complex litigation have and need "significant flexibility and leeway with regard to their handling of these cases."[67] "[I]nnovative means of trial management" are necessary to expeditiously resolve matters like the Opioid Litigation,[68] which is why a presiding judge is empowered "to adopt any procedures deemed appropriate to fairly and efficiently manage and resolve Mass Litigation."[69] But, those goals cannot override a party's constitutionally-protected right to a jury trial.[70] The Manual for Complex Litigation expressly recognizes this and advises caution in similar circumstances.[71]

Defendants have demonstrated that extraordinary relief is warranted to preserve their right to try Plaintiffs' legal claims to a jury. To the extent that the public nuisance liability determination and Plaintiffs' legal claims present common issues, the order of trial must be such that the jury first determines those common issues. For that reason, we grant in part and deny in part the writ requested in Petition No. 20-0694. We emphasize that the issued writ is narrow and impacts only those issues common to determination of liability for public nuisance and Plaintiffs' legal claims.[72]

IV. CONCLUSION

For the reasons discussed above, we deny the writ sought in Petition No. 20-0751, and grant in part and deny in part the writ sought in Petition No. 20-0694.

PETITION FOR PROHIBITION NO. 20-0751 DENIED PETITION FOR PROHIBITION NO. 20-0694 DENIED IN PART AND GRANTED IN PART.

CHIEF JUSTICE JENKINS and JUSTICE ARMSTEAD dissent in No. 20-0751, concur in part and dissent in part in No. 20-0694, and reserve the right to file separate opinions.

JUSTICE HUTCHISON concurs in Nos. 20-0751 and 20-0694 and reserves the right to file a separate opinion.

JUSTICE WOOTON concurs in No. 20-0751, concurs in part and dissents in part in No. 20-0694, and reserves the right to file a separate opinion.

ARMSTEAD, Justice, concurring, in part, and dissenting, in part, in 20-0694 and dissenting in 20-0751, joined by JENKINS, Chief Justice:

It is undeniable that the opioid crisis in our State

has not only had a devastating impact on our State's children and families, but also on our cities, towns, communities and counties, as neighborhoods seek to combat the impact of rampant substance abuse. The mandamus action currently before the Court brings front and center many of the unique

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legal questions and challenges courts will undoubtedly be asked to resolve as local governments across the country seek redress. The nature and character of the relief sought in the current action does not easily lend itself to clear application of the legal theories of recovery that have governed public nuisance claims for decades. Instead, as is clearly demonstrated by the facts and legal theories presented in this matter, the lines between injunctive and monetary damages – indeed the lines between legal and equitable theories of recovery – are blurred. In applying the traditional theories of public nuisance to the present case, Plaintiffs' efforts to neatly package the requested recovery as "injunctive" relief equates to the proverbial conundrum of attempting to place a square peg into a round hole.

Indeed, the majority clearly recognizes that this matter is not simply a nuisance action but instead includes theories of recovery that so significantly overlap with other monetary and legal causes of action as to require a jury trial. I fully agree with the majority's conclusion that, to proceed as if this case is purely a nuisance action, would deprive Defendants of their fundamental right to have the intertwined claims against them determined by a jury.

However, having determined that Plaintiffs' public nuisance and legal claims are so intertwined that a jury trial is necessary to protect the fundamental rights of Defendants, the majority has inexplicably denied the same Defendants their statutory right to allocate fault pursuant to West Virginia Code § 55-7-13a to 13d (2015 & 2016), (hereinafter, the "2015 Act"). Accordingly, I write separately to concur in the majority's finding that there must be a jury trial and to dissent as to the majority's denial of a writ of prohibition enjoining the Panel from precluding application of the 2015 Act and striking Defendants' Notices of Non-Party Fault.

The 2015 Act encompasses House Bill 2002 which was signed into law on March 5, 2015 and became effective on May 25, 2015. The 2015 Act abolished joint and several liability and adopted comparative fault standards. Even prior to its effective date, this Court recognized that the 2015 Act comprised "a series of new statutes which in fact do purport to fully occupy the field of comparative fault and the consideration of 'the fault of parties and nonparties to a civil action[.]' " *Modular Bldg. Consultants of W. Virginia, Inc. v. Poerio, Inc.* , 235 W. Va. 474, 486 n.12, 774 S.E.2d 555, 567 n.12 (2015). Specifically, the 2015 Act provides:

> In any action based on tort or any other legal theory seeking damages for personal injury, property damage, or wrongful death, recovery shall be predicated upon principles of comparative fault and the liability of each person, including plaintiffs, defendants and nonparties who proximately caused the damages, shall be allocated to each applicable person in direct proportion to that person's percentage of fault.

W. Va. Code § 55-7-13a. As the majority opinion notes, the 2015 Act allows for "assessing percentages of fault" and mandates that the " 'trier of fact shall consider the fault of all persons who contributed to the alleged damages,' including nonparties." (citations in majority opinion omitted). The import of this process is that "any recovery by a plaintiff shall be reduced in proportion to the percentage of fault chargeable to such nonparty." W. Va. Code § 55-7-13d(a)(3). This means that the 2015 Act expressly allows a party to assert an "empty-chair defense."

In order to determine if the claims asserted by Plaintiffs against Defendants are subject to the 2015 Act, it is useful for us to review the nature of such claims and the remedies demanded by the Plaintiffs. Plaintiffs have asserted that their

claims are nuisance claims and have characterized the damages sought to be the costs of "abatement" of the nuisance rather than "damages." However, although the law relating to nuisance claims has been slowly evolving, the general principle is that the remedy for nuisance claims is the abatement of the nuisance itself, rather than monetary damages. Under the traditional definition of abatement, nuisance claims seek court intervention to require one party to stop doing something that affects another. For example, when a business in and of itself is lawful, but the business activity materially disturbs another's use of their property, a court may enjoin the

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activity. *See* Syllabus Point 5, *Snyder v. Cabell* , 29 W. Va. 48, 1 S.E. 241 (1886). Examples of conduct that may be enjoined include merry-go-rounds, *see Town of Davis v. Davis* , 40 W. Va. 464, 466, 21 S.E. 906, 906 (1895), and loud singing, talking, dancing, and opening and shutting doors. *See Medford v. Levy* , 31 W. Va. 649, 651-52, 8 S.E. 302, 303-4 (1888).

As our law of nuisance has evolved, this Court has held that certain damages are recoverable in a nuisance claim:

> 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 Point 5, *McMechen v. Hitchman-Glendale Consol. Coal Co.* , 88 W. Va. 633, 107 S.E. 480 (1921) (emphasis added). However, the damages sought in this matter are not merely "incidental," but could total into the billions of dollars, making them not only consequential but monumental. Indeed, Plaintiffs do not ask that the manufacture, prescription, delivery, marketing, sale, and/or use of these products be enjoined in the State of West Virginia. Instead, they seek monetary compensation for the damages allegedly caused by Defendants.

This effort to characterize monetary damages as merely the cost of "abatement" has been discussed by at least one commentator, observing that:

> Plaintiffs who have sued based upon the theory of public nuisance have also generally mischaracterized the remedies available under public nuisance law. Although public nuisance law permits governments to abate public nuisances, the law does not traditionally award monetary damages as a legal remedy to government plaintiffs.

Nathan R. Hamons, *Addicted to Hope: Abating the Opioid Epidemic and Seeking Redress from Opioid Distributors for Creating A Public Nuisance* , 121 W. Va. L. Rev. 257, 268–69 (2018) (footnotes omitted). This not a new issue, as was recognized more than eighty years ago by the Tennessee Supreme Court:

> The term nuisance, in legal parlance, has a very broad and elastic signification. What is a nuisance must after all be determined upon the facts shown in any particular case. In the case before us, the theories of nuisance and negligence are so closely woven together in the pleadings and in the argument that it is difficult after all to determine which is the gravamen of the action. Both theories are relied upon and neither is wholly separate from the other.

Davidson Cty. v. Blackwell , 19 Tenn.App. 47, 82 S.W.2d 872, 874 (1934).

The majority has correctly held that "Defendants have demonstrated that extraordinary relief is warranted to preserve their right to try Plaintiffs' *legal claims* to a jury. To the extent

that the public nuisance liability determination and *Plaintiffs' legal claims* present common issues, the order of trial must be such that the jury first determines those common issues." (emphasis added). Moreover, the majority bases its decision to require a trial by jury, at least in part, on the fact that Plaintiffs essentially agree that there is an overlap of their legal and equitable claims. The majority expressly finds that "[i]mportantly, Plaintiffs do not disagree with Defendants' characterization of the overlap of their public nuisance claims (liability only) and legal claims, nor do they contend that those other claims are equitable and not legal. And, they do not protest that the legal claims are entirely independent of their public nuisance claims (liability only)."

To the extent that Plaintiffs' complaints clearly allege overlapping legal and public nuisance claims, as the majority clearly found, they also clearly assert claims for damages that fall within the 2015 Act. However, the majority opinion lets stand the Panel's determination that as to the nuisance claims, because such claims are equitable in nature, the 2015 Act does not apply. As the majority cited, Plaintiffs' complaints allege several causes of action for which the factual bases are intertwined with their public nuisance claims. Similarly, Plaintiffs' demands for damages contained within their complaints

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intertwine the remedies sought for such claims. For example, in Paragraph 823 of the Complaint filed by the Doddridge County, Marion County, Monongalia County, Randolph County, and Upshur County Commissions, Plaintiffs seek:

> DAMAGES
>
> 823. As a direct and proximate result of the Defendants' actions, conduct, and omissions, as set forth herein, Plaintiffs have suffered and continue to suffer injury and damages, including but not limited to, incurring excessive costs related to diagnosis, treatment, and cure of abuse and/or addiction or risk of addiction to opioids; bearing the massive costs of these illnesses and conditions by having to provide necessary resources for care, treatment facilities, and law enforcement associated with opioid addiction, abuse and diversion; and property damage.

Significantly, the following paragraph of the County Commission Complaint, which appears to be directed primarily, if not entirely, to Plaintiffs public nuisance claim, demands as follows:

> 824. Plaintiffs have further suffered *economic and noneconomic damages* , including *damages* and costs necessary to eliminate the hazard to public health and safety and to abate, or cause to be abated, the public nuisance caused by the opioid epidemic, as well as any other *damage* as may be available under West Virginia law.

(emphasis added). The County Commission Complaint concludes by demanding both compensatory and punitive damages, as well as pre-judgment and post-judgment interest, costs and attorney fees, and "[a]ny and all further relief as a court and/or jury deem just and proper." Notably absent is any demand for specific performance or request that any action on the part of Defendants be enjoined or abated – demands that are traditional remedies in public nuisance actions.

Likewise, in the Complaint filed by and on behalf of various hospitals,[1] Plaintiffs seek an "Award [of] compensatory damages in an amount sufficient to fairly and completely compensate Plaintiffs for all damages; treble damages; punitive damages; pre-judgment and post-judgment interest as provided by law, and that such interest be awarded at the highest legal rate." As for equitable relief, the Hospital Complaint seeks "equitable relief against Defendants as the Court should find appropriate, including disgorgement of illicit proceeds and other orders." In the Hospital Complaint, Plaintiff hospitals seek "compensatory damages

... to compensate Plaintiffs."

Of particular note is the fact that, in Paragraph 824 of the County Commission Complaint, Plaintiffs state that they have suffered "economic and noneconomic damages" related to their public nuisance claim. Not only is Plaintiffs' use of the word "damages" significant, these demands track, almost verbatim, the definition of "Compensatory Damages" contained in the 2015 Act, which states: " 'Compensatory Damages' means damages awarded to compensate a plaintiff for economic and noneconomic loss." W. Va. Code § 55-7-13b.

As cited by Defendants in their Response in Opposition to Plaintiffs' Motion to Strike Defendants' Notices of Non-Party Fault, filed before the Panel below, the United States Supreme Court has held that the distinction between the term "damages" and other monetary relief is largely "semantic." *Granfinanciera, S.A. v. Nordberg* , 492 U.S. 33, 49 n.7, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989). Further, the Supreme Court has also held that "[a]lmost invariably ... 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,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty."

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Great-W. Life & Annuity Ins. Co. v. Knudson , 534 U.S. 204, 210, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002).

The majority also discusses this Court's decision in *Realmark Dev., Inc. v. Ranson* , 214 W. Va. 161, 588 S.E.2d 150 (2003) when reaching its determination that Defendants are entitled to a jury trial. The holding in *Realmark,* however, also supports a finding that the 2015 Act applies in this case as well. *Realmark* involved a claim of unjust enrichment, which this Court found is "based on the principles of equity." *Id.* , 214 W. Va. at 164, 588 S.E.2d at 153. However, the *Realmark* Court held that "the remedy sought in this case is a money judgment and, thus, is governed by law. In other words, 'unjust enrichment' ... is but the equitable reason for requiring payment for value of goods and services received." *Id*. Similarly, in the present case, the mere fact that Plaintiffs have characterized their demand for damages as "abatement" of a public nuisance does not diminish the fact that they are demanding compensatory damages as envisioned by the 2015 Act.[2]

The majority is correct in its determination that the presence of overlapping legal and equitable claims removes this case from the traditional public nuisance scenario and requires that Defendants be afforded their fundamental right to a trial by jury. However, the majority's denial of those same Defendants' statutory rights to file notices of non-party fault and avail themselves of the provisions of the 2015 Act is inherently inconsistent with its holding that they are entitled to a jury trial. If, as the majority has determined, "Defendants have demonstrated that extraordinary relief is warranted to preserve their right to try Plaintiffs' legal claims to a jury," then such right to extraordinary relief should also extend to their statutory right, as part of such jury trial, to identify nonparties they believe may bear some responsibility for the actions alleged by Plaintiffs. This is particularly true in light of the fact that the damages alleged by Plaintiffs, despite their characterization of such damages as abatement, clearly fall within the definition of compensatory damages contained in the 2015 Act. Damages are damages and Plaintiffs seek to receive monetary compensation for their nuisance claims. There is no discernable distinction between damages sought in legal claims and damages sought in Plaintiffs' "equitable" claims for the purposes of the 2015 Act.

For the reasons stated above, the 2015 Act applies to Plaintiffs' claims at issue in this request for extraordinary relief and Defendants should be allowed to proceed to trial, allowing the jury to consider the notices of non-party fault they previously filed. Therefore, I respectfully concur with the majority's conclusion that

Defendants are entitled to a trial by jury of their public nuisance claims and I dissent as to the majority's denial of an extraordinary writ to prohibit the Panel from enforcing its order finding the 2015 Act to be inapplicable to Plaintiffs' public nuisance claims and striking Defendants' notices of non-party fault.

I am authorized to state that Chief Justice Jenkins joins me in this separate opinion.

Justice Hutchison, concurring:

I write separately to applaud the majority for a well-researched and well-reasoned opinion that tries, in some small measure, to bring order to the legal chaos caused by the opioid crisis. It was a challenge of the highest order for the majority to cogently address the claims raised by the defendants, the companies that made, distributed, and dispensed opioid drugs in West Virginia. To be blunt, the opioid crisis is "a man-made plague, twenty years in the making. The pain, death, and heartache it has wrought cannot be overstated." [1]

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With a deft hand, the majority opinion addresses the theoretical concerns raised by the defendants while simultaneously leaving the Mass Litigation Panel with the freedom to move this case forward toward a just conclusion.

As this case demonstrates, the opioid crisis has triggered a complex maze of litigation that seeks to place responsibility for the epidemic on the companies that profited from making and selling the opioid medications. The plaintiffs in this case are various cities, counties, and hospitals seeking legal compensation for past out-of-pocket losses they allege were caused by the defendants pumping opioids into their communities. The plaintiffs also seek equitable remedies, including injunctions to stop the frenetic distribution of opioids into West Virginia. Additionally, the plaintiffs seek an equitable solution from the defendants to abate widespread opioid addiction, to fix existing and future opioid-related problems in their communities, and to right what the plaintiffs see as a foundering ship. The plaintiffs filed their lawsuit, the case was referred to the Mass Litigation Panel, and the motions started flying. The Mass Litigation Panel is a group of circuit judges trained and well-experienced in shepherding complex cases to a fair conclusion. In my two-and-a-half decades as a circuit judge, my service included over two decades of service on the panel. This opioid case is exceptionally complicated, and I sympathize with the trial judges on the panel rassling with the dozens upon dozens of issues being lobbed their way by the parties' lawyers.

A careful reading of the majority's opinion makes it pretty clear that the defendants are, to use a cliché, just throwing spaghetti at the wall and hoping something sticks. By my count, this case is based upon the sixth and seventh petitions for writs of prohibition filed by the defendants. Instead of these petitions being helpful to the process and focusing the trial judges on a speedy and fair resolution, the petitions appear to be roadblocks to keep the trial judges from ever setting the case for a trial on the merits.[2]

My central concern when I saw the defendants' petitions on this Court's docket is simple: this case cannot make any progress beyond the complaint stage. This Court has said that it will not micromanage the work of circuit judges. Nor will it micromanage the work of the judges who serve on the Mass Litigation Panel. These judges are in the trenches grappling with questions whose answers depend on the varied and unique facts of the case. Judges make decisions based on the situation as they see it at that moment, but just as quickly judges are allowed to change their mind when presented with new facts, new arguments, and new legal precedent. Yet time and again, lawyers dissatisfied with the ruling of a judge will petition this Court to body-check the judge and disrupt the course of the case below.

The majority's opinion is brilliant because it navigates the problems created by the defendants' petitions and expresses the unquestionable principle that our system of justice is founded upon jury trials. Two-and-a-half centuries ago, Blackstone extolled the value

of juries in his *Commentaries* as a principal tool in "secur[ing] the just liberties of this nation for a long succession of ages."[3]

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He noted that, as far back as the Magna Carta in 1215, juries were "more than once insisted on as the principal bulwark of our liberties" because juries are "excellently contrived for the test and investigation of truth."[4] Blackstone also observed that "it is the most transcendent privilege" and "the glory of the English law" that a citizen "cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of ... his neighbors and equals."[5] The majority opinion applies these fundamental principles and concludes, "To the extent that the public nuisance liability determination and Plaintiffs' legal claims present *common issues* , the order of trial must be such that the jury first determines those *common issues.* " (Emphasis added). I have no qualms with this general statement or application of the law.

Where I, perhaps, stand separate from the majority opinion is on the question of timing. It is so early in the development of this case that no one really knows what "common issues" are involved, or the parameters of either the plaintiffs' nuisance action or their tort claims. As I said, this case has not made it past the pleading stage. The judges on the Mass Litigation Panel cannot begin to outline a trial plan because, again, the defendants keep disrupting the progress of the case by filing petitions under this Court's original jurisdiction. To clarify, the parties have not conducted discovery nor have they identified their trial evidence or witnesses. And, importantly, the plaintiffs have not yet offered the judges on the panel a clear outline of the issues they want to resolve by trial. Hence, the defendants' arguments in this case "present[ ] a hypothetical controversy" that, typically, this Court would "not resolve with an advisory opinion." *State ex rel. Perdue v. McCuskey* , 242 W. Va. 474, 479, 836 S.E.2d 441, 446 (2019). As we once said in Syllabus Point 2 of *Harshbarger v. Gainer* , 184 W. Va. 656, 403 S.E.2d 399 (1991), "[c]ourts are not constituted for the purpose of making advisory decrees or resolving academic disputes," yet for all intents and purposes, the majority opinion has done nothing more than eloquently resolve academic questions posed by the defendants.

Take, for instance, the defendants' arguments regarding the plaintiffs' request in their complaint for abatement. "Abatement" is an equitable form of relief and is simply the "act of eliminating or nullifying" whatever is causing the public nuisance. Bryan A. Garner, *Black's Law Dictionary* (11th ed. 2019). "Jurisdiction in equity to abate nuisances is undoubted and of universal recognition." *State v. Ehrlick* , 65 W. Va. 700, 705, 64 S.E. 935, 937 (1909). The law is clear that "[a]n activity that diminishes the value of nearby property and also creates interferences to the use and enjoyment of the nearby property may be abated by a circuit court applying equitable principles." Syl. pt. 12, *Burch v. Nedpower Mount Storm, LLC* , 220 W. Va. 443, 647 S.E.2d 879 (2007). The common law of equity offers judges the opportunity to formulate creative remedies to abate a nuisance, such as clean-up costs, or a common law fund to restore property values diminished by a nuisance. *See , e.g.* , Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law* , 34 B.C. Envtl. Aff. L. Rev. 1, 27 (2007) (discussing creation of an equitable fund so that "plaintiffs would have a remedy available that would allow for direct cleanup and full use of their property in the post-restoration future[.]"). In this case, neither the parties nor the judges have explored the scope of potential remedies because of the delays caused by the filing, by the defense, of these several petitions for writs of prohibition.

The defendants insist they have a right to a jury trial to resolve the plaintiffs' equitable claim that the defendants created a public nuisance. The defendants claim that because

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they might have to open their pocketbooks and fork out cash to abate and fix the nuisance that they supposedly created, the plaintiffs are actually alleging a legal claim that must be tried

to a jury. This argument is nonsense. A judge has broad powers to halt and correct a nuisance. Merely because there is a monetary cost to the judge's chosen remedy does not create a right to a jury trial. For instance, an injunction, which tells a defendant to stop doing something, can carry monetary costs for the defendant. Bankruptcy actions, which involve divvying up money and other assets of the bankrupt debtor, are basically equitable and handled exclusively by a judge, not a jury.[6] The right to a jury trial arises when there is no equitable way to halt or correct the harm created by the defendant, that is, when the harm is done and all that is left to the plaintiff is to assert a legal claim (like one for negligence) and demand cash damages that substitute for the harm inflicted.

The majority opinion gave voice to the defendants' questions about abatement but refused to give an answer. The majority notes that the defendants' arguments are being raised "in the extremely early stages of these cases," and that the answer lies in the facts and arguments yet to be made by the parties. And, wisely, the opinion leaves it at that.

In summary, the defendants' arguments in this case about abatement (or anything else) were both premature and wholly academic. The majority opinion recites these arguments and, despite the majority's decision to issue a modified writ of prohibition, effectively leaves *all* of the arguments raised by the defendants for future resolution. The majority opinion does not require that the panel hold a jury trial; it merely says that, if the plaintiffs insist on entangling their legal and equitable claims, then the defendants are entitled to assert their right to a jury trial of the entangled issues. The judges on the Mass Litigation Panel should recognize that when they again take back the reins of this case. The panel should move this case forward toward a resolution based upon the facts and law as they *actually* exist, and not simply on hypothetical problems that the lawyers *claim* exist.

One final concern I have with this case is the defendant manufacturers' attempt to make an "empty chair" argument to rebut the plaintiffs' claim that the defendants should be responsible for creating a public nuisance. The defendants seek to blame "non-parties," entities that were not sued by either the plaintiffs or the defendants: pharmacies, pharmacists, doctors who prescribed the defendants' drugs, individuals who bought the defendants' drugs but then illegally sold them to people suffering from addition, and other drug manufacturers. The parties have not yet begun discovery, yet the defendants' petition demands that this Court bind the trial judges to a specific evidentiary ruling allowing the defendants to deflect blame onto dozens of other unknown, unnamed, un-sued entities who are nowhere near to the courtroom. The defendants' argument is absurdly premature and was properly rejected wholesale by the majority opinion.

Moreover, the defendants insist that West Virginia Code § 55-7-13d binds the trial judges in this case. I disagree. In 1979, this Court adopted the common law principle of comparative fault into tort actions and ruled that "[a] party is not barred from recovering damages in a tort action so long as his *negligence* or fault does not equal or exceed the combined *negligence* or fault of the other parties involved in the accident." Syl. pt. 3, *Bradley v. Appalachian Power Co.* , 163 W. Va. 332, 256 S.E.2d 879 (1979) (emphasis added). When the Legislature enacted West Virginia Code § 55-7-13d in 2015, it sought to alter the common law of "principles of comparative fault" governing tort actions. W. Va. Code § 55-7-13a(b) (2015).[7] If the plaintiffs

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were seeking to hold the defendants at fault for *negligently* harming the plaintiff cities, counties, and hospitals, and the parties were able to develop evidence upon which a jury could base a reasoned comparative negligence verdict, then it might be proper for a trial court to permit the jury to allocate fault between parties and non-parties under West Virginia Code § 55-7-13d.

However, as this opioid case was presented to this Court in the defendants' petitions, the plaintiffs are *not* asking for negligence-based damages or an allocation of fault for that

negligence. Instead, the plaintiffs are asking solely for a determination of whether the defendants created a public nuisance, which is broadly defined as "an unreasonable interference with a right common to the general public." *Restatement (Second) of Torts* § 821B (1) (1979). *See also* , *Hark v. Mountain Fork Lumber Co.* , 127 W.Va. 586, 595–96, 34 S.E.2d 348, 354 (1945) ("A public nuisance is an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons."). Whether a defendant unreasonably interfered with the rights of citizens to enjoy their property and livelihoods is generally a question with a "yes" or "no" answer. There is no equivocation in the answer, and it certainly does not involve any allocation of negligence or fault. West Virginia Code § 55-7-13d just does not apply to actions for a public nuisance.

Furthermore, West Virginia Code § 55-7-13d is clear that in order for an entity to be a "non-party" in a negligence action, the actual parties must first make a bona fide attempt to sue and serve those entities and so try (but fail) to make them actual parties to the suit. To read the statute otherwise is to invite every defendant in every civil suit to flail about, blaming strangers for harms caused by the defendant without giving the stranger an opportunity to defend his or her reputation. To paraphrase the cliché, spaghetti will be thrown at strangers with hope that it sticks. There is nothing in the record of this case to suggest that the parties ever tried, let alone failed, to bring into this lawsuit the dozens of entities upon whom the defendants now seek to foist fault. By its own terms, the statute cannot be relied upon by the defendants in this case.

Hence, as an academic question, the judges on the panel were absolutely correct that West Virginia Code § 55-7-13d has no application to the public nuisance action brought by the plaintiffs. Likewise, the majority opinion properly refused to adopt the defendants' assertions regarding the statute.

Again, I express my admiration for the finesse applied by the majority opinion to the complicated, speculative questions raised by the defendants in their petitions. The majority opinion both upholds the fundamental right to a jury trial, while simultaneously preserving the ability of the trial court to formulate whatever trial plan is necessary to expeditiously resolve the parties' dispute.

Accordingly, I respectfully concur.

Wooton, Justice, concurring, in part, and dissenting, in part:

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I concur in the Court's judgment that the Mass Litigation Panel's decision to hold a bench trial on the respondents' public nuisance claims was not "so plainly in contravention of a clear legal mandate as to merit issuance of the extraordinary remedy of prohibition." However, I do not concur in the Court's analysis, which gives far too much credence to legal arguments whose resolution, at least in the early stages of this litigation, should be left in the capable hands of the Panel. Further, I respectfully dissent from the remainder of the Court's decision, for the reasons that follow.

For more than a decade, West Virginia Trial Court Rule 26 has provided "a process for efficiently managing and resolving mass litigation" by referral of such litigation to a Mass Litigation Panel. The Panel consists of seven highly qualified and experienced active or senior status circuit court judges — men and women willing and able to take on the formidable task of handling these complex cases, with circuit judges taking on the task in addition to handling the myriad other cases on their dockets, including civil and criminal cases, abuse and neglect cases, original jurisdiction matters, appeals from family court and magistrate court, and all of the administrative duties that fall within their remit. In order to enable the Panel to accomplish the duties assigned to its members, Trial Court Rule 26 was developed to equip members with the tools they require to handle complex, multi-party, multi-issue litigation – and the authority to utilize those tools. In particular, Rules 26.05(a) and (f) require the Panel members to "develop and

implement case management and trial methodologies to fairly and expeditiously resolve Mass Litigation referred to the Panel by the Chief Justice[,]" and to "take such action as is reasonably necessary and incidental to the powers and responsibilities conferred by this rule or by the specific directive of the Chief Justice[.]" Consistent with this broad grant of authority, this Court has held that the "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." *In re: Tobacco Litig.* , 218 W. Va. 301, 306, 624 S.E.2d 738, 743 (2005) (citing *State ex rel. Mobil Corp. v. Gaughan* , 211 W. Va. 106, 111, 563 S.E.2d 419, 424 (2002)).

In the instant case, however, the majority has seen fit to wade into the litigation from lofty chambers situated high above the arena in which this complex case, involving dozens of litigants and dozens of attorneys, will actually be tried. The majority has determined that the Panel is required to hold a jury trial on all issues common to the respondents' equitable *and* legal claims before it holds a bench trial on their purely equitable public nuisance claim, which necessarily leads to the conclusion — although the majority opinion is somewhat opaque on this point — that the Panel must reconsider its previous denial of petitioners' motions for leave to file notices of third party fault pursuant to West Virginia Code §§ 55-7-13d(a)(1), (2) (2016). In this latter regard, petitioners state that the non-parties may include prescribing practitioners; individuals involved in criminal drug trafficking; users of illegally or wrongfully obtained prescription drugs; hospitals; pharmacy benefit managers; federal, state and local government entities charged with regulation and/or enforcement of controlled substances; health insurers; wholesale pharmaceutical distributors; and pharmaceutical manufacturers. Thus, the trial mandated by the majority's opinion will feature dozens of defendants attempting to shift the blame to dozens — perhaps hundreds — of other entities and individuals. One can only imagine the verdict form that the jury will be asked to navigate at the conclusion of a trial which can reasonably be expected to last for years.

It has long been established in our law that public nuisance claims are equitable in nature, *Town of Weston v. Ralston* , 48 W. Va. 170, 36 S.E. 446 (1900), and thus triable by the court without a jury. *Weatherholt v. Weatherholt* , 234 W. Va. 722, 769 S.E.2d 872, 874 (2015).[1] Petitioners do not really argue

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with this general proposition; rather, they contend that because respondents are seeking a monetary recovery for the costs of preventing and/or abating the nuisance, the damages sought are legal, not equitable. The majority deems this a close question, despite the fact that the weight of authority in this country is to the contrary. *See , e.g. , In re Nat'l Prescription Opiate Litig.* , No. 1:17-MD-2804, 2019 WL 4194272, at *3 (N.D. Ohio Sept. 4, 2019) ("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."). The majority further overlooks the fact that the appendix record in this case does not support the petitioners' characterization of the damages sought as legal. Although the respondents' description of the damages in their complaint can fairly be characterized as vague — "damages and costs necessary to eliminate the hazard to public health and safety and to abate, or cause to be abated, the public nuisance caused by the opioid epidemic" — West Virginia is a notice pleading state and it is early days in the underlying litigation. As the majority acknowledges in its opinion at note 56, this Court's Rules of Civil Procedure give a defending party a "liberal opportunity for discovery" to ascertain the particulars of the opposing party's claims both as to liability and damages. *See Sticklen v. Kittle* , 168 W. Va. 147, 163, 287 S.E.2d 148, 157 (1981). In the instant case, given the Presiding Judge's grant of a year for the parties to engage in discovery prior to trial on the public nuisance claims, there would have been ample time for petitioners to pin

respondents down on the particulars of damages with interrogatories, requests for production, and depositions: what form(s) will the abatement take? How will the funds be distributed, to whom, and for what? How are you putting a price tag on these costs? Thereafter, the court could have required respondents to describe the damages they seek, with particularity, in their pre-trial memorandum, all of which would have allowed the court to sort out the equitable wheat from the legal chaff before the trial begins. I am in complete accord with the majority opinion on this point.

All of this is effectively made moot, however, by the majority's holding that the petitioners are entitled to a jury trial on all factual and legal issues that are common to the equitable and legal claims, prior to a bench trial on the equitable claims. I acknowledge that there is precedent to this effect:

> "The usual practice is to try the legal issues to the jury and to try the equitable issues to the court. Where there are some issues common to both the legal and equitable claims, the order of trial must be such that the jury first determines the common issues. The court may, if it chooses, submit all the issues to the jury. There is no constitutional right to a trial without a jury and reversible error cannot be predicated upon the submission of equitable issues of fact to a jury." We adhere to the principles so expressed[.]

W. Va. Hum. Rts. Comm'n v. Tenpin Lounge, Inc. , 158 W. Va. 349, 354, 211 S.E.2d 349, 352—53 (1975) (citing 2B Barron and Holtzoff, Federal Practice and Procedure § 873, p. 32 (Rules ed. 1961)). However, in mass litigation cases where this Court's stated objective is to give Panel judges "flexibility and leeway with regard to their handling of these cases[,]" *In re: Tobacco Litig.* , 218 W. Va. at 306, 624 S.E.2d at 743, it is inimical to those goals for us to step in — particularly here, at the pleading stage[2] of a case which the majority concedes may well be the most complex in this State's history — to mandate procedures that the Panel must follow. At this point, before the first deposition has been taken or the first interrogatory answered, the issues alleged to be common to

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both the equitable and legal causes of action are described by the petitioners in words that could most charitably be termed general. The bottom line: it's simply too early to know what the disputed issues of material fact (if any) will be, and it's simply too early for this Court to inject itself into the litigation.

Again, I would defer to the wisdom of the judicial officers entrusted with the front-line responsibility of handling mass litigation to devise procedures and methods for accomplishing the stated goals of the Mass Litigation Panel, and to do so in a manner that preserves petitioners' right to a jury trial on all issues triable to a jury. The majority's decision, which effectively strips the Panel of its authority to "take such action as is reasonably necessary and incidental to the powers and responsibilities conferred by [Trial Court Rule 26.05]," will be seen as an invitation for every disappointed litigant in every mass litigation case to challenge every decision of the Panel on a writ.

Accordingly, I concur, in part, and respectfully dissent, in part.

Notes:

[1] *See* W. Va. Trial Court Rule 26.06(c)(3) ("The Chief Justice, whether acting directly upon the motion or upon the recommendation of the Panel member or members, shall enter an order either granting or denying the motion, or providing modified relief. The order shall be filed with the Clerk of the Supreme Court of Appeals who shall send a copy of the order to the Panel Chair and to the clerk(s) of the circuit court(s) where the actions are pending for service on all parties."). This Court also ordered that all then-pending, later-filed, and later-remanded cases involving the same or similar common questions of law or

fact be joined before the Panel. That order resulted in the Opioid Litigation, from which the petitions before the Court arise.

[2] 212 W. Va. 752, 575 S.E.2d 362 (2002).

[3] The State was not then a part of the Opioid Litigation. The Panel permitted it to join the mass litigation on February 19, 2020.

[4] Plaintiffs represent that McKesson Corp. has stipulated to a non-jury trial of the public nuisance claims against it. According to briefing before the Panel, this came about after certain Plaintiffs agreed to limit their claims to public nuisance in exchange for McKesson Corp.'s consent to a bench trial. In addition, in "All Plaintiffs' Consolidated Memorandum of Law In Opposition to Certain Defendants' (1) Motion for Clarification or Reconsideration of Order Regarding Trial Liability for Public Nuisance; (2) Motion for Clarification or Reconsideration of Orders Regarding Public Nuisance Trial Plan; (3) Motion for Dismissal of County and Municipal Plaintiffs' Public Nuisance Claims for Lack of Standing; and (4) Motion for Dismissal of the Hospital Plaintiffs' Public Nuisance Claims for Lack of Standing," Plaintiffs stated that they "remain[ed] willing to enter into [such a] stipulation with all Defendants."

[5] W. Va. R. Civ. P. 39(a) ("When trial by jury has been demanded as provided in Rule 38 or a timely motion or request therefor has been made under subdivision (b) of this rule, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded or requested shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the State.").

[6] W. Va. Const. art. III, § 13 ("In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six persons. No fact tried by a jury shall be otherwise reexamined in any case than according to rule of court or law.").

The right to a jury trial in federal courts, guaranteed by the Seventh Amendment, has not been extended to states through the Fourteenth Amendment. *See Bostic v. Mallard Coach Co., Inc.* , 185 W. Va. 294, 301, 406 S.E.2d 725, 732 (1991). "However, the interpretation of that amendment by the U.S. Supreme Court can certainly inform our understanding of our similar state jury trial guarantee." *Bishop Coal Co. v. Salyers* , 181 W. Va. 71, 76–77, 380 S.E.2d 238, 243–44 (1989).

[7] Page 7 of the Panel's order of February 19, 2020 (quoting *Gov. Justice Issues Statement on President Trump's Declaration of National Public Health Emergency* Office of the Governor Jim Justice (Aug. 11, 2017) available at https://governor.wv.gov/News/press-releases/2017/Pages/Gov.-Justice-Issues-Statement-on-President-Trump's-Declaration-of-National-Public-Health-Emergency.aspx (last visited March 3, 2021)).

[8] The title page of the Motion for Reconsideration states that it applies to all cases.

[9] Defendants did not concede that Plaintiffs' public nuisance claims were equitable.

[10] 158 W. Va. 349, 211 S.E.2d 349 (1975).

[11] *See, e.g.* , *Beacon Theatres, Inc. v. Westover* , 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959).

[12] Defendants also argued that the monetary relief sought by Plaintiffs could not be deemed "incidental" to any equitable relief, as this Court's precedent, *McMechen, et al. v. Hitchman-Glendale Consolidated Coal Co. et al.* , 88 W. Va. 633, 107 S.E. 480 (1921), conflicted with more recent decisions of this Court and the Supreme Court of the United States. Defendants also distinguished proceedings in the Federal

District Court of the Southern District of West Virginia, in which three distributors had agreed to a bench trial, and disputed Plaintiffs' ability to secure a prospective remedy insofar as they alleged a temporary and continuing public nuisance.

[13] Defendants also challenged the Phase I Trial on due process grounds, disputed the practicality of conducting a single trial of all public nuisance claims (liability only), advocated for a "bellwether" trial of the City of Clarksburg and Harrison County's claims and appropriate discovery, and contested the Panel's ability to bifurcate the liability for public nuisance from causation. Those issues are not now before the Court.

[14] *See* W. Va. Code § 55-7-13d(a)(2) (2015) ("Fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice no later than one hundred-eighty days after service of process upon said defendant that a nonparty was wholly or partially at fault. Notice shall be filed with the court and served upon all parties to the action designating the nonparty and setting forth the nonparty's name and last-known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault ....").

The notice filed by AmerisourceBergen Drug Corporation, for example, identified categories of nonparties that it contended were wholly or partially at fault for the harm alleged by Plaintiffs or any recovery in the case. These categories are, among others, nonparty pharmacies, nonparty pharmacists, nonparty prescribing practitioners, nonparty individuals involved in illegal drug sales, and nonparty pharmaceutical manufacturers.

[15] When the motion was filed, no party that had been sued by the State had filed a notice of nonparty fault. The State, however, supported the motion to strike.

[16] W. Va. Code § 46A-1-101, et seq.

[17] The Panel also ruled that the Phase I Trial (nuisance liability) would include the determination of causation. The Panel observed that both Plaintiffs and Defendants contended that causation should be part of the Phase I Trial (nuisance liability).

[18] *See* W. Va. Code § 55-7-13c(a) (stating that "[i]n any action for compensatory damages, the liability of each defendant for compensatory damages shall be several only and may not be joint").

[19] Petitioners in Petition No. 20-0751 do not challenge that portion of the August 4, 2020, order in which the Panel found that the State's WVCCPA claim was not subject to the 2015 Act.

[20] *State ex rel. W. Va. Fire & Cas. Co. v. Karl* , 199 W. Va. 678, 683, 487 S.E.2d 336, 341 (1997).

[21] Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver* , 160 W. Va. 314, 233 S.E.2d 425 (1977).

[22] *State ex rel. Vanderra Res., LLC v. Hummel* , 242 W. Va. 35, 40, 829 S.E.2d 35, 40 (2019) (quoting *Am. El. Power Co. v. Nibert* , 237 W. Va. 14, 19, 784 S.E.2d 713, 718 (2016)).

[23] *State ex rel. Owners Ins. Co. v. McGraw* , 233 W. Va. 776, 780, 760 S.E.2d 590, 594 (2014).

[24] Syl. Pt. 10, in part, *State ex rel. Lynn v. Eddy* , 152 W. Va. 345, 163 S.E.2d 472 (1968).

[25] Syl. Pt. 2, in part, *State ex rel. W. Va. Truck Stops, Inc. v. McHugh* , 160 W. Va. 294, 233 S.E.2d 729 (1977). *See* Louis J. Palmer, Jr. & Robin Jean Davis, Litigation Handbook on West Virginia Rules of Civil Procedure 1044 (2017) ("A denial of a jury demand as a matter of right may be challenged through a writ of mandamus.").

[26] Syl. Pt. 4, in part, *State ex rel. Hoover v. Berger* , 199 W. Va. 12, 483 S.E.2d 12 (1996).

[27] Syl. Pt. 4, in part, *id.* (emphasis added).

[28] *Little v. Little* , 184 W. Va. 360, 362, 400 S.E.2d 604, 606 (1990).

[29] *See* W. Va. R. Civ. P. 2 ("There shall be one form of action to be known as 'civil action'.") (Eff. July 1, 1960; amended eff. Apr. 6, 1998).

[30] *E. Shepherdstown Dev., Inc. v. J. Russell Fritts, Inc.* , 183 W. Va. 691, 695, 398 S.E.2d 517, 521 (1990) (citing Syl. Pt. 1, *Tenpin Lounge* , 158 W. Va. at 349, 211 S.E.2d at 349) (emphasis in original).

[31] *Realmark Dev., Inc. v. Ranson* , 214 W. Va. 161, 164, 588 S.E.2d 150, 153 (2003).

[32] *See Bishop Coal Co.* , 181 W. Va. at 77, 380 S.E.2d at 244 ("The test most often applied by the Supreme Court under its expansive reading of the seventh amendment is whether the relief sought is essentially legal (e.g. money damages) or equitable (e.g. injunctive relief).").

[33] *Realmark Dev.* , 214 W. Va. at 164, 588 S.E.2d at 153 (internal quotation omitted).

[34] West Virginia Code § 55-7-13b (2015) defines "compensatory damages" as "damages awarded to compensate a plaintiff for economic and noneconomic loss."

[35] *Id*. § 55-7-13c(a) (2015).

[36] *Id*.

[37] *Id*. § 55-7-13d(a)(1) (2015).

[38] *Id*. § 55-7-13d(a)(2), (3).

[39] *Realmark Dev.* , 214 W. Va. at 164, 588 S.E.2d at 153.

[40] *Town of Weston v. Ralston* , 48 W. Va. 170, 194, 36 S.E. 446, 456 (1900) (Brannon, J., concurring).

[41] *N.A.A.C.P. v. AcuSport, Inc.* , 271 F. Supp. 2d 435, 467 (E.D. N.Y. 2003). The court distinguished these cases from the public nuisance claim before it because the latter did not seek damages.

[42] *See, e.g.* , *Duff v. Morgantown Energy Assocs. (M.E.A.)* , 187 W. Va. 712, 716, 421 S.E.2d 253, 257 (1992) (in the course of considering whether trial court properly enjoined alleged private and public nuisance, stating that "[w]hile courts generally grant injunctions to abate existing nuisances, there is also authority for courts to enjoin prospective or anticipatory nuisances").

[43] *Compare United States v. Price* , 688 F.2d 204, 213 (3d Cir. 1982) (payments to fund diagnostic study were appropriate component of injunctive relief because "[i]t is not unusual for a defendant in equity to expend money in order to obey or perform the act mandated by an injunction. Injunctions, which by their terms compel expenditures of money, may similarly be permissible forms of equitable relief. In all cases the question the court must decide is whether, considering all of the circumstances, it is appropriate to grant the specific relief requested") *with Jaffee v. United States* , 592 F.2d 712, 715 (3d Cir. 1979) (plea for injunction ordering United States to provide medical care for soldiers exposed to radiation was a "disguised claim for damages").

[44] *Realmark Developments* , 214 W. Va. at 164, 588 S.E.2d. at 164.

[45] *Thompson v. Town of Alderson* , 215 W. Va. 578, 581, 600 S.E.2d 290, 293 (2004).

[46] *Granfinanciera, S.A. v. Nordberg* , 492 U.S. 33, 49, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989).

[47] *Great-W. Life & Annuity Ins. Co. v. Knudson* , 534 U.S. 204, 218, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002).

[48] *See* Syl. Pt. 1, *Wilt v. Crim* , 87 W. Va. 626, 105 S.E. 812 (1921).

[49] *See, e.g.* , *Curtis v. Loether* , 415 U.S. 189, 196, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974) (indicating that the Supreme Court of the United States would not "go so far as to say that any award of monetary relief must necessarily be 'legal' relief").

[50] *In re Nat'l Prescription Opiate Litig.* , No. 1:17-MD-2804, 2019 WL 4043938, at *1 (N.D. Ohio Aug. 26, 2019).

[51] *In re Opioid Litigation* , No. 400000/2017 (Sup.

Ct. New York, May 19, 2020).

[52] *State of Oklahoma v. Purdue Pharma L.P.* , No. CJ-2017-816 (D. Ct. of Cleveland Cty., Ok. Apr. 16, 2019).

[53] *State ex rel. Vanderra Res., LLC* , 242 W. Va. at 40, 829 S.E.2d at 40 (internal quotation omitted).

[54] Defendants ask the Court to intervene in the extremely early stages of these cases. West Virginia is a notice pleading state and the underlying litigation is in its early days. *See, e.g.* , *Sticklen v. Kittle* , 168 W. Va. 147, 163, 287 S.E.2d 148, 157 (1981) ("Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.") (internal quotation omitted). In discovery, Defendants will have the opportunity to ascertain the particulars of Plaintiffs' public nuisance theory and abatement remedy. Then, the Panel may require Plaintiffs to describe the claims and their remedy, with particularity, in their pre-trial memoranda. That description may clarify the application of the authorities discussed above to the public nuisance claims and the abatement remedy.

[55] As noted by the Solicitor General during oral argument, this alternative argument—and so our conclusion, below, to grant in part Petition No. 20-0694—does not apply to the State, which has brought claims for public nuisance and violation of the WVCCPA. As noted above, that portion of the Panel's August 4, 2020, order finding that the State does not seek damages for its claim under the WVCCPA is not challenged in this instance.

[56] Because we have determined that the Panel's ruling—Plaintiffs' public nuisance claims are not legal claims for damages—is not a clear error mandating an extraordinary remedy, we proceed to address Defendants' alternative argument. By analyzing Defendants' alternative argument, we do not endorse or shield from future review the Panel's ruling as to the non-legal nature of Plaintiffs' public nuisance claims and abatement remedy.

[57] W. Va. R. Civ. P 18(a) ("Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as the party has against an opposing party.").

[58] *Tenpin Lounge* , 158 W. Va. at 351, 211 S.E.2d at 351.

[59] *Id.* at 352, 211 S.E.2d at 351.

[60] *Id.* at 353, 211 S.E.2d at 352.

[61] *Id.* at 354, 211 S.E.2d at 352.

[62] *Id.* at 354–55, 211 S.E.2d at 352–53.

[63] During oral argument, counsel for city and county Plaintiffs acknowledged that there are legal claims in the cities' and counties' complaints. The appendix record does not include a complete complaint filed by a hospital plaintiff; but, the hospital plaintiffs do not oppose Defendants' representations that the complaints include legal claims, in addition to the hospitals' claims for public nuisance.

[64] *Compare* 9 Charles Allen Wright & Arthur R. Miller , Federal Practice and Procedure § 2338 (4th ed. 2008) (stating that "there is no difficulty in giving the judge discretion to decide trial order if the legal issues are independent of the equitable issues, so that resolution of one will not affect the determination of the other. In cases of that type, the question merely is one of the court's administrative convenience and the judge's sense of how the trial of the case should proceed.").

[65] *Id.* at § 2305 (emphasis added). *See also In re Nat'l Prescription Opiate Litig.* , 2019 WL 4621690, at *3 ("Also supporting the decision to try nuisance liability to the jury is Supreme Court authority holding clearly that all facts found by a jury in adjudicating legal claims, which are also relevant to the plaintiffs' equitable claims, are binding on a court's

subsequent determination of those equitable claims.").

[66] *Tenpin Lounge* , 158 W. Va. at 354, 211 S.E.2d at 53 (internal quotation omitted). Plaintiffs encourage us to adopt the Panel's stance that *Camden-Clark* , 212 W. Va. at 752, 575 S.E.2d at 362, is limited to the employment context, so the case is neither controlling nor persuasive. While we do not agree that our holding in *Camden-Clark* cannot apply outside the employment context, we also recognize that the case was, in part, driven by the Court's concern that an employer could "game" the system if permitted to "seek an injunction before taking action adverse to an employee, and thus greatly reduce the likelihood that a jury would ever hear that employee's potential counterclaims." *Id.* at 761, 575 S.E.2d at 371. Even if *Camden-Clark* is distinguishable, *Tenpin Lounge* still squarely applies.

[67] *State ex rel. Mobil Corp. v. Gaughan* , 211 W. Va. 106, 111, 563 S.E.2d 419, 424 (2002) (citing *State ex rel. Appalachian Power Co. v. MacQueen* , 198 W. Va. 1, 6, 479 S.E.2d 300, 305 (1996)).

[68] *State ex rel. Allman v. MacQueen* , 209 W. Va. 726, 731, 551 S.E.2d 369, 374 (2001).

[69] W. Va. Trial Ct. Rule 26.08.

[70] *See* Syl. Pt. 3, *State ex rel. Appalachian Power Co.* , 198 W. Va. at 1, 479 S.E.2d at 300 ("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.").

[71] Manual for Complex Litigation (Fourth) § 11.632 (2007).

[72] *See Tenpin Lounge* 158 W. Va. at 354, 211 S.E.2d at 353 (" 'Where there are some issues common to both the legal and equitable claims, the order of trial must be such that the jury first determines the common issues. The court may, if it chooses, submit all the issues to the jury. There is no constitutional right to a trial without a jury and reversible error cannot be predicated upon the submission of equitable issues of fact to a jury.' ") (quoting 2B Barron and Holtzoff, Federal Practice and Procedure , § 873, p. 32 (Rules ed. 1961)).

[1] On page "i" of the Table of Contents to the Hospital Complaint, the Plaintiffs are identified as: Appalachian Regional Healthcare, Bluefield Regional Medical Center, Charleston Area Medical Center, Davis Health System Affiliates, Grafton City Hospital, Grant Memorial Hospital, Greenbrier Valley Medical Center, Jackson General Hospital, Monongalia Health System Affiliates, Plateau Medical Center, Princeton Community Hospital, West Virginia University Health System, Wetzel County Hospital, and Williamson Memorial Hospital.

[2] Plaintiffs also argue that the 2015 Act is inapplicable because their causes of action accrued prior to the effective date of the Act. However, if their causes of action accrued prior to the effective date of the 2015 Act, their claims may be time barred by the applicable statute of limitations. "Where a tort involves a continuing or repeated injury, the cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the tortious overt acts or omissions cease." Syllabus Point 11, *Graham v. Beverage* , 211 W. Va. 466, 566 S.E.2d 603 (2002). Thus, if Plaintiffs are able to establish a continuing tort that brings their actions within the statute of limitations, the 2015 Act is applicable because the date the statute of limitations would run is after the effective date of the 2015 Act.

[1] *In re Nat'l Prescription Opiate Litig.* , No. 1:17-MD-2804, 2018 WL 6628898, at *21 (N.D. Ohio Dec. 19, 2018). *See also* , Andrew Kolodny, *et al.* , *The Prescription Opioid and Heroin Crisis: A Public Health Approach to an Epidemic of Addiction* , 36 Ann. Rev. Public Health 559, 560 (2015) ("According to the United States Centers for Disease Control and Prevention (CDC), the unprecedented increase in OPR [opioid pain reliever] consumption has led to the 'worst drug overdose epidemic in [US] history.' Given the

magnitude of the problem, in 2014 the CDC added opioid overdose prevention to its list of top five public health challenges."); Julie Garner, *The Opioid Boom* , U. Wash. Mag. (December 7, 2017) (describing the over-prescription of opioid medications, professor Gary Franklin said, "It has been the worst man-made epidemic in modern medical history.").

[2] It has been my personal experience that the parties will often use original jurisdiction petitions as a way to slow down a particular lawsuit in an effort to control the pace of the case and, thereby, effectively control its outcome.

[3] 3 William Blackstone, *Commentaries on the Laws of England* , 379 (1765-69). Blackstone also reflected that the right to trial by jury should be "guard[ed] with the most jealous circumspection" lest "time imperceptibly undermine this best preservative of English liberty." He noted that where governments had rejected trials by jury, "the liberties of the commons are extinguished" and "the government is degenerated into a mere aristocracy." *Id.* at 381.

[4] *Id.* at 365.

[5] *Id.* at 379. *See also* 1 Matthew Hale, *The History of the Pleas of the Crown* 33 (1736) ("[T]he law of England has afforded the best method of trial that is possible, of this and all other matters of fact, namely by a jury ... concurring in the same judgment, by the testimony of witnesses *viva voce* in the presence of the judge and jury, and by the inspection and direction of the judge.")

[6] *See Katchen v. Landy* , 382 U.S. 323, 327, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966) (bankruptcy "courts are essentially courts of equity, and they characteristically proceed in summary fashion to deal with the assets of the bankrupt they are administering.").

[7] To the extent the statute seeks to change the common law, it is a long-standing maxim that "[s]tatutes in derogation of the common law are strictly construed." Syl. pt. 1, *Kellar v. James* , 63 W.Va. 139, 59 S.E. 939 (1907). *Accord* , Syllabus Point 3, *Bank of Weston v. Thomas* , 75 W.Va. 321, 83 S.E. 985 (1914) ("Statutes in derogation of the common law are allowed effect only to the extent clearly indicated by the terms used. Nothing can be added otherwise than by necessary implication arising from such terms."); Syl. pt. 5, *Phillips v. Larry's Drive-In Pharmacy, Inc.* , 220 W. Va. 484, 647 S.E.2d 920 (2007) ("Where there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law."). To the extent the statute seeks to impose a rule of procedure upon the courts, Article VIII, Section 3 of the West Virginia Constitution "unquestionably provides this Court with the sole constitutional authority to promulgate rules for the judicial system, and demands that those rules have the force of law." *State ex rel. Workman v. Carmichael,* 241 W. Va. 105, 132, 819 S.E.2d 251, 278 (2018). *Accord* , Syl. pt. 10, *Teter v. Old Colony Co.* , 190 W. Va. 711, 714, 441 S.E.2d 728, 731 (1994) ("Under Article VIII, ... Section 3 of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them."); Syl. pt. 1, *Bennett v. Warner* , 179 W. Va. 742, 372 S.E.2d 920 (1988) ("Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law."). "Not only does our Constitution explicitly vest the judiciary with the control over its own administrative business, but it is a fortiori that the judiciary must have such control in order to maintain its independence." Syl. pt. 2, *State ex rel. Lambert v. Stephens* , 200 W. Va. 802, 490 S.E.2d 891 (1997).

[1] "Where already, at the time of the adoption of the Constitution, equity exercised jurisdiction in a certain matter, the provision of the Constitution guaranteeing trial by jury does not

relate to or give right to trial by jury in suits in equity involving such matter." *Weatherholt* , 234 W. Va. at 723, 769 S.E.2d at 874, Syl. Pt. 5 (citing *Davis v. Settle* , 43 W. Va. 17, 26 S.E. 557 (1896)).

[2] Of note, a major reason these cases are still at the pleading stage is that since their referral to the Mass Litigation Panel — on petitioners' motions -- the petitioners have challenged virtually every ruling made by the Panel. The instant petitions for extraordinary relief are numbers six and seven.
