

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 9th day of October, 2008, the following order was made and entered:

RE: APPROVAL OF AMENDMENTS TO WEST VIRGINIA TRIAL COURT RULE 26

On a former day, to-wit, May 22, 2008, the Court approved a period of public comment on proposed amendments to Rule 26 of the West Virginia Trial Court Rules, as recommended by the Mass Litigation Panel. The period of public comment concluded on July 7, 2008. Thereafter, the Mass Litigation Panel presented to the Court revised proposed amendments.

Upon consideration whereof, the Court is of opinion to and does hereby approve and adopt the revised proposed amendments, effective immediately. Justice Albright did not participate in the consideration of this matter. Senior Status Justice McHugh sitting by temporary assignment. Insertions are indicated by underscoring, deletions by strikethrough, to read as follows:

A26. MASS LITIGATION.

Rule 26.01. Mass Litigation - Preamble.

There is hereby adopted a process for efficiently managing and resolving mass litigation which includes the establishment of a Mass Litigation Panel.

Rule 26.0102. Mass Litigation Panel and Procedure.

(a) The Mass Litigation Panel ~~A Panel~~ shall consist of six (6) active or senior status circuit court judges who shall be appointed by the Chief Justice, with the approval of the ~~full~~ Supreme Court of Appeals. Each ~~shall serve on the Panel~~ appointment is for a term of three (3) years, with two (2) judges to be appointed each year. There ~~shall be~~ is no prohibition against

serving successive terms. The Chief Justice shall annually designate ~~one of the~~ a Panel members ~~of the Panel~~ to serve as its eChairman to preside over the activities of the Panel and to report to the Supreme Court of Appeals.

Rule 26.03. Application.

These rules apply to and govern all actions in the circuit courts referred and transferred by the Chief Justice as Mass Litigation to the Panel. These rules shall not be construed to limit the jurisdiction of the circuit courts, as established by law, or as creating any new cause of action.

Rule 26.04. Definitions.

For purposes of this Rule, the following definitions apply:

(a) "Mass Litigation" — Two (2) or more civil actions pending in one or more circuit courts: (1) involving common questions of law or fact in mass accidents or single catastrophic events in which a number of people are injured; or (2) involving common questions of law or fact in "personal injury mass torts@implicating numerous claimants in connection with widely available or mass-marketed products and their manufacture, design, use, implantation, ingestion, or exposure; or (3) involving common questions of law or fact in "property damage mass torts" implicating numerous claimants in connection with claims for replacement or repair of allegedly defective products, including those in which claimants seek compensation for the failure of the product to perform as intended with resulting damage to the product itself or other property, with or without personal injury overtones; or (4) involving common questions of law or fact in "economic loss" cases implicating numerous claimants asserting defect claims similar to those in property damage circumstances which are in the nature of consumer fraud or warranty actions on a grand scale including allegations of the existence of a defect without actual product failure or injury; or (5) involving common questions of law or fact regarding harm or injury allegedly caused to numerous claimants by multiple defendants as a result of alleged nuisances or similar property damage causes of action.

(b) ALiaison Counsel@— Attorneys designated by the Presiding Judge and charged with essentially administrative matters, including communications between the court and other plaintiff or defense counsel; receiving and distributing notices, orders, motions, and briefs for the group; convening meetings of counsel; advising other counsel and unrepresented parties of developments; and otherwise assisting in the coordination of activities and positions.

(c) ALead Counsel@— Attorneys designated by the Presiding Judge and charged with formulating and presenting positions on substantive and procedural issues during the litigation by initiating and organizing discovery requests and responses; conducting the principal examination of deponents; employing experts; arranging for support services; serving as the principal attorneys at trial for their respective plaintiff or defense group or subgroups; and organizing and coordinating the work of the other attorneys on their respective plaintiff or defense trial team.

(d) Certificate of Service List@ — The document prepared by Liaison Counsel from the Notices of Appearance and information from self-represented parties and certified by the Presiding Judge as the official contact list of counsel and self-represented parties for service or other notice.

(e) Notice of Appearance@ — The document all counsel shall file and serve containing the name and address of the party or parties each counsel represents, the name and address of the attorney, the name of the attorney's law firm, the attorney's West Virginia State Bar Identification Number, if applicable, or *pro hac vice* admission status, telephone number, fax number, and electronic mail address.

(f) Notice of Withdrawal@ — The document all counsel shall file and serve on all parties, after complying with Trial Court Rule 4.03(b), if counsel no longer represents a party or parties, or after a party is dismissed.

(g) Presiding Judge@ — One or more members of the Panel assigned by order of the Panel Chair, with the advice and consent of the Panel, to preside in Mass Litigation or proceedings therein referred by the Chief Justice to the Panel. Presiding Judge@ also includes an active or senior status circuit court judge or judges recommended by the Panel and assigned by the Chief Justice to assist the Panel in resolving Mass Litigation or proceedings therein.

(h) Lead Judge@ — The judge appointed by order of the Panel Chair, with the advice and consent of the Panel, to lead in Mass Litigation in which more than one Presiding Judge is assigned.

Rule 26.05. Panel Duties.

~~(b) The Mass Litigation Panel shall have the following responsibilities:~~

~~(1) To (a) develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil~~ resolve Mass Litigation which may be referred to the Panel ~~it by the Chief Justice;~~

~~(2) To (b) preside over actions in Mass Litigation or proceedings therein referred to it by the Chief Justice and to provide assistance and guidance to any other circuit judge within the State upon assignment by the Chief Justice;~~

~~(3) To make recommendations to the Chief Justice on the transfer of actions from one circuit to another in order to facilitate any case management or trial methodologies developed by the Panel, and to (c) request the assignment by the Chief Justice of additional active or senior status circuit court judges to assist the Panel in resolving Mass Litigation or proceedings therein as needed, and provide assistance and guidance to such judges when assigned in any activities that may be necessary to resolve actions or issues in actions that may be referred to the Panel;~~

~~(4) To (d) recommend rules for adoption by the Supreme Court of Appeals rules for the conducting of the business of the pPanel as needed;~~

~~(5) To (e) report periodically to the Chief Justice concerning the Panel's its activities;~~
and

~~(6) To (f) take such action as is reasonably necessary and incidental to the powers and responsibilities expressly conferred by this rule or by the specific directive of the Chief Justice.; and~~

(g) develop and implement plans for central organization, including, but not limited to staffing, record keeping, and other assistance for the management of Mass Litigation, the transfer and storage of Mass Litigation case-court files to the appropriate circuit, the implementation of appropriate technology, and the adoption of necessary rules and procedures.

~~(e) "Mass litigation" shall be defined as two (2) or more civil actions pending in one or more circuit courts: (a) involving common questions of law or fact in mass accidents or single catastrophic events in which a number of people are injured; or (b) involving common questions of law or fact in "personal injury mass torts" allegedly incurred upon numerous claimants in connection with widely available or mass-marketed products and their manufacture, design, use, implantation, ingestion, or exposure; or (c) involving common questions of law or fact in "property damage mass torts" allegedly incurred upon numerous claimants in connection with claims for replacement or repair of allegedly defective products, including those in which claimants seek compensation for the failure of the product to perform as intended with resulting damage to the product itself or other property, with or without personal injury overtones; or (d) involving common questions of law or fact in "economic loss" cases incurred by numerous claimants asserting defect claims similar to those in property damage circumstances which are in the nature of consumer fraud or warranty actions on a grand scale including allegations of the existence of a defect without actual product failure or injury. (d) Any coordinated or consolidated actions transferred pursuant to this rule shall be conducted by a member or members of the Panel and/or by a judge to whom the actions are assigned by the Chief Justice. Any member of the Panel or any circuit judge to whom actions are assigned under this rule shall be authorized to exercise the powers of a circuit judge in any circuit in which actions are pending or have been transferred for the purpose of conducting any proceedings consistent with the Panel's case management and trial methodologies.~~

Rule 26.06. Motion to Transfer Refer Actions as Mass Litigation.

~~(e)(a)(1) Any party, judge, or the Administrative Director of the Courts may seek a referral to the Panel for transfer of actions as Mass Litigation to the Panel by filing a Motion to Refer to the Mass Litigation Panel in any circuit court in which a qualified case an action is pending. The motion shall identify the nature of the actions sought to be referred, the number of plaintiffs, the number of defendants, the number of actions pending, the basis for the request, a listing of the particular cases actions in all the circuits for which a referral is being requested, and, if known, whether additional related actions may be filed in the future.~~

~~Said (2) The motion may be filed within six (6) months after the filing date of the action case in which the motion is being filed; provided, however, that a judge or the Administrative Director of the Courts may file said the motion at any time, if it is determined that the litigation qualifies as a Mass Litigation and that the litigation that may be resolved more expeditiously by reference referral to the Panel.~~

~~(3) The motion shall be served on all the parties, including those parties not represented by counsel, all judges in actions which are the subject of the motion, and the Administrative Director Panel's Mass Litigation Manager. Any party shall have twenty (20) days after the motion is filed to file a reply memorandum stating its position and opposition, if~~

any. Any affected judge may file a reply memorandum within ~~ten (10)~~ twenty (20) days thereafter.

(b) The filing of a Motion to Refer to the Mass Litigation Panel shall not operate as a stay of the civil action(s).

(c)(1) After the response periods have expired, the judge of the circuit court in which the ~~m~~Motion to Refer to the Mass Litigation Panel was filed shall forward to the Chief Justice direct the clerk of the circuit court to transmit to the Clerk of the Supreme Court of Appeals for filing a copy of the motion and all reply memoranda filed in the case for review by the Chief Justice. Upon review of the motion and reply memoranda, the Chief Justice may act directly upon the motion or may direct the Panel to conduct a hearing and make recommendations concerning coordinated or consolidated proceedings under this rule. The Chief Justice shall act upon the motion within ten (10) days.

(2) If the Chief Justice directs, motion is referred to the Panel, the Panel or a designated member of the a Panel member or members shall hold a hearing to receive evidence and entertain arguments by the parties or any judge, and shall submit findings of fact and a recommendation to the Chief Justice. Said recommendation shall be provided to the Chief Justice within twenty (20) days from the date the matter was referred to the Panel.

(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 by providing modified relief, consistent with this rule within ten (10) days. 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.

~~(f) The filing of a motion under subsection (e) of this rule shall not operate to stay discovery in any affected case in any instance or to delay a scheduled trial unless a stay of a trial is ordered by the Chief Justice.~~

~~(g) (d) Nothing contained in this rule shall be deemed to affect~~ (d) Nothing contained in this rule shall be deemed to affect the authority of a circuit court judge to act independently under the provisions of W. Va. R.Civ.P. 42.

Rule 26.07. Assignment of Presiding Judge in Mass Litigation.

(a) An order from the Chief Justice granting a Motion to Refer to the Mass Litigation Panel is a transfer of Mass Litigation to the Panel. Upon receipt of the order, the Panel Chair shall, with the advice and consent of the Panel, by order assign a Presiding Judge. If more than one Presiding Judge is assigned, the Panel Chair shall, with the advice and consent of the Panel, by order appoint a Lead Judge, and in such event, to the extent possible, require appropriate measures to be adopted to insure uniformity of decisions, including the requirement for all pre-trial dispositive motions to be decided by a majority of the Presiding Judges assigned to preside in the Mass Litigation or proceedings therein.

(b) If the Panel requests the assignment of additional active or senior status circuit court judges to assist in resolving Mass Litigation or proceedings therein, the request and recommendation shall be filed with the Clerk of the Supreme Court of Appeals and sent to the Chief Justice. The order of assignment by the Chief Justice shall be filed with the Clerk and

sent by the Clerk to the Panel Chair and to the clerk of the circuit court where the Mass Litigation is pending for service on all parties.

(c) The Panel Chair may act on any properly filed motions until the Mass Litigation is assigned to a Presiding Judge.

Rule 26.08. Powers of Presiding Judge.

(a) The Presiding Judge is authorized to preside in any circuit in which Mass Litigation or proceedings therein are pending, or in which Mass Litigation or proceedings therein are transferred for purposes consistent with the Panel's case management and trial methodologies.

(b) With the advice and consent of the Panel, the Presiding Judge is authorized to consolidate and/or transfer Mass Litigation or proceedings therein from one circuit to one or more other circuits to facilitate the Panel's case management and trial methodologies and to order the transfer of court files to the appropriate circuit.

(c) In the absence of an agreement of the parties, the Presiding Judge is authorized to appoint Liaison Counsel and/or Lead Counsel and, after consultation with all counsel, to determine the method and manner of compensation for Liaison Counsel and/or Lead Counsel.

(d) The Presiding Judge is authorized to adopt a case management order that specifies the use of a Certificate of Service List, Notice of Appearance and/or Notice of Withdrawal and, after considering the due process rights of the parties, to adopt any procedures deemed appropriate to fairly and efficiently manage and resolve Mass Litigation.

Rule 26.09. Motion to Join in Existing Mass Litigation.

(a)(1) This procedure applies if the initial order by the Chief Justice granting a Motion to Refer to the Mass Litigation Panel authorizes the Panel to transfer and join with the existing Mass Litigation any similar or related actions subsequently filed in any circuit court.

(2) A Motion to Join in Existing Mass Litigation shall be filed with the clerk of the circuit court(s) where the action(s) sought to be transferred are pending and with the clerk of the circuit court where the existing Mass Litigation is pending. The motion shall set forth the identity and nature of the action(s) sought to be transferred, the number of plaintiffs, the number of defendants, the number of actions pending, the basis for the request, a listing of the particular actions in all the circuits for which a transfer is requested, and, if known, whether additional related actions may be filed in the future. The motion shall be served on all parties, including those not represented by counsel, and sent to all judges in the action(s) sought to be transferred and to the Presiding Judge in the existing Mass Litigation sought to be joined.

(3) The Presiding Judge in the existing Mass Litigation shall, with the advice and consent of the Panel, grant or refuse the motion by written order. The order shall be filed with the clerk of the circuit court where the existing Mass Litigation is pending, and shall be sent to the Panel Chair, and to the clerk(s) of the circuit court(s) where the action(s) sought to be transferred are pending for service on all parties.

(b) If the initial order by the Chief Justice granting a Motion to Refer to the Mass Litigation Panel does not authorize the Panel to transfer and join with the existing Mass Litigation any subsequently filed actions, the procedure under Rule 26.06 shall be followed.

Rule 26.10. Class Actions.

If any Mass Litigation transferred to the Panel is later certified as a class action by any court pursuant to Rule 23, W. Va. R.Civ.P., the Panel may request the Chief Justice transfer the Mass Litigation from the Panel to the appropriate circuit court.

Rule 26.11. Official Reporter.

In each Mass Litigation proceeding, the Presiding Judge shall determine and designate the official court reporter to transcribe proceedings. No other transcriber or transcription shall be permitted without consent of the Presiding Judge.

Rule 26.12. Scope; Conflicts.

If these Rules conflict with other rules or statutes, these rules shall apply; otherwise all applicable Rules apply.@

The Court thanks the Mass Litigation Panel, as well as those who provided comments on the proposed amendments, for their insight and commitment to the creation of these rules.

The Clerk of the Court is directed to prepare an engrossed version of this amended rule and make it available for use by the bench, bar and general public on the Court's website at <<http://www.state.wv.us/wvsca/rules/rulesindex.htm>> as soon as practicable.

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court