



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

Civil Action No. 19-C-9000

THIS DOCUMENT APPLIES TO:

**MAYOR ELMER RAY SPENCE
ON BEHALF OF THE TOWN OF
DELBARTON, et al.,**

Plaintiffs,

v.

**Civil Action Nos. 20-C-16 MSH
through 20-C-27 MSH**

CARDINAL HEALTH, INC., et al.,

Defendants.

**ORDER GRANTING PLAINTIFFS' MOTION TO STRIKE
H.D. SMITH, LLC'S NOTICE OF NON-PARTY FAULT**

Pending before the Mass Litigation Panel is *Plaintiffs' Motion to Strike H.D. Smith, LLC's Notice of Nonparty Fault* (Transaction ID 65982788). The Presiding Judges have reviewed Defendant H.D. Smith's Notice Regarding Potential Non-party Fault Under W. Va. Code § 55-7-13d(a)(2) (Transaction ID 65964886), the Plaintiffs' Motion to Strike (Transaction ID 65982788), and Defendants' Opposition (Transaction ID 66015950), as well as the arguments and positions adopted and incorporated by reference by the parties.

The Supreme Court of Appeals of West Virginia has held that the Panel's ruling that public nuisance claims are not legal claims that would trigger the constitutional jury trial right or would be subject to comparative fault statutory amendments do not merit prohibition. *State ex rel. Amerisource Bergen Drug Corp. v. Moats*, 859 S.E.2d 374, 386 (W.Va. 2021). As stated by the Court:

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[.]" 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. 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 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.

Id. at 385-386 (internal citations omitted). The Supreme Court granted Defendants' petition only on the alternate ground "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." *Id.* at 386 (emphasis in original.) However, all City/County and Hospital Plaintiffs voluntarily dismissed all claims for relief, without prejudice, with the express exception of Plaintiffs' equitable claims for public nuisance. *See* (Transaction IDs 66922936, 66936677, 66940716, 66942534, 66951004 and 66987420).

Because the Panel concludes that W. Va. Code § 55-7-13d and its predecessor statute do not apply to Plaintiffs' equitable claims for abatement of public nuisance, Plaintiffs' Motion to Strike (Transaction ID 65982788) is **GRANTED** for the reasons set forth in the Panel's *Order Regarding Plaintiffs' Motion to Strike Defendants' Notices of Non-Party Fault* (Transaction ID 65807300) entered on July 29, 2020.

All objections and exceptions to the Panel's Order are noted and preserved for the record. A copy of this Order has this day been electronically served on all counsel of record via File & Serve*Xpress*. It is so **ORDERED**.

ENTERED: October 7, 2021.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation