



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

CIVIL ACTION NO. 21-C-9000 DISTRIBUTOR

THIS DOCUMENT APPLIES TO ALL DISTRIBUTOR CASES

**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND
ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT ON *RES JUDICATA* AND RELEASE GROUNDS**

The Mass Litigation Panel (“MLP” or “Panel”) has previously denied the Distributor Defendants’ Motion for Summary Judgment on Res Judicata Grounds as set forth in the Panel’s June 7, 2022, Order (Transaction ID 67699026). The Panel now makes the following findings of fact and conclusions of law in support of its decision:

1. Plaintiffs are Cities and Counties of West Virginia that have sued Defendants Amerisource Bergen Drug Corporation, Cardinal Health, Inc., and McKesson Corporation (collectively “Defendants”) for nuisance in connection with their distribution of prescription opioids.

2. Defendants seek summary judgment on Plaintiffs’ abatement claims, arguing that they are barred on *res judicata* grounds. Specifically, Defendants contend that the West Virginia Attorney General (“WVAG”) previously brought an action on behalf of the State asserting similar claims against Defendants which were settled and released.

3. *Res judicata* “generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in their earlier actions.” *Beahm v. 7 Eleven, Inc.*, 223 W. Va. 269, 272 (2008) (per curiam) (quotation omitted). The application of *res judicata* is dependent on the “distinctive characteristics of a particular case,” and the party seeking to invoke the bar must show

that “the two actions . . . have (1) substantially the same parties who sue and defend in each case and in the same respective character [and] (2) the same cause of action[.]” *Id.* at 273, 276.

4. Before the Opioid Litigation was referred to the Panel, Defendant Cardinal Health, Inc. (“Cardinal”) filed a motion to dismiss on *res judicata* grounds in *Brooke County v. Purdue Pharma L.P.* The Circuit Court of Marshall County denied the motion in late 2018. In a detailed order, the Honorable David W. Hummel, Jr. rejected Cardinal’s arguments that *res judicata* barred the county plaintiffs’ claims. *See Brooke Cnty. Commission v. Purdue Pharma L.P.*, No. 17-C-248 (Marshall Co., W.Va. Dec. 28, 2018) (*Res Judicata* Order), Ex. A Defs.’ *Res Judicata* Motion. The Supreme Court of Appeals declined to issue a writ of prohibition challenging this ruling. *See State ex rel. Cardinal Health v. Hummel*, No. 19-0204 (W.Va. June 4, 2019).

5. After the Opioid Litigation was referred to the Panel, the Panel ruled that it would apply the prior Marshall County rulings, including Judge Hummel’s *res judicata* ruling, to the cases in the MLP as the law of the case. *Monongalia Cnty. Commission v. Purdue Pharma L.P.*, No. 18-C-222 MSH, Trans. *Id.* 64374611 at p. 3 (W.Va. MLP October 31, 2019). The Defendants again sought a writ of prohibition which was also refused. *State of West Virginia ex rel. ABDC, et al. v. Moats*, No. 19-1051 (W.Va. Jan. 30, 2020).

6. On December 7, 2021, after this Court entered orders setting the phased trial plans, Defendants once again sought a writ of prohibition. There, the Distributors argued that “[t]here is no pending ‘statewide’ public nuisance claim against Distributors” and “Distributors have settled with and been released by the only party with standing to seek to abate a statewide public nuisance (the State)” so that “any claim for a ‘statewide’ nuisance claim is barred by *res judicata*.” Distributors’ Dec. 7, 2021, Petition for Writ of Prohibition Regarding Trial Plan, pp. 19–20. Once

again, the Supreme Court refused to grant extraordinary relief. *See State ex rel. Cardinal Health v. Moats*, No. 21-0986 (W.Va. Mar. 17, 2022).

7. Finally, in March of 2021, in *City of Huntington v. AmerisourceBergen Drug Corp.* (S.D. W.Va. No. 3:17-cv-01362) (Faber), the Court denied Defendants’ Motion to Dismiss or for Summary Judgment Based on *res judicata* grounds. *See Ex. B to Defs.’ Res Judicata Mot.* As part of the briefing, the WVAG filed an *amicus curiae* brief opposing the application of *res judicata* and stating that the State did not settle the city or county’s claims with Defendants. *See Ex. E to Pls.’ Br. in Opp. to Res Judicata Motion.*

8. In their current motion, Defendants do not ask the Panel to revisit or overrule Judge Hummel’s *Res Judicata* Order (and the Panel’s finding that order was law of the case) or challenge the ruling in the *City of Huntington* case. Instead, Defendants argue that this case “is differently situated” so that “the prior rulings are not dispositive here.” They argue that Plaintiffs “have chosen to bring a statewide nuisance claim for abatement,” which alters Judge Hummel’s prior *res judicata* analysis.¹

9. Defendants are incorrect. Plaintiffs are not seeking a “statewide nuisance claim for abatement.” Instead, the public nuisance claims asserted by Plaintiffs here are the same as those asserted by the Plaintiffs in *Brooke County* and *City of Huntington*.² The only difference is the trial plan adopted by the Panel.

10. But the trial plan implemented by the Panel has not transformed Plaintiffs’ claims into “statewide” claims as Defendants contend. The Panel has consolidated each of the 63 City

¹ This is the same argument raised in the Defendants’ 2021 writ. *See Distributors’ Dec. 7, 2021, Petition for Writ of Prohibition Regarding Trial Plan, supra* p. 19-20.

² Indeed, the County Plaintiffs in *Brooke County* are also Plaintiffs in this action and have never amended their Complaint after Judge Hummel’s Order to assert any new or additional claims or allegations regarding their public nuisance cause of action.

and County Plaintiffs’ claims against the Distributors for a phased trial to decide two common factual predicates. When the Panel or Plaintiffs have used the term “statewide” in the context of City and County Plaintiffs’ claims, the term merely refers to the consolidation of these Plaintiffs’ individual claims.

11. While the trial plan phases Plaintiffs’ claims against Defendants for trial, the trial plan does not relieve each Plaintiff from proving individual or specific causation. Rather, the Panel has merely deferred the requirement of Plaintiff-specific proof until Phase II to conserve judicial resources and promote judicial economy.³

12. Defendants’ new *res judicata* argument fails since this case is not differently situated than the *Brooke County* and *City of Huntington* cases. Defendants have not provided the Panel any other basis to depart from Judge Hummel’s *Res Judicata* Order that the Panel adopted as the law of the case.

13. Although Defendants have not asked the Panel to overturn Judge Hummel’s *Res Judicata* Order, the Panel agrees with the *Brooke County* and federal *City of Huntington* and finds and concludes that *res judicata* does not bar Plaintiffs’ claims.

14. **First**, privity—a necessary element of *res judicata*—is absent. The City and County Plaintiffs are not part of the State of West Virginia or its agencies. *See, e.g.*, W. Va. Code § 29-12A-3(e); W. Va. Code § 14-2-3; *Pniewski v. Martorella*, No. 3:04-0354, 2008 WL 4057423, *2 (S.D. W. Va. Aug. 25, 2008). And the West Virginia Constitution establishes counties as separate units of government and grants explicit powers to county commissions over the “superintendence

³ As recently noted by the Supreme Court of Appeals: “[C]ourts managing highly complex litigation have and need ‘significant flexibility and leeway with regard to their handling of these cases.’ ‘[I]nnovative means of trial management’ are necessary to expeditiously resolve matters like the Opioid Litigation, which is why a presiding judge is empowered ‘to adopt any procedures deemed appropriate to fairly and efficiently manage and resolve Mass Litigation.’” *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 245 W. Va. 431, 859 S.E.2d 374, 388 (2021).

and administration of the internal police and fiscal affairs of their counties.” W. Va. Const., Art. IX, Sec. 11. The West Virginia Constitution gives West Virginia cities chartered as home city rule similar express powers. W.Va. Const. Art. 6, Sec. 39a. Further, both cities and counties have the explicit authority to abate nuisances. *See* W. Va. Code §§ 7-1-3kk; § 8-12-5(23).

15. ***Second***, the WVAG does not have the legal authority to bring suit on behalf of Plaintiffs or release their claims. Instead, Plaintiffs have broad statutory authority to address the public health, safety, and fiscal consequences of the opioid epidemic in their communities. Indeed, the WVAG has confirmed that it was not representing Plaintiffs in its settlement with Defendants. *See* MLP Transcript of August 22, 2019 at p. 19 (Deputy AG Sizemore stating: “The Attorney General has never claimed to be representing political subdivisions. Legally, the Attorney General does not represent political subdivisions. They are their own legal entity.”).

16. ***Third***, the doctrine of virtual representation does not apply. Defendants argue that because Plaintiffs are asserting “statewide claims,” there “is no basis for a finding that the State did not adequately represent the interests of all entities within its borders in bringing and settling that claim.” But Plaintiffs have not asserted statewide claims. Nor have Defendants provided any evidence to support their claim that the State adequately represented Plaintiffs’ interests. Instead, the WVAG has confirmed it did not intend to represent Plaintiffs’ interests in its settlements and has opposed Defendants’ efforts to use its settlements as *res judicata* against West Virginia cities and counties.

17. Defendants’ attempt to use the limited doctrine of virtual representation as a substitute for privity in this case is also contrary to West Virginia law. Virtual representation “cannot be construed to imply privity to all who derive injury from a single wrongful act.” *Beahm*, 223 W. Va. at 274. Rather, virtual representation only applies when a nonparty actively participates

in and exercises control over the conduct of the prior litigation; where a nonparty impliedly consents to abide by a prior judgment; or if the nonparty's actions involve deliberate maneuvering or manipulation to avoid the preclusive effects of a prior judgment. *Galanos v. National Steel Corp*, 178 W. Va. 193, 196 (1987). There is no evidence before the Panel that any of these conditions apply here.

18. **Fourth**, Plaintiffs' claims are not based on the same causes of action as the WVAG's claims. For *res judicata* to bar a party's claims, "the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." *West Virginia Human Rights Comm'n v. Esquire Grp., Inc.*, 217 W. Va. 454, 462 (2005) (quoting Syl. Pt. 4, *Blake v. Charleston Area Medical Ctr., Inc.*, 201 W.Va. 469 (1997)). The Panel finds and concludes that this element is not met since the WVAG sought recovery on behalf of the State and could not—nor did not—seek recovery for the claims asserted by Plaintiffs.

19. **Fifth**, the releases the WVAG executed with Defendants do not apply to Plaintiffs' claims. "Obviously, a judgment dismissing an action as compromised and settled does not preclude a party from bringing suit upon a claim not within the scope of the compromise agreement." *Fortuna v. Queen*, 178 W. Va. 586, 591 (1987).

20. The releases the WVAG and Defendants executed in connection with that settlement did not expressly include Plaintiffs as released parties. The State executed releases with Defendants on behalf of its State agencies, departments, and instrumentalities, including "any agency, person, or other entity claiming by or through them or any of them." See Ex. E to *Res Judicata* Motion, p. 4; Ex. F to *Res Judicata* Motion, p. 5; Ex. J to *Res Judicata* Motion, p. 3. Plaintiffs are neither a State agency nor an instrumentality of the State and are not claiming through

the State or its agencies. And, as discussed above, West Virginia cities and counties are not included as released parties by the plain language of the agreements.

* * * *

For the foregoing reasons, the WVAG's prior settlements with Defendants does not bar Plaintiffs' claims. Defendants' Motion for Summary Judgment on *Res Judicata* and Release is therefore **DENIED**.

The Panel notes the Defendants' objection and exception to this Order.

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: July 1, 2022.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation