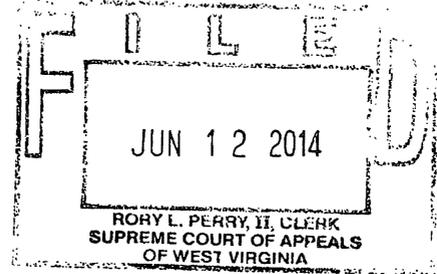


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 14-0144

**TUG VALLEY PHARMACY, LLC;
B & K PHARMACIES, INC., d/b/a
FAMILY PHARMACY; and
STROSNIDER DRUG STORE, INC., d/b/a
SAV-RITE PHARMACY,
Defendants Below,**



Petitioners,

v.

**CERTIFIED QUESTION FROM THE CIRCUIT
COURT OF MINGO COUNTY, WEST VIRGINIA**

**ALL PLAINTIFFS BELOW IN MINGO
COUNTY CIVIL ACTIONS NOS.
10-C-251, 11-C-332, 12-C-38, 10-C-252,
10-C-319, 12-C-39, 12-C-35, and 11-C-370,**

Respondents.

PETITIONERS' REPLY BRIEF

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III. STATEMENT OF THE CASE

In their *Statement of Facts* the Respondents have introduced additional evidence about themselves in an attempt to portray themselves as mere victims and to demonize the defendants. What surely is not lost on the Court is that they do not dispute the uncontroverted evidence that each of them, or their decedents, engaged in substantial criminal or immoral conduct that is essential to their claims. It is not the defendants who have defined the plaintiffs' behavior as criminal, but rather our elected representatives in Congress and our state legislature by and through the passage of federal and state laws.¹ As discussed below, it is the Respondents' undisputed serious criminal conduct, and not the conduct of others, that should bar their claims.

IV. SUMMARY OF ARGUMENT

While West Virginia may have adopted the doctrine of comparative negligence, it has never embraced or endorsed the doctrine of comparative *criminal* negligence nor has it rewarded an intentional wrongdoer. While this Court has not yet had an opportunity to confront such claims directly, it is perhaps because it has taken this long for plaintiffs to become brazen enough to bring file them in court. What is clear, however, is that fundamental principles within West Virginia's jurisprudence, including the doctrine of *in pari delicto*, as well as persuasive authority from other states, fully support the Petitioners' argument that undisputed criminal and immoral conduct should bar individuals from obtaining relief through the courts arising from their actions. Importantly, like West Virginia, other jurisdictions have found the wrongful conduct doctrine to be entirely consistent with comparative negligence principles.

¹ See, e.g., West Virginia Code §60A-4-101(c)(possession of controlled substance without prescription); §60A-8-6 (unlawful purchase or receipt of controlled substance); §60A-4-410(a) (unlawful "doctor shopping"); §60A-4-403(a)(3) (acquiring or possessing controlled substances by misrepresentation, fraud, forgery, deception or subterfuge), see also, 21 U.S.C. §843(a)(3).

V. STATEMENT OF ORAL ARGUMENT

The parties all request oral argument pursuant to Rule 20(a) of the Rules of Appellate Procedure.

VI. ARGUMENT

A. STANDARD OF REVIEW

Certified questions are reviewed under a *de novo* standard. *See, Traders Bank v. Dils*, 226 W.Va. 691, 704 S.E.2d 691, Syl. Pt. 1 (2010).

B. EACH OF THE PLAINTIFFS HAS ADMITTED TO ENGAGING IN SERIOUS AND SUBSTANTIAL ILLEGAL, CRIMINAL, AND IMMORAL CONDUCT INVOLVING CONTROLLED SUBSTANCES.

Although the Respondents' brief contains additional information about the individual plaintiffs or their decedents, their criminal and immoral behavior relating to their claims is not contested and therefore is conceded. This concession was not unexpected, as the plaintiffs had admitted to their conduct either in depositions or in verified discovery responses. Claims and characterizations regarding alleged conduct by the Petitioners are not relevant to the certified questions before the Court.

C. PLAINTIFFS' CLAIMS ARE BARRED AS A MATTER OF WEST VIRGINIA LAW.

In terms of West Virginia precedent, Respondents correctly noted that two of the important West Virginia cases supporting the application of the wrongful conduct doctrine are persuasive but not binding authority, but Respondents' criticism of these decisions rings hollow. First, their discussion of the decision by former United States District Court Judge Knapp in *Gray v. Farley*, 1992 W.L. 564130 (S.D.W.V. 1992) is in error. Rather than offering any challenge to the relevant portion of the cited decision, Respondents' brief discusses Judge

Knapp's separate memorandum orders dismissing plaintiff Gray's claims against other defendants, along with plaintiff Gray's Fourth Circuit appeal of those separate claim dismissals.² Respondents completely ignore the sound reasoning and analysis Judge Knapp authored in the first memorandum decision, which did extensively discuss the wrongful conduct doctrine and which the plaintiff chose not to appeal.

The plaintiff in *Gray* was an arsonist who in the relevant portion of his lawsuit had brought premises liability and negligence claims against Huck, the property owner who hired him to burn down his residence. Seeking to apply West Virginia law, District Court Judge Knapp cited to Supreme Court decisions from both Virginia and West Virginia that demonstrated the clear reluctance courts have towards rewarding criminal or immoral conduct and dismissed the criminal Gray's claims against Huck. *Id.*, at p. 3, citing *Workman v. Lewis*, 28 S.E.2d 56 (W.Va. 1943); *Thomas v. LaRosa*, 400 S.E.2d 809 (W.Va. 1990); see also, *Miller v. Bennett*, 56 S.E.2d 217 (Va. 1949); and *Zysk v. Zysk*, 387 S.E.2d 466 (Va. 1990). Although incorrectly referenced as the *Miller* decision in his memorandum opinion, Judge Knapp correctly quoted from this Court's ruling in *Workman v. Lewis*, *supra*, regarding soundness of the *in pari delicto* doctrine:

[T]he reason why upon such fraudulent or vicious contract neither the courts of law or equity will render either party any relief, is, that it is obvious, that in refusing relief to either party in such a case the courts very generally adopt the best rule of discouraging the making of such contracts, and it is for this reason and not because the defendant in such a case has any claim on his own account to any favor from the court, that the rule is generally adopted...

Id., at p. 3, quoting *Workman v. Lewis*, 28 S.E.2d 56, at 58. The Court went on to state generally that "it is clear that West Virginia recognizes that persons with equally evil intentions

² Respondents seem to have erroneously retrieved decisions from the District Court that were concurrently decided and simultaneously reported. Those decisions were 1992 W.L. 564131 and 1992 W.L. 564132.

shall not be allowed recovery from one another for injuries received as a result of their concerted evil conduct.” While both of the cited West Virginia decisions, *Workman v. Lewis* and *Thomas v. LaRosa*, involved discussions of illegal agreements between the parties, the Court’s rightful hostility towards persons seeking to gain from their own criminal or immoral conduct is fundamentally sound.

While the *Allen v. Purdue Pharma, L.P.* decision from the Circuit Court of Greenbrier County, West Virginia, is persuasive authority, like the District Court decision in *Gray v. Farley* its primary value is that it represents another fair and intellectually sound application of the wrongful conduct doctrine to a tort claim. Although Respondents correctly noted that the Circuit Court in *Allen* also discussed issues of proximate causation, it must be remembered that the claim was against a manufacturer for the plaintiff’s wrongful death, not claims of general addiction. Further, in *Allen*, unlike the Respondents in the matters before the Court, the plaintiff’s sole illegal or immoral act was the illegal and immoral misuse of Oxycontin after it was obtained. In addition to such gross substance abuse and misuse, Respondents in this case also engaged in a virtual smorgasbord of other illegal actions, including most commonly: obtaining prescriptions for drugs by misrepresentation and/or fraud; drug buying, selling or sharing (criminal distribution); and doctor shopping. While this Court admittedly has not applied the wrongful conduct rule or the doctrine of *in pari delicto* to the tort realm, such an application is consistent with existing jurisprudence.

D. MULTIPLE OTHER JURISDICTIONS SUPPORT BARRING PLAINTIFFS’ CLAIMS.

In their brief Respondents do not take the approach of challenging the wisdom or validity of the wrongful conduct doctrine supported by those jurisdictions who have confronted the

unusual and remarkable circumstances in which wrongdoers seek to shift blame to others, but rather they settle on the strategy of trying to factually distinguish their claims from them. Other than attempting to factually distinguish the referenced decisions from Kentucky, Mississippi, Florida, Iowa, Montana, and New York, distinctions which Petitioners dispute, Respondents offer up no reason why adoption of the wrongful conduct doctrine would be unsound.

Curiously, the Respondents do concede the strong factual similarity between the case at bar and the Michigan Supreme Court decision in *Orzel v. Scott Drug Co.*, 537 N.W.2d 208 (Mich. 1995). The controversy in *Orzel* was between a plaintiff who, like most of the Respondents in this case, misrepresented his physical condition to his doctors, obtained drugs from street sources, and abused them. He also obtained prescriptions from the pharmacy by using prescriptions written for other persons. Similar also to this case, the *Orzel* defendant was a pharmacy alleged to have filled prescriptions too frequently, failed to fill them for legitimate purposes, and failed to seek proper identification from the plaintiff.

Rather than challenging the doctrine and holding in *Orzel*, in their brief Respondents instead attempt seize upon two of the four (4) point “limitations” of the wrongful conduct doctrine. While it certainly is true that the *Orzel* court recognized that its wrongful conduct rule was general and not without limitation, Respondents ignore the fact that the court reviewed each of the four limitations and still barred the plaintiff’s claims against the defendant pharmacy despite the fact that they were materially indistinguishable from those in made in this case. More specifically, while Respondents contend that they should be recognized as being in an unequal position because the defendants are pharmacists or doctors, the *Orzel* court rejected that plaintiff’s same argument:

In comparing John Orzel's wrongful conduct with the defendant's wrongful conduct, we conclude that the two wrongdoers are equally at fault. Both parties played pivotal roles in making the illegal acts possible, and we cannot say that one party is more guilty than the other. While the plaintiffs argue that John Orzel's culpability is less than the defendant's because of his alleged disability, we are not convinced. Even if we were to accept the plaintiffs' characterization of John Orzel's status as legally insane, that status does not prompt application of the culpability exception in this case because it was John Orzel who, by his continuous illegal use of Desoxyn, caused himself to become both addicted and insane. Certainly we regard his status as a tragedy. However, because John Orzel is ultimately responsible for causing any "great inequality of condition" in the first place, we conclude it would be inappropriate to apply the culpability exception under these facts

Orzel, at 537 N.W.2d 217.

With respect to the fourth limitation, like the Respondents in this case, in *Orzel* the Michigan Supreme Court considered whether the plaintiff was entitled to pursue civil remedies for the defendant pharmacy's statutory violations. Like the single West Virginia statute referenced by the Respondents, the *Orzel* court considered multiple Michigan statutes governing the duties of pharmacists that Scott Drug Company may have violated, but it rejected Orzel's contention that they were designed to protect illicit drug users like him. The Court's discussion of this point was particularly eloquent and relevant:

We find that the instant plaintiffs are not entitled to a recovery because we are not convinced that plaintiffs like John Orzel "clearly" fall within the class of persons that the allegedly violated statutes were devised to protect. In contrast to the consistent and affirmative evidence in *Longstreth*³ showing that both the Legislature and the people intended to include the minor plaintiffs within the protected class, we have found no evidence to suggest that the Legislature intended to confer special protection on persons like John Orzel, who repeatedly and fraudulently engage in the illicit use of drugs. Nor does the overall legislative scheme indicate that the Legislature would have intended recovery for such persons. *One of the primary purposes of these provisions is to prevent the illegal possession and use of controlled substances. This purpose would be inherently subverted if the courts permitted relief to illicit drug users like John Orzel. To*

³ *Longstreth v. Gensel*, 423 Mich. 675, 377 N.W.2d 804 (1985).

allow plaintiffs like him to recover would in effect sanction illegal possession and use of controlled substances—and that this Court simply cannot do.

Id., at 537 N.W.2d at 219 (*emphasis supplied*).

These principles apply as equally to the Respondents as they did to plaintiff Orzel. Importantly, however, the Respondents have offered no valid arguments against the adoption of the wrongful conduct doctrine, which is the issue raised by the certified questions, and they have ignored the fact that it bars their claims based on their undisputed criminal and immoral conduct.

E. PUBLIC POLICY DICTATES THAT THE PLAINTIFFS CLAIMS BE BARRED.

Respondents offer no public policy arguments in favor of their position and utterly fail to address the obvious negative consequences of allowing persons to access our civil justice system for the purpose of recovering compensation for claims arising from their own criminal conduct. The distortion of the public's view of the judicial system as one of a mockery and a farce aside, the onslaught of potential claims by criminals and intentional addicts against those whom they may have duped and deceived along their journey would amount to a perverse injustice. If admitted criminal conduct is not a bar to bringing these claims, then there is practically nothing that will stand between the filing of a complaint and an inevitable jury trial.

For the cases that have been brought or which will be brought, the management and outcome of cases will be wildly unpredictable and our already burdened court system will be further strained, with courts, defendants and jurors having to repeatedly confront basic and difficult issues. Such issues include: 1) whether plaintiffs should be compelled to identify their illegal drug dealing or drug sharing sources as potential co-defendants, quite frequently including their own family members, friends or acquaintances, some of whom may have acted negligently or intentionally; 2) the apportionment of liability among and between the likely galaxy of

persons involved in the distribution history and the criminal plaintiff; 3) the attendant insurance coverage litigation regarding persons who may have negligently or intentionally allowed their prescriptions to fall into the hands of a plaintiff addict; and 4) the task juries will face in weighing and apportioning fault among between criminal plaintiffs and individual or multiple negligent and/or criminal defendants. For those that might successfully navigate the judicial terrain and secure a judgment, for society there is the unwelcome prospect of putting any sums of money into the hands of admitted drug addicts.

Respondents will contend that the public policy benefit of their position is to discourage the conduct of defendant wrongdoers, but as discussed in Section G of Petitioner's original brief, if anything this case represents a clear example that the criminal justice system has been very well equipped to curtail and punish conduct where appropriate.

F. THE COMPARATIVE NEGLIGENCE DOCTRINE IN WEST VIRGINIA DOES NOT SAVE THE PLAINTIFFS' CLAIMS.

Respondents' brief fails to address any supposed inconsistency between the adoption of the wrongful conduct doctrine and the continued existence of the comparative negligence doctrine in West Virginia. As noted in Petitioners' original brief, all of the cited cases come from jurisdictions that have recognized the wrongful conduct doctrine and operate with variations of pure or modified comparative negligence rules. Respondents would have this Court reject the reasoned principles of the wrongful conduct doctrine in favor of what essentially would be the "comparative criminal conduct doctrine." Fidelity to traditional concepts of comparative negligence does not bind the Court to such a dubious and unattractive result.

G. THIS COURT SHOULD NOT LET OUR CIVIL JUSTICE SYSTEM BE ABUSED WHEN SYSTEMS ARE IN PLACE TO GOVERN THE CONDUCT OF THE PARTIES.

Respondents did not respond to or contest the arguments and authorities contained within this section of Petitioner's brief. However, Respondents did include in their brief lengthy descriptions of several additional former co-defendant physicians who have been imprisoned, deported, or both, as a result of their misconduct. While these individuals surely were included to flame the fires of passion, their stories actually offer even more evidence that the criminal justice system is alive, well, and better suited to protect the public than permitting plaintiffs to pursue civil claims arising from their own criminal or immoral conduct.

VI. CONCLUSION

WHEREFORE, the Petitioners respectfully pray that this Court answer the above-referenced certified questions in their favor; that the claims of the plaintiffs be barred and dismissed; and that the Court award such other and further relief as it deems just and appropriate.



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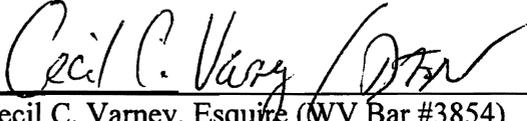
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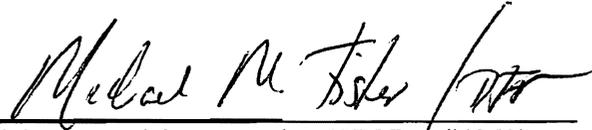
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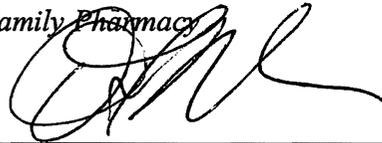
CERTIFICATE OF SERVICE

Petitioners, Tug Valley Pharmacy, LLC; Samuel Randolph Ballengee; and B & K Pharmacies, Inc., d/b/a Family Pharmacy, by counsel, Michael M. Fisher, Esquire, Elizabeth S. Cimino, Esquire, and Jackson Kelly PLLC; Strosnider Drug Store, Inc., d/b/a Sav-Rite Pharmacy, by counsel, David Nelson, Esquire, and Hendrickson & Long, PLLC; and Diane Shaffer, M.D., by counsel, Cecil C. Varney, Esquire, do hereby certify that they have served the foregoing **PETITIONERS' REPLY BRIEF** on all parties by depositing a true and exact copy thereof in the United States Mail, postage paid, addressed to counsel of record at the address listed below on this the **12th** day of **June, 2014**.

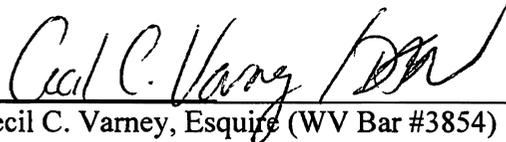
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