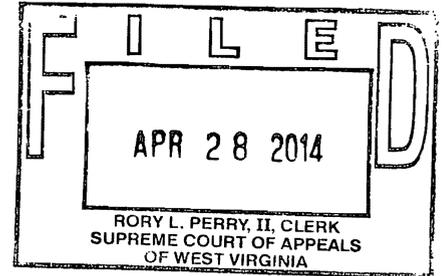


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.**

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## I. INTRODUCTION

Comes now the Petitioners, Tug Valley Pharmacy, LLC; Samuel Randolph Ballengee<sup>1</sup>; 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.<sup>2</sup>, by counsel, Cecil C. Varney, Esquire, and submit the following brief in connection with the certified questions answered by the Circuit Court of Mingo County, West Virginia on December 19, 2013, as follows:

## II. ASSIGNMENTS OF ERROR / CERTIFIED QUESTIONS

The Petitioners submit that the Circuit Court of Mingo County, West Virginia was in err when it answered the following certified question in the affirmative:

1. May a person maintain an action if, in order to establish the cause of action, the person must rely, in whole or in part, on an illegal or immoral act or transaction to which the person is a party?

The Petitioners further submit that the Circuit Court of Mingo County, West Virginia was in err when it answered the following certified question in the negative:

2. May the doctrine of *In Pari Delicto* be employed as a bar to tort claims under West Virginia law?

J.A. at 1-7.<sup>3</sup>

## III. STATEMENT OF CASE

### A. PROCEDURAL STATEMENT OF CASE

From 2010 to 2012, approximately 33 plaintiffs filed eight civil actions in the Circuit Court of Mingo County, West Virginia against physicians and pharmacists seeking damages on the ground that the defendants had caused them to become addicted to narcotic pain

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<sup>1</sup> Samuel Randolph Ballengee is not listed in the above-referenced case style, but was a defendant below in Civil Action Nos. 11-C-332 and 12-C-38.

<sup>2</sup> Diane Shaffer, M.D. is not listed in the above-referenced style, but was a defendant below in Civil Action Nos. 10-C-251 and 11-C-332.

<sup>3</sup> References to the Joint Appendix shall be "J.A. at \_\_\_\_."

medications and that, essentially, all of their lives had been completely ruined. J.A. at 115-176. Several of the plaintiffs failed to pursue and prosecute their claims, resulting in the voluntary dismissal of their claims, leaving 29 plaintiffs who are still pursuing their claims.

Without exception, each of the plaintiffs have admitted, under oath, to engaging in serious illegal, criminal, and immoral activity, in clear violation of state and federal criminal laws, concerning their acquisition, use, and abuse of narcotic pain medications, including buying, selling or sharing “street” drugs from other persons. Incredibly, however, most of the plaintiffs have asserted their Fifth Amendment rights to silence in order to protect the identity of their additional sources for controlled substances. Nevertheless, the plaintiffs seek, through the prosecution of these claims, to profit from their own admitted criminal wrongdoing and immoral behavior, to persuade the Court to encourage and condone their illegal conduct, and to abuse and make a mockery out of our judicial system, while protecting the sources and drug contacts for their illegal controlled substance activities.<sup>4</sup>

The defendant, Tug Valley Pharmacy, LLC, and its Pharmacist in Charge, Samuel Randolph Ballengee, operate a pharmacy in downtown Williamson, West Virginia. J.A. at 139. B & K Pharmacies, Inc. d/b/a Family Pharmacy operates a pharmacy in South Williamson, Kentucky. J.A. at 130-131. Neither of these pharmacies has been the subject of discipline by their governing Boards of Pharmacy, nor have they ever been charged with any criminal conduct whatsoever.

The defendant, Strosnider Drug Store, Inc. d/b/a Save Rite Pharmacy was a pharmacy in Kermit, West Virginia.<sup>5</sup> J.A. at 122-133. A former pharmacist, James P. Wooley, lost his pharmaceutical license and was prosecuted and sentenced in 2012 for illegal controlled substances activities unrelated to the subject plaintiffs. J.A. at 1038-1044.

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<sup>4</sup> The plaintiffs’ testimony will be specifically addressed *infra* with appropriate citations to the Joint Appendix.

<sup>5</sup> Strosnider filed for bankruptcy in 2011 and its assets were sold in 2012 with all operations ceasing at that time. Bankruptcy Case No. 11-20793 closed on July 15, 2013. This case moved forward only upon an agreement by plaintiffs not to pursue Strosnider’s assets.

The defendant, Diane Shaffer, is a former medical doctor in the Mingo County area. She also lost her medical license and was prosecuted and sentenced in 2012 relating to a conspiracy to misuse a DEA registration number for dispensing medication. J.A. at 1027-1033.

This litigation was subject to a number of delays which resulted from the filing for protection under United States bankruptcy laws by a former defendant, William Ryckman, M.D. The case also was slightly delayed by the Strosnider bankruptcy. During this time, the parties nevertheless engaged in written discovery and, in the fall of 2012, the parties engaged in depositions of the remaining plaintiffs, some expert witnesses, and some defendants.

Again, in each of the plaintiffs' depositions, they readily admitted to engaging in a consistent course of conduct to commit criminal and immoral acts in order to pursue their abuse of narcotic pain medication. Their conduct included, but was not limited to, the criminal and illegal possession of pain medications; the criminal and illegal distribution, purchase, and receipt of pain medications; the criminal and illegal acquiring and obtaining of narcotic pain medications through misrepresentation, fraud, forgery, deception, and subterfuge; the criminal and illegal obtaining of narcotic pain medication from multiple doctors during a concurrent time period (more popularly known as "doctor shopping"); and abusing pain medication by ingesting it in amounts more than prescribed and by snorting, hoofing, and/or injecting the pain medication in order to enhance its effects.

In January of 2013, the defendants filed separate motions for summary judgment seeking the dismissal of the plaintiffs' claims pursuant to well-settled West Virginia law which bars a plaintiff from recovery when his or her own unlawful or immoral acts caused or contributed to the alleged injuries in question. J.A. at 177-241, 244-245. Moreover, the defendants also argued that the doctrine of *in pari delicto* applied to actions, both at law and at equity, and mandated that the claims of the plaintiffs be barred and dismissed. J.A. at 245-246.

Finally, the defendants provided case law from other jurisdictions which had also barred such claims under very similar factual scenarios. J.A. at 246.

Oral argument concerning the various motions for summary judgment was held on May 13, 2013, before Circuit Judge Michael Thornsby. J.A. at 242-255. Upon Judge Thornsby's removal from the bench shortly thereafter, these matters were assigned to the Honorable John L. Cummings. On November 15, 2013, the parties appeared before Judge Cummings and suggested that the court certify the above-referenced questions to this Court for consideration. On December 19, 2013, Judge Cummings entered an Order certifying the above-referenced questions, said Order being received by this Court on February 18, 2014. J.A. at 1-7.

#### B. FACTUAL STATEMENT OF CASE

Each of the plaintiffs claim that the defendant physicians and pharmacies caused them to abuse and become addicted (or continue his or her addiction) to prescription narcotic pain medication and claim that their lives essentially have been ruined because of their drug abuse and addiction. Each of the plaintiffs allege that the defendant pharmacies contributed to the "pill mill" operations run by the defendant doctors by deviating from the applicable standard of care in the filling of prescriptions. The plaintiffs argue that the defendant physicians did not perform the necessary examinations in order to issue prescriptions for the pain medications and that the defendant pharmacies filled prescriptions which were not written for legitimate medical purposes. The plaintiffs claim that their addictions have ruined their lives and have caused them to lose earning capacity, experience financial loss, and suffer shame, embarrassment, and damage to their reputations in the community.<sup>6</sup> It is anticipated that plaintiffs will characterize the defendants and their conduct as extreme or even criminal.

However, as stated above, it is uncontroverted that each of the plaintiffs have engaged in a consistent and persistent course of conduct to criminally, illegally, and immorally

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<sup>6</sup> The plaintiffs' discovery responses were similar, if not nearly identical. An example to support the allegations made by plaintiffs can be found at J.A. at 270 – 273.

break the law, over and over again, and unlawfully acquire, possess, distribute, and abuse narcotic pain medications to enhance their effects. As such, the very core of the plaintiffs' alleged claims stem from their own criminal, illegal, and immoral activity. Specifically, the plaintiffs have each engaged in the following conduct:

1. Willis Duncan - Willis Duncan admitted to being addicted to narcotic pain medication since 1996, eleven years before Tug Valley Pharmacy, LLC even came into existence. J.A. at 275. Duncan admitted to illegally possessing, purchasing, and receiving controlled substances "off the street." J.A. at 263. Duncan further admitted to sharing pain medication with his wife on a frequent basis. J.A. at 267. Duncan admitted to illegally engaging in "doctor shopping" by obtaining pain medication from the Wellness Center in Williamson, West Virginia, Dr. Shaffer, and other physicians at concurrent times. J.A. at 259-260. Duncan further admitted taking pain medications in amounts greatly exceeding the prescribed daily dosages and snorting them to enhance their effects. J.A. at 263, 268. Duncan admitted to illegally obtaining controlled substances through misrepresentation, fraud, deception, and subterfuge by not advising doctors or pharmacies that he was addicted, that he was receiving narcotic pain medications through doctor shopping during concurrent periods, and that he was snorting and ingesting pain medications in amounts more than prescribed in order to enhance their effects. J.A. at 260, 262, 268. Finally, Duncan asserted his Fifth Amendment rights and refused to admit to obtaining narcotic pain medications from individuals who are not licensed to dispense such controlled substances. J.A. at 289.

2. Dewey Marcum - Dewey Marcum admitted to illegally possessing, purchasing, and receiving pain medication on a regular basis "off the street" and to sharing pain medication with his wife. J.A. at 297-298, 304-305. Marcum also admitted to illegally engaging in "doctor shopping" by receiving the same controlled substances from more than one doctor within a 30-day period. J.A. at 322. Marcum further admitted to snorting pain medication and

ingesting it in far greater amounts than prescribed in order to enhance its effects. J.A. at 299, 315-316, 322-323. Marcum admitted to illegally obtaining controlled substances through misrepresentation, fraud, deception, and subterfuge by not telling any of the pharmacies that he was addicted and otherwise abusing pain medication through snorting and ingesting it in amounts more than prescribed. J.A. at 300. Finally, Marcum asserted his Fifth Amendment right of silence regarding his illegal purchase and sale of narcotic pain medication. J.A. at 300.

3. Steven Marcum - Steven Marcum openly admitted being addicted to narcotic pain medication since 1999, eight years before Tug Valley Pharmacy, LLC even came into existence. J.A. at 337. Marcum admitted to illegally possessing, purchasing, and receiving pain medication “off the street” and from plaintiffs Charles Edward Speer, Lora Speer, and others. J.A. at 337, 339. Marcum also admitted to illegally engaging in “doctor shopping” by obtaining medication from Drs. Hoover and Ryckman in Williamson, West Virginia and Dr. Donald Kiser in Marietta, Ohio during the same 30-day intervals. J.A. at 336 – 337, 359. Marcum also admitted to snorting pain medication, using pain medication in amounts that greatly exceeded the prescribed daily dosage, and avoiding drug testing as part of his job. J.A. at 336 – 337, 359. Marcum further admitted to illegally acquiring pain medication through misrepresentation, fraud, deception, and subterfuge by failing to advise pharmacies and physicians of his addiction and doctor shopping activities. J.A. 338, 358. Marcum asserted his Fifth Amendment rights to silence concerning his source for pain medication. J.A. at 365.

4. Deborah Duncan - Deborah Duncan died as a result of a combined Oxymorphone, Oxycodone, Hydrocodone, and Alprazolam overdose intoxication, with no evidence of any prescription access to Oxymorphone and Oxycodone. J.A. at 397, 399-404. Duncan was addicted to narcotic medication since 1993, fourteen years before Tug Valley Pharmacy even came into existence. J.A. at 376. Her husband, Willis Duncan, admitted that he shared and abused pain medication on a frequent basis with his wife. J.A. at 267. Duncan used

prescription pain medication in amounts greater than prescribed, as her prescription would only last approximately two weeks. J.A. at 388. Duncan snorted narcotic medication and was routinely intoxicated as she “couldn’t hide being doped up all the time” from her family. J.A. at 374.

5. Charles Edward Speer - Charles Edward Speer admitted to being addicted to narcotic pain medication since 1990, seventeen years before Tug Valley Pharmacy, LLC even came into existence. J.A. at 407-408, 424. Speer admitted to illegally possessing, purchasing, and receiving pain medication “off the street” and sharing pain medication with his wife. J.A. at 408, 414-415. Speer admitted to routinely seeing multiple doctors during the same 30-day period in order to get prescriptions for the same narcotic pain medication. J.A. at 406, 409. Speer ingested pain medication in amounts greatly exceeding the prescribed daily dosage (i.e., 30 to 40 Lorcets and 20 to 25 Xanax per day) and snorting pain medications going back into the 1980’s. J.A. at 408, 415. Speer admitted to illegally obtaining pain medication through misrepresentation, fraud, deception, and subterfuge by not disclosing his addiction, his ingestion of pain medication in amounts more than prescribed, and his “doctor shopping” activities. J.A. at 416. Speer asserted his Fifth Amendment right to silence concerning his illegal narcotic pain medication transactions. J.A. at 415, 441.

6. Lora Speer - Lora Speer admitted to being addicted to narcotic pain medication since 2004, three years before Tug Valley Pharmacy, LLC even came into existence. J.A. at 460. Speer admitted to illegally possessing, purchasing, and receiving pain medication “off the street”, taking pain medication in amounts more than prescribed, borrowing or buying pain medication, fighting with her husband over pain medication, and sharing pain medication with her husband. J.A. at 447, 449-450, 451-452. Speer admitted to taking as many as 10 to 40 Lorcets daily and 10 to 40 Alprazolam daily and sometimes even exceeding those amounts. J.A. at 467-468. Speer admitted to illegally obtaining pain medication through misrepresentation,

fraud, deception, and subterfuge by not telling pharmacies that she was addicted, that she was taking narcotic pain medication in amounts more than prescribed, and that she was abusing and snorting pain medication. J.A. at 453. Speer asserted her Fifth Amendment right to silence concerning her illegal purchase of pain medication. J.A. at 473.

7. Elizabeth Collins - Elizabeth Collins admitted to being addicted to pain medication since 2006, months before Tug Valley Pharmacy, LLC began its operations. J.A. at 483. Collins admitted to illegally possessing, purchasing, and receiving pain medications “off the street”, including Oxycodone, to which she did not have a prescription. J.A. at 479. Collins admitted to ingesting pain medication in amounts more than prescribed and being arrested multiple times for intoxication due to her drug use and abuse. J.A. at 479. Collins admitted to illegally obtaining pain medication through misrepresentation, fraud, deception, and subterfuge by not advising pharmacies that she was addicted to pain medication, that she was taking pain medication in amounts more than prescribed, and that she lied to physicians about being in pain. J.A. at 483. Collins also asserted her Fifth Amendment right to silence with regard to her illegal procurement of pain medication. J.A. at 482.

8. Joyce Mullins - Joyce Mullins admitted to illegally possessing, purchasing, and receiving pain medication “off the streets”, ingesting her husband’s pain medication, and selling her husband’s pain medication. J.A. at 508. Her husband was receiving pain medication because he was suffering from prostate cancer. J.A. at 507-508. Mullins also admitted to ingesting pain medication in amounts more than prescribed and concealing that information from physicians and pharmacies. J.A. at 505. Mullins admitted to illegally obtaining pain medication through misrepresentation, fraud, deception, and subterfuge by misleading physicians and pharmacies concerning her addiction and lack of pain. J.A. at 501, 503, 510.

9. Bruce Blankenship - Bruce Blankenship admitted to being addicted to narcotic pain medication since 2002, five years before Tug Valley Pharmacy, LLC even came into existence. J.A. at 528. Blankenship admitted to illegally possessing, purchasing and receiving pain medication “off the streets”. J.A. at 532. Blankenship admitted to illegally engaging in “doctor shopping,” that is, traveling to various pain clinics in Florida to obtain pain medication in addition to that received from Dr. Shaffer and/or Dr. Hoover during the same time period. J.A. at 529. Blankenship admitted to snorting and ingesting pain medication in amounts greater than prescribed. J.A. at 533. Blankenship further admitted to illegally obtaining pain medication through misrepresentation, fraud, deception, and subterfuge by faking a back injury, concealing his addiction, and concealing his abuse of pain medication. J.A. at 533. In fact, Blankenship admittedly lied to the Circuit Court of Mingo County in 2009, when he advised said court during a guilty plea that he had not ever been addicted to drugs, when in this case, he admitted to being addicted since 2002. J.A. at 550. Blankenship asserted his Fifth Amendment rights to silence with regard to his illegal conduct in obtaining pain medications. J.A. at 529, 531, 544.

10. Teddy Blankenship - Teddy Blankenship admitted being addicted to narcotic pain medication since 2002, five years before Tug Valley Pharmacy, LLC even came into existence. J.A. at 555. Blankenship admitted to illegally possessing, purchasing, and receiving pain medication “off the street”, including Oxycodone, and frequently sharing pain medication with his brother. J.A. at 559, 564. Blankenship further admitted to illegally engaging in “doctor shopping” by seeing multiple physicians to obtain controlled substances during the same time period. J.A. at 557-558. Blankenship admitted to ingesting medication in amounts greatly exceeding the prescribed dosage and snorting said medication. J.A. at 559, 564. Blankenship admitted to illegally obtaining pain medication through misrepresentation, fraud, deception, and subterfuge by misrepresenting his medical conditions to physicians and

concealing his addiction from physicians and pharmacies. J.A. at 558, 560. Blankenship asserted his Fifth Amendment right to silence concerning his conduct to illegally obtain pain medication. J.A. at 590.

11. Misty Marcum - Misty Marcum believes that she can escape responsibility for her criminal and illegal drug activity because of her belief that “when you lay candy out to a baby, they’re gonna take it.” J.A. at 614. Of course, Marcum is not a baby and narcotic pain medication is not candy. Marcum admitted to illegally possessing, purchasing, and receiving pain medication “off the street”, using the pain medication of her husband, selling and trading Xanax and Prozac for Hydrocodone, and receiving pain medication from friends. J.A. at 596, 600, 604, 609. She also admitted to ingesting medication in amounts greatly exceeding the prescribed dosage and snorting said medications to enhance their effects. J.A. at 599, 608. Marcum further admitted to illegally obtaining pain medication through misrepresentation, fraud, deception, and subterfuge by concealing her addiction, her ingestion of pain medication in amounts greatly exceeding the prescribed dosage, and the lack of a legitimate medical need for said medications. J.A. at 613. Marcum asserted her Fifth Amendment right to silence regarding her illegal purchase and sell of pain medication. J.A. at 611, 621.

12. Polly Williams - Polly Williams did not like to “snort” pain medication, so she “hoofed” them, that is, crushed the medications and inhaled them through her mouth and thus directly into her lungs. J.A. at 637. Williams admitted to being addicted to pain medication since 2003, four years before Tug Valley Pharmacy, LLC even came into existence. J.A. at 627. Williams admitted to illegally possessing, purchasing, and receiving pain medication “off the streets”, using Hydrocodone and Xanax in amounts in excess of their prescribed dosage, sharing pain medications with various ex-husbands, and trading pain medications. J.A. at 628, 632, 634. Williams further admitted to illegally engaging in “doctor shopping”, including traveling to Florida with friends to get drugs. J.A. at 640-641. Williams admitted to illegally obtaining pain

medications through misrepresentation, fraud, deception, and subterfuge by misrepresenting her pain, the non-legitimate medical need for the pain medication, and her addiction. J.A. at 638-639. Williams asserted her Fifth Amendment right to silence concerning the receipt and distribution of pain medication. J.A. at 636.

13. Shaun Collins - Shaun Collins admitted to “eating pills like candy” and ingesting his monthly prescriptions within a two week period. J.A. at 671. Collins admitted to illegally possessing, purchasing, and receiving pain medication “off the street”. J.A. at 671. Collins admitted to illegally obtaining controlled substances through misrepresentation, fraud, deception, and subterfuge by being untruthful with physicians concerning the prescription of pain medications by multiple doctors at the same time and by concealing his addiction from pharmacies. J.A. at 668, 670. Collins also asserted his Fifth Amendment rights concerning his drug activities. J.A. at 672.

14. Dennis Mitchell Smith - Dennis Smith admitted abusing pain medication since 1996 or 1997, approximately eleven years before Tug Valley Pharmacy, LLC came into existence. J.A. at 692. Smith admitted to engaging in theft, when intoxicated on pain medications, in order to purchase them. J.A. at 690. He also admitted to illegally possessing, purchasing, and receiving pain medication from friends. J.A. at 689. Smith admitted to ingesting pain medication in amounts exceeding the prescribed dosage. J.A. at 693, 695. Smith further admitted to obtaining pain medication through misrepresentation, fraud, deception, and subterfuge by misrepresenting his medical condition in order to obtain pain medication, using car insurance to obtain pain medication when he did not have a specific injury, misrepresenting his level of pain, and concealing his addiction and lack of pain in order to obtain pain medication. J.A. at 692, 694, 698, 699. Finally, Smith asserted his Fifth Amendment right to silence concerning obtaining pain medication illegally and snorting pain medication. J.A. at 691, 696, 699.

15. Paul Horn - Paul Horn admitted to ingesting 10 to 12 Hydrocodone a day, more if they were available, and 15 Alprazolam, more if available, and “if he didn’t pass out before he could take more.” J.A. 719, 727. Horn admitted to being addicted to pain medication since 2004, three years before Tug Valley Pharmacy, LLC even came into existence. J.A. at 737. Horn admitted to illegally possessing, purchasing, and receiving pain medication “off the street” and sharing and trading pain medication with friends. J.A. at 718, 723. Horn admitted to illegally engaging in “doctor shopping” and traveling out of state for that purpose. J.A. at 722. Horn admitted to illegally defeating a drug screening test by submitting a false sample. J.A. at 717. Horn admitted to snorting both Hydrocodone and Alprazolam. J.A. at 719. Horn admitted to illegally obtaining pain medications through misrepresentation, fraud, deception, and subterfuge by concealing this addiction from physicians and pharmacies, ingesting pain medication in amounts exceeding the prescribed dosage, and snorting and abusing pain medication. J.A. at 719, 721, 722.

16. James Mullins - James Mullins admitted to illegally possessing, purchasing, and receiving pain medication “off the street” from drug dealers. J.A. at 753-754. Mullins admitted to using pain medications in amounts exceeding the prescribed daily dosage and in combination with other illegal drugs such as marijuana and cocaine. J.A. at 747. Mullins admitted to illegally obtaining pain medication through misrepresentation, fraud, deception, and subterfuge by concealing his addiction and ingestion of pain medication in amounts exceeding the prescribed dosage from numerous physicians. J.A. at 748, 750-751.

17. Brenda Preece - Brenda Preece admitted that she has been addicted to pain medication since at least 2004, three years before Tug Valley Pharmacy, LLC even came into existence. J.A. at 772. She admitted to illegally possessing, purchasing, and receiving pain medication “off the street” and sharing pain medications with others. J.A. at 778, 781-782. Preece, in order to obtain pain medication through misrepresentation, fraud, deception, or

subterfuge, even went so far as to prepare a false MRI report to present to physicians in order to receive pain medication. J.A. at 771. She also engaged in receiving payments from friends for the sole purpose of going to doctors to illegally obtain prescription pain medication. J.A. at 773. Preece consistently concealed the true nature of her medical condition and her addiction from physicians and pharmacies. J.A. at 777. Preece admitted to ingesting pain medication in amounts greatly exceeding the prescribed dosage and using them in combination with alcohol and other drugs, such as Oxycodone, to intensify their effects. J.A. at 775. Preece admitted to taking as many as 20 to 25 Hydrocodone pills per day. J.A. 775. Preece asserted her Fifth Amendment Right to silence regarding her procurement of pain medication. J.A. at 785, 800.

18. Ernest Meade and Mary Lou Meade - Ernest Meade admitted to being addicted to pain medication since 1985, a full two decades before Tug Valley Pharmacy, LLC even came into existence. J.A. at 808. Likewise, Mary Lou Meade admitted to being addicted to pain medication since 1987, again two full decades before Tug Valley Pharmacy, LLC even came into existence. J.A. at 808. Both plaintiffs admitted to illegally possessing, purchasing, and receiving pain medication “off the street”, and sharing pain medication with one another. J.A. at 808-810. Both plaintiffs admitted to ingesting pain medication in amounts exceeding the prescribed dosage. J.A. at 821-822, 831-832. Both plaintiffs admitted to illegally obtaining pain medication through misrepresentation, fraud, deception, and subterfuge by misrepresenting their medical condition in order to “get high”. J.A. at 811-812. In fact, Ernest Meade admitted that he did not care whether a doctor was legitimate or not because he “was just out for the drugs.” J.A. at 812. Both plaintiffs concealed their addiction and abuse of pain medication from pharmacies so that the pharmacies would not stop filling their prescriptions. J.A. at 815-816. Both plaintiffs asserted their Fifth Amendment right to silence concerning their illegal procurement of pain medication. J.A. at 859, 864.

19. Lynette Salmons Francis - At the time of the death of Lynette Salmons Francis, she had 45 Xanax and 12 Hydrocodone tablets in her possession. J.A. at 887. Four days earlier, she had just filled prescriptions for 120 Xanax and 60 Hydrocodone. J.A. at 887. Accordingly, she had presumably taken 76 Xanax and 48 Hydrocodone in four days. Francis illegally possessed, purchased, and received pain medication by purchasing, trading, and selling pain medication in order to get a stronger drug – OxyContin. J.A. at 876. Francis was engaged in illegal doctor shopping from 2004 until the time of her death. J.A. at 877, 880. Francis ingested pain medication by injecting and snorting it. J.A. at 874, 879. Francis was observed with clear needle marks on her arms and admitted to her mother that she was “shooting up” OxyContin. J.A. at 874. Francis often ingested more Hydrocodone than prescribed and was observed with white powder on her nose at different times as a result of snorting Hydrocodone. J.A. at 877.

20. Sula Collins (and the consortium claims of Nickey, Whitney, and Christopher Collins) - Sula Collins admitted to illegally obtaining pain medications through misrepresentation, fraud, deception, and subterfuge by continually misrepresenting her medical condition to physicians and pharmacies, obtaining pain medication when she was not in pain, and concealing her addiction from physicians and pharmacies. J.A. at 901-908. In an effort to justify her conduct, Collins admitted that she made these representations “because I was just protecting my medication. Protecting my addiction.” J.A. at 907.

21. Wilber Hatcher - Wilber Hatcher admitted to illegally possessing, purchasing, and receiving pain medication from a friend. J.A. at 923. He further admitted to using pain medication in amounts that exceeded the prescribed dosages and by snorting said medication. J.A. at 933, 935-936. Hatcher admitted to illegally obtaining pain medication through misrepresentation, fraud, deception, and subterfuge by concealing his addiction in order to increase the strength of his pain medication and by concealing information surrounding his

addiction from the pharmacy. J.A. at 927, 938. Hatcher asserted his Fifth Amendment right to silence regarding his illegal procurement of pain medication from family members, coworkers, and others. J.A. at 932-933.

22. Lisa Hensley - Lisa Hensley admitted to illegally engaging in “doctor shopping” by obtaining the same or similar medication from hospitals and physicians during the same time period on multiple occasions. J.A. at 955-957. Hensley admitted to illegally obtaining pain medication through misrepresentation, fraud, deception, and subterfuge by concealing her addiction from numerous physicians and hospitals and pharmacies. J.A. at 954-957, 960. Hensley admitted to using pain medications in amounts exceeding the prescribed dosages. J.A. at 953.

23. Russell Ratliff - Russell Ratliff admitted to illegally possessing, purchasing and receiving pain medication. J.A. at 982, 984. He began his hydrocodone abuse while receiving a lawful prescription from a Kentucky surgeon. After he began to abuse the drug he made an appointment with the Williamson Wellness Center and falsely told those doctors that he had suffered a knee injury from a mining accident. J.A. 980-981. There was no accident and he had no knee pain. J.A. at 980-981. In addition to falsely claiming a workplace injury, he later purposefully withheld his known addiction from his doctors and pharmacists so that he could continue to abuse drugs. J.A. at 977, 987. Ratliff illegally purchased and/or obtained drugs from street sources. J.A. at 982, 984. Ratliff also crushed and snorted medications and to used them in amounts that greatly exceeded the prescribed daily dosage. When asked whether he had shared drugs with fellow plaintiff Brenda Preece, he asserted his Fifth Amendment rights. J.A. at 978.

24. Joey Porter – Joey Porter admitted to having regularly purchased controlled substances, including hydrocodone, from street sources in order to perpetuate his habit and abuse. J.A. at 996-997. Porter knowingly and intentionally concealed his physical condition from the prescribing physicians and pharmacists so as to continue to obtain controlled

substances. J.A. at 1002. Porter also admitted to intentionally misusing the drugs by crushing and snorting them and also by ingesting them in amounts greatly exceeding the prescribed daily dosage. J.A. at 997-998.

25. Marcella Justice – Marcella Justice became addicted to prescription drugs following treatment she received from Dr. Siegel, who is not a party to this litigation. J.A. at 1013. Justice then began to illegally purchase drugs from individuals before she sought an appointment from Dr. Hoover. J.A. at 1013, 1016, 1017. She later illegally withheld medical information from Drs. Hoover and Siegel that she was illegally receiving controlled substance prescriptions from each of them simultaneously and also illegally from third parties. J.A. at 1015, 1018. Justice admitted that she illegally crushed and snorted hydrocodone and admitted that she ingested controlled substances in amounts greatly exceeding the prescribed daily dosage. J.A. at 1013.

As will be revealed below, the admitted criminal, illegal and immoral conduct of the plaintiffs bars their ability to seek recovery in these cases.

#### **IV. SUMMARY OF ARGUMENT**

Despite the admitted criminal, illegal, and immoral conduct of the plaintiffs, the plaintiffs will contend that their claims should not be barred, but rather should be judged under the doctrine of comparative negligence. The Defendants submit that the doctrine of comparative negligence is inapplicable to address the intentional, criminal, illegal, and immoral conduct of the plaintiffs and that well settled law bars any recovery by the plaintiffs in this case.

It is a long standing West Virginia public policy that a plaintiff cannot recover when his or her own unlawful or immoral act caused the injury in question, as participation in any illegal or immoral act precludes recovery for injuries sustained as a result of the act. Likewise, West Virginia law recognizes the doctrine of *in pari delicto* which bars a plaintiff's claim, even where the defendant was culpable of criminal or immoral conduct, as the law will

not lend itself to afford relief to one as against the other, but rather will leave them as it finds them.

In applying these West Virginia doctrines, the Honorable James J. Rowe, Judge of the Circuit Court of Greenbrier County, West Virginia, dismissed the claims of a plaintiff that his wife's addiction and subsequent death was the responsibility of a drug manufacturer who promoted the sale and use of OxyContin. Moreover, multiple other jurisdictions have barred claims similar to the ones being proposed by the present plaintiffs. Such decisions are based upon well-established public policies that allowing such claims to proceed would result in the courts condoning and encouraging illegal conduct, would allow wrongdoers to receive profit or compensation as a result of their illegal acts, and would make a mockery out of our civil justice system.

In each of the jurisdictions in which these legal doctrines and public policies have been applied, either pure or modified comparative negligence doctrines were in existence, but wisely were not applied. Those courts refused to judge those cases through a comparative negligence analysis, but rather chose to apply the wrongful conduct doctrine and *in pari delicto* doctrine to bar the claims. Consequently, in the present case, the defendants submit that the admitted criminal, illegal, and immoral conduct of the plaintiffs bars any rights to recovery in connection with this matter.

#### V. STATEMENT OF ORAL ARGUMENT

The defendants request the opportunity for oral argument pursuant to Rule 20(a) of the Rules of Appellate Procedure on the ground that these cases arguably involve issues of first impression, involve issues of fundamental public importance, and/or involve inconsistencies or conflicts among the decisions of lower tribunals (i.e., the decision of Judge Rowe in the Circuit Court of Greenbrier County, West Virginia and the answer to the present certified questions by Judge Cummings).

## VI. ARGUMENT

### A. STANDARD OF REVIEW

Certified questions are judged according to 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<sup>7</sup>

Each of the plaintiffs has admitted, under oath, to a long history of violating criminal laws relating to controlled substances. For instance, West Virginia Code §60A-4-401(c) states that “[i]t is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice or except as otherwise authorized by this act . . .” (emphasis added); *See also* Title 21, United States Code, §844(a) (Simple Possession) and §841(a)(1) (Possession with Intent to Distribute).

Likewise, West Virginia Code §60A-8-6 provides that “it is unlawful for any person or entity to knowingly purchase or receive any prescription drug from any source other than a person or entity licensed pursuant to the laws of this State except where otherwise provided, such person or entity to include, but not be limited to, a wholesale distributor, manufacturer, pharmacy distributor or pharmacy.” (emphasis added).

In addition, West Virginia Code §60A-4-410(a) makes it unlawful to engage in “doctor shopping”. Specifically, that statute provides “[i]t is unlawful for a patient, in an attempt to obtain a prescription for a controlled substance, to knowingly withhold from a practitioner that the patient has obtained a prescription for a controlled substance of the same or similar therapeutic use in a concurrent time period from another practitioner.”

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<sup>7</sup> The particular drugs mentioned above to which the plaintiffs have admitted to illegally possessing, distributing, acquiring, and abusing are classified as controlled substances under both Federal and State statutes. *See* W.Va. Code §60A-2-206; Title 21, United States Code, §812.

Finally, it is a felony to violate West Virginia Code §60A-4-403(a)(3). That statute provides that “[i]t is unlawful for any person knowingly or intentionally . . . [t]o acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge . . .” (emphasis added) ; *See also* Title 21, United States Code, §843(a)(3).

As revealed above, each of the plaintiffs has readily admitted, under oath, to having violated state and federal criminal laws in furtherance of their illegal and criminal drug activity. Nonetheless, the plaintiffs have the audacity to attempt to seek financial recovery for alleged injuries and damages which stem from their own illegal and immoral acts.

Moreover, the brazen nature of the plaintiffs is further exemplified by their assertion of the Fifth Amendment. Specifically, when pressed for information during discovery concerning potential joint tortfeasors to their conduct (i.e. other drug distributors and purchasers), most of the plaintiffs chose to invoke their rights of silence pursuant to the Fifth Amendment.<sup>8</sup>

Their scheme could not be more clear. The plaintiffs want to protect their sources of distribution and purchase of pain medication, so that the sources will be in place when they hopefully obtain a monetary recovery in this case. At a minimum, they want to selectively apportion blame on the defendants while allowing other responsible parties to evade responsibility or prosecution. Quite simply, the plaintiffs are attempting to make a mockery of our judicial system and to profit from their own wrongdoing. This Court should not allow them to succeed.

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<sup>8</sup> Setting aside the ability of the plaintiffs to succeed in the assertion of Fifth Amendment rights under the circumstances of this case and their own admissions of wrongful conduct, the Court is permitted to draw an adverse inference that a truthful answer to the questions posed would have further established the plaintiffs’ criminal conduct. *See W. Va. Dept. of Health and Human Res. ex rel Wright v. Doris S.*, 197 W. Va. 489, 498, 475 S.E.2d 865, 874 (1996).

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

West Virginia law supports the principle that a plaintiff cannot recover when his or her unlawful conduct or immoral act caused or contributed to the injuries in question. Likewise, West Virginia law recognizes the doctrine of *in pari delicto* which bars a plaintiff's claims even when the defendant may have been culpable of negligent, criminal or immoral conduct of his own.

These principles were applied by the Honorable James Rowe, Judge of the Circuit Court of Greenbrier County, West Virginia in *Allen v. Perdue Pharma, L.P.*, Civil Action No. 01-C-224, in the Circuit Court of Greenbrier County, West Virginia. J.A. at 1046-1051. In *Allen*, the plaintiff alleged that a defendant drug manufacturer of the drug OxyContin, among others, negligently and aggressively promoted the sale and use of said drug even when it knew that the drug could cause dependence, addiction, and other related damages. J.A. at 1048. The plaintiff further alleged that his wife took the drug and, as a result thereof, became addicted and later died as a result of her abuse. J.A. at 1048.

Judge Rowe ruled that the plaintiff's claims were barred because of the wife's misuse and abuse of the drug (i.e. crushing, liquefying, and injecting), that her conduct was in direct contradiction of how the drug was supposed to be ingested, and that her abuse was the proximate cause of her addiction and death. J.A. at 1049. Specifically, Judge Rowe held that "West Virginia recognizes the established legal principle that a plaintiff cannot recover when his own unlawful or immoral act caused the injuries in question. *Gray v. Farley*, 1992 W.L. 564130, at 2 (S.D.W.Va. October 26, 1992) ("[P]articipation in any immoral or illegal act by plaintiff precludes recovery for injuries sustained as a result of the act.")(citing *Workman v. Lewis*, 126 W.Va. 6, 28 S.E.2d 56 (1943). J.A. at 1049. Judge Rowe further held that "[a]s the *Gray* court stated, '[n]o Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.' [C]onsent or participation in any [moral or unlawful act by plaintiff precludes

recovery for injuries sustained as a result of the act.” J.A. at 1049. Judge Rowe found that the plaintiff’s wife had used and abused drugs before she was ever prescribed OxyContin and, therefore, there was no causal relationship between the defendant’s acts or omissions and the wife’s drug addiction and subsequent death. J.A. at 1050-1051.

The *Gray* case relied upon by Judge Rowe, while not factually similar to the case at hand, also provides instruction. In *Gray*, plaintiff filed a premises liability action against a property owner with whom he had conspired to commit arson. During the plaintiff’s attempt to commit the arson, he was confronted by a police officer, a struggle ensued, and the plaintiff sued as a result of his injuries. The Honorable Dennis Knapp, Senior United States District Judge for the Southern District of West Virginia, held that “one who consents to and participates in an immoral or illegal act cannot recover damages from other participants for the consequences of that act. *Miller v. Bennett*, 56 S.E.2d 272 (Va. 1949).” *Gray*, 1992 W.L. 564130, at 2 (S.D.W.Va. 1992). In other words, Judge Knapp held that no court will lend its aid to a man who finds his cause of action upon an immoral or illegal act, not for the sake of the defendant, but because no court will lend their aid to such a plaintiff. *Id.* Judge Knapp specifically held that the doctrine of *in pari delicto* applied to actions both at law and equity and that it was clear that West Virginia recognizes that persons with equally evil intentions shall not be allowed recovery from one another for injuries received as a result of their concerted evil conduct. *Id.* at 2-3.

In the present case, plaintiffs admit that they have engaged in serious, substantial, and repeated violations of federal and state criminal laws in connection with their possession, purchase, receipt, use and abuse of narcotic pain medications. Consistent with the legal doctrines discussed above, the plaintiffs simply cannot recover in this case because of their own unlawful and immoral activities. Similarly, pursuant to the doctrine of *in pari delicto*, this Court should not lend aid to the plaintiffs, not for the sake of the defendants, but because the Court will

not lend its aid to such plaintiffs. Therefore, the plaintiffs' claims in the present case must be barred.

D. MULTIPLE OTHER JURISDICTIONS SUPPORT BARRING PLAINTIFFS' CLAIMS

There are multiple other jurisdictions which have barred similar claims. Specifically, when plaintiffs have admitted to immoral and illegal conduct in acquiring, using and abusing prescription pain medication, multiple jurisdictions have refused to allow such claims to proceed.

1. Michigan - One of the leading cases to bar claims similar to the ones alleged by the present plaintiffs is *Orzel v. Scott Drug Co.*, 537 N.W.2d 208 (Mich. 1995). In that case, a wife, as guardian of her husband, brought suit against a pharmacy for allegedly negligently supplying Desoxyn, a schedule II controlled substance, to her husband. The plaintiff alleged that the pharmacy caused his physical and psychological addiction to the drug and mental illness.

However, the Supreme Court of Michigan noted that the plaintiff had repeatedly violated both federal and state laws by illegally obtaining, possessing, and using the drug. *Orzel*, 537 N.W.2d at 212 – 215; 221. The court found that the plaintiff had admitted that he had purchased other Desoxyn pills from other sources (other pharmacies and “off the street”) while having his prescriptions filled by the defendant pharmacy, that he took more pills than were prescribed, that he unlawfully obtained multiple prescriptions during the same time period (“doctor shopping”), that he misrepresented his actual need for the drug to prescribing physicians, and that he had unlawfully used and abused the drug, even before he had prescriptions filled by the defendant pharmacy. *Orzel*, 537 N.W.2d at 211.

The court then merged two legal maxims to create the “wrongful conduct rule” to bar the plaintiff’s claim in that case. First, the court set forth the fundamental common law maxim that a person cannot maintain an action if, in order to establish his cause of action, he

must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party. *Orzel*, 537 N.W.2d at 212. In addition, the court set forth a similar common law maxim known as the doctrine of *in pari delicto* to also bar the plaintiff's claim. *Orzel*, 537 N.W.2d at 212. Specifically, the court stated that as between parties *in pari delicto*, that is equally in the wrong, the law will not lend itself to lend relief to one as against the other, but will leave them as it finds them. *Orzel*, 537 N.W.2d at 212 – 213.

The court held that the rationale to support the wrongful conduct rule was rooted in the public policy that courts should not lend their aid to a plaintiff who has founded his cause of action on his own illegal conduct. *Orzel*, 537 N.W.2d at 213. Specifically, that court held that if it would choose to regularly give its aid under said circumstances, several unacceptable consequences would occur, as follows:

“First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct. . . Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of their responsibility for their illegal acts to other parties. . .”

*Orzel*, 537 N.W.2d at 213.<sup>9</sup>

2. Kentucky (Federal) - In *Foister v. Purdue Pharma, L.P.*, 295 F.Supp.2d 693 (E.D.Ky. 2003), multiple users (or the estates of former users) brought suit against a drug manufacturer and marketer claiming that they had been harmed by the use, abuse, and/or addiction to the drug OxyContin. The Court noted that the plaintiffs used OxyContin at various times for both legitimate and illegitimate purposes, that all the plaintiffs allegedly suffered

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<sup>9</sup> The *Orzel* Court stated that, in order to implicate the wrongful conduct rule, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute. *Orzel*, 537 N.W.2d at 214. If the plaintiff's illegal act only amounted to a violation of a safety statute, it may not arise to the level of serious misconduct sufficient to bar cause of action by implication by application of the wrongful conduct rule. *Orzel*, 537 N.W.2d at 214. However, the Court determined that the plaintiff's illegal conduct was of the type that warranted application of the wrongful conduct rule based upon the significant degree of harm and punishment associated with such violations, the number of times he committed them, his improper use of the controlled substance, his illegal possession of it, his acquisition of the controlled substance by misrepresentation which is a felony, and his repeated violation of criminal provisions. *Orzel*, 537 N.W.2d at 214 – 215. The court declined to apply any exceptions to the rule. *Orzel*, 537 N.W.2d at 221.

serious and debilitating side effects, namely addiction to the drug, and that two of the plaintiffs' estates claimed they were killed by OxyContin. *Foister*, 295 F.Supp.2d at 696. In discussing OxyContin, the Court noted that the pill was designed to release Oxycodone in controlled amounts in order to keep the brain from receiving too much of the drug. However, some patients, as well as other individuals, soon figured out that crushing the tablets would defeat the time-release function and unlock the full narcotic effect of the drug. *Foister*, 295 F.Supp.2d at 696.

In granting the motions for summary judgment in favor of the defendants and dismissing the plaintiffs' claims, the court stated that it would not abandon its reason and common sense and fall prey to the passion and prejudice against the defendants. *Foister*, 295 F.Supp.2d at 695. Moreover, the court stated that it would not ignore the abuses of the plaintiffs and would not accept the plaintiffs' "victimization" mentality. *Foister*, 295 F.Supp.2d at 695.<sup>10</sup>

Rather, the court noted that, in Kentucky, plaintiffs may not recover in a legal or equitable proceeding when the basis for such action rests upon their own illegal conduct. *Foister*, 295 F.Supp.2d at 704. As a general rule, a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transgression to which he is a party. *Foister*, 295 F.Supp.2d at 704. In other words, courts refuse to aid those whose cause of action is based upon their own illegal conduct. *Foister*, 295 F.Supp.2d at 704. Finally, the court addressed the holding of *Orzel* and other similar cases, and wholeheartedly agreed with those authorities and the public policy considerations surrounding the doctrines. *Foister*, 295 F.Supp.2d at 704 – 705.

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<sup>10</sup> Traditionally, in West Virginia, even intoxication cannot be used as a defense or mitigating circumstance in a criminal case. *State v. Brant*, 162 W.Va. 762, 766, 252 S.E.2d 901, 902-903 (1979). That rule is founded on the wise recognition that in most cases voluntary intoxication reduces the individual's inhibitions to antisocial activity making the commission of a criminal act more likely. A rule which permits a defendant to plead that because of his intoxication his capacity to control himself or to perform a specific intent was diminished would provide every would-be malefactor with a convenient excuse which would appear sufficiently reasonable to confuse any jury. *Id.* By analogy, in the present case, the plaintiffs' victimization arguments that they shouldn't be responsible for their own criminal conduct because of their addiction does not pass muster.

3. Mississippi - In *Price v. Purdue Pharma Co.*, 920 So.2d 479 (Miss. 2006), a patient brought an action against doctors, pharmacies, and drug manufacturers alleging that he sustained injuries from ingesting OxyContin, including addiction to the drug. In addressing the plaintiff's claims, the court noted that he had been treated by at least 10 different physicians from 10 different clinics in two cities and had utilized 7 pharmacies in three cities to obtain OxyContin. *Price*, 920 So.2d at 482. During this time, the plaintiff never informed the physicians that he was seeing other doctors or obtaining other prescriptions from them. *Price*, 920 So.2d at 482. The court held that any attempt to acquire a controlled substance fraudulently or dishonestly was a crime.<sup>11</sup> *Price*, 920 So.2d at 484.

The court then held that it had long recognized the maxim that no court will lend its aid to a man who founds his cause of action upon an illegal or immoral act. *Price*, 920 So.2d at 484. Specifically, if a plaintiff cannot open his case without showing that he has broken the law, a court will not aid him. *Price*, 920 So.2d at 484. It has been said that the objection may often sound very ill in the mouth of the defendant, but it is not for the sake of the defendant that the objection is allowed; it is founded on general principles of policy. *Price*, 920 So.2d at 484.

The court found that the plaintiff's entire claim was wholly rooted in his own transgressions which took place at the time of his alleged injury and that his claim absolutely required the essential aid from his own misdeeds to establish it. *Price*, 920 So.2d at 485. The plaintiff's violation of the law was not merely a condition, but instead constituted an integral and essential part of his case and was the contributing cause of his alleged injury. *Price*, 920 So.2d at 485. Therefore, the court joined those jurisdictions in holding that "the wrongful conduct rule" in Mississippi prevents a plaintiff from suing caregivers, pharmacies, pharmaceutical companies, and laboratories for addiction to a controlled substance which a plaintiff obtained

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<sup>11</sup> In Mississippi, like West Virginia, it is unlawful for any person knowingly or intentionally to acquire or obtain possession or attempt to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge. Miss. Code Ann. §41-29-144(1).

through his own fraud, deception and subterfuge. *Price*, 920 So.2d at 486. The court would not lend aid to a party whose cause of action directly results from an immoral or an illegal act committed by that party. *Price*, 920 So.2d at 486.

4. Florida - In *Kaminer v. Eckerd Corp. of Florida, Inc.*, 966 So.2d 452 (Fla. Dist. 2007), the estate of a student, who died after consuming OxyContin that had been given to him by a fraternity brother, brought a wrongful death action against the pharmacy from which the fraternity brother's roommate had stolen the drug. *Kaminer*, 966 So.2d at 453. The court followed and applied the wrongful conduct rule set forth in *Orzel*.

Specifically, the court stated that the rationale for the wrongful conduct rule was rooted in the public policy that courts should not lend their aid to a plaintiff who founded his case on his own illegal conduct. *Kaminer*, 966 So.2d at 454. In dismissing the action, the court further adopted the public policies set forth in *Orzel* that the courts should not condone or encourage illegal conduct, that wrongdoers should not be able to receive a profit or compensation as a result of their illegal acts, that the public should not view our legal system as a mockery of justice, and that wrongdoers should not be able to shift much of the responsibility for their illegal acts to other parties. *Kaminer*, 966 So.2d at 452.

5. Iowa - In *Pappas v. Clark*, 494 N.W.2d 245 (Iowa 1992), a wife brought a professional negligence action against a physician and pharmacist concerning the death of her husband which was caused by a self-injected illegal dose of cocaine. *Pappas*, 494 N.W.2d at 246. The court noted that the husband had illegally obtained various prescription drugs from numerous Iowa pharmacies and that he had been a cocaine addict for several years.

The court held that the plaintiff's claims were barred by the public policy of the State of Iowa which generally denies relief to those injured in whole or in part because of their own illegal acts. *Pappas*, 494 N.W.2d at 247. The court held that the general rule was that a person could not maintain an action if, in order to establish his cause of action, he must rely, in

whole or in part, on an illegal or immoral act or transaction to which he is a party, or to maintain a claim for damages based on his own wrong or caused by his own neglect, or where he must base his cause of action, in whole or in part, on a violation by himself of the criminal or penal laws. *Pappas*, 494 N.W.2d at 247.

The court found that the plaintiff's conduct in fraudulently obtaining prescriptions from the defendant pharmacies and in using illegal drugs, including but not limited to his self-injected overdose of cocaine which caused his death, constituted illegal acts. *Pappas*, 494 N.W.2d at 247. Specifically, the court held that the plaintiff had violated Iowa criminal law which makes it unlawful to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge. *Pappas*, 494 N.W.2d at 247.

In refusing to apply the doctrine of comparative negligence, the court stated that when a plaintiff has engaged in activities prohibited, as opposed to merely regulated, by law, the courts will not entertain the suit if the plaintiff's conduct constituted a serious violation of the law and the injuries for which he seeks recovery were the direct result of that violation. *Pappas*, 494 N.W.2d at 247 – 248. In the latter instance, recovery is denied, not because the plaintiff contributed to his injury, but because the public policy of the State generally denies judicial relief to those injured in the course of committing a serious criminal act. *Pappas*, 494 N.W.2d at 248.

6. Montana - In *Patten v. Raddatz*, 895 P.2d 633 (Mont. 1995), the court addressed contractual and tort claims stemming from a long-term sexual relationship between the plaintiff and defendant which involved the plaintiff giving the defendant prescription drugs and causing her to become addicted to them. In dismissing the claims, the court applied the doctrine of *in pari delicto* because the doctrine is based upon the premise that there is no recourse between wrongdoers. *Patten*, 895 P.2d at 635. The court held that the claims arose from a relationship founded upon prostitution and possession of dangerous drugs, both of which are illegal. *Patten*, 895 P.2d at 635 – 636. Because the agreement between the parties was illegal,

the court held that the *in pari delicto* doctrine did not permit recovery for torts supposedly committed during the course of performing such agreements. *Patten*, 895 P.2d at 636.

7. New York (Federal) - In *Sorrentino v. Barr Laboratories, Inc.*, 397 F.Supp.2d 418 (W.D. New York 2005), a widower, who was convicted of murdering his wife, brought a wrongful death action against a pharmaceutical company alleging that it did not provide warnings about the proposed side-effects of a prescription drug and that the plaintiff had stabbed his wife due to his use of the drug. The court held that the plaintiff was barred from seeking damages stemming from his wife's death under New York's public policy against allowing individuals to profit from their own wrongdoing. *Sorrentino*, 397 F.Supp.2d at 422 – 423. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. *Sorrentino*, 397 F.Supp.2d at 423.

In the present case, the above decisions from other jurisdictions reveal that the present plaintiffs' claims are barred and they are not entitled to any recovery in connection with this matter. Whether this Court applies the long standing principle that a plaintiff cannot recover when his own unlawful or immoral conduct is involved, the *in pari delicto* doctrine, or a combination of both doctrines, the record is clear that the present plaintiffs have each engaged in serious, substantial, and ongoing criminal and immoral conduct which bars their claims.

While there are some factual distinctions between the conduct of the various plaintiffs, each of them have been involved in numerous criminal activities involving the felonious conduct of obtaining controlled substances through misrepresentation, fraud, forgery, deception, or subterfuge; illegally possessing controlled substances; and/or illegally purchasing, distributing, and receiving controlled substances from improper sources. Consequently, the defendants submit that the plaintiffs' claims are barred, that the plaintiffs are not entitled to any recovery in this matter, and that their claims must be dismissed.

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

In *Orzel* and the cases which followed, the strong public policy considerations precluding plaintiffs from asserting such claims were clearly addressed, as follows:

If courts choose to regularly give their aid under such circumstances, several unacceptable consequences would result. First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct... Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of the responsibility for their illegal actions to other parties...

*Orzel*, 537 N.W.2d at 213.

In the present case, the public policies set forth above could not be more convincing. If this Court would allow the plaintiffs to proceed with their claims, this Court would, in effect, be condoning and encouraging their illegal conduct and the conduct of others. In addition, if this Court would allow the plaintiffs to proceed with their claims, the plaintiffs may be able to potentially receive a profit or compensation as a result of their own numerous, serious, substantial, and repeated criminal activities. The defendants submit that any recovery by the plaintiffs would only lead to more illegal drug activity and additional criminal conduct which flows from illegal drug activity.

Furthermore, if this Court would permit the plaintiffs to proceed with their claims, the public would view our legal system as a farce. The many law abiding citizens in this State would be absolutely perplexed as to how our legal system would allow criminals to pursue and potentially receive compensation stemming from their own criminal activities. The defendants submit that such a result would, indeed, make a mockery out of our system of justice. Finally, if this Court would allow the plaintiffs to proceed with their claims, the plaintiffs would be able to shift their responsibility for their illegal acts to other parties.

The defendants submit that this Court should follow *Foister*, not abandon its reason and common sense, and not fall prey to the passion and prejudice against the defendants. This Court should not ignore the abuses of the plaintiffs and not accept the plaintiffs' victimization mentality. Rather, the defendants submit that this Court should bar the claims of the plaintiffs in accordance with the strong legal and public policy considerations set forth above.

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

The defendants anticipate that the plaintiffs will argue that their claims should not be barred and that the conduct of the plaintiffs and of the defendant physicians and pharmacies should be judged under a comparative negligence standard. The defendants submit that such a position fails for several reasons.

First, the conduct of the plaintiffs does not involve "negligence." Rather, their conduct involves intentional, criminal, illegal, and immoral activity. As such, the doctrine of "comparative negligence" is inapplicable to govern the conduct of the plaintiffs and the plaintiffs' claims should be barred by the long-standing legal maxims addressed above.

Secondly, rather than engaging in a tortured analysis of negligence and intentional conduct concepts, this Court should simply apply the legal maxims addressed above to bar the plaintiffs' claims. Courts have long refused to become engulfed in disputes between wrongdoers who have engaged in illegal and/or immoral conduct. The refusal to become involved in such claims is neither for the benefit of a defendant, nor to provide a windfall to a defendant. Rather, the refusal to become involved in the resolution of such suits is consistent with the public policy considerations expressed above and to avoid wasting the court's resources resolving claims of parties who have engaged in immoral and illegal conduct.

For instance, in *Orzel*, the Supreme Court of Michigan was asked to articulate the scope of a pharmacist's duty when filling prescriptions issues by licensed physicians. The court

refused, because its holding in applying the wrongful conduct rule would make any comment from the court as to the pharmacist's duty "dicta." *Orzel*, 537 N.W.2d at 552.

In the present case, any comments made by the plaintiffs as to the conduct of the defendants are equally irrelevant, as it is the plaintiffs' immoral and illegal conduct which bars their claims. The bar is not for the sake of the defendants, to protect them, or to provide some benefit or windfall to them. Rather, the bar is based upon the policies that the courts will not lend aid to one as against the other and will leave the parties as they find them.

Finally, in the cases discussed above, each state had adopted the doctrine of comparative negligence, whether pure comparative or some form of modified comparative negligence. Specifically, Michigan has adopted a modified comparative (51%) fault doctrine. M.C.L.A. §600.2959. Kentucky follows a pure comparative fault doctrine. K.R.S. §411.182. Mississippi has adopted a pure comparative fault doctrine. M.C.A. §11-7-15. Florida follows a pure comparative fault doctrine. F.S.A. §768.81(2). Iowa has adopted a modified comparative (51%) fault doctrine. I.C.A. §668.3(1)(b). Montana follows a modified comparative (51%) fault doctrine. Mont. Stat. §27-1-702. And, finally, New York has adopted a pure comparative fault doctrine. N.Y. C.P.L.R. §1411.

Nonetheless, those courts did not apply the comparative negligence doctrine, as it was the intentional, criminal, illegal, and immoral conduct of the plaintiffs which barred their claims in the first instance. In the present case, this Court should apply these long-standing principles, refuse to waste its resources resolving claims which stem from the plaintiffs' illegal and immoral conduct, and dismiss the claims.

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

The defendants submit that this Court should not allow the plaintiffs to abuse our civil legal system in order to seek recovery from or to punish the defendants in this case. Our

system of justice is comprised of many parts, each of which serves an important and legitimate function. For instance, with regard to criminal conduct, our legal system is well-designed to address such conduct. Our legal system has strong, well-articulated criminal laws. Our legal system grants authority to local, state, and federal law enforcement authorities to investigate, charge, make arrests, and prosecute criminal conduct.

Moreover, our legal system is designed to regulate the licensing and discipline of physicians and pharmacies. The West Virginia Board of Medicine has the power to license, investigate, charge, suspend, and annul the licenses of physicians to practice medicine in this State. *See generally*, W.Va. Code §30-3-2, 30-3-5, 30-3-7, 30-3-10, and 30-3-14. Moreover, the West Virginia Board of Pharmacy likewise has the same ability with regard to pharmacies. *See generally*, W.Va. Code §30-5-2 and 30-5-7. In addition, the Drug Enforcement Administration's Office of Diversion Control requires all businesses that import, export, manufacture or distribute controlled substances; all health professionals licensed to dispense, administer and prescribe them; and all pharmacies authorized to fill prescriptions to register with the DEA and comply with requirements relating to drug security and recordkeeping. *See generally*, Title 21, United States Code, §822; Title 21, Code of Federal Regulations, §1301.11; and Title 28, Code of Federal Regulations, Part O, Subpart R, Appendix. These systems work, as evidenced by the termination of the licenses of Dr. Shaffer and Mr. Wooley by the boards involved and the prosecution and sentencing of Dr. Shaffer and Mr. Wooley<sup>12</sup> in connection with their crimes by the federal government.<sup>13</sup>

Therefore, there are appropriate measures within our legal system to deal with any inappropriate conduct, whether it be from citizens, physicians, pharmacies, or others. These

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<sup>12</sup> *See, United States v. Wooley*, Criminal Action No. 2:12-00007, United States District Court for the Southern District of West Virginia and *United States v. Diane E. Shafer, M.D.* J.A. 1038-1044; Criminal Action No. 2:12-00085, United States District Court for the Southern District of West Virginia. J.A. 1027-1033.

<sup>13</sup> Since Strosnider's debts have been discharged in bankruptcy, any recovery by the plaintiffs would be limited to funds from its insurer, an entity that was free from any fault in this matter.

systems should be allowed to work. The plaintiffs should not be allowed to abuse our civil system in order to profit from their own wrongdoing, make a mockery out of our judicial system, and seek recovery related to their own illegal and immoral conduct.

## VII. CONCLUSION

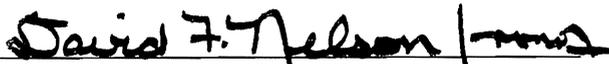
WHEREFORE, the Petitioners respectfully pray that this Court answer the above-referenced certified questions in their favor; that the claims of the plaintiffs be barred and dismissed; and that the Court award such other and further relief as it deems just and appropriate.



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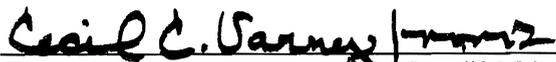
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

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 I have served the foregoing *Brief of Respondents* 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 28<sup>TH</sup> day of April, 2014.

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