



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

CIVIL ACTION NO. 21-C-9000 PHARM

THIS DOCUMENT APPLIES TO:

STATE OF WEST VIRGINIA ex rel.
PATRICK MORRISEY, Attorney General,

Plaintiff,

v.

CIVIL ACTION NO. 22-C-111 PNM

THE KROGER CO., et al.,

Defendants.

KROGER'S MOTION FOR RECONSIDERATION OF THE COURT'S NOVEMBER 22, 2022 ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' JURY TRIAL DEMAND

Defendants, The Kroger Co., Kroger Limited Partnership I, d/b/a Peyton's Southeastern, and Kroger Limited Partnership II, d/b/a Peyton's Northern (collectively "Kroger"), by counsel and pursuant to Rule 39(b) and Rule 54(b) of the West Virginia Rules of Civil Procedure, move this Panel for reconsideration of its November 22, 2022 *Order Granting Plaintiff's Motion to Strike Defendants' Jury Trial Demand* (Transaction ID 682421842) (the "Order"). In support of its Motion, Kroger states the following:

1. "[T]he court upon motion ... may at any time, order a trial by a jury of any or all issues." W.Va. R. Civ. P. 39(b).
2. "[A]ny order or other form of decision, however, designated ... is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." W.Va. R. Civ. P. 54(b). "[A]s Rule 54(b) provides, virtually all interlocutory orders may be altered or amended before final judgment if sufficient cause is

Denied Judge Derek C Swope Jan 13, 2023

shown.” See F. Cleckley, R. Davis, & L. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure* at § Rule 54(b)[2], p. 1158 (4th Ed. 2012) (internal quotes omitted).

3. On November 02, 2022, the State filed *Plaintiff’s Motion to Strike Defendants’ Jury Trial Demand* (Transaction ID 68339782). The State’s motion is premised on its representations to the Court that it seeks “equitable abatement of a public nuisance and civil penalties and other equitable remedies,” as opposed to monetary damages. Motion, p.1.
4. On November 16, 2022, Kroger filed *Kroger’s Response to Plaintiff’s Motion to Strike Defendants’ Jury Trial Demand* (Transaction ID 68396162). Among other arguments, Kroger disputed the State’s characterization of the relief sought in this action as equitable in nature, and asserted that the State’s demand for “equitable abatement” was actually a legal demand for monetary damages. Kroger adopts and incorporates in full all of its arguments and legal authority as presented in its Response as further support for this motion.
5. On November 18, 2022, the State filed *Plaintiff’s Reply in Support of Motion to Strike Defendants’ Jury Trial Demand* (Transaction ID 68407629). The State reiterated and expressly stated in its reply that “***all of the relief the State seeks against Kroger*** ... is equitable, not legal, in nature.” Reply, p.1 (emphasis added).
6. “Money damages are, of course, the classic form of ***legal*** relief.” *Mertens v. Hewitt Associates*, 508 U.S. 248, 255 (1993) (emphasis in original).
7. On November 22, 2022, the Court entered its *Order Granting Plaintiff’s Motion to Strike Defendants’ Jury Trial Demand* (Transaction ID 68421842). The Court found in relevant part that it had previously determined “the State does not seek damages” and that Kroger

had not submitted any new evidence or an intervening change of controlling legal authority that would warrant an exception to the law of the case. Order, p. 14.

8. On December 29, 2022, the County and City Plaintiffs filed a *Motion to Adopt the West Virginia First Memorandum of Understanding* (Transaction ID 68760098) in all opioid cases before the panel. The motion asks the Court to adopt a memorandum of understanding (“MOU”) between the State, through its Attorney General (the plaintiff in this case), and Local Governments “relating to the allocation and use of the *proceeds* of Settlements and Judgments” described in the MOU. *See* Motion, Ex. A.
9. The County and City Plaintiffs’ motion expressly states that the “MOU is a comprehensive agreement concerning application and use *of all funds recovered* in connection with this consolidated Civil Action.” Motion, p.1.
10. The MOU itself states that “The Parties” (i.e., the State and the Local Governments) “shall organize a private, nonstock, nonprofit corporation *for the purposes of receiving and distributing West Virginia Opioid Funds*,” with the corporation referred to in the MOU as the “Opioid Foundation” or alternatively the “Opioid *Abatement* Foundation.” *See, e.g.*, Motion, Ex. A, pp. 4 § B.1 & 11, Footnote (emphasis added). The MOU makes clear that the purpose of the Opioid [Abatement] Foundation is to use “West Virginia Opioid Funds” to fund “an efficient, expeditious *abatement* of the Opioid crisis” through various “abatement strategies” *chosen by “The Parties”* and described in Exhibit A of the MOU. *Id.*, at pp. 8 & 11.
11. In other words, the MOU filed with the Court on December 29, 2022 makes clear that the State is not actually seeking equitable abatement (or any other equitable remedy) at all. Instead, *the State itself* (in conjunction with the Local Governments, as “The Parties” to

the MOU), through the “Opioid Abatement Foundation,” intends to engage in abatement activities. The State is simply seeking “West Virginia Opioid Funds,” i.e., monetary damages, from Kroger and others, to fund the foundation.

12. To the extent the Court has any doubt that the State’s claim is a legal one for monetary damages, the State’s recent settlement demand should put those doubts to rest.
13. The Court ordered that this matter be mediated by the Resolution Judges on January 17-18, 2023, and as part of that order directed the State to communicate a settlement demand to Kroger no later than December 20, 2022. *Order Scheduling Mediation on January 17-18, 2023* (Transaction ID 68261236).
14. On January 4, 2023, Kroger received the State’s settlement demand. *See* Affidavit of R. Harvey, attached hereto as Ex. 1. The State’s settlement offer consisted solely of a demand for a lump-sum monetary payment by Kroger. No other form of relief was demanded. *Id.*
15. The State’s January 4, 2023 settlement offer, consisting solely of a demand that Kroger pay money, when considered in conjunction with the MOU laying out how that money will be used by the State’s “Opioid Abatement Foundation” to conduct abatement activities, demonstrates unequivocally that this is in fact a claim for monetary damages and not one for equitable relief. *Cf. City of Huntington v. AmerisourceBergen Drug Corporation*, No. 3:17-01362 & 3:17-01665, --- F.Supp.3d ---, 2022 WL 2399876, at *67-69 (S.D.W.Va. July 4, 2022) (plaintiffs’ claims for “abatement” were in fact unpled legal claims for monetary damages).
16. The above new evidence is also proper for the Court to consider as part of reconsidering its Order and is not excluded by Rule 408 of the West Virginia Rules of Evidence. That rule only prohibits evidence of compromise offers to prove or disprove liability, the validity

or amount of a disputed claim, or for impeachment purposes at trial. *See* W.Va. R. Evid. 408(a). The rule expressly permits such evidence if “offered for another purpose,” such as clarifying the actual, legal nature of the relief sought by the State in this case. *See* W.Va. R. Evid. 408(b). The legal nature of the State’s requested relief is a material issue that affects the outcome of multiple decisions made by the Court in this case. The MOU and the State’s settlement demand are the best evidence on that important issue.

17. “A right to trial by jury generally applies to an action for the recovery of money or damages, or a legal action for the recovery of money only, or an action in which only a money judgment is sought.” *Relmark Developments, Inc. v. Ranson*, 214 W.Va. 161, 588 S.E.2d 150 (2003). *Cf. Thompson v. Town of Alderson*, 215 W.Va. 578, 600 S.E.2d 290 (2004) (“Where relief to be awarded is money damages, even though the underlying claim is historically one in equity, then the ordinary characterization of the monetary award is as a legal remedy, to which the right to trial by jury attaches.”).
18. In *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, a group of defendants in the manufacturer and distributor tracks sought a writ of prohibition challenging the panel’s rulings that those defendants did not have a right to a jury trial on the public nuisance / abatement claims in those cases. 245 W.Va. 431, 859 S.E.2d 374 (2021). Although the Supreme Court of Appeals of West Virginia declined to issue a writ on that issue at that time, the Court made clear in its opinion that its ruling was due to “the extremely early stages of these cases” and that the defendants could use discovery to “ascertain the particular of Plaintiffs’ public nuisance theory and abatement remedy.” 245 W.Va. at 442 n.54. The Court also made clear that “we do not endorse *or shield from future review*” the panel’s ruling on this issue once the nature of the Plaintiffs’ claims and remedy were

clarified. *Id.* at 443 n.56 (emphasis added). Now that the State itself has made its position clear, this Court should revisit its Order.

19. Kroger's right to a jury trial is itself a fundamental, constitutional right under the United States and West Virginia Constitutions. The Court's November 22, 2022 Order striking Kroger's demand should be reconsidered and vacated in light of this new evidence and because the Court's Order deprives Kroger of its fundamental, constitutional right to due process under the United States and West Virginia Constitutions, its constitutional right to a trial by jury, and works a manifest injustice on the defendants in this case.

For the above reasons, and for the reasons set forth previously in *Kroger's Response to Plaintiff's Motion to Strike Defendants' Jury Trial Demand*, filed November 16, 2022 (Transaction ID 68396162), the Court should reconsider and vacate its November 22, 2022 *Order Granting Plaintiff's Motion to Strike Defendants' Jury Trial Demand* (Transaction ID 682421842) and schedule this matter for a jury trial pursuant to Kroger's demand therefor.

DATE: January 12, 2023

Respectfully submitted,
**The Kroger Co., Kroger Limited Partnership I
d/b/a Peyton's Southeastern, and Kroger
Limited Partnership II d/b/a Peyton's Northern**

/s/ Ronda L. Harvey
Ronda L. Harvey (WVSB #6326)
Ashley Hardesty Odell (WVSB #9380)
David A. Mohler (WVSB #2589)
Ryan S. Moore (WVSB #14155)
BOWLES RICE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25326-1386
304-347-1100
rharry@bowlesrice.com
ahardestyodell@bowlesrice.com
dmohler@bowlesrice.com
rmoore@bowlesrice.com

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CERTIFICATE OF SERVICE

The undersigned counsel for Defendants hereby certifies that on the 12th day of January, 2023, the foregoing document was filed using the File & Serve*Xpress* system, which will send electronic notification of such filing to all counsel of record.

/s/ Ronda L. Harvey
Ronda L. Harvey (WVSB #6326)

Denied Judge Derek C Swope Jan 13, 2023

This document constitutes a ruling of the court and should be treated as such.

File & Serve
Transaction ID: 68878379

/s/ Judge Derek C Swope