



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

CIVIL ACTION NO. 22-C-9000 NAS

THIS DOCUMENT APPLIES TO:

**A.D.A., AS NEXT FRIEND OF J.J.S., a
minor child under the age of 18,
Plaintiff,**

v.

Civil Action No. 21-C-110 MSH

**JOHNSON & JOHNSON, *et al.*,
Defendants.**

**TRAVIS BLANKENSHIP, NEXT
FRIEND AND GUARDIAN OF MINOR
CHILD Z.D.B.,
Plaintiff,**

v.

Civil Action No. 22-C-05 MSH

**MCKESSON CORPORATION, *et al.*,
Defendants.**

**SCOTT OTWELL, NEXT FRIEND
AND GUARDIAN OF MINOR CHILD
R.G.O.,
Plaintiff,**

v.

Civil Action No. 22-C-20 MSH

**MCKESSON CORPORATION, *et al.*,
Defendants.**

**TAMMY BOSWELL, NEXT FRIEND
AND GUARDIAN OF MINOR
CHILDREN B.E.B. AND S.F.B.,
Plaintiff,**

v.

Civil Action No. 22-C-21 MSH

**MCKESSON CORPORATION, *et al.*,
Defendants.**

**TIMOTHY LAMBERT, NEXT FRIEND
AND GUARDIAN OF MINOR
CHILDREN M.D.L. AND T.J.L.,
Plaintiff,**

v.

**MCKESSON CORPORATION, *et al.*,
Defendants.**

Civil Action No. 22-C-22 MSH

**KELLY MANGUS, NEXT FRIEND
AND GUARDIAN OF MINOR CHILD
L.C.M.,
Plaintiff,**

v.

**MCKESSON CORPORATION, *et al.*,
Defendants.**

Civil Action No. 22-C-23 MSH

**STACEY HARRIS, NEXT FRIEND
AND GUARDIAN OF MINOR CHILD
N.M.B.,
Plaintiff,**

v.

**MCKESSON CORPORATION, *et al.*,
Defendants.**

Civil Action No. 22-C-24 MSH

**CYNTHIA WOOLWINE, NEXT
FRIEND AND GUARDIAN OF MINOR
CHILDREN E.G.W. AND B.D.W.,
Plaintiff,**

v.

**MCKESSON CORPORATION, *et al.*,
Defendants.**

Civil Action No. 22-C-25 MSH

**ANGELA WHITED, NEXT FRIEND
AND GUARDIAN OF MINOR
CHILDREN C.D.W. AND C.G.W.,
Plaintiff,**

v.

**MCKESSON CORPORATION, *et al.*,
Defendants.**

Civil Action No. 22-C-26 MSH

**FLORETTA ADKINS, NEXT FRIEND
AND GUARDIAN OF MINOR CHILD
M.J.A.,
Plaintiff,**

v.

**MCKESSON CORPORATION, *et al.*,
Defendants.**

Civil Action No. 22-C-27 MSH

**DIANNA BROOKS, NEXT FRIEND
AND GUARDIAN OF MINOR CHILD
W.A.R.,
Plaintiff,**

v.

**MCKESSON CORPORATION, *et al.*,
Defendants.**

Civil Action No. 22-C-28 MSH

**JACQUELINE ADAMS, NEXT
FRIEND AND GUARDIAN OF MINOR
CHILDREN S.D.L. ABD AND H.G.L.,
Plaintiff,**

v.

**MCKESSON CORPORATION, *et al.*,
Defendants.**

Civil Action No. 22-C-29 MSH

**STACEY ANDERSON, NEXT FRIEND
AND GUARDIAN OF MINOR
CHILD(REN) A.L.A. AND T.L.A.,
Plaintiff,**

v.

**MCKESSON CORPORATION, *et al.*,
Defendants.**

Civil Action No. 22-C-30 MSH

**THOMAS PAYNTER, NEXT FRIEND
AND GUARDIAN OF MINOR CHILD
Z.N.B.,
Plaintiff,**

v.

**MCKESSON CORPORATION, *et al.*,
Defendants.**

Civil Action No. 22-C-31 MSH

**PATRICIA FULLER, NEXT FRIEND
AND GUARDIAN OF MINOR CHILD
A.J.F.,
Plaintiff,**

v.

**MCKESSON CORPORATION, *et al.*,
Defendants.**

Civil Action No. 22-C-32 MSH

**DONNA JOHNSON, NEXT FRIEND
AND GUARDIAN OF MINOR CHILD
L.M.J.,
Plaintiff,**

v.

**MCKESSON CORPORATION, *et al.*,
Defendants.**

Civil Action No. 22-C-33 MSH

**BRANDY SWIFT, NEXT FRIEND AND
GUARDIAN OF MINOR CHILDREN
S.R.S., M.K.S.; and J.A.S.,
Plaintiff,**

v.

Civil Action No. 22-C-34 MSH

**MCKESSON CORPORATION, *et al.*,
Defendants.**

**STACY STACEY, NEXT FRIEND AND
GUARDIAN OF MINOR CHILD
T.K.L.,
Plaintiff,**

v.

Civil Action No. 22-C-35 MSH

**MCKESSON CORPORATION, *et al.*,
Defendants.**

**ROGER JOHNSON, NEXT FRIEND
AND GUARDIAN OF MINOR CHILD
S.A.J.,
Plaintiff,**

v.

Civil Action No. 22-C-36 MSH

**MCKESSON CORPORATION, *et al.*,
Defendants.**

**A.N.C., AS NEXT FRIEND OF J.J.S., a
minor child under the age of 18,
Plaintiff,**

vs.

Civil Action No. 22-C-73 MSH

**JOHNSON & JOHNSON, *et al.*,
Defendants.**

ORDER REGARDING RULINGS ON MOTIONS TO DISMISS

Pending before the Court are over 100 motions to dismiss filed by the Manufacturer, Distributor, and Pharmacy Defendants, and by the West Virginia Board of Pharmacy

(“WVBOP”) in the above-captioned civil actions.¹ Having reviewed and considered the motions to dismiss, responses, and replies, and having heard oral argument regarding all motions to dismiss on March 24, 2023, the Court makes the following rulings:

1. These cases are not public nuisance actions. Plaintiffs have not demonstrated they have a “special injury” different in kind and character from that of other members of the public who ingested opioids. Therefore, Plaintiffs do not have standing to bring a public nuisance cause of action. These are individual personal injury actions and West Virginia common law tort principles apply.
2. Claims of public nuisance involving Neonatal Abstinence Syndrome (“NAS”) have already been addressed in the public nuisance actions filed by the State of West Virginia, Cities, and Counties against the Manufacturer Defendants, Distributor Defendants, and Pharmacy Defendants, and abatement of NAS is addressed in the West Virginia First Memorandum of Understanding adopted by the Court. *Order Adopting the West Virginia First Memorandum of Understanding* (Transaction ID 68796699). Accordingly, any motion to dismiss a public nuisance cause of action is **GRANTED**.
3. These are individual personal injury actions involving drugs prescribed by physicians and dispensed by the Pharmacy Defendants for medical treatment and, therefore, the West Virginia Medical Professional Liability Act (“MPLA”) applies to Plaintiffs’ claims against the Pharmacy Defendants. Because Plaintiffs did not comply with the notice and certificate of merit provisions of the MPLA the Court lacks subject matter jurisdiction over these claims and, therefore, the Pharmacy Defendants’ motions to dismiss are **GRANTED** on these grounds.

¹ Defendants have filed approximately 120 motions to dismiss, including joinders, in the above-captioned civil actions.

4. To establish negligence in West Virginia, it must be shown that the defendant is guilty of an act or omission in violation of a duty owed to the plaintiff. Syl. Pt. 3, *Bradley v. Dye*, 247 W. Va. 100, 875 S.E.2d 238, 239 (2022). The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if care is not exercised. *Id.*, Syl. Pt. 4, Whether a plaintiff is owed a duty of care by a defendant is a determination that must be rendered by the court as a matter of law. *Id.*, Syl. Pt. 5.
5. As a threshold matter, Plaintiffs cannot assert a negligence claim unless there is a duty owed, which is a legal question for the Court. Here, Plaintiffs are not asserting a private right of action under the Controlled Substances Act (“CSA”) or the West Virginia Controlled Substances Act (“WVCSA”), so their claims must be based on a common law duty. Plaintiffs must also allege that breach of a common law duty proximately caused Plaintiffs to suffer their alleged injuries. The Court can properly dismiss a complaint where plaintiff’s factual allegations on their face cannot establish proximate cause.
6. Reading the Complaints in the light most favorable to Plaintiffs, and assuming all allegations to be true, the Court finds that Plaintiffs have failed to allege the Manufacturer Defendants, Distributor Defendants, Pharmacy Defendants, or the McKinsey Defendants owed them a common law duty of care. Therefore, Plaintiffs’ negligence causes of action against the Manufacturer Defendants, Distributor Defendants, Pharmacy Defendants, and the McKinsey Defendants, including their product liability and failure to warn claims, fail as a matter of law. Plaintiffs’ attempt to bypass the duty of care requirement by asserting a public nuisance claim does not save these causes of action, as there is no “special injury” providing standing for these private citizens to bring such claim.
7. Each of Plaintiffs’ claims sounds in tort and requires proof of causation, specifically proximate cause. The Court further finds that the allegations in Plaintiffs’ Complaints fail to

establish proximate cause. Although Plaintiffs argue their alleged injuries were foreseeable and, therefore, proximate cause is established, the Court finds that Plaintiffs' allegations regarding causation are too attenuated and remote to prove proximate cause.

8. The allegations in Plaintiffs' Complaints also demonstrate that several third parties over whom Defendants had no control break the chain of causation, including: 1) physicians who prescribed opioids to Plaintiffs' mothers for use while Plaintiffs' mothers were pregnant with Plaintiffs; 2) any individuals who provided illegally obtained opioids to Plaintiffs' mothers for use while Plaintiffs' mothers were pregnant with Plaintiffs; and 3) Plaintiffs' mothers who ingested prescribed opioids and/or illegally obtained opioids during their pregnancies with Plaintiffs. *See also* Syl. Pt. 3, *Stevens v. MTR Gaming Group, Inc.*, 237 W.Va. 531, 788 S.E.2d 59 (2016) (No duty of care on the part of manufacturers of video lottery terminals or casinos where terminals are located to protect users from compulsively gambling.)
9. The allegations in Plaintiffs' Complaints further demonstrate that Plaintiffs' mothers were the sole proximate cause of Plaintiffs' alleged injuries. The injuries which are the basis of Plaintiffs' claims would not have occurred unless Plaintiffs' mothers took opioids during their pregnancies with Plaintiffs. Put another way, had Plaintiffs' mothers not taken opioids during their pregnancies with Plaintiffs, Plaintiffs could not have ingested opioids *in utero* and could not have developed NAS.
10. Defendant Indivior Inc. ("Indivior") is also entitled to dismissal as a matter of law. Indivior is the manufacturer of Suboxone and Subutex, which are Schedule III, buprenorphine-based medications used to treat opioid use disorder ("OUD"), not opioids. Plaintiffs allege their mother's addictions were caused by use of opioids indicated for chronic pain, before any Indivior product was used to treat their OUD. Plaintiffs have also failed to allege sufficient

facts to support a reasonable inference that their alleged injuries were proximately caused by their mother's use of any Indivior product during their pregnancies with Plaintiffs.

11. The Court further finds that Plaintiffs' causes of action pertaining to fraud, civil conspiracy, and medical monitoring should accordingly also be dismissed.
12. The WVBOP is entitled to dismissal under the public duty doctrine. Plaintiffs have failed to articulate an argument that the special relationship exception to the public duty doctrine applies. Furthermore, the WVBOP is entitled to dismissal based upon qualified immunity. Plaintiffs' allegations failed to establish the WVBOP violated regulations when performing their review of the Controlled Substances Monitoring Program ("CSMP").

Having provided the parties with the Court's rulings, the Court **ORDERS** attorneys Marc Williams, Timothy Hester, Jay Arceneaux, Mychal Schulz, Mark David McPherson, and Justin Taylor to prepare a detailed proposed order with findings of fact and conclusions of law granting the motions to dismiss filed by the Manufacturer Defendants, the Pharmacy Defendants, the Distributor Defendants, Indivior, the McKinsey Defendants, and the WVBOP as to all counts in the Complaints. The parties shall specify the Transaction ID Numbers of the motions to dismiss to which the proposed order applies. The proposed order shall be filed and served in rich text format no later than thirty (30) days from the entry of this Order.

This Order shall not be considered a final Order for appeal purposes. A copy of this Order has this day been electronically served on all counsel of record via File & Serve*Xpress*.

It is so **ORDERED**.

ENTERED: April 17, 2023.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation