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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION **CIVIL ACTION NO. 22-C-9000 NAS**

THIS DOCUMENT APPLIES TO:

TREY SPARKS,

Plaintiff,

v. Civil Action No. 23-C-14 MSH

JOHNSON & JOHNSON; JANSSEN PHARMACEUTICALS, INC.; NORAMCO; MCKESSON CORPORATION; CARDINAL HEALTH, INC.; H.D. SMITH, LLC; H.D. SMITH HOLDINGS, LLC; H.D. SMITH HOLDING COMP; AMERISOURCEBERGEN CORPORATION; AMERISOURCEBERGEN DRUG CORPORATION; ANDA, INC.; TEVA PHARMACEUTICALS USA, INC.; ALLERGAN USA, INC.; ALLERGAN SALES LLC; ALLERGAN FINANCE LLC; ABBVIE INC.; and WEST VIRGINIA BOARD OF PHARMACY,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

Now pending before the Court are motions to dismiss the above-captioned case in its entirety. The Court has considered Defendants' motions to dismiss, Plaintiff's responses in opposition, and Defendants' replies.[1] The Court has also reviewed Defendants' proposed order,[2] which expands on the Court's June 2, 2023, *Order Regarding Motions to Dismiss* ("June 2 Order")[3] and Plaintiff's objections to Defendants' proposed order.[4] Because the Court finds that

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[1] A list of the motions to dismiss to which this Order applies, including their Transaction ID numbers, is attached as Appendix A.

[2] *See* Trans. ID No. 70185639 (Kanawha Cnty. Cir. Ct. June 13, 2023).

[3] *See* Trans. ID No. 70128899 (Kanawha Cnty. Cir. Ct. June 2, 2023).

[4] *See* Trans. ID No. 70232687 (Kanawha Cnty. Cir. Ct. June 21, 2023). Defendants did not file a response to Plaintiff's objections.

Defendants' proposed order accurately interprets, expands, and expounds on the Court's June 2 Order, the Court dismisses the above-captioned case, as set forth in more detail below, noting Plaintiff's objections and exceptions.

On May 31, 2023, the Court issued an order granting motions to dismiss and dismissing with prejudice all claims in 20 cases brought on behalf of individuals alleging injury related to alleged *in utero* exposure to opioids and Neonatal Abstinence Syndrome ("NAS"). *See In re: Opioid Litig.*, Civil Action No. 22-C-9000 NAS, Ord. Granting Defs.' Mots. to Dismiss, Trans. ID No. 70112431 (Kanawha Cnty. Cir. Ct. May 31, 2023) ("May 31 Order"). The First Amended Complaint ("Complaint") in this case advances similar factual allegations and claims as the cases dismissed in the May 31 Order. In fact, it is substantively identical to one of those cases—*A.N.C. as next friend of J.J.S., a minor child under the age of 18 v. Johnson & Johnson et al.*, Civil Action No. 22-C-73 MSH.

The Complaint in this case asserts claims brought by an individual ("Sparks") who allegedly suffers from the effects of NAS purportedly caused by exposure to opioids during his birth mother's pregnancy. *See* Finding Nos. 1–11, *infra*. Defendants are the West Virginia Board of Pharmacy (the "WVBOP"), Distributor Defendants, and Manufacturer Defendants (collectively, "Defendants").[5]

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[5] The Distributor Defendants are AmerisourceBergen Corporation, AmerisourceBergen Drug Corporation, Cardinal Health, Inc., McKesson Corporation, Anda, Inc., H. D. Smith, LLC, H. D. Smith Holdings, LLC, and H. D. Smith Holding Company.

The Manufacturer Defendants are Johnson & Johnson, Janssen Pharmaceuticals, Inc., Noramco, LLC incorrectly named as Noramco, Allergan Finance LLC (f/k/a Actavis, Inc., f/k/a Watson Pharmaceuticals, Inc.), Allergan USA, Inc., Allergan Sales, LLC, AbbVie Inc., and Teva Pharmaceuticals USA, Inc. (incorrectly identified by Plaintiff as having acquired Distributor Defendant Anda, Inc. The findings, conclusions, and relief granted in this Order apply equally to Teva USA regardless of Plaintiff's error.).

Plaintiff Sparks brings six claims: (I) public nuisance; (II) negligence, gross negligence, and recklessness; (III) negligent and intentional misrepresentation (as to the Manufacturer Defendants); (IV) civil conspiracy; (V) malicious and intentional conduct (as to the WVBOP); and (VI) state law violations (as to the WVBOP).

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure requires that a complaint be dismissed if it "fail[s] to state a claim upon which relief can be granted." "A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776 (1995). Thus, a court must grant a Rule 12(b)(6) motion to dismiss and dismiss a claim when "the claim is not authorized by the laws of West Virginia." *Id.*

For the reasons addressed in more detail below, the Court hereby **GRANTS** the motions to dismiss and **ORDERS** that the above-captioned Complaint is hereby **DISMISSED** with prejudice as to all Defendants. The Court concludes:

(1) Plaintiff cannot establish that he has standing to bring a public nuisance claim;

(2) As a matter of law, Plaintiff cannot establish that Defendants owed him a duty of care;

(3) The allegations in Plaintiff's Complaint establish that, as a matter of law, Defendants' alleged conduct is necessarily too remote from Plaintiff's alleged injuries to establish proximate causation;

(4) The allegations in Plaintiff's Complaint establish that, as a matter of law, the conduct of his birth mother is necessarily the sole proximate cause of the alleged injuries;

(5) Plaintiff's allegations of negligent and intentional misrepresentation and civil conspiracy should accordingly also be dismissed; and

(6) The WVBOP is entitled to dismissal under the public duty doctrine and based upon qualified and absolute immunity.

FINDINGS OF FACT

In resolving a motion to dismiss, courts "construe the complaint in the light most favorable to the plaintiff, taking all allegations as true." *Sedlock v. Moyle*, 222 W. Va. 547, 550 (2008). The Court therefore accepts the allegations of the Complaint as true for purposes of resolving the motions to dismiss. The following summarizes Plaintiff's pertinent allegations:

I. Findings as to Plaintiff

1. Plaintiff is a private party.[6]
2. Plaintiff's birth mother was prescribed opioid medications by medical providers.[7]
3. Plaintiff's birth mother also obtained opioid medications through the diversion of opioids from prescriptions written for others, including from criminal drug dealers.[8]
4. Plaintiff's birth mother used opioid medications during her pregnancy with Plaintiff.[9]
5. Plaintiff's birth mother also used or switched to an opioid use disorder medicine, methadone, during her pregnancy with Plaintiff.[10]

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[6] *See, e.g.*, *Sparks* Compl. – Trans. ID No. 69908744 ¶¶ 1, 15, 18.

[7] *Id.* ¶ 21.

[8] *Id.*

[9] *Id.* ¶ 17.

[10] *Id.*

6. Plaintiff's birth mother continued to obtain and use opioids during her pregnancy,[11] both through prescriptions written by her medical providers and through the diversion of opioids from prescriptions written for others.[12]

7. Plaintiff's NAS diagnosis resulted from his birth mother's consumption of opioids during her pregnancy with Plaintiff and would not have occurred unless his birth mother ingested opioids during her pregnancy.[13]

8. Defendants' alleged conduct and Plaintiff's alleged injuries are separated by the actions of third parties, including: (1) medical providers who conducted patient examinations and wrote prescriptions for Plaintiff's birth mother[14]; (2) individuals who in some instances illegally diverted prescription medications to illicit channels[15]; and (3) Plaintiff's birth mother, who ingested opioids during her pregnancy with Plaintiff.[16]

II. Findings as to Defendants

9. Plaintiff claims that the Manufacturer Defendants improperly marketed and misrepresented the benefits and risks of prescription opioids for the treatment of pain and failed to adhere to their alleged statutory, regulatory, and common-law

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[11] *Id.* ¶ 19.

[12] *Id.* ¶ 21.

[13] *Id.* ¶¶ 1, 15, 17, 19.

[14] *See, e.g., id.* ¶ 21.

[15] *See, e.g., id.*

[16] *See, e.g., id.* ¶¶ 17, 19.

obligations intended to help prevent the diversion of prescription opioids into illicit channels and illicit uses.[17]

10. Plaintiff claims that the Distributor Defendants distributed large quantities of prescription opioids in West Virginia and failed to adhere to their alleged statutory, regulatory, and common-law obligations intended to help prevent the diversion of prescription opioids into illicit channels and illicit uses.[18]

11. Plaintiff claims that the WVBOP failed to perform sufficient investigations or otherwise take sufficient regulatory actions to prevent the diversion of prescription opioids into illicit channels and illicit uses.[19]

CONCLUSIONS OF LAW

I. Public Nuisance—Lack of Standing

"Ordinarily, a suit to abate a public nuisance cannot be maintained by an individual in his private capacity, as it is the duty of the proper public officials to vindicate the rights of the public." *Callihan v. Surnaik Holdings. of W. Va., LLC*, No. 2:17-cv-04386, 2018 WL 6313012, at *5 (S.D.W.Va. Dec. 3, 2018) (quoting *Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 596 (1945)). Plaintiffs acting in their "private capacity" lack standing to bring a public nuisance claim unless they can show "an injury different from that inflicted upon the public in general, ***not only***

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[17] *See, e.g.*, *id.* ¶¶ 44–46, 48–49, 68, 79, 82.

Plaintiff defines "Manufacturer Defendants" to include Noramco, but Noramco is a manufacturer of active pharmaceutical ingredients only. *Id.* at 1, ¶¶ 4, 30. The findings, conclusions and relief granted in this Order apply equally to Noramco.

[18] *See, e.g.*, *id.* ¶¶ 20, 51, 68, 79, 82.

[19] *See, e.g.*, *id.* ¶¶ 37, 40, 42–43, 112, 114.

in degree, but in character." *Callihan*, 2018 WL 6313012, at *5 (quoting *Int'l Shoe Co. v. Heatwole*, 126 W. Va. 888, 30 S.E.2d 537, 540 (1944)) (emphasis added).

Under this legal standard, to maintain a public nuisance claim a private litigant must establish a "special injury . . . which cannot be fully compensated in an action at law." *Hark*, 127 W. Va. at 596. This standing requirement applies to damages claims for public nuisance, such as the claim asserted here. *See Callihan*, 2018 WL 6313012, at *5 (dismissing private plaintiffs' damages claims for public nuisance, including claims for bodily injury and property damage, for failure to allege special injury); *Hark*, 127 W. Va. at 595–96 (applying special injury standard to public nuisance claim where private plaintiffs sought injunctive relief and damages); *Rhodes v. E.I. du Pont de Nemours & Co.*, 657 F. Supp. 2d 751, 756, 767 (S.D.W.Va. 2009) (applying special injury standard to public nuisance claim in case where private plaintiffs sought compensatory and punitive damages, costs and fees, medical monitoring, abatement, and provision of alternative drinking water), *aff'd in relevant part*, 636 F.3d 88 (4th Cir. 2011); *Heatwole*, 30 S.E. 2d at 539–40 (applying special injury standard to public nuisance claim where private plaintiff claimed damages).[20]

Plaintiff cannot satisfy this standing requirement. He is a private party, not a public official, *see* Finding No. 1, *supra*, and cannot demonstrate the requisite "special injury"—that is, an injury "different from" an injury to the "public in general," "not only in degree, but in character." *Callihan*, 2018 WL 6313012, at *5. A claim of "personal injury" or "physical harm" is insufficient

[20] *State ex rel. Surnaik Holdings of W. Va., LLC v. Bedell*, 247 W. Va. 41, 875 S.E.2d 179 (2022), is not to the contrary. That case involves questions of class certification for a class "center[ed] on geographic areas that were . . . exposed to identified levels of smoke particles . . . due to [] alleged negligence." *Id.* at 185. The majority opinion does not analyze either public nuisance or special injury, and the concurrence mentions "nuisance" only in passing. *Id.* at 188.

to establish standing for a private party to assert a public nuisance claim where those alleged injuries are not different "in character" from the personal injuries suffered by others exposed to opioids. *Id.*

Here, Plaintiff's claimed injuries necessarily arise from exposure to opioids and thus are not different "in character" from the injuries that might be suffered by "the public in general" from exposure to opioids, or that might be suffered by other infants exposed *in utero* to opioids. *Compare, e.g.*, *Sparks* Compl. – Trans. ID No. 69908744 ¶ 72 (alleging that the public's exposure to opioids has created "high rates of NAS, addiction, overdoses, dysfunction, and despair"); *with City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 419–21 (S.D.W.Va. 2022) (summarizing harms suffered by West Virginia residents from exposure to opioids, including "drug overdose deaths," "addict[ion] to opioids," babies "born with neonatal abstinence syndrome," and "sharply increased rates of infectious disease").

Accordingly, Plaintiff's public nuisance claims are dismissed because Plaintiff cannot establish the requisite "special injury." *See Callihan*, 2018 WL 6313012, at *5 (applying West Virginia law to dismiss public nuisance claim for failure to allege special injury from toxic fumes allegedly caused by fire); *Rhodes*, 657 F. Supp. 2d at 768–71 (holding that plaintiffs failed to establish a "special injury" required for a public nuisance claim based on "mere contamination of their water supply"); *Curry v. Boone Timber Co.*, 87 W. Va. 429, 105 S.E. 263, 264 (1920) ("No evidence shows . . . that damage or injury can or likely will occur, or has occurred, to any one or more of the several complainants peculiarly affecting them that will not equally affect every other owner of property along [the street in question].").

Moreover, claims of public nuisance involving NAS have already been resolved through settlement of the public nuisance actions filed by the State of West Virginia and West Virginia

cities and counties against the Manufacturer Defendants, Distributor Defendants, and Pharmacy Defendants. Those prior settlement agreements, which this Court approved, provide specifically for treatment and medical monitoring of infants born with NAS. *See* Ord. Adopting the W. Va. First Mem. of Understanding, Trans. ID No. 68796699. This reinforces the importance of the "special injury" requirement for public nuisance claims—to prevent duplicative, repeated public nuisance claims asserted by private claimants who cannot establish an injury different in degree and character from other members of the public. *See Callihan*, 2018 WL 6313012, at *5 (public nuisance claims cannot "[o]rdinarily . . . be maintained by an individual in his private capacity" because "it is the duty of the proper public officials to vindicate the rights of the public").

II. Negligence—Duty

To establish a claim for negligence under West Virginia law, it must be shown that the defendant's acts or omissions violated a duty owed to the plaintiff. *See* Syl. Pt. 3, *Bradley v. Dye*, 247 W. Va. 100 (2022). "No action for negligence will lie without a duty broken." Syl. Pt. 1, *Parsley v. Gen. Motors Acceptance Corp.*, 167 W. Va. 866 (1981). Accordingly, "the threshold question in all actions in negligence is whether a duty was owed." *Strahin v. Cleavenger*, 216 W. Va. 175, 183 (2004).

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. Syl. Pt. 5, *Bradley*, 247 W. Va. at 100; *see also Miller v. Whitworth*, 193 W. Va. 262, 265 (1995). Plaintiff does not assert a private right of action under

the Controlled Substances Act ("CSA") or the West Virginia Controlled Substances Act ("WVCSA"), so his claims must be based on a common law duty.[21]

"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." Syl. Pt. 3, *Sewell v. Gregory*, 179 W. Va. 585 (1988). "Importantly, however, the existence of duty also involves policy considerations underlying the core issue of the scope of the legal system's protection." *Stevens v. MTR Gaming Grp., Inc*., 237 W. Va. 531, 535 (2016) (quotation omitted). "We are therefore bound to evaluate such pertinent factors as 'the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant.'" *Id*. (quotation omitted).

The Court has previously held that manufacturers and distributors of prescription opioids and pharmacies that self-distribute and dispense prescription opioids owed certain duties of care to government entities in the State of West Virginia. But the question presented here is different. Here, a private plaintiff asserts personal injury claims and alleges that manufacturers, distributors, and the WVBOP owed him a duty of care. That stretches the concept of due care too far and would allow any private party in this State—no matter how far removed from any Defendant or its alleged conduct, and irrespective of the intervening conduct of numerous other actors, including this party's mother—to claim that entities associated with the supply of prescription opioids (or active pharmaceutical ingredients) owed that party a duty of care in their activities. Even assuming that any Defendant in such a case owed a duty of care to ***some*** entity, Plaintiff has not properly alleged

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[21] Under West Virginia Code Section 55-7-9, a statutory violation can give rise to a tort action only if the allegedly violated statute confers a private cause of action. *See Arbaugh v. Bd. of Educ., Cnty. of Pendleton*, 214 W. Va. 677, 681 (2003). Plaintiff fails the four-part test imposed by *Hurley v. Allied Chem. Corp.*, 164 W. Va. 268, 278 (1980), to determine whether a statute creates an implied cause of action. Moreover, because Plaintiff alleges only regulatory violations and not statutory violations, Section 55-7-9 does not apply by its own terms because it provides a remedy only for "a violation of any statute," not regulatory violations.

that such a duty ran ***from*** Defendants ***to*** this private Plaintiff. *See Stevens*, 237 W. Va. at 538 (manufacturers of video lottery terminals and the casinos featuring those terminals did not owe a duty of care to individual gamblers to prevent compulsive gambling).[22]

Plaintiff alleges two primary ways through which he suffered injuries from his birth mother's ingestion of opioids during her pregnancy. First, Plaintiff alleges that his birth mother was prescribed opioids by medical providers. *See, e.g.*, Finding Nos. 2, 6, *supra*. Any "duty" to reduce the exposure of the birth mother or Plaintiff to alleged harms associated with the medical use of prescription opioids, therefore, involved a duty owed by medical providers (as to the proper prescribing of opioids to women who are or may become pregnant) or by the birth mother (as to the ingesting of prescription opioids in accordance with medical direction while pregnant), not Defendants. Second, to the extent Plaintiff alleges injuries caused by his birth mother's illicit ingestion of opioids, *see* Finding Nos. 3, 6, *supra*, that also cannot establish a breach of duty owed by Defendants to Plaintiff or his birth mother. Defendants do not owe a duty of care to prevent individuals from illicitly obtaining opioids through those individuals' own illegal conduct or through illegal conduct by third parties who divert opioids after they have left Defendants' or third parties' custody and control. *See*, *e.g.*, *Miller*, 193 W. Va. at 266 ("[A] person usually has no duty to protect others from the criminal activity of a third party because the foreseeability of risk is slight, and because of the social and economic consequences of placing such a duty on a person."). Although certain inapplicable "exceptions are recognized in which a person has an obligation to

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[22] This is particularly true where some Defendants had no control over the conduct performed by others, as explained in *City of Charleston v. Joint Commission*. 473 F. Supp. 3d 596, 621–22 (S.D.W.Va. 2020) (finding that defendants owed no legal duty to plaintiffs and emphasizing that defendants "had no control or responsibility over the manufacturing or distributing of opioids" and plaintiffs were not even the intended recipients of the pain management standards at issue).

protect others from the criminal activity of a third party," *id*., "the general proposition [is] that there is no duty to protect against deliberate criminal conduct of third parties," *Strahin*, 216 W. Va. at 183–84.

Further, even assuming that Defendants owed a duty of care to Plaintiff, he cannot establish any injury that is proximately caused by any breach of such a duty. *See Wal-Mart Stores East, L.P. v. Ankrom*, 244 W. Va. 437, 448 (2020) (negligence claims require a showing of a duty owed to the plaintiff and injury "resulting proximately from the breach of that duty"). As discussed below, Plaintiff's allegations of injury from his birth mother's ingestion of opioids cannot, as a matter of law, "result proximately" from the duties he alleges were owed to him by Defendants. *See infra* pp. 11–15.

For these reasons, Plaintiff cannot establish that Defendants owed him a duty of care. This defeats Plaintiff's claims of negligence and any negligence-based claims of faulty product design and failure to warn.[23]

III. Proximate Causation

Beyond the need to establish a duty owed by Defendants to Plaintiff, which Plaintiff cannot do, each of Plaintiff's claims sounds in tort and requires proof of proximate causation. *See Strahin*, 216 W. Va. at 183; *Stewart v. George*, 216 W. Va. 288, 292 (2004); *Wilkinson v. Duff*, 212 W. Va. 725, 730 (2002); *Metro v. Smith*, 146 W. Va. 983, 990 (1962). Proximate cause is "that cause which, in actual sequence, unbroken by any independent cause, produced the wrong complained

[23] For the same reasons that Plaintiff cannot maintain his claims for negligence, his claim of gross negligence is also barred. *See City of Charleston*, 473 F. Supp. 3d at 626 (the failure to establish elements of negligence "precludes any showing that defendants were grossly negligent"); *Wood v. Shrewsbury*, 117 W. Va. 569, 186 S.E. 294, 297 (1936) (where a plaintiff seeks to establish gross negligence, plaintiff must present "affirmative proof tending to magnify the negligence").

of, without which the wrong would not have occurred." Syl. Pt. 3, *Webb v. Sessler*, 135 W. Va. 341 (1950); *accord Wal-Mart Stores East, L.P.*, 244 W. Va. at 450 (applying *Webb* standard). The Court concludes that, as a matter of law, Plaintiff's claims cannot establish proximate causation.

A. Remoteness

Plaintiff's alleged injuries are too remote from Defendants' conduct to establish proximate causation. Under West Virginia law, "a remote [] cause of injury" is insufficient to support a finding of proximate causation. *Metro*, 146 W. Va. at 990.[24] While a tortfeasor is "not relieved from liability" by "reasonably foreseeable" acts of third parties, *Anderson v. Moulder*, 183 W. Va. 77, 89 (1990), foreseeability alone is not sufficient to establish proximate causation under West Virginia law. Lack of remoteness is a separate and distinct element of proximate causation under West Virginia law, and if a defendant's alleged conduct is too remote from the alleged harm, it cannot be a proximate cause of that harm as a matter of law, regardless of whether the harm was foreseeable. *See Metro*, 146 W. Va. at 990; *Webb*, 135 W. Va. at 348–49; *Aikens v. Debow*, 208 W. Va. 486, 492 (2000); *City of Huntington*, 609 F. Supp. 3d at 481; *City of Charleston v. Joint Comm'n*, 473 F. Supp. 3d 596, 631 (S.D.W.Va. 2020); *Emp. Teamsters-Loc. Nos. 175/505 Health & Welfare Tr. Fund v. Bristol Myers Squibb Co.*, 969 F. Supp. 2d 463, 472–75 (S.D.W.Va. 2013).

In *Webb*, the Supreme Court of Appeals affirmed the grant of a motion to dismiss, holding that the alleged negligence of various defendants was "remote as distinguished from proximate, and, therefore, not actionable" because "remote causes of the injury . . . do not constitute

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[24] *See also Aikens v. Debow*, 208 W. Va. 486, 492 (2000) ("the doctrine of remoteness is a component of proximate cause"); *Emp. Teamsters-Loc. Nos. 175/505 Health & Welfare Tr. Fund v. Bristol Myers Squibb Co.*, 969 F. Supp. 2d 463, 475 (S.D.W.Va. 2013) ("the proximate causation analysis is about carefully drawing a line so as to distinguish the direct consequences in a close causal chain from more attenuated effects influenced by too many intervening causes"); *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (the law "does not attribute remote consequences to a defendant").

actionable negligence." 135 W. Va. at 348–49. Likewise, in *City of Charleston*, West Virginia municipalities alleged that an organization that accredited public and private health care organizations had collaborated with opioid manufacturers to "misrepresent[] the addictive qualities of opioids and foster[] dangerous pain control practices." 473 F. Supp. 3d at 606 (internal quotations and citation omitted). That court, on a motion to dismiss, held that proximate causation was absent because "defendants' actions are too attenuated and influenced by too many intervening causes, including the criminal actions of third parties, to stand as the proximate cause of plaintiffs' injuries." *Id.* at 631; *see also Emp. Teamsters-Loc.*, 969 F. Supp. 2d at 475.

The Court concludes that Defendants' conduct as alleged by Plaintiff is, as a matter of law, too attenuated and remote from the alleged injuries to establish proximate causation, even if those injuries were foreseeable. Defendants' alleged conduct (described above in the Findings) is necessarily multiple steps removed from Plaintiff's claimed injuries, which Plaintiff admits occurred only after (1) medical providers prescribed opioids to Plaintiff's birth mother while she was pregnant with Plaintiff; (2) third parties provided illegally obtained opioids to Plaintiff's birth mother; and (3) Plaintiff's birth mother ingested medically prescribed opioids and/or illegally obtained opioids during her pregnancy with Plaintiff.

As alleged by Plaintiff, the numerous independent actions of multiple actors over whom Defendants had no control defeat proximate causation as a matter of law because these actions render Defendants' conduct too remote from Plaintiff's alleged injuries. *See Metro*, 146 W. Va. at 990 ("the negligence which renders a defendant liable for damages must be a proximate, not a remote, cause of injury"); *see also Emp. Teamsters-Loc.*, 969 F. Supp. 2d at 475–76 (ruling on a motion to dismiss that "a vast array of intervening events, including the 'independent medical judgment' of doctors" precluded a finding of proximate cause (citation omitted)); *City of*

Charleston, 473 F. Supp. 3d at 631 ("The independent medical judgment of the prescribing physicians further breaks the chain of causation" because "no injury would occur unless the physician proceeded to unnecessarily prescribe opioid treatments or if patients obtained the drugs through some other illegal means").

For this reason, Plaintiff cannot establish proximate causation. The Court can properly dismiss a complaint where, as here, Plaintiff cannot establish proximate causation as a matter of law. *See Webb*, 135 W. Va. at 348–49.

B. Sole Proximate Cause

Plaintiff also cannot establish the required element of proximate causation for his claims against Defendants for the independent reason that the conduct of Plaintiff's birth mother was necessarily the sole proximate cause of Plaintiff's alleged injuries. "Where there is a sole, effective intervening cause, there can be no other causes proximately resulting in the alleged injury." *Webb*, 135 W. Va. at 348. As Plaintiff admits, the alleged injuries that form the basis of Plaintiff's claims necessarily occurred because Plaintiff's birth mother ingested opioids during her pregnancy, and they would not have occurred otherwise. Finding Nos. 6–7, *supra*. Put another way, because Plaintiff necessarily bases his claim on injuries from alleged exposure to opioids *in utero*, those injuries could not have occurred unless his birth mother took opioids during her pregnancy. Finding No. 6.

Accepted as true, Plaintiff's allegations therefore establish that his birth mother's conduct is the sole proximate cause of Plaintiff's alleged injuries. Under the *Webb* standard, the birth mother's ingestion of opioids—which, by Plaintiff's own allegations, was the necessary factor causing his alleged NAS, independent of any alleged conduct by Defendants—"produced the wrong complained of," which wrong "would not have occurred" without that conduct, and which wrong resulted from Plaintiff's birth mother's conduct "unbroken by any independent cause." Syl.

Pt. 3, *Webb*, 135 W. Va. 341. The actions of the birth mother therefore "constitute[] a new effective cause and operate[] independently of any other act, making [them] and [them] only, the proximate cause of the injury." Syl. Pt. 12, *Marcus v. Staubs*, 230 W. Va. 127 (2012). *Accord* Syl. Pt. 8, *Harbaugh v. Coffinberger*, 209 W. Va. 57 (2000).

In short, the birth mother's ingestion of opioids during pregnancy is the sole proximate cause of Plaintiff's alleged injuries because it directly "produced the wrong complained of" "unbroken by any independent cause." *See* Syl. Pt. 3, *Webb*, 135 W. Va. 341. As a matter of law, Plaintiff cannot establish proximate causation in his claims against Defendants for this separate and additional reason.

IV. Misrepresentation and Civil Conspiracy

Plaintiff's causes of action for misrepresentation and civil conspiracy are also dismissed.

A. Negligent and Intentional Misrepresentation

Plaintiff's claims of negligent and intentional misrepresentation sound in tort. *See Trafalgar House Constr., Inc. v. ZMM, Inc.*, 211 W. Va. 578, 583 (2002) (describing "claims in tort" for "misrepresentation (fraudulent or negligent)"). As with any tort, Plaintiff cannot sustain these claims without a showing of proximate causation. *See White v. Wyeth*, 227 W. Va. 131, 140 (2010). For the reasons addressed above, Plaintiff's own allegations make clear that Defendants' alleged misrepresentations and omissions cannot be a direct or proximate cause of Plaintiff's injuries as a matter of law, and that the conduct of Plaintiff's birth mother was the sole proximate cause of his alleged injuries. This lack of causation therefore bars Plaintiff's claims of negligent and intentional misrepresentation.

B. Civil Conspiracy

Civil conspiracy is not a "*per se*, stand-alone cause of action." *Dunn v. Rockwell*, 225 W. Va. 43, 57 (2009). "[A] civil conspiracy must be based on some underlying tort or wrong." *O'Dell*

v. Stegall, 226 W. Va. 590, 625 (2010). For this reason, when a plaintiff's underlying tort claims fail, so too must civil conspiracy claims premised on those underlying torts. *See Hammer v. Hammer*, No. 14-0995, 2016 WL 765839, at *4 (W. Va. Feb. 26, 2016) ("if the [underlying] claim fails, the civil conspiracy claim cannot survive"). For the reasons addressed above, all of Plaintiff's underlying tort claims fail as to all Defendants. Plaintiff's civil conspiracy claims therefore "cannot survive." *Id*.

V. WVBOP—Public Duty Doctrine and Qualified Immunity

Under West Virginia law, the determination of "whether qualified or statutory immunity bars a civil action is one of law for the court to determine." *W. Va. Dep't of Health & Human Res. v. Payne*, 231 W. Va. 563, 576 n.31 (2013). As a matter of law, Plaintiff's claims against the WVBOP are barred by the public duty doctrine and by qualified and absolute immunity.

Plaintiff's allegations against the WVBOP stem from alleged negligence in the performance of certain statutory and/or regulatory duties. One of the main elements of a negligence action is the existence of a legal duty. The public duty doctrine is a defense based upon the absence of a duty owed to the specific party asserting the negligence claim. *Holsten v. Massey*, 200 W. Va. 775, 780 (1997).

Under the public duty doctrine, a "governmental entity is not liable because of its failure to enforce regulatory or penal statutes." *Benson v. Kutsch*, 181 W. Va. 1, 2–3 (1989). Thus, a local governmental entity's liability for certain functions "may not be predicated upon the breach of a general duty owed to the public as a whole; instead, only the breach of a duty owed to the particular person injured is actionable." *Walker v. Meadows*, 206 W. Va. 78, 83 (1999). A "government entity can interpose the public duty doctrine as a defense when it perceives a plaintiff is attempting to hold the entity liable for breach of a non-discretionary duty owed to the general

public." *W. Va. State Police v. Hughes*, 238 W. Va. 406, 413 (2017); *see also Parkulo v. W. Va. Bd. of Prob. & Parole*, 199 W. Va. 161, 172 (1996).

The only exception to the public duty doctrine is where a special relationship exists such that a state agency could be said to have assumed a specific duty to the individual plaintiff. *See Randall v. Fairmont City Police Dep't,* 186 W. Va. 336, 347 (1999); Syl. Pt. 2, *Wolfe v. City of Wheeling*, 182 W. Va. 253 (1989). Plaintiff's Complaint includes no allegations that could establish this "special relationship exception" to the public duty doctrine.[25] Thus, Plaintiff's claims against the WVBOP are barred by the public duty doctrine.

Plaintiff's claims against the WVBOP are also barred by qualified immunity. "Under the doctrine of qualified immunity, the discretionary actions of government agencies, officials and employees performed in an official capacity are shielded from civil liability so long as the actions do not violate clearly established law or constitutional duty." *Hughes*, 238 W. Va. at 411. The doctrine of qualified immunity shields "discretionary judgments and decisions" that do not violate a "clearly established law, statute, or regulation." *W. Va. Bd. of Educ. v. Croaff*, No. 16-0532, 2017 WL 2172009, at *6–7 (W. Va. May 17, 2017). Qualified immunity therefore bars civil actions when "an objectively reasonable official, situated similarly to the defendant, could have believed that his conduct did not violate the plaintiff's constitutional rights, in light of clearly established law and the information possessed by the defendant at the time of the allegedly wrongful conduct[.]"[26] *Hutchison v. City of Huntington*, 198 W. Va. 139, 149 (1996). Qualified

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[25] To the extent Plaintiff contends there is a malicious conduct exception to the public duty doctrine, this exception applies only to political subdivisions pursuant to West Virginia Code § 29-12A-1, *et seq.*, and not to WVBOP, a state agency.

[26] *See Sparks* Compl. – Trans. ID No. 69908744 ¶¶ 112–13.

immunity "is broad and protects all but the plainly incompetent or those who knowingly violate the law." *Hughes*, 238 W. Va. at 411 (citation and quotation marks omitted).

Under these standards, Plaintiff's claims against the WVBOP are barred by qualified immunity. While Plaintiff alleges that the WVBOP "failed in its mandatory, regulatory duty" under West Virginia Code of State Rules Section 15-2-5.1.1 to identify abnormal or unusual practices of patients, Plaintiff's allegations offer no factual support for those conclusory assertions that the WVBOP violated its statutory and regulatory duties. The Court must not accept statements of legal conclusions without any factual support. *Hylton v. Bennett*, No. 12-0194, 2012 WL 5834621, at *2 (W. Va. Nov. 16, 2012). In matters where qualified immunity is implicated, "the trial court must insist on heightened pleading by the plaintiff." *Hutchison*, 198 W. Va. at 149. Here, the Complaint contains nothing but conclusory allegations without any factual support. Such generalized, unsupported allegations of regulatory violations are insufficient to overcome qualified immunity, which "insulates the State and its agencies from liability based on vague or principled notions [of government responsibility]." *Crouch v. Gillispie*, 240 W. Va. 229, 238 (2018) (alteration in original) (quoting *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 516 n.33 (2014)). "We are wary of allowing a party to overcome qualified immunity by cherry-picking a violation of any internal guideline irrespective of whether the alleged violation bears any causal relation to the ultimate injury." *Id.* at 237.

The Complaint (¶¶ 111–13) includes further allegations that the WVBOP failed to investigate "thousands" of "reports of suspicious orders" and "did not conduct a single investigation or review a single record in relation to those reports of suspicious orders until 2018 at the earliest." Yet even crediting those allegations as true, the judgments made by the WVBOP in deciding how to evaluate and respond to suspicious order reports are inherently "discretionary

actions" that fall squarely within the scope of qualified immunity because they "do not violate a clearly established law." *Hughes*, 238 W. Va. at 411. No regulation, statute, or other law requires or places a duty on the WVBOP to investigate or review reports of suspicious orders, and its decisions as to how to respond to such suspicious order reports are vested to its discretion. For this reason, any decisions made by the WVBOP to investigate (or not to investigate) suspicious order reports it receives are discretionary acts that "do not violate a clearly established law" and are subject to qualified immunity.

Furthermore, Plaintiff's allegations are barred by the doctrine of absolute immunity, which applies if the "cause of action arises from . . . administrative policy-making acts or omissions." *W. Va. Reg'l Jail*, 234 W. Va. at 507. Even crediting Plaintiff's conclusory allegations that the WVBOP breached its regulatory duties to review records in the CSMP or to issue reports related to that review, these are clearly "administrative policy-making acts" that are subject to absolute immunity.

VI. Grounds for Dismissal Not Reached

In addition to the grounds discussed above, Defendants raised numerous additional grounds for dismissal in briefing they incorporated in this case by reference, including, among others, that: (1) Plaintiff's claims based on a theory of failure to warn should be dismissed because the prescription opioid medications at issue were at all relevant times accompanied by warnings that the use of medications during pregnancy could cause NAS; (2) Plaintiff's claims are barred under the product-identification rule; (3) Plaintiff's claims are barred under the learned-intermediary doctrine; (4) Plaintiff's claims are preempted; (5) Plaintiff's claims as to certain Defendants are barred under the component-parts doctrine; (6) Plaintiff's claims as to certain Defendants are barred under West Virginia's innocent seller statute, W. Va. Code § 55-7-31; (7) Plaintiff's civil conspiracy claim fails to plead the elements of civil conspiracy, including an agreement to commit

tortious acts for a common purpose; (8) Plaintiff cannot hold the manufacturer of a brand-name drug liable for harm allegedly caused by a generic equivalent drug; (9) as to certain Defendants, Plaintiff's claims fail for lack of personal jurisdiction; (10) Plaintiff does not seek to vindicate a "common right" and cannot allege Defendants unreasonably interfered with such a right; and (11) Defendants were not the cause-in-fact of the alleged injuries.

Because the Court dismisses Plaintiff's claims in full and with prejudice based on the other grounds discussed above, the Court need not, and does not, reach these additional asserted grounds for dismissal.

For the foregoing reasons, the Court hereby **GRANTS** the motions to dismiss and **ORDERS** that the above-captioned Complaint is hereby **DISMISSED** in its entirety as to all Defendants with prejudice.[27] Plaintiff's objections and exceptions are noted and preserved for the record.

The Court **FINDS** upon **EXPRESS DETERMINATION** that this is a final order available for the proper application of the appellate process pursuant to the Rules of Civil Procedure and the Rules of Appellate Procedure. Accordingly, this order is subject to immediate appellate review.

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[27] For the avoidance of doubt, the Court finds that the grounds for dismissal expressed in this Order apply equally to all Defendants in the captioned case regardless of whether a Defendant filed a motion to dismiss on other grounds. Thus, pursuant to its authority under the doctrines of the law of the case, collateral estoppel, or *res judicata*, applicable either together or in the alternative, and consistent with its prior practice, the Court dismisses all claims against all Defendants for the reasons contained in this Order. *See S.U. v. C.J.*, No. 19-1181, 2021 WL 365824, at *3–4 (W. Va. Feb. 2, 2021) (recognizing the Court's precedent allowing *sua sponte* dismissal pursuant to *res judicata* to avoid judicial waste); *see also Medley v. Ames*, No. 21-0113, 2022 WL 856611, at *4 (W. Va. Mar. 23, 2022) (unpublished) (affirming denial of a habeas petition where the "Petitioner's claims are . . . barred by the doctrines of the law of the case, collateral estoppel, and/or *res judicata*"); *see also In re: Opioid Litig.*, 19-C-9000, Ord. Regarding Rulings Issued During the Sept. 20, 2019 Status Conference, Trans. ID No. 64297517 (Kanawha Cnty. Cir. Ct. Oct. 9, 2019) (holding the Court will not revisit its rulings to the extent the parties file identical motions on the same issues already ruled upon by this Court).

A copy of this Order has been electronically served this day on all counsel of record via File & Serve*Xpress*.

It is so **ORDERED**.

ENTERED: June 27, 2023.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation