



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

CIVIL ACTION NO. 22-C-9000 NAS

THIS DOCUMENT APPLIES TO:

**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.

**ORDER GRANTING DEFENDANT CUMBERLAND HEALTH SERVICES, INC.
D/B/A IAEGER PHARMACY'S MOTION FOR SUMMARY JUDGMENT**

Now pending before the Court is *Defendant, Cumberland Health Services, Inc. d/b/a Iaegeer Pharmacy's Motion for Summary Judgment* (Transaction ID 70049665) filed on May 19, 2023.¹ Defendant Iaegeer Pharmacy asserts the facts are undisputed and it is entitled to judgment as a matter of law, consistent with the Court's *Order Regarding Rulings on Motions to Dismiss* (Transaction ID 69834672) entered on April 17, 2023, in which the Court granted all motions to dismiss filed by the Manufacturer Defendants, Distributor Defendants, Pharmacy Defendants, and the West Virginia Board of Pharmacy ("WVBOP") filed in the NAS cases then

¹ "Defendant" or "Iaegeer Pharmacy."

pending before the Court.² Plaintiff did not file a response to Iaegeer Pharmacy's motion for summary judgment.³

On June 9, 2023, the Court granted Iaegeer Pharmacy's motion for summary judgment, consistent with the Court's *Order Regarding Rulings on Motions to Dismiss* (Transaction ID 69834672) entered on April 17, 2023, and *Order Granting Defendants' Motions to Dismiss* (Transaction ID 70112431) entered on May 31, 2023. See *Order Regarding Defendant Cumberland Health Services, Inc. d/b/a Iaegeer Pharmacy's Motion for Summary Judgment* (Transaction ID 70169565). The Court ordered Defendant Iaegeer Pharmacy to prepare a detailed proposed order with findings of fact and conclusions of law granting the motion for summary judgment, consistent with the Court's May 31, 2023, *Order Granting Defendants' Motions to Dismiss* (Transaction ID 70112431). Defendant Iaegeer Pharmacy timely filed and served the proposed order on June 21, 2023 (Transaction ID 70231851). Plaintiff did not file an objection to Defendant's proposed order by the June 26, 2023, deadline set by the Court.

The Court has considered Defendant's motion for summary judgment, the Pleadings herein, the Court's prior applicable rulings, the applicable law, and argument by counsel on the

² On April 18, 2023, the Court granted the WVBOP's motion to transfer *Trey Sparks v. Johnson & Johnson, et al.*, Marshall County Civil Action No. 23-C-14, and ordered the case joined with *In re: Opioid Litigation*, Civil Action No. 22-C-9000 NAS ("the NAS Cases"). *Order Granting Motion to Transfer* (Transaction ID 69848009). The Court granted motions to dismiss filed by the Manufacturer Defendants, Distributor Defendants, and the WVBOP in the *Sparks* case by separate orders. *Order Regarding Motions to Dismiss* (Transaction ID 70128899) entered on June 2, 2023, and *Order Granting Defendants' Motions to Dismiss* (Transaction ID 70266225) entered on June 27, 2023.

³ Pursuant to the Court's *Order Regarding E-filing and Service Deadlines for Responses to Motions and Replies to Responses* (Transaction ID 63616820) entered July 23, 2019, "Unless otherwise ordered by the Court, any response to a motion shall be e-filed and served within fourteen (14) calendar days after the filing of the motion, not including the date the motion is filed."

issues presented. The Court has also reviewed Defendant’s proposed order.⁴ Finding that Defendant’s proposed order accurately interprets, expands, and expounds on the Court’s *Order Regarding Defendant Cumberland Health Services, Inc. d/b/a Iaeger Pharmacy’s Motion for Summary Judgment* (Transaction ID 70169565), the Court **GRANTS** Defendant Iaeger Pharmacy’s motion for summary judgment based upon the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**:

FINDINGS OF FACT

1. Defendant Iaeger Pharmacy is a West Virginia corporation and retail pharmacy located in Iaeger, West Virginia.

2. On March 28, 2022, Plaintiff, as next friend and guardian of minor child T.K.L., filed a Complaint alleging that Defendants, including Iaeger Pharmacy, caused T.K.L. to be born on November 24, 2008, at Raleigh General Hospital in Beckley, West Virginia, with Neonatal Abstinence Syndrome (“NAS”) as a result of exposure to opioids *in utero*. *See Complaint*, at ¶¶ 1-2, 11.

3. Specifically, Plaintiff claims that she was first prescribed opioids in 2001 for chronic pain resulting from an accident. *Id.* at ¶ 4. She further asserts that her addiction to opioids began prior to the gestation of T.K.L., that she “consistently filled prescriptions” of various opioid medications, and that she “obtained and consumed opioids ... throughout the pregnancy with Plaintiff T.K.L.” *Id.* at ¶¶ 5-6. She also claims that her ingestion of opioids during her pregnancy exposed T.K.L. to opioid medications in utero resulting in T.K.L.’s injuries. *Id.* at ¶ 11.

4. Plaintiff asserts six claims against Iaeger Pharmacy in the Complaint, including:

⁴ (Transaction ID 70231851) filed on June 21, 2023. Plaintiff did not file an objection to the proposed order.

fraud (Count I), negligence and gross negligence (Count II), civil conspiracy (Count III), injunctive and equitable relief of medical monitoring and continuing treatment (Count IV), products liability (Count V), and punitive damages (Count VII).⁵ *See Complaint*, ¶¶ 272 - 412.

5. Plaintiff's only specific allegation pertaining to Iaeger Pharmacy is that it filled prescriptions for Hydrocodone and Acetaminophen for Plaintiff in January 2001, over seven (7) years before Plaintiff's pregnancy with T.K.L. *See Complaint*, ¶ 185.

6. The Complaint contains no allegations as to where, from whom, or how Plaintiff obtained any of the opioid prescriptions she used during her pregnancy with T.K.L.; nor does Plaintiff make any specific allegations of wrongdoing by Iaeger Pharmacy related to any opioid prescriptions filled and dispensed by it to Plaintiff; nor does she allege that Iaeger Pharmacy filled or dispensed any opioid prescriptions to her during her pregnancy.

7. On June 10, 2022, Iaeger Pharmacy filed its Answer to the Complaint and admitted that it only filled one prescription for Hydrocodone for Plaintiff on January 15, 2001, which was over seven (7) years before Plaintiff's pregnancy with T.K.L. *See Cumberland Health Services, Inc. d/b/a Iaeger Pharmacy Defendant's Answer to Plaintiff's Complaint*, ¶ 1, 185.

8. On January 23, 2023, Iaeger Pharmacy amended its original Answer to the Complaint by stipulation and asserted several affirmative defenses, including the Court's lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and 12(h)(3) of the West Virginia Rules of Civil Procedure due to Plaintiff's failure to follow the pre-filing requirements of the West Virginia Medical Professional Liability Act ("MPLA") set forth in West Virginia Code §55-7B-1, *et seq.*, and lack of proximate cause, among other defenses. *See Stipulation to Allow Cumberland Health*

⁵ Count VI of the Complaint alleges state law violations solely against Co-Defendant, West Virginia Board of Pharmacy. *See Complaint*, ¶¶ 398-404.

Services, Inc. d/b/a Iaeger Pharmacy to Amend Its Answer Upon the Lifting of the Stay in the NAS Cases (Transaction ID 68366048); *See also Defendant Cumberland Health Services, Inc. d/b/a Iaeger Pharmacy's Amended Answer to Plaintiff's Complaint.* (Transaction ID 68963669).

9. All of the other Manufacturer, Distributor and Pharmacy Defendants in the pending West Virginia NAS cases filed motions to dismiss and/or joinders to various motions to dismiss, and Plaintiffs filed responses to the same. Iaeger Pharmacy did not file a motion to dismiss as it had already filed an Answer to the Complaint.

10. On March 24, 2023, the Court heard oral argument on all motions to dismiss filed by the other Defendants in the West Virginia NAS cases then pending before the Court.

11. On April 17, 2023, the Court entered an *Order Regarding Rulings on Motions to Dismiss* (Transaction ID 69834672), the findings of which are incorporated by reference herein. The Court granted all Defendants' motions to dismiss filed in the NAS cases then pending before the Court. The Court ordered certain defense counsel to prepare a detailed proposed order with findings of fact and conclusions of law granting the motions to dismiss as to all counts in the Complaints, which was timely filed and served.

12. As to the Pharmacy Defendants, the Court found that Plaintiffs in the pending NAS cases failed to comply with the pre-filing requirements of the West Virginia Medical Professional Liability Act ("MPLA") because they did not serve the requisite Notice of Claim or Screening Certificate of Merit on the Pharmacy Defendants. Therefore, the Court held that it lacked subject matter jurisdiction over those claims. *See Order Regarding Rulings on Motions to Dismiss* (Transaction ID 69834672), ¶ 3.

13. The Court further found that "[e]ach of Plaintiffs' claims sounds in tort and requires

proof of causation, specifically proximate cause” . . . “the allegations in Plaintiffs’ Complaints fail to establish proximate cause” . . . and “Plaintiffs’ allegations regarding causation are too attenuated and remote to prove proximate cause.” *Id.* at ¶ 7.

14. In addition, the Court found that:

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.

Id. at ¶ 8.

15. The Court also found that “[t]he allegations in Plaintiffs’ Complaints demonstrate that Plaintiffs’ mothers were the sole proximate cause of Plaintiffs’ alleged injuries” and ~~that their~~ “[t]he injuries which are the basis of Plaintiffs’ claims would not have occurred unless Plaintiffs’ mothers took opioids during their pregnancies with Plaintiffs.” *Id.* at ¶ 9.

16. Lastly, the Court ~~held~~ found that “Plaintiffs’ causes of action pertaining to fraud, civil conspiracy, and medical monitoring should accordingly also be dismissed.” *Id.* at ¶ 11.

17. On May 19, 2023, Iaeger Pharmacy filed a motion for summary judgment seeking judgment as a matter of law on all of Plaintiff’s claims against it based on the Court’s April 17, 2023, *Order Regarding Rulings on Motions to Dismiss* (Transaction ID 69834672). Plaintiff did not file a response to Iaeger Pharmacy’s motion.

18. On May 31, 2023, the Court entered an *Order Granting Defendants’ Motions to Dismiss* (Transaction ID 70112431), consistent with the *Order Regarding Rulings on Motions to Dismiss* (Transaction ID 69834672) entered on April 17, 2023.

19. On June 9, 2023, the Court granted Iaeger Pharmacy's motion for summary judgment, consistent with its *Order Regarding Rulings on Motions to Dismiss* (Transaction ID 69834672), and its *Order Granting Defendants' Motions to Dismiss* (Transaction ID 70112431). *See Order Regarding Defendant Cumberland Health Services, Inc. d/b/a Iaeger Pharmacy's Motion for Summary Judgment* (Transaction ID 70169565).

20. Iaeger Pharmacy filed and served a detailed proposed order with findings of fact and conclusions of law on June 21, 2023, as ordered by the Court.

CONCLUSIONS OF LAW

21. Plaintiff's claims against Iaeger Pharmacy, a retail pharmacy, are governed by the MPLA set forth in West Virginia Code §§ 55-7B-1, *et seq.* The MPLA governs claims for medical professional liability, as follows:

[a]ny liability for damages resulting from the death or injury of a person for **any tort or breach of contract based on health care services rendered, or which should have been rendered**, by a health care provider or health care facility to a patient. It also means **other claims that may be contemporaneous to or related to the alleged tort or breach of contract** or otherwise provided, all in the context of rendering health care services.

W. Va. Code § 55-7B-2(i) (emphasis added); *See also State v. Scott*, 866 S.E.2d 350 (W. Va. 2021) (describing the legislative expansion of the MPLA to claims against health care providers and facilities).

22. The MPLA defines "health care" to include:

[a]ny act, service or treatment provided under, pursuant to or in furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment . . . [or] performed or furnished, by any health care provider . . . or person supervised by or acting under the direction of a health care provider . . . [or] [t]he process employed by . . . health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers.

W. Va. Code. § 55-7B-2(e)(1)-(3).

23. "Health care provider" and "health care facility" are defined to include "pharmacist" and "pharmacy," respectively. *Id.* at § 55-7B- 2(f), (g); *See Bowles v. CVS Pharmacy*, No. 19-CV-154, 2019 WL 7556265, at* 5 (N.D. W. Va. Dec. 20, 2019) ("CVS Pharmacy meets the definition of a 'health care facility'").

24. Here, the MPLA expressly governs Plaintiff's claims as Iaeger Pharmacy is a "health care provider" or "health care facility" that engaged in "health care" in allegedly filling and dispensing prescription(s) to Plaintiff.

25. In addition, Plaintiff (and the Minor whose claims she presses) are "person[s]" subject to the MPLA's pre-suit requirements, whether or not they are also "patients." *Id.*; *See also Id.* §§ 55-7B-6(a), 55-7B-9b; *Est. of Fout-Iser ex rel. Fout-Iser v. Hahn*, 220 W. Va. 673, 676–77 (2007) (applying the MPLA to medical malpractice claims brought on behalf of a stillborn child); *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 225 W. Va. 300, 316 n.27 (2010) ("[A] nonpatient may sue a healthcare provider under the requirements of the Medical Professional Liability Act, even though the healthcare provider did not render any services to the nonpatient."); *Osborne v. United States*, 211 W. Va. 667, 674 (2002) (claims brought by accident victims against doctor who negligently prescribed pain medication to third party); *State ex rel. W. Va. Univ. Hosps., Inc. v. Nelson*, 245 W. Va. 150, 152, 156 (2021) (claims of woman killed by recipient of allegedly negligent psychiatric treatment). While this Court has held that the statute does not cover government entities seeking relief in their sovereign capacity, *See Findings of Fact & Conclusions of Law on Ord. Denying Pharmacy Defs.' Mot. to Dismiss Compls. and Am. Compls.*, Trans. ID No. 67895252 (Kanawha Cnty. Cir. Ct. Aug. 3, 2022), Plaintiffs here are private parties.

26. Even accepting Plaintiffs' allegations that the Pharmacy Defendants violated controlled substances laws, Plaintiffs' claims still fall within the MPLA's ambit. *See W. Va. Code*

§ 55-7B-5(d); *cf. State ex rel. Hope Clinic, PLLC v. McGraw*, 245 W. Va. 171, 174 (2021) (MPLA applies to claims that defendants “purposely prescribed and filled prescriptions for controlled substances in a concerted effort to addict [the patient] for monetary purposes” and that “pharmacies and pharmacists negligently dispensed prescriptions for controlled substances,” causing the patient “to become addicted to pain medications”).

27. The MPLA applies to all of Plaintiff’s tort claims regardless of how she plead them as they are related and contemporaneous to Iaeger Pharmacy’s alleged activities of filling and dispensing medications or supervising employees and all arise “in the context of rendering health care services.” W. Va. Code § 55-7B-2(i); *Minnich v. MedExpress Urgent Care, Inc.*, 796 S.E.2d 642, 647 (W. Va. 2017); *State ex. rel. W. Va. Univ. Hosps., Inc. v. Scott*, 866 S.E.2d 350, 358, 363 (W.Va. 2021) (stating that “[w]here the alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of ‘health care’ ... the Act applies regardless of how the claims have been pled. ...” and further stating that the 2017 amendments “illustrate the Legislature’s intent for the MPLA to broadly apply to services encompassing patient care—not just the care itself.”) (citing Syl. Pt. 4, *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007).

28. Because the MPLA applies, Plaintiff was required to comply with the MPLA’s mandatory, pre-filing requirements of serving Iaeger Pharmacy with a proper notice of claim and screening certificate of merit by a medical expert. *See* W. Va. Code § 55-7B-6(b). Failure to follow the MPLA’s pre-suit requirements bars the plaintiff from bringing a medical professional liability action. *See* W.Va. Code § 55-7B-6(a) (“[N]o person may file a medical professional liability action against any health care provider without” providing pre-suit notice).

29. It is undisputed that Plaintiff did not comply with the pre-filing requirements of the MPLA as she never served Iaeger Pharmacy with the requisite notice of claim or screening certificate of merit by a qualified medical expert.

30. The Court, therefore, **FINDS** that it lacks subject matter jurisdiction in this civil action as to the claims against Iaeger Pharmacy, thereby requiring dismissal of the Complaint on all counts as to Iaeger Pharmacy. This finding is consistent with this Court's prior ruling granting the other Pharmacy Defendants' motions to dismiss in all pending NAS cases. *See Order Regarding Rulings on Motions to Dismiss*, ¶ 3 (Transaction ID 69834672).

31. Where a court lacks subject matter jurisdiction under Rule 12(b)(1), it "must take no further action in the case other than to dismiss it from the docket." *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.*, 211 S.E.2d 705, 707 (W.Va. 1975); W. Va. R. Civ. P. 12(h)(3).

32. Moreover, it is well-established that when the MPLA's pre-suit notice requirements are not satisfied, a circuit court lacks subject matter jurisdiction and dismissal is required. Syl. Pts. 2 & 5, *State ex. Rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth*, 835 S.E.2d 579, 589 (W. Va. 2019); Syl. Pt 3, *Hope Clinic*, 858 S.E.2d at 223; *State ex rel. Miller v. Stone*, 216 W.Va. 379, 607 S.E.2d 485 (2004).

33. The Court further **FINDS** that Plaintiff cannot establish proximate causation in any of her tort claims against Iaeger Pharmacy as a matter of law, which finding is consistent with the Court's prior, controlling *Order Regarding Rulings on Motions to Dismiss* (Transaction ID 69834672) entered on April 17, 2023, and *Order Granting Defendants' Motions to Dismiss* (Transaction ID 70112431) entered on May 31, 2023. The Court also **FINDS** that: 1) Plaintiff's claims are too attenuated and remote to prove proximate cause against Iaeger Pharmacy; 2) there are several third parties over whom Iaeger Pharmacy had no control break the chain of causation;

and 3) the minor T.K.L.'s mother was the sole proximate cause of his alleged injuries because such injuries would not have occurred unless Plaintiff took opioids during her pregnancy with T.K.L. *See Order Regarding Rulings on Motions to Dismiss*, ¶¶ 7-9 (Transaction ID 69834672).

34. In addition, Court **FINDS** that the findings of fact and conclusions of law adopted in its *Order Granting Defendants' Motions to Dismiss* (Transaction ID 70112431) in the pending West Virginia NAS baby cases are also adopted and incorporated by reference herein as a further basis for granting summary judgment in favor of Iaeger Pharmacy on all claims and counts of Plaintiff's Complaint, including those for fraud, civil conspiracy, negligence, gross negligence, products liability, medical monitoring and punitive damages.

35. Based on the foregoing, the Court hereby **FINDS** that the salient facts are undisputed and Iaeger Pharmacy is entitled to summary judgment as a matter of law, pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, on all claims and counts against it in Plaintiff's Complaint.

WHEREFORE, for the reasons set forth herein and in the Court's prior, controlling *Order Regarding Rulings on Motions to Dismiss* (Transaction ID 69834672) and *Order Granting Defendants' Motions to Dismiss* (Transaction ID 70112431) in the then pending West Virginia NAS cases, the Court **ORDERS** that Defendant Cumberland Health Services, Inc. d/b/a Iaeger Pharmacy's motion for summary judgment is hereby **GRANTED** and that Plaintiff's Complaint is **DISMISSED WITH PREJUDICE** on all counts as to Defendant Cumberland Health Services, Inc. d/b/a Iaeger Pharmacy. 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.

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