



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

CIVIL ACTION NO. 21-C-9000 DISTRIBUTOR

THIS DOCUMENT APPLIES TO ALL DISTRIBUTOR CASES

**ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY
JUDGMENT ON DEFENDANTS' AFFIRMATIVE DEFENSES**

Pending before the Mass Litigation Panel ("Panel") is *Plaintiffs' Motion for Summary Judgment on Defendants' Affirmative Defenses* (Transaction ID 67622942). Having reviewed and considered the arguments raised in the Motion and Distributor Defendants' Opposition (Transaction ID 67673006), the Panel finds that oral argument will not aid in the decisional process. Therefore, the Panel makes the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiffs are Cities and Counties of West Virginia, acting by and through counsel, that have sued Defendants AmerisourceBergen Drug Corporation, Cardinal Health, Inc., and McKesson Corporation (collectively "Defendants") for nuisance in connection with their distribution of prescription opioids.

2. The Plaintiffs seek abatement of a public nuisance and do not seek damages. *See, e.g., Order Regarding the Plaintiffs' Motion to Strike Defendants' Notices of Non-Party Fault* (July 29, 2020) (Transaction ID 65807300) at "the payment of costs incurred to abate a public nuisance is equitable relief, rather than damages").

The Legal Standard

3. The Panel may enter an order granting partial summary judgment on all or part of a claim. Rule 56(a) of the West Virginia Rules of Civil Procedure provides that "[a] party seeking to recover upon a claim . . . may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse

party, move with or without supporting affidavits for a summary judgment in the party's favor upon all *or any part thereof*." W. Va. R. Civ. P. 56(a) (emphasis added). Summary judgment is appropriately granted where "inquiry concerning the facts is not desirable to clarify the application of the law." *Greaser v. Hinkle*, 245 W. Va. 122, 857 S.E.2d 614, 618 (2021) (internal quotation marks and citation omitted).

4. It is thus appropriate to decide a pure question of law on a motion for summary judgment. *See City of Morgantown v. Nuzum Trucking Co.*, 237 W. Va. 226, 229, 786 S.E.2d 486, 489 (2016) ("The parties all agreed that issues raised in the summary judgment motions were purely legal and, therefore, were ripe for resolution by summary judgment."). This includes questions of statutory or regulatory interpretation, as well as the existence or content of a legal duty. *See, e.g., Pilgrim's Pride Corp. v. Morris*, 228 W. Va. 596, 599, 723 S.E.2d 642, 645 (2011) ("[I]nterpreting a statute or an administrative rule or regulation presents a purely legal question") (internal quotation marks and citation omitted); *Jackson v. Putnam Cnty. Bd. of Educ.*, 221 W. Va. 170, 179, 653 S.E.2d 632, 641 (2007) ("[T]he question of the existence of a legal duty is a question of law appropriately resolved in a motion for summary judgment.").

5. The Panel granted a similar motion in the State's case against the manufacturer defendants. *Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference, In Re: Opioid Litigation*, Civil Action No. 21-C-9000 MFR (Transaction ID 67434309) (W. Va. MLP Mar. 29, 2022) at 1; and *Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference, In Re: Opioid Litigation*, Civil Action No. 21-C-9000 MFR (Transaction ID 67650385) (W. Va. MLP May 23, 2022) at 3.

6. The Panel ruled that the manufacturer defendants' fault-shifting defenses were inapplicable to the State's public nuisance claim because comparative fault is not an element of

the liability phase (Phase I) of the public nuisance case. *Id.* See also, *City of Huntington v. AmerisourceBergen Drug Corp.*, 2021 WL1711382, at *2 (S.D. W. Va. Apr. 29, 2021) (“Defendants have not established that there is a ‘fault’ element (in the way they describe it) of a public nuisance claim under West Virginia law.”).

7. The Panel further ruled that the manufacturer defendants’ affirmative defenses related to offset and collateral source payments were inapplicable to the Phase I liability trial, as those defenses were relevant to the issue of abatement but were not relevant to liability. *Amended Order* at 3. See, e.g., Restatement (Second) of Torts § 920A cmt. (b) (“Payments made to or benefits conferred on the injured party from other sources [i.e., those unconnected to the defendant] are not credited against the tortfeasor’s liability, although they cover all or a part of the harm for which the tortfeasor is liable.”).

8. The collateral source rule prevents evidence of payments from sources other than the culpable defendants. *Kenny v. Liston*, 233 W.Va. 620, 626, 760 S.E.2d 434, 440 (2014).

9. The Panel has applied the collateral source rule to a governmental plaintiff (an airport authority) suing private defendants in a construction defect case where the defendants sought to introduce evidence of non-recourse grant payments for repairs made to the airport by the Federal Aviation Administration. *Central West Virginia Regional Airport Authority, Inc. v. Triad Engineering, Inc., et al.*, Civil Action No. 15-C-1022 KAN (Transaction ID 62962840) (W. Va. MLP Feb. 12, 2019).

10. Other courts with opioid cases have granted similar motions regarding fault- and cost-shifting defenses. See, *City and County of San Francisco, et al. v. Purdue Pharma L.P., et al.*, Case No. 18-cv-07591-CRB, Order Granting in Part and Denying in Part Plaintiff’s Motion for Summary Judgment on Defendants’ Affirmative Defenses (N.D. Cali. April 18, 2022). See

also, People of the State of California, acting by and through Santa Clara County Counsel Orry P. Korb and Orange County District Attorney Tony Rackauckas vs. Purdue Pharma L.P., Order 24-26 (Cal. Super. Ct. Orange Cnty. Mar. 12, 2021) (granting summary adjudication on fault-shifting affirmative defenses because abatement remedy for nuisance claim does not seek damages); *State of New Hampshire v. Johnson & Johnson*, No. 217-2018-CV-00678, Order 306 (N.H. Super. Ct. Jan. 6, 2022); *State of Washington v. McKesson Corp.*, No. 19-2-06975-9 SEA, Order 3-5 (Wash. Super Ct. King Cnty Aug. 18, 2021).

Application of Standard

Based on the foregoing Findings of Fact and Conclusions of Law, *Plaintiffs' Motion for Summary Judgment on Defendants' Affirmative Defenses* (Transaction ID 67622942) is **GRANTED.**

Distributor Defendants' objections are noted for the record.

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

It is so **ORDERED.**

ENTERED: June 9, 2022

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation