



**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**IN RE OPIOID LITIGATION** **Civil Action No. 21-C-9000 PHARM**

**THIS DOCUMENT APPLIES TO ALL STATE CASES AGAINST PHARMACIES**

**ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT, MOTIONS  
TO EXCLUDE EXPERT TESTIMONY, AND MOTIONS IN LIMINE**

Having reviewed the following motions for summary judgment, motions to exclude expert testimony, and motions *in limine*, the Panel issues the following rulings:

**Motions for Summary Judgment:**

1. *Plaintiff's Motion for Partial Summary Judgment Regarding Defendants' Statutory and Regulatory Duties and Their Failure to Meet Those Duties* (Transaction ID 67948219).

*Defendants' Response in Opposition* (Transaction ID 68024359) and *Notice of Filing Under Seal* (Transaction ID 68025350).

**DENIED.**

2. *The State's Motion for Partial Summary Judgment on Pharmacy Defendants' Affirmative Defenses* (Transaction ID 67948130).

*Pharmacy Defendants' Memorandum of Law in Opposition* (Transaction ID 68024348).

**GRANTED IN PART, DENIED IN PART.**

Fault-Shifting and Damages-Based Affirmative Defenses: **GRANTED.**

Setoff and Collateral Source-Related Affirmative Defenses: **GRANTED.**

Time-Bar Affirmative Defenses of Statute of Limitations and Laches: **DENIED.**

Equitable Affirmative Defenses: **DENIED.**

DEA Quota-Based Affirmative defenses: **DENIED.**

3. *The State's Motion for Partial Summary Judgment on Existence of Opioid Epidemic and Application of Public Nuisance Law* (Transaction ID 67948814).

*Pharmacy Defendants' Memorandum of Law in Opposition* (Transaction ID 68024905) and *Notice of Filing Under Seal* (Transaction ID 68025348).

**DENIED.**

4. *Pharmacy Defendants' Joint Motion for Partial Summary Judgment Regarding the Statute of Limitations* (Transaction ID 67948536).

*Plaintiffs' Memorandum of Law in Opposition* (Transaction ID 68018735).

**DENIED.**

#### **Motions to Exclude Expert Testimony**

1. *Pharmacy Defendants' Motion to Exclude Certain of Dr. David Courtwright's and Mr. Carmen Catizone's Opinions* (Transaction ID 67948790).

*Plaintiff's Opposition* (Transaction ID 68018636).

**GRANTED IN PART, DENIED IN PART.** The State's experts will not be permitted to speculate regarding knowledge, state of mind, or motive of the Defendants. Nor can experts simply read documents into the record. However, experts will be permitted to summarize voluminous technical documents. To the extent an expert will opine regarding any Defendant's knowledge, the State must lay a proper foundation. *See Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference* (Transaction ID 67650385) p. 18, C.A. No. 21-C-9000 MFR, and *Order Regarding Pre-Trial Admission of Evidence and Motions in Limine*, (Transaction ID 67722738) p. 5, C.A. No. 21-C-9000 DISTRIBUTOR.

The parties are reminded that the Panel has adopted the "McCormick Rule" and the process utilized in CT4 by Senior District Judge Charles R. Breyer to "to generally allow all evidence to come in subject to a motion to strike at the conclusion of trial." *Order Regarding Trial Logistics* (Transaction ID 6787970).

2. *Pharmacy Defendants' Motion to Exclude the Causation Opinions of Rahul Gupta* (Transaction ID 67948543).

*Plaintiff's Opposition* (Transaction ID 68018459).

**DENIED.**

3. *Pharmacy Defendants' Motion to Exclude Certain Opinions of State Expert Ruth Carter* (Transaction ID 67948856).

*Plaintiff's Opposition* (Transaction ID 68018666).

**GRANTED IN PART, DENIED IN PART.** The motion is granted to the extent that Ms. Carter may not give legal opinions. The Motion is denied to the extent that Ms. Carter is qualified to testify regarding what an adequate SOMS should have and what Defendants' SOMS were lacking. The motion is granted to the extent that Ms. Carter will not be permitted to speculate regarding knowledge, state of mind, or motive of the Defendants. To the extent Ms. Carter will opine regarding any Defendant's knowledge, the State must first lay a proper foundation. *See Amended Order Regarding Rulings*

*Issued During March 25, 2022, Pretrial Conference* (Transaction ID 67650385) pp. 18 and 20, C.A. No. 21-C-9000 MFR, and *Order Regarding Pre-Trial Admission of Evidence and Motions in Limine*, (Transaction ID 67722738) p. 5, C.A. No. 21-C-9000 DISTRIBUTOR.

The parties are reminded that the Panel has adopted the “McCormick Rule” and the process utilized in CT4 by Senior District Judge Charles R. Breyer to “to generally allow all evidence to come in subject to a motion to strike at the conclusion of trial.” *Order Regarding Trial Logistics* (Transaction ID 6787970).

4. *Pharmacy Defendants’ Motion to Exclude Dr. Andrew Kolodny’s Opinion* (Transaction ID 67948884).

*Plaintiff’s Opposition* (Transaction ID 68018545).

**GRANTED IN PART, DENIED IN PART.** The State’s experts will not be permitted to speculate regarding knowledge, state of mind, or motive of the Defendants. Nor can experts simply read documents into the record. However, experts will be permitted to summarize voluminous technical documents. To the extent an expert will opine regarding any Defendant’s knowledge, the State must lay a proper foundation. *See Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference* (Transaction ID 67650385) p. 18, C.A. No. 21-C-9000 MFR, and *Order Regarding Pre-Trial Admission of Evidence and Motions in Limine*, (Transaction ID 67722738) p. 5, C.A. No. 21-C-9000 DISTRIBUTOR.

The parties are reminded that the Panel has adopted the “McCormick Rule” and the process utilized in CT4 by Senior District Judge Charles R. Breyer to “to generally allow all evidence to come in subject to a motion to strike at the conclusion of trial.” *Order Regarding Trial Logistics* (Transaction ID 6787970).

#### **Motions in Limine:**

1. *Pharmacy’s Motion in Limine to Exclude Evidence or Argument Concerning Defendants’ Conduct Outside of and Unrelated to the State of West Virginia* (Transaction ID 67977269).

*Plaintiff’s Opposition* (Transaction ID 68046063).

**DENIED.** The State will be permitted to introduce evidence that is national in scope that could have an effect in West Virginia. Any evidence related to states and counties contiguous to West Virginia will also be permitted. *See Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference* (Transaction ID 67650385) p. 25 (hereafter the “*Amended Order*”).

2. *WalMart's Motion in Limine to Exclude Evidence of Civil or Criminal Investigations or Other Ongoing Litigation* (Transaction ID 67977532).

*Plaintiff's Opposition* (Transaction ID 68052801).

**GRANTED IN PART, DENIED IN PART.** The motion is **GRANTED** to the extent that such evidence goes to liability. The motion is **DENIED** to the extent that such evidence goes to knowledge and/or notice.

3. *Plaintiff's Motion in Limine to Exclude Evidence or Argument on Contributory Fault as to Opioid Epidemic Harms* (Transaction ID 67976088).

*Pharmacy Defendants' Opposition* (Transaction ID 68052963).

**GRANTED.** This is a public nuisance, not a tort. Any evidence related to contributory fault would come in during Phase II.

4. *Plaintiff's Motion in Limine to Exclude Expert Analysis of Medicaid Prescriptions and Prescriptions Appearing in the State Controlled Substances Automated Prescription Program* (Transaction ID 67976122).

*Pharmacy Defendants' Response in Opposition* (Transaction ID 68051935).

**GRANTED IN PART, DENIED IN PART.** The Panel grants the Plaintiff's motion to the extent that the Defendants seek to establish non-party and/or third-party fault. *See Amended Order* at p. 22. The Panel shall allow such testimony if it goes to prove that the Defendants had knowledge or notice.

5. *Plaintiff's Motion in Limine to Exclude Evidence Regarding the State's (A) Licensure and Registration determinations for Healthcare Professionals and Entities; and (B) Decisions to Investigate, Prosecute, or Discipline Particular Healthcare Professionals or Entities* (Transaction ID 67976140).

*Pharmacy Defendants' Opposition* (Transaction ID 68053400).

**GRANTED.** This is not a damages case, and the Panel has granted the State's motion for summary judgment with respect to the Defendants' fault-shifting defenses. Therefore, the Panel grants this motion. *See Amended Order* at p. 22.

6. *Pharmacy Defendants' Motion in Limine to Exclude Plaintiff's Undisclosed Individualized and County-level Evidence* (Transaction ID 67977879).

*Plaintiff's Opposition* (Transaction ID 68052776).

**GRANTED.** *See Amended Order* at p. 25.

7. *Plaintiff's Motion in Limine to Exclude Certain Evidence of Walmart's Prescriber Review Committee and/or in the Alternative Motion to Compel Production of Prescriber Review Committee Documents Being Withheld by Walmart* (Transaction ID 67977898).

*Wal-Mart Inc.'s Response* (Transaction ID 68052430).

**GRANTED.**

8. *Walgreens' Motion in Limine to Exclude Testimony of Out of State Pharmacists* (Transaction ID 67977322).

*Plaintiff's Opposition* (Transaction ID 68051767).

**GRANTED IN PART, DENIED IN PART.** Out of state Pharmacists testifying to out of state practice in individual states shall be excluded. National level evidence shall be allowed.

9. *Pharmacy Defendants' Motion in Limine to Preclude Argument and Evidence Regarding Lobbying* (Transaction ID 67977751).

*Plaintiff's Opposition* (Transaction ID 68046075).

**GRANTED IN PART, DENIED IN PART.** Evidence of misleading marketing, or false or misleading speech is not protected by the First Amendment. Thus, evidence of misleading marketing, or false or misleading speech, shall not be excluded. Evidence of lobbying activity that is not probative of misleading marketing or misleading speech shall be excluded. *See Amended Order* at p. 38.

10. *State's Motion in Limine to Exclude Evidence or Argument Regarding Purported Loss of Access to Prescription Medications* (Transaction ID 67976148).

*Defendants' Opposition* (Transaction ID 68052221).

**GRANTED.**

11. *Pharmacy Defendants' Motion in Limine to Exclude a News Article* (Transaction ID 67978007).

*Plaintiff's Opposition* (Transaction ID 68051139).

**GRANTED.**

12. *Pharmacy Defendants' Omnibus Motions in Limine* (Transaction ID 67978020).

*Plaintiff's Opposition* (Transaction ID 68052144).

1. *Introducing evidence or making references to Pharmacy Defendants as a group.*

**GRANTED.**

2. *Introducing evidence or argument about DEA settlements.*

**GRANTED IN PART, DENIED IN PART.** The motion is **GRANTED** as it relates to liability. The motion is **DENIED** as it relates to knowledge and notice.

3. *Introducing evidence or argument about non-DEA settlements.*

**GRANTED IN PART, DENIED IN PART.** The motion is **GRANTED** as it relates to liability. The motion is **DENIED** as it relates to knowledge and notice.

4. *Introducing lay opinion testimony that prescription opioids are a “gateway” drug.*

**DENIED.** Notwithstanding, there must be a factual basis for any opinion asserted.

5. *Introducing expert testimony that opines on Pharmacy Defendants’ alleged state of mind and corporate conduct, reiterates corporate documents, opines on corporate ethics and morality, and provides legal opinions.*

**GRANTED IN PART, DENIED IN PART.** The State’s experts shall not be permitted to speculate regarding the Defendants’ knowledge, state of mind, or motives. Furthermore, the State’s experts shall not be permitted to simply read documents into the record. The State’s experts shall be permitted to opine regarding any Defendants’ knowledge. However, the State must first lay the proper foundation. *See Amended Order* at p. 18.

6. *Introducing and Relying on Evidence From its Selectively Matched Data.*

**GRANTED IN PART, DENIED IN PART.** Experts shall not testify to matters wherein the basis for their opinions were not produced during the discovery phase of this trial.

7. *Introducing Evidence That Individual Prescribers Were Misled and Individual Prescribers Engaged in the Unlawful Prescribing of Opioid Medications.*

**GRANTED.** *See Amended Order* at p. 25.

The parties are **ORDERED** to meet and confer and to file and serve a detailed joint proposed Amended Rulings Order in rich text format, including findings of fact and conclusions of law **no later than 12:00 p.m. on September 22, 2022.**

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

It is so **ORDERED**.

**ENTERED:** September 8, 2022.

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

/s/ Derek C. Swope  
Presiding Judge  
Opioid Litigation