IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: Nov 17 2023
11:07PM EST
Transaction ID 71445181

A.D.A., as next friend of L.R.A.,
a minor child under the age of 18
Plaintiff Below, Petitioner,
v. Docket No. 23-ICA-275
Johnson & Johnson, et al.,
Defendants Below, Respondents.

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A.N.C., as next friend of J.J.S.,
a minor child under the age of 18,
Plaintiff Below, Petitioner,
v. Docket No. 23-ICA-276
Johnson & Johnson, et al.,
Defendants Below, Respondents.

****

Trey Sparks,
Plaintiff Below, Petitioner,
v. Docket No. 23-ICA-307
Johnson & Johnson, et al.,
Defendants Below, Respondents.

PETITIONERS' BRIEF

A.D.A., as next friend of L.R.A., a minor child under the age of 18, A.N.C., as next friend of J.J.S., a minor child under the age of 19, and Trey Sparks,

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred in finding that Minor Plaintiffs' direct, *in utero*, poisoning by their birth mother's ingestion of the manufacturing defendants' drugs, resulting in long-lasting, bodily injuries to the Minor Plaintiffs, was not a "special injury" for purposes of standing to bring a claim for public nuisance.

2. The Circuit Court erred in finding that Plaintiffs' "claims of public nuisance involving NAS have already been resolved through settlement" of public nuisance claims brought by political subdivisions.

3. The Circuit Court erred in concluding that defendants that sell "prescription opioids owed certain duties of care to government entities," but do not owe any duty to private individuals to exercise reasonable care to avoid harming them.

4. The Circuit Court erred in concluding that questions of proximate cause—whether Defendants' alleged conduct was too remote from the minors' injuries, and whether the birth mothers were the sole proximate cause of the injuries—can be resolved as a matter of law.

5. The Circuit Court erred in concluding that Plaintiffs' civil conspiracy claims "cannot survive."

6. The Circuit Court erred in concluding that Plaintiffs' claims against the West Virginia Board of Pharmacy are barred by the public duty doctrine and qualified immunity.

7. The Circuit Court erred in dismissing Plaintiffs' causes of action pertaining to fraud.

8. The Circuit Court erred in dismissing Plaintiffs' claim for punitive damages.

9. The Circuit Court erred by failing to liberally construe Plaintiffs' complaints or allowing leave to amend.

STATEMENT OF THE CASE

Prenatal exposure to opioids causes severe withdrawal symptoms—a condition referred to as "neonatal abstinence syndrome" or "NAS". Children born with NAS suffer significant and painful withdrawal symptoms, and have myriad medical issues, which often result in lasting developmental and physical impairments. These range from withdrawal symptoms immediately after birth to permanent deficits leaving the individual dependent on assistance in performing activities of daily living for their entire lifetime.

These actions are among several related cases, collectively referred to herein as "NAS cases," filed on behalf of innocent children who were victims of the opioid crisis.[1] Each Complaint contains factual allegations which, when accepted as true together with all reasonable inferences drawn in favor of Plaintiffs, state claims under West Virginia law. Nonetheless, the Mass Litigation Panel (hereinafter referred to as the "Circuit Court"), acting through the Circuit Court of Kanawha County, dismissed the actions at the pleading stage. The Circuit Court also generally classified the facts of each matter as identical.

The error committed by the Circuit Court begins with its recitation of the standard under Rule 12. The Circuit Court referred to Rule 12 as a means to "weed out unfounded suits" (JA 00100), but failed to acknowledge the corollary: "The policy of the rule thus to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied." *John W. Lodge Dist. Co., Inc., v. Texaco, Inc.*, 161 W. Va. 603, 245 S.E.2d 157 (1978). Indeed, "[i]n view of the liberal policy of the rules of pleading with regard to the construction of plaintiff's complaint, and in view of the policy of

[1] For ease of reference, Plaintiffs A.D.A., A.N.C., and Trey Sparks are collectively referred to as "Plaintiffs," and those who suffered NAS—the two minors on behalf of whom the actions are brought, as well as Trey Sparks—are collectively referred to as "Minor Plaintiffs."

the rules favoring the determination of actions on the merits, the motion to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. The standard which plaintiff must meet to overcome a Rule 12(b)(6) motion is a liberal standard, and few complaints fail to meet it. The plaintiff's burden in resisting a motion to dismiss is a relatively light one." *Id.*[2]

I. A.D.A.

A.D.A is the parent and legal guardian of L.R.A. (D.O.B. March 10, 2017). L.R.A. was born dependent on opioids due to prenatal exposure. JA 04589, ¶10. The cord blood test administered at birth revealed that L.R.A.'s birth mother consumed oxycodone and other opioids. JA 04590, ¶13. Upon information and belief, her birth mother obtained oxycodone both "legally" through prescriptions written for her to treat migraines and back pain, and illegally, through the black market created and facilitated by the diversion of pills from suspicious prescriptions written for others. *Id*., ¶14. L.R.A. was diagnosed as suffering from NAS shortly after her birth. JA 04589, ¶11. She spent the first weeks of her life receiving methadone treatment to control withdrawal symptoms. *Id*. L.R.A. suffers permanent "developmental impacts" and will require years of treatment and counseling to deal with the effects of prenatal exposure to opioid medications. *Id*., ¶10. On December 27, 2021, Petitioner A.D.A. filed her Complaint against certain Defendants herein in Marshall County, West Virginia.

II. A.N.C.

A.N.C. is the parent and legal guardian of J.J.S. (D.O.B. August 20, 2019), a child born dependent on opioids ingested by his mother during pregnancy. JA 04897, ¶17; JA 04898, ¶19. A.N.C. was consuming buprenorphine and other opioids at the time of J.J.S.'s birth. JA 04897,

[2] The West Virginia Supreme Court of Appeals chose to maintain this liberal standard and disregarded the more stringent federal standard. *Mountaineer Fire & Rescue Equipment, LLC v. City National Bank of West Virginia*, 244 W. Va. 508, 854 S.E.2d 870 (2020).

¶18; JA 04898, ¶20. Upon information and belief, A.N.C. obtained oxycodone both "legally" through prescriptions and illegally, through diversion of pills. JA 04898, ¶21. Infant J.J.S. was born addicted to oxycodone, an opioid sold as a prescription pill. J.J.S. was diagnosed as suffering from NAS shortly after his birth. JA 04897, ¶18. He spent the first five days of his life in the hospital experiencing excruciating, painful withdrawal symptoms as the doctors weaned him from opioid addiction. *Id*., ¶¶17-18. He suffers permanent "developmental impacts", medical issues, and other problems requiring years of treatment and counseling as a result of opioid exposure in utero. *Id*., ¶¶17-18. On August 26, 2022, Petitioner A.N.C. filed her Complaint against the Defendants herein in Marshall County, West Virginia.

III. Sparks

Trey Sparks was born addicted to opioids as a result of *in utero* exposure to oxycodone and other opioids prior to his birth on February 20, 2003. JA 05273, ¶14. Mr. Sparks' mother used Oxycontin throughout her pregnancy and was using methadone at the time of his birth. JA 05274, ¶16. Mr. Sparks' birth mother obtained oxycodone pills both "legally" through prescriptions, and illegally, through the diversion of pills from suspicious prescriptions written for others. JA 05275, ¶20. Mr. Sparks was diagnosed as suffering from NAS within hours after his birth. JA 05274, ¶16. He was immediately given methadone to attempt to ameliorate his suffering from opioid withdrawal. *Id*. He continued to receive methadone treatment for the first months of his life to control the withdrawal symptoms. *Id*. He was also forced to endure numerous cardiac surgeries—including three during the first year of his life—with complications that continue to necessitate daily medications. Now, as an adult, Mr. Sparks suffers permanent learning and "developmental impacts" and will continue to require years of treatment and counseling to deal with the effects of prenatal opioid exposure to opioids. JA 05273, ¶14. On February 17, 2023, Petitioner filed his

Complaint against certain Defendants herein in Marshall County, West Virginia.

VI. Procedural History

The Complaints allege the following claims: Public Nuisance (All Defendants); Negligence, Gross Negligence and Recklessness (All Defendants); Negligence and Recklessness (Johnson & Johnson Defendants & McKinsey); Negligent and Intentional Misrepresentation (Manufacturing Defendants & McKinsey); Civil Conspiracy (All Defendants); Malicious and Intentional Conduct (West Virginia Board of Pharmacy[3]); and State Law Violations (BOP). The Complaints also include a prayer for punitive damages. The Defendants fall into the following categories: (1) Opioid Manufacturers[4]; (2) Opioid Distributors[5]; (3) the McKinsey Companies[6]; and (4) the West Virginia Board of Pharmacy.

Opioid manufacturers are companies which manufactured and marketed branded and generic opioid drugs while concealing the harms of these medications to the unborn and ignoring their statutory and common law duties to prevent the flow of excessive opioids into West Virginia.

Opioid distributors and wholesalers brokered and supplied the opioid pills impacting the Minor Plaintiffs to pharmacies. These distributors were required by law to monitor quantities of drugs shipped to pharmacies but turned a blind eye to the millions of pills in suspicious orders these pharmacies dispensed, fueling the diversionary market, opioid addiction, and cases of NAS.

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[3] The West Virginia Board of Pharmacy is referred to herein as "BOP".

[4] Manufacturing Defendants in certain of these matters include: Johnson & Johnson; Janssen Pharmaceuticals, Inc.; Noramco; TEVA Pharmaceuticals USA, Inc.; Allergan USA, Inc.; Allergan Sales LLC; Allergan Finance LLC; and AbbVie Inc.

[5] Distributor Defendants in certain of these matters include: McKesson Corporation; Cardinal Health, Inc.; AmerisourceBergen Corporation; AmerisourceBergen Drug Corporation; H.D. Smith, LLC; H.D. Smith Holdings LLC; H.D. Smith Holding Company; and Anda, Inc.

[6] McKinsey Defendants in certain of these matters include McKinsey & Company, Inc.; McKinsey & Company, Inc. United States; and McKinsey & Company, Inc. Washington D.C.

The McKinsey Defendants are global management and business consulting firms which enabled opioid manufacturers to increase sales of addictive opioid drugs by growing the diversionary market, thwarting the regulatory process and fostering a conspiracy.

The West Virginia Board of Pharmacy is the state regulatory board charged with overseeing the operations and activities of pharmacies in West Virginia and had mandatory duties that it willfully ignored. The BOP is specifically tasked with investigating the flows of controlled substances like oxycodone within the State of West Virginia and to individual pharmacies. One of its core missions is to investigate "suspicious orders," which are orders for controlled substances of unusual quantity or frequency.

Recognizing the breadth of these actions, the West Virginia Supreme Court of Appeals created a specific tract to adjudicate NAS cases within the Mass Litigation Panel on August 9, 2022. Each of these cases was then transferred from Marshall County to the Circuit Court of Kanawha County. The Defendants filed motions to dismiss these and all other NAS cases. The Circuit Court set a briefing schedule and held an omnibus-style hearing on the motions to dismiss pending in the NAS cases on March 24, 2023. On April 17, 2023, the Circuit Court entered a preliminary "Order Regarding Rulings on Motions to Dismiss," concluding—in 12 short paragraphs—that all Defendants should be summarily dismissed in all NAS cases without opportunity to amend.[7] That Order stated that it "shall not be considered a final Order for appeal purposes," and instructed the Defendants to prepare a "detailed proposed order . . granting the motions to dismiss." On May 31, 2023, the Circuit Court entered an "Order Granting Defendants' Motions to Dismiss," dismissing all pending NAS cases in their entirety as to all Defendants,

[7] While undersigned counsel submits the Complaints are sufficient, at the hearing counsel offered to amend the pleadings if needed. JA 00247, 00329, 00331, 00350.

including all the claims asserted by the instant three Plaintiffs.[8]

Plaintiffs timely filed their notices of appeal, and now submit their briefs in support of the same. Plaintiffs seek relief through entry of an order **REVERSING** the Order of May 31, 2023, and **REMANDING** each of these cases back to the Circuit Court of Kanawha County with instructions to commence discovery.

SUMMARY OF ARGUMENT

The Circuit Court erred in granting motions to dismiss under Rule 12. This Court's review is de novo, and upon consideration of the governing legal principles and the record Plaintiffs respectfully submit that this Court will agree to reverse the Circuit Court's order and remand these actions to permit Plaintiffs to proceed with discovery to more fully establish their claims.

The claims at issue are brought on behalf of minors who suffered distinct and tragic personal injuries: Neonatal Abstinence Syndrome, known as NAS, which often results in permanent or long-term developmental injuries as a result of gestational poisoning when their biological mothers ingested opioids during pregnancy. Newborns suffering from NAS encounter excruciating withdrawal symptoms immediately following birth, and for many, including the Minor Plaintiffs involved in these cases, the harm continues in the form of significant developmental deficits requiring treatment. The opioid epidemic has been fueled by the acts and omissions of Defendants—a group of manufacturers, distributors, wholesalers, and the global consulting firm they conspired with. The Defendants seek to avoid their responsibility, denying any duty of care and even going so far as to blame the birth mothers. However, West Virginia law recognizes numerous entirely viable causes of action for which Plaintiffs may recover damages from the Defendants.

[8] The errors noted on the part of the Circuit Court in this matter refer to the decision of the Mass Litigation Panel acting through the Circuit Court of Kanawha County.

First and foremost, courts in other proceedings have recognized that the opioid crisis constitutes a public nuisance for which some or all of the Defendants may be liable. Persons who have a "special injury"—who "suffer harm of a kind different from that suffered by other members of the public"—are entitled to recover individual damages arising from a public nuisance. Rest. 2d Torts § 821C. It is well-established that allegations of personal injury satisfy this "special injury" requirement. *See* Rest. 2d Torts § 821C, cmt. d ("When the public nuisance causes personal injury to the plaintiff . . . the harm is normally different in kind."); *Rhodes v. E. I. du Pont de Nemours & Co.*, 657 F. Supp. 2d 751, 769 n. 16 (S.D.W. Va. 2009) (quoting Prosser & Keeton, Torts (5th Ed.), § 90, at 648) ("Where the plaintiff suffers personal injury, or harm to his health . . . there is no difficulty in finding a different kind of damage."). The Circuit Court also erred in concluding that settlements in other opioid litigation cases brought by the State and political subdivisions effectively resolve Plaintiffs' claims. The existing settlements focus on providing funds to abate the nuisance through addiction treatment and other programs to stop or slow the distribution of opioids and the spread of opioid addiction, not compensating individuals harmed by in utero exposure to opioids. In any event, Plaintiffs and others suffering from in utero poisoning as a result of the public nuisance were not parties to these settlements and any effort to bind them violates fundamental due process principles.

Plaintiffs also allege negligence. The Circuit Court erred in failing to follow longstanding law governing the duty of care. Simply stated, duty is primarily a question of foreseeability, and Plaintiffs' allegations clearly support a finding that the Defendants had reason to foresee the harm to Plaintiffs and others who are similarly situated. The Circuit Court ignored the question of foreseeability entirely, and erroneously found that "policy considerations" overrode it. Plaintiffs allege that the Defendants were well aware of the clear dangers surrounding opioids, including

addiction, abuse, and diversion, all of which present foreseeable risks of opioid use during pregnancy. Moreover, the Defendants already have statutory and other duties to take care to avoid this foreseeable harm, so these lawsuits do not seek to impose an additional burden.

The Circuit Court committed further error in its attempt to justify and bolster its erroneous conclusions. It asserted that causation is too remote and then posited that the actions of the birth mothers constitute an intervening cause. Both arguments raise the issue of whether an intervening cause broke the chain of causation, which at its core is a quintessential question of fact for jury consideration. Moreover, the Circuit Court applied the wrong analytical framework and its ruling contravenes the principles expressed by the Supreme Court of Appeals in *Wal-Mart Stores East, L.P. v. Ankrom*, 244 W. Va. 437, 854 S.E.2d 257 (2020).

With regard to the West Virginia Board of Pharmacy, the Circuit Court erroneously applied the public duty doctrine and qualified immunity. The Circuit Court's reasoning is flawed, and it conflicts with an order on the same question issued by the Circuit Court of Marshall County. *See Brooke Cty. Comm'n, v. Purdue Pharma, L.P.,* Case. No. 17-C-248, (Marshall Cty. Cir. Ct. Dec. 28, 2018). The Circuit Court also failed to consider that *Holsten v. Massey*, 200 W. Va. 775, 787 (1997), which recognizes a wanton or reckless conduct exception to the public duty doctrine for subdivisions, applies with equal force to liability cases against state agencies. Plaintiffs have clearly pleaded a viable claim against the Board of Pharmacy under governing law.

Lastly, the Circuit Court erred by granting the motions to dismiss without liberally construing the Minor Plaintiffs' complaints and without granting the plaintiffs leave to amend their complaints. It is axiomatic that trial courts are required to liberally construe a plaintiff's complaint and take all allegations as true when evaluating a defendant's motion to dismiss. The Circuit Court erroneously ignored these requirements here.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners respectfully submit that these matters are appropriate for Rule 20 argument. While these appeals arise from dismissal of actions at the pleading stage despite detailed allegations to support well-established causes of action, the matters at issue are of fundamental public importance, including redress of serious, special injury to the most vulnerable victims of the opioid epidemic. In addition, the appeals reveal inconsistencies and conflicts among the decisions of lower tribunals. Due to the number of assignments of error, Petitioners believe that the minimum time set for argument under Rule 20 will be not sufficient and that additional time is necessary.

ARGUMENT

This appeal arises from a Circuit Court's order dismissing Petitioners' claims in their entirety *at the pleading stage*. The standard of review is therefore *de novo*. *Savarese v. Allstate Ins. Co*., 223 W. Va. 119, 123, 672 S.E.2d 255, 259 (2008).

I. The Circuit Court erred in finding that the direct, *in utero*, poisoning of the Minor Plaintiffs by their birth mothers' ingestion, during pregnancy, of the manufacturing defendants' drugs, which resulted in long-lasting, bodily injuries, was not a "special injury" for purposes of satisfying the standing requirement for bringing a claim for public nuisance.

The Circuit Court's error in ruling that the Minor Plaintiffs did not suffer a "special injury" and therefore lack standing to pursue an individual claim for damages includes three distinct sub-errors. JA 00109. First, the Circuit Court failed to consider the significance of the personal injury allegations, including the weight to be given to comment d of Restatement (Second) of Torts § 821C and cases applying the "special injury" requirement to plaintiffs alleging discernable personal injuries, including the express holding in a footnote of one of the cases the Circuit Court itself cited. *See* Restatement (Second) Torts § 821C, cmt. d ("When the public nuisance causes personal injury to the plaintiff . . . the harm is normally different in kind."); *Rhodes v. E. I. du Pont*

de Nemours & Co., 657 F. Supp. 2d 751, 769 n. 16 (S.D. W. Va. 2009) (quoting Prosser & Keeton, Torts (5th Ed.), § 90, at 648) ("Where the plaintiff suffers personal injury, or harm to his health . . . there is no difficulty in finding a different kind of damage.").

Second, the Circuit Court incorrectly identified (or failed to identify) the "public right" allegedly invaded—the alleged harm or "inconvenience" to the public at the center of the public nuisance. *See* Restatement (Second) of Torts § 821B(1) (defining public nuisance as an "unreasonable interference with a right common to the general public"); *Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 595, 34 S.E.2d 348, 354 (1945) (defining public nuisance as a "condition that unlawfully operates to hurt or inconvenience an indefinite number of persons"). Third, the Circuit Court ignored the allegations of "lasting developmental impact" (JA 04897) and other developmental injuries in the complaints before it and treated all of the Minor Plaintiffs as having only one, relatively minor, injury—NAS, or pre-natal addiction to opioids followed by withdrawal symptoms. The Circuit Court's dismissal of the Minor Plaintiffs' nuisance claims is based upon a clear error of law: The failure to recognize that the type of injury suffered by Minor Plaintiffs qualifies as special injury.

A. The Circuit Court ignored Restatement comment d and cited no cases holding that a discernable personal injury is insufficient to meet the "special injury" requirement.

The Circuit Court's holding directly contradicts comment d of section 821C(1) of the Restatement (Second) of Torts (1979), which provides: "When the public nuisance causes personal injury to the plaintiff . . the harm is normally different in kind from that suffered by other members of the public and the tort action may be maintained."[9] *Restatement* section 821 is authoritative in

[9] The clarity of *Restatement* comment d probably accounts for the relatively limited briefing on the "special injury" issue below. Only a handful of defendants raised the "special injury" issue at all in their main brief, and that handful raised it cursorily, and without acknowledging or mentioning comment d. JA 04671, 04967, 05119. Plaintiffs responded, also cursorily, by calling attention to comment d, which Plaintiffs believed that handful of defendants had simply overlooked. JA 04772-73, 05100-01, 05181. Defendants, in

West Virginia. Our Supreme Court of Appeals expressly relied on and cited to *Restatement* section 821 and several of its subparts in "delineat[ing] between a public nuisance and a private nuisance" in *Hendricks v. Stalnaker*, 181 W. Va. 31, 33-34, 380 S.E.2d 198, 200-01 (1989), and then again in support of its definition of public nuisance in *Duff v. Morgantown Energy Ass'n*, 187 W. Va. 712, 716 n. 6, 421 S.E.2d 253, 257 n. 6 (1992).[10] Despite having been confronted with such a clear—if not controlling—contrary authority, the Circuit Court entirely neglects to mention Restatement section 821.

Neither the defendants in their briefs nor the Circuit Court in its Orders identify a single decision from any jurisdiction holding that a personal, bodily injury is insufficient to satisfy the standing requirement. None of the cases cited by the Circuit Court[11] involved plaintiffs who properly alleged in their complaints that they themselves had suffered actual bodily harm as a result of the alleged public nuisance.

The plaintiffs in *Callihan* relied on the allegation that every single member of a putative class (defined by geographical proximity to a large warehouse fire) "sustained personal injuries" merely by "inhaling toxic fumes"—without regard to whether this inhalation resulted in an actual

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their Reply (JA 05203-04), cited four cases—the same four cases cited by the Circuit Court in its Order (JA 00107-08)—none of which provides support for their position that a plaintiff who properly pleads an actual, discernable personal injury does not have a "special injury" for purposes of standing to assert a public nuisance claim. At the hearing, Plaintiffs' counsel explained that none of the cases cited by the defendants in their Reply brief casts doubt on *Restatement* comment d or supports defendants' position on special injury. JA 00304-09.

[10] The same Circuit Court Judges, presiding over cases brought by political subdivisions in the same "Opioid Litigation" group of cases referred to the MLP, cited and relied extensively on section 821B of the *Restatement* in support of orders denying motions for summary judgment filed by multiple defendants. *See* In Re: Opioid Litigation Civil Action, No. 21-C-9000 (MFR), Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference, at 4 (May 23, 2022) (ID 67650385); MLP Order on Distributors' Summary Judgment Factual Issue #2 at 1, 4 n. 6, & 5 (July 1, 2022) (ID 67786397).

[11] *Callihan v. Surnaik Holdings. of W. Va., LLC*, No. 2:17-cv-04386, 2018 WL 6313012 (S.D.W. Va. Dec. 3, 2018); *Rhodes v. E.I. du Pont de Nemours & Co.*, 657 F. Supp. 2d 751 (S.D.W. Va. 2009); *Int'l Shoe Co. v. Heatwole*, 126 W. Va. 888 (1944); and *Curry v. Boone Timber Co.*, 87 W. Va. 429 (1920).

injury or discernable bodily harm. The district court dismissed the public nuisance claims in part because the complaint did not actually include that allegation, and also because it was not clear why simply "inhaling toxic fumes" without evidence of resulting bodily harm constituted an injury.

Rhodes supports the Plaintiffs' position. *See Rhodes*, 657 F. Supp. 2d at 769 n. 16 (quoting Prosser & Keeton, Torts (5th Ed.), § 90, at 648) ("Where the plaintiff suffers personal injury, or harm to his health . . there is no difficulty in finding a different kind of damage."). The moving defendant in *Rhodes* relied on *Restatement* comment d in arguing that the plaintiffs did not have standing for a public nuisance claim because they *did not* allege "personal injury" or "physical harm" to property, but only "contamination of the water supply" and contamination of their bodies from drinking contaminated water. 657 F. Supp. 2d at 768. The court explained that "contamination alone, without any evidence of physical harm, is not an injury at all and certainly not one upon which the plaintiffs could base their public nuisance claim," and then inserted a footnote to clarify that the result would have been flipped had the plaintiffs alleged any kind of actual, discernable personal injury. *Id*. at 769; *id*. at 769 n. 16 ("Though the private nature of personal injuries and private property damage qualify such injuries as 'special injuries,' the plaintiffs have not demonstrated either personal injury or private property damage in this matter.").

None of the West Virginia Supreme Court cases relied upon by the Circuit Court involve plaintiffs who come anywhere close to alleging a bodily injury or physical harm to property. *See Int'l Shoe Co. v. Heatwole*, 126 W. Va. 888, 892 (1944) (finding that enjoying the beauty of, and fishing and bathing in, allegedly polluted river are not rights exclusive to riparian owners); *Curry v. Boone Timber Co.*, 87 W. Va. 429 (1920) (holding that individuals who have not suffered bodily injury or property damage from proposed railroad had no standing to seek to enjoin its construction).

Respondents may point out that, since the Circuit Court issued its decision on May 31, 2023, another court presiding over cases involving babies who were poisoned in utero by opioids adopted the Circuit Court's faulty reasoning. *See In re: McKinsey & Co., Inc.*, Case No. 21-md-02996-CRB, 2023 WL 4670291, at *8 (N.D. Cal. July 20, 2023). The error in this decision is evident upon examination of the authorities cited. The *McKinsey* court cited Dobbs' treatise for the proposition that a personal injury does not always qualify as a "special injury" for purposes of standing to bring a public nuisance claim in cases where every other member of the public whose rights were invaded by the public nuisance suffered the same kind of injury. *McKinsey*, 2023 WL 4670291, *8. The *McKinsey* order interpreted the Dobbs treatise to mean if a "defendant's pollution causes respiratory problems *for everyone in town*, the plaintiff's respiratory harm does not differ in kind from that suffered by others and she cannot recover on a public nuisance theory." *Id*. (emphasis added).

The McKinsey court then re-wrote the Dobbs quote by changing respiratory problems "*for everyone in town*" to respiratory problems "for many others"—and then explicitly changed the requirement of "special injury" to a requirement of "unique harm"—and concluded that because "millions of adults and minors alike" have suffered "personal injuries from opioid exposure," babies with developmental injuries have not shown that they were "uniquely harmed by their exposure to opioids." *Id*. In doing so, the *McKinsey* court clearly committed the analytical errors addressed in the next subsection, *infra*, in failing to first identify the universe of harms to members of the public caused by the public nuisance of the opioid epidemic. That universe includes—for every one of the "millions" hurt by the actual ingestion or absorption of opioids leading to addiction, withdrawal, or death—many others who, without ingesting or absorbing opioids, have

been hurt or inconvenienced by the interference with the public right to safety and use of public spaces caused by the illegal secondary market for opioids.

This Court need not delve into those analytical errors, however, because the quote from the Dobbs treatise—or more specifically, the California appellate court case to which Dobbs cites—is a recognized as an outlier. Dobbs cites to and derives the rule and the language quoted by the *McKinsey* court from a single California appellate court case decided in 1971, *Venuto v. Owens-Corning Fiberglas Corp*., 99 Cal. Rptr. 350, 356, 22 Cal. App. 3d 116, 125 (Cal. App. 1971). *See* Dobbs, Law of Torts, § 403, at 643 n. 35. Since *Venuto* was decided, two other California appellate courts have criticized it as an inaccurate statement of the law on this point. *See Birke v. Oakwood Worldwide*, 87 Cal. Rptr. 3d 602, 610, 169 Cal. App. 4th 1540, 1550 (Cal. App. 2009) ("In addition, to the extent *Venuto, supra*, 22 Cal. App. 3d 116, can be read as precluding an action to abate a public nuisance by a private individual who has suffered personal injuries as a result of the challenged condition, we believe it is an incorrect statement of the law."); *Hacala v. Bird Rides, Inc.*, 306 Cal. Rptr. 3d 900, 90 Cal. App. 5th 292, 326-327 (Cal. App. 2023) ("The *Venuto* holding has been criticized, reasonably in our view, for advancing an 'incorrect statement of the law' that is inconsistent with our Supreme Court's statements in *Lind* [*v. City of San Luis Obispo*, 109 Cal. 340 (1895)].").

In summary, the "special injury" issue can be resolved easily and without further analysis. "Where the plaintiff suffers personal injury, or harm to his health . . there is no difficulty in finding a different kind of damage." *Rhodes,* 657 F. Supp. 2d at 769 n. 16 (quoting Prosser & Keeton, Torts (5th Ed.), § 90, at 648); *see also* Restatement (Second) of Torts § 821C cmt. d. Neither the Defendants, in their briefing below, nor the Circuit Court, in either of its two orders, cited a single case or authority that questions the validity of this rule. In fact, both purported to rely on one case,

Rhodes, that very specifically re-affirms it. *See* 657 F. Supp. 2d at 769 n. 16. The Circuit Court erred in adopting this deeply flawed and unsupported line of reasoning.

B. The interference with a public right—or the public harm or "inconvenience"— due to the opioid epidemic is not limited to physical injuries to individuals from the ingestion of opioids.

When courts are confronted with cases that cannot be resolved simply by referring to *Restatement* comment d, their first task in determining whether an individual seeking to "recover damages" from a public nuisance has a "special injury" is to determine the kind of harm "suffered by other members of the public exercising the [same] right." Restatement (Second) of Torts § 821C; *see also* Restatement (Second) of Torts § 821C cmt. b (comparing the harm suffered by the individual to the harm "suffered by other persons seeking to exercise the same public right"). The *Rhodes* court referred to this initial task as identifying the "relevant comparative population" or the "community" whose rights have been interfered with by the public nuisance. *Rhodes*, 657 F. Supp. 2d at 769 ("To make [a special injury] determination, I must first identify the relevant comparative population [which is] the community seeking to exercise the same public right as the plaintiff."). This task involves identifying the community consisting of the "indefinite number of persons" who have been "hurt or inconvenience[d]" by the alleged public nuisance. *Hark,* 127 W. Va. at 595, 34 S.E.2d at 354.

The Circuit Court did not expressly undertake this task. However, it is clear from each of the two sentences that constitute its entire "special injury" analysis that the Circuit Court limited its consideration of harms and inconveniences caused by the opioid epidemic to personal injuries suffered by other individuals "exposed to opioids." It is also clear that the Circuit Court used the phrase "exposed to opioids" in the limited sense of absorbing opioids into their bodies by ingesting, snorting, or injecting opioid pills—or, in the case of babies exposed in utero, by the mother doing

one of those things—not in the more general sense of being "exposed" to a community that has been oversaturated with opioids, resulting in a robust illegal secondary market for opioids in that community that interferes with the rights of the community to public safety and convenience in the use of public spaces. In the Circuit Court's own words (JA 00109 (emphasis added)):

> A claim of 'personal injury' or 'physical harm' is insufficient 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*.
>
> Here, the Minors' 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*.

The last phrase of the second sentence—"that might be suffered by other infants exposed in utero to opioids"—reveals the Circuit Court's completely backwards (or circular) reasoning. If you start (or finish) your analysis by limiting your consideration of the hurt or inconvenienced population to those who have suffered the same harm as the plaintiffs claiming personal injuries ("infants exposed in utero to opioids"), then the conclusion follows automatically.

In limiting its consideration of the harm suffered by others to "personal injuries suffered by others exposed to opioids," the Circuit Court contradicted its prior holdings on the same issue in opioid cases brought by political subdivisions. In the most glaring example, the distributor defendants moved for summary judgment against the political subdivisions on the grounds that there was no public nuisance or interference with public rights at all, only a collection of individual personal injuries suffered by people who ingested opioids and suffered physical injuries as a result.[12] The Circuit Court rejected this argument in that case on grounds that clearly contradict its analysis in the instant case:

[12] *See* In Re: Opioid Litigation Civil Action, No. 21-C-9000 (DTB), Findings of Fact and Conclusions of Law and Order Denying Defendants' Motion for Summary Judgement re "Factual Issue # 2," July 1, 2022 ("MLP Order on Distributors' Summary Judgment Factual Issue #2") at 6–7 ("Defendants claim that the

> Plaintiffs point out that the opioid epidemic in Plaintiffs' communities has affected the general public and the public entities tasked with addressing public health and public safety. They argue that the burden of the opioid epidemic is borne by the community as a whole—including law enforcement, first responders, healthcare workers, the courts, employers, teachers, and families—and by local governments like Plaintiffs that are responsible for serving their citizens. . . The Panel finds that there is a triable issue of fact concerning Plaintiffs' claims of interference with public rights.

Id. at 7–8.

It is obvious that "the community as a whole—including . . employers, teachers, and families" has not been "exposed to opioids" in the sense of having ingested or absorbed them into their bodies and thus has not suffered "personal injuries" from the public nuisance that is the opioid epidemic. The Circuit Court itself recognized in its prior order that the interference with public rights at the core of the public nuisance is not just a collection of personal injuries, then contradicted that holding by dismissing the Minor Plaintiffs' claims for lack of "special injury" after comparing their injuries only to "personal injuries suffered by others exposed to opioids." JA 00109.

The Minor Plaintiffs define the public nuisance as "the over-saturation of opioids in West Virginia for non-medical purposes, as well as the adverse social, economic, and human health outcomes associated with widespread illegal opioid use," (JA 04605, 04817, 04918), which, in turn, interferes with "public health, quality of life, and safety." JA 04607, 04920 ("The nuisance undermines public health, quality of life, and safety."). It is challenging to provide a complete description of the public rights involved and the harms resulting from the defendants' interference with those public rights, but what the Minor Plaintiffs describe in their Complaints by referring to

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harms Plaintiffs seek to abate 'implicate only the inherently private right that each individual has to not be injured by a product.'").

"adverse social, economic, and human health outcomes associated with widespread illegal opioid use" that undermines "public health, quality of life, and safety" is reasonably clear.[13]

In addition to enabling the poisoning and addiction by the ingestion of opioids by some (clearly a minority of) members of the community, including pregnant women and their gestating babies, the creation, growth, and maintenance of an illegal secondary market for opioids unreasonably interferes with the public right to safety and to the use of public spaces through the increases in physical danger, likelihood of harassment, risk of theft, fear, filth, disease, and blight in public spaces that follow from such an illegal secondary market. As the Circuit Court correctly held in the political subdivision cases, it is this invasion of *public* rights and public spaces (not just the invasion of individuals' bodies and private spaces) that makes the opioid epidemic a *public* nuisance. *See* MLP Order on Distributors' Summary Judgment Factual Issue #2 (finding that "the burden of the opioid epidemic is borne by the community as a whole" and therefore "there is a triable issue of fact concerning Plaintiffs' claims of interference with public rights").

The Ninth Circuit Court of Appeals decision in *Ileto v. Glock Inc.*, 349 F.3d 1191 (9th Cir. 2003), is particularly instructive on the question of what constitutes a "special injury" in the context of a similar type of public nuisance. In that case, the plaintiffs—four individuals who suffered gunshot wounds and one individual who witnessed a shooting and suffered emotional distress—brought public nuisance claims for individual damages against "multiple defendants involved in

[13] In comparing allegations of harm included in Minor Plaintiff A.N.C.'s Complaint to the harms associated with the opioid epidemic described by the federal district court in *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 419–21 (S.D. W. Va. 2022), the Circuit Court did not include any of A.N.C.'s description of harms from paragraph 79 and quoted only the second sentence of A.N.C.'s two-sentence description of harms in paragraph 88, despite attributing the quoted language to both paragraphs. JA 00109. The Circuit Court did not inquire into or ask for Plaintiffs' description of the harms or public rights at stake, and no one referred to Plaintiffs' description prior to the Circuit Court's order. Plaintiffs could have addressed any questions or concerns about the clarity of Plaintiffs' description of the public rights and harms involved by amending their complaints.

the manufacture, marketing, and distribution of various firearms found in [the shooter's] possession." *Id*. at 1194. The plaintiffs defined the public nuisance as the creation of an illegal secondary market for guns. *Id*. at 1201 (explaining that plaintiffs' "focus is on the defendants' affirmative actions in distributing their products to create an illegal secondary market for guns" and that therefore "this is an action that alleges . . . public nuisance claims").

At the district court level, the defendants in *Glock* challenged the plaintiffs' standing on grounds similar to the basis of the Circuit Court's holding in the instant case—that the plaintiffs "have not suffered a harm different in kind from other members of the public." *Ileto v. Glock*, Inc., 194 F. Supp. 2d 1040, 1057 (C.D. Cal. 2002). Just as the conspicuous harm from legal and illegal opioids is the harm of addiction or death that results from what the Circuit Court referred to as "exposure to opioids," meaning the ingestion of them, the conspicuous harm from legal and illegal guns is the harm of death or bodily wounds from getting shot by them. However, the district court was not persuaded by defendants, and relied on the simple "personal injury" rule discussed in the previous section to reject defendants' arguments as to the four individuals who suffered actual gunshot wounds. *Id*. (quoting Rest. 2d Torts § 821C cmt. d) ("The Restatement (Second) of Torts advises, however, that 'when the public nuisance causes personal injury to the plaintiff . . . the harm is normally different in kind from that suffered by other members of the public and the tort action may be maintained.'"). However, the district court did not hold that the plaintiff who merely witnessed a shooting and suffered emotional distress had a special injury, concluding that his emotional distress was only different in degree from the "danger, fear" and other inconveniences allegedly experienced by other members of the public. *Id*.

The Ninth Circuit affirmed with respect to the plaintiffs who had been shot and reversed with respect to the plaintiff who suffered only emotional distress from witnessing a shooting:

> We agree that, on the basis of the facts alleged, plaintiffs [who were shot] all suffered an injury, namely trauma resulting from an assault with a gun and gun shot wounds, different in kind from the general public. Furthermore, plaintiff Powers allegedly suffered "specific and direct physical and emotional injuries . . . by [the] shock to his nervous system upon experiencing and witnessing the events described herein." ***This harm is different in kind from the harm allegedly suffered by the general public. These physical and mental injuries are different in kind from the "danger, fear, inconvenience, and interference with the use and enjoyment of public places that affect the tenor and quality of everyday life" that plaintiffs allege are suffered by the general public.***

Glock, 349 F.3d at 1212 (emphasis added). In other words, while the only *conspicuous* injuries that result from the illegal secondary market for guns are gunshot wounds, the Ninth Circuit agreed with plaintiffs that the proper comparison group includes members of the community who had not been shot or even witnessed a shooting but had suffered harm through the interference with public rights that resulted from the creation of an illegal secondary market for guns. That harm is much broader and includes danger and fear, resulting in inconvenience and interference with public life and the use of public spaces.

Similarly, while the only *conspicuous* injuries caused by opioids are addiction, withdrawal, and sometimes sudden death suffered by people who ingest them or otherwise absorb them into their bodies, the appropriate comparison group includes members of the community who have suffered harm through the interference with public rights to safety and the use of public spaces caused by the defendants' public nuisance. This interference with public rights results from increases in physical danger, likelihood of harassment, risk of theft, fear, filth, disease, and blight in public spaces that follow from the creation of a robust illegal secondary market for opioids. In summary, the Circuit Court's limiting of the comparison population to other persons "exposed to opioids" through ingestion or absorption of them is clearly erroneous. Once the harm suffered by other members of the public is correctly defined, the difference in "kind" of the injury suffered by the Minor Plaintiffs is obvious.

C. The developmental harm to Minor Plaintiffs resulting from their mothers' ingestion of opioids during pregnancy is clearly different in "kind" from the addiction and withdrawal suffered by individuals who intentionally ingest opioids as adults or teenagers.

The Circuit Court also erred in treating all of the Minor Plaintiffs as if the only injury that they alleged was "NAS," and erred in treating NAS as no different in "kind" or "character" from the harm of addiction and withdrawal experienced by fully-developed adults and teens when they *intentionally* consume opioids. All three Plaintiffs allege that, in addition to NAS and "excruciating pain" following birth, they also suffered "lasting developmental impacts" that required them to have "years of treatment and counseling." JA 04589, 04897, 05300.

Even if the harm suffered by "other members of the public" were limited to the conspicuous injuries suffered by members of the public who ingested or otherwise absorbed opioids—that is, to "others exposed to opioids" as the Circuit Court erroneously held (JA 00109)—then the Minor Plaintiffs still have a "special injury." Their injuries differ in kind, not just degree, from "others exposed to opioids" in two ways: First, they did not willfully or knowingly consume opioids. Whatever one may think about the conduct of adults who ingest opioids, babies whose mothers consume opioids while pregnant with them are, in all possible ways, innocent. Second, their injuries are developmental in nature, which is a completely different kind of physical injury than addiction, withdrawal, or overdose, not a different degree of addiction, withdrawal, or overdose death. The Circuit Court's erroneous reasoning on these issues fails to address either the overwhelmingly contrary legal authorities or the operative facts of the instant cases.

II. The Circuit Court erred in finding that Petitioners' "claims of public nuisance involving NAS have already been resolved through settlement" of public nuisance claims brought by the State and by political subdivisions.

In a three-sentence paragraph at the end of its section on public nuisance, the Circuit Court stated that "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" same defendants, that those settlements "provide specifically for treatment and medical monitoring of infants born with NAS," and that the latter fact "reinforces the importance of the 'special injury' requirement for public nuisance claims." JA 00110. It is not clear whether this paragraph was meant solely to bolster the Circuit Court's erroneous analysis of the special injury issue or whether the Circuit Court intended to make a separate (and equally erroneous) holding that the Minor Plaintiffs' claims were dissolved through settlements to which they were not parties and received no notice. Either way, the Circuit Court is wrong.

A. The abatement of the nuisance provided for in the political subdivision settlements and the recovery of damages for injuries occasioned by the nuisance sought by the Minor Plaintiffs are separate and distinct remedies.

If the Circuit Court merely intended the statement to reinforce its erroneous analysis of the "special injury" question, then it succeeded—but not in the way it intended. The Circuit Court's conclusion—that "treatment and medical monitoring of infants born with NAS" is "duplicative" of the relief sought by the Minor Plaintiffs—merely "reinforces" the conclusion from the previous assignment of error section in this brief. Namely, it is abundantly clear that the Circuit Court does not appreciate the distinction between a public nuisance claim brought by an individual that seeks retrospective relief through the recovery of his or her damages in compensation for a personal injury, on the one hand, and a public nuisance claim brought by a public official or agency seeking prospective relief from the ongoing interference with public rights, in the form of abatement of the

nuisance, on the other. *Compare* Restatement (Second) of Torts § 821C(1) (describing the standing requirement "to recover damages in an individual action for a public nuisance"); *with* Restatement (Second) of Torts § 821C(2) (describing the standing requirements "to maintain a proceeding to enjoin to abate a public nuisance").

"The distinction between abatement of nuisances and recovery of damages for injuries occasioned by . . . nuisances, considered as grounds of action, is so apparent and so vast, that it is not at all surprising to find well defined and broad differentiation as to parties." *McMechen v. Hitchman-Glendale Consol. Coal Co.*, 88 W. Va. 633, 637-638, 107 S.E. 480, 482 (1921). In fact, Justice Hutchison provided a clear explanation of this distinction in this very context. "Abatement," he explained, "is an equitable form of relief and is simply the act of eliminating or nullifying whatever is causing the public nuisance." *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 245 W. Va. 431, 451, 859 S.E.2d 374, 394 (2021) (Hutchison, J., concurring) (internal quotation marks and citations omitted). Confusion could perhaps arise because "eliminating or nullifying whatever is causing the nuisance" may require more than simple injunctive relief, such as the establishment of one or more trust funds to deal with the lingering permanent effects of the defendants' wrongful acts. The latter approach to abatement most commonly arises in the context of environmental clean-up costs from a past release. "The common law of equity offers judges the opportunity to formulate creative remedies to abate a nuisance, such as clean-up costs, or a common law fund to restore property values diminished by a nuisance." *Id.* In the context of the opioid epidemic, treatment of ongoing opioid addiction and addiction-related problems in the community, which may persist even after the defendants' nuisance-causing behaviors have stopped, is analogous to environmental clean-up costs associated with an environmental release,

which may persist even after the defendant has stopped releasing the contaminant into the environment.

In contrast, "damages" are the appropriate remedy "when the harm is done and all that is left to the plaintiff is to . . . demand cash damages that substitute for the harm inflicted." *Id.*, 245 W. Va. at 451, 859 S.E.2d at 395. With respect to the Minor Plaintiffs, the harm is done. They were poisoned in the womb, they suffered after birth, they have incurred medical costs associated with treatment of their acute post-natal injuries and treatment of their developmental injuries, and they have varying degrees of permanent development injuries, which will impair their ability to earn a living and function as "whole persons."

These are classic compensatory damages claims for harm that has already occurred. JA 04617-18, 04932, 05325. "[C]ompensatory damages for personal injuries are composed of two broad categories." *Flannery v. United States*, 171 W. Va. 27, 29, 297 S.E.2d 433, 435 (1982). The first category consists of "pecuniary" damages, such as past and future medical expenses, as well as lost wages and lost earning capacity. *Id*. The second category consists of "intangible damages" and includes compensation for pain and suffering and general damages in compensation for "permanent injury." *Id*. General damages for permanent injury may be thought of as money awarded to compensate for "those future effects of any injury which have reduced the capability of an individual to function as a whole man." *Id.*, 171 W. Va. at 30, 297 S.E.2d at 436.

The categories of relief identified by the Circuit Court as *potentially* available to Minor Plaintiffs in the West Virginia First Memorandum of Understanding (JA 05137-75)—"treatment and medical monitoring of infants born with NAS" (JA 00110)—do not necessarily overlap at all with any of the damages sought by the Minor Plaintiffs themselves, as they are past the neonatal stage (so they would not receive any benefit from relief afforded to infants born in the future with

NAS) and they did not bring claims for medical monitoring.[14] At most, they may receive *some* benefit—subject to future discretionary decisions made by people overseeing the allocation of the settlement funds—from the provision in the settlement for "[e]xpand[ing]" already-existing but undisclosed in-kind "treatment and services" for *some* (completely undefined and unknown) developmental conditions associated with gestational opioid poisoning to cover *some* additional children who suffered NAS, on what appears to be essentially an ad hoc basis. JA 05147 (identifying one of many "abatement strategies" as "[e]xpand[ing] long-term treatment and services for medical monitoring of NAS babies and their families").

In the end, the theoretical allocation of funds to this one potentially relevant "abatement strategy" may or may not offset *some* of any Minor Plaintiff's *future* medical costs, which is only one of the many categories and subcategories of compensatory damages for personal injuries available to plaintiffs in West Virginia. *Flannery*, 171 W. Va. at 29, 297 S.E.2d at 435. Whether the settlement will provide even that benefit to a given Minor Plaintiff will depend on such factors as whether the child has passed the age cut-off for the provision of services by the time the services become available in his or her location, the location and manner of providing the "expand[ed]" services and whether they reach that child, and whether the services provided address or respond at all to that child's individual injuries and needs.

While we do not yet know whether the settlement will ever provide *any* in-kind benefit to *any* of the Minor Plaintiffs in the form of offsetting *some* future medical costs, we do know with certainty what it will *not* cover. The settlement does not provide for even the possibility of cash damages to Minor Plaintiffs or other individuals who have suffered NAS and developmental

[14] However, some of the Minor Plaintiffs who seek to amend to add claims for public nuisance did bring medical monitoring claims and some of the Minor Plaintiffs who brought public nuisance claims may seek to amend to add medical monitoring claims.

injuries. It does not purport to compensate them for *past* medical expenses (pasts costs associated with medical diagnoses and medication or counseling), lost earning capacity, past pain and suffering, or the future effects of their permanent developmental injuries (future pain and suffering and the reduction in their capability to function as a whole person).

The Circuit Court thus erred in finding that the *individual damages* sought by the Minor Plaintiffs are in any way "duplicative" of the *abatement* relief sought by the political subdivisions or the "abatement strategies" provided under the terms of their settlement. To the extent that the Circuit Court intended this paragraph (JA 00110) merely to "reinforce[]" its analysis of the "special injury" requirement, it achieved the opposite of its intended effect. Only one of ten "core" "abatement strategies" (strategy "D") in the settlement concerns injuries of the kind suffered by Minor Plaintiffs. JA 05146-48. Five of the ten core strategies (B–C & E–G) are aimed directly at reducing the population of adults and teens who are addicted to opioids, which, in addition to potentially benefitting those addicted persons themselves, will also reduce the lingering interference with public rights caused by having a community full of addicts even after the oversupply of drugs has stopped. One strategy ("A") is aimed at preventing sudden death to adults and teens who consume opioids. The other three core strategies (H–J) are aimed, in whole or part, at redressing the oversupply of opioids itself.

B. The Circuit Court's order would violate the Minor Plaintiffs' due process rights if taken to mean that the political subdivisions actually had the power to resolve Plaintiffs' individual claims for damages without notice, an opportunity to be heard, and an opportunity to opt out.

If the Circuit Court's "prior settlements" paragraph is interpreted as meaning that the third-party settlement agreements resolved the Minor Plaintiffs' claims for individual damages caused by a public nuisance, the ruling violates fundamental due process. *See Martin v. Wilks*, 490 U.S. 755, 761 (1989) ("[I]t is a principle of general application in Anglo-American jurisprudence that

one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."); *id*. at 762 ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.").[15] None of the limited exceptions to this rule, e.g., class actions, bankruptcy, and probate proceedings, apply here. *Id*. at 762 n. 2. "[B]efore an absent class member's right of action [is] extinguishable due process require[s] that the member 'receive notice plus an opportunity to be heard and participate in the litigation,' and . . . that 'at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)).[16]

Minor Plaintiffs have not sought and do not seek "abatement" or to prevent or remedy the nuisance itself. They seek their individual damages. Even if some portion of the "abatement" relief in the State and political subdivision settlement is one day earmarked for some form of services to be provided to the Minor Plaintiffs, the Circuit Court cannot constitutionally deprive Plaintiffs of

[15] The Circuit Court itself relied on similar reasoning in rejecting the same defendants' arguments that settlements with the State extinguished the claims of the political subdivisions under the doctrine of *res judicata*. *See In Re: Opioid Litigation Civil Action*, No. 21-C-9000 (DTB), July 1, 2022, Findings of Fact and Conclusions of Law and Order Denying Defendants' Motion for Summary Judgment on Res Judicata and Release Grounds (Trans. ID 67785215).

[16] The only exceptions to the right to notice and an opportunity to opt out in the class action context are for class actions seeking only injunctive or declaratory relief—because a defendant cannot be ordered to do conflicting things—and so-called "mandatory" class actions arising in a "limited fund" context. When considered in conjunction with the other two recognized exceptions—bankruptcy and probate, which are obviously limited fund proceedings—it is clear that the only circumstance in which a person can be constitutionally deprived of his or her individual right to pursue a claim for his or her own damages (without at least receiving notice and an opportunity to opt out) is in a case involving the limited availability of funds. And even that context requires due process protections. The United States Supreme Court addressed the "limited fund" argument in support of a mandatory class action in *Ortiz* and found that the lower courts had erred by not engaging in sufficient fact-finding with respect to the "limit and insufficiency of the fund," and that absent class members must be given notice and an opportunity to challenge any such findings. 527 U.S. at 848-50.

their own ability to pursue claims for damages without providing notice and an opportunity to be heard.

Minor Plaintiffs were not provided actual or constructive notice of the State and political subdivision settlement; absent persons were never invited to attend a hearing on or argue against the settlement; and the Circuit Court never engaged in fact-finding and never found that the available funds were limited. Accordingly, as a matter of law and due process, the public nuisance claims of Minor Plaintiffs for individual damages could not have been "resolved" through the "settlements" between the defendants and the State and political subdivisions. The Circuit Court erred in concluding otherwise.

III. The Circuit Court Erred in Finding Plaintiffs Could Not Establish Defendants Owed Them a Duty of Care.

The Circuit Court rejected Plaintiffs' negligence claims concluding that the Plaintiffs' private "personal injury claims" were different from the government entities cases in which it had "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." JA 00115; JA 00166. The Circuit Court reached this conclusion without applying established West Virginia law – essentially ignoring both its own prior decisions, decisions of other West Virginia courts in opioid cases, and binding decisions of the Supreme Court of Appeals.

A. West Virgnia Law imposes a duty on defendants to act with reasonable care to avoid creating a foreseeable and unreasonable risk of harm.

The duty owed by the Defendants in this case stems from the common law duty of reasonable care. Under West Virginia law, every person is required to use reasonable care to avoid injuring another: "'[t]he liability to make reparation for an injury, by negligence, is founded upon

an original moral duty, enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injure another.' This basic expression of policy is a restatement of the general duty which all actors in an organized society owe to their fellow persons." *Brooke County Dist. Order* at 6-7 ¶ 14 (citing Syl. Pt. 1, *Robertson*, 171 W. Va. at 607, 301 S.E.2d at 563; *In re Opioid Litigation*, No. 400000/2017, at 19 ("Here, the plaintiffs have adequately pled the existence of a duty owed by the distributor defendants by alleging that societal expectations required different behaviors on their part, including, but not limited to, refusing to fill suspicious orders for opioids[.]"). *Robertson v. LeMaster*, 301 S.E.2d 563, 567 (W. Va. 1983) (cit. om.)).

"Whether a person acts negligently is always determined by assessing whether or not the alleged negligent actor exercised reasonable care under the facts and circumstances of the case, with reasonable care being that level of care a person of ordinary prudence would take in like circumstances." *Strahin v. Cleavenger*, 603 S.E.2d 197, 205 (W. Va. 2004) (cit. om.). Moreover, "one who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm." *Stevens v. MTR Gaming Grp., Inc.,* 237 W.Va. 531, 534, 788 S.E.2d 59, 62 (W. Va. 2016) (citing *Robertson*).

B. Plaintiffs' complaints adequately allege that defendants' conduct created a foreseeable and unreasonable risk of harm to the Minor Plaintiffs.

The Circuit Court erred in concluding that "[e]ven assuming that any Defendant in these cases owed a duty of care to ***some*** entity, Plaintiffs have not properly alleged that such a duty ran ***from*** Defendants ***to*** these private Plaintiffs." JA 00115 (emphasis original) (cit. om.). The Circuit Court provided no analysis on foreseeability, instead conducting a proximate cause analysis which—contrary to the pleading standard set forth in *Lodge*—ignored the Plaintiffs' allegations and theories of liability against the Defendants.

The Circuit Court further erred in failing to find that under the circumstances alleged in Plaintiffs' Complaints, it was foreseeable that the Defendants' actions and inactions would result in an unreasonable risk of harm to the Plaintiffs and, therefore, Defendants owed a duty of care to Plaintiffs as alleged in Plaintiffs' Complaint.

1. Plaintiffs alleged Defendants' conduct created an unreasonable risk.

Plaintiffs have adequately pled that Defendants owed a duty to the minor children. First, with respect to a direct duty, Plaintiffs' Complaints allege – and a jury applying West Virginia negligence law could find – that Defendants should have and did foresee that if they lied about the safety of opioids, oversupplied them and did not report or adequately respond to diversion, that serious harms would befall the Plaintiffs.[17] Moreover, even if the minor children were not owed this duty directly, West Virginia law is replete with examples of cases in which a duty running to a third party can give rise to liability.[18]

[17] *See e.g.*, JA04920, ¶ 87.d ("Defendants have reason to know their conduct has a significant effect adverse upon women and men of child-rearing age and therefore on babies, making them more likely to be born addicted to oxycodone or other opioids"); *see also* JA04607at ¶59.d (same); JA05315, ¶71.d (same); JA04910, ¶ 48 (J&J "maintained detailed information on where retail opioids were ending up – which doctors were prescribing which opioid pills and in which quantities" and "knowledge of the adverse effects of opioids"); JA04602, ¶ 41 (same); JA05305, ¶ 32 (same); JA04913, ¶ 57 ("The FDA and other regulators warned" and Manufacturing Defendants had access to scientific studies, detailed prescription data, and reports of adverse events, including reports of addiction, hospitalization, and deaths"; JA04913, ¶ 60 (2016 U.S. Surgeon General letter regarding "urgent health crisis" and 2016 CDC report that efforts to rein in the prescribing of opioids for chronic pain are critical "to reverse the epidemic of opioid drug overdose deaths and prevent opioid-related morbidity"); JA05309, ¶ 47 (same); JA04922 ¶ 94 ("Defendants owe a non-delegable duty to Plaintiff minor child J.J.S. to conform their behavior to the legal standard of reasonable conduct under the circumstances, in the light of the apparent risks."); JA04608, ¶ 66; JA05316, ¶78 (same); JA04924, ¶ 104 (Defendants "are in a limited class of registrants authorized to legally distribute controlled substances and opioid ingredients. This places Defendants in a position of great trust and responsibility vis-à-vis Plaintiff."); JA05319, ¶ 88; JA04928, ¶ 126 ("All Defendants acted in concert to mislead medical professionals, patients, the scientific community, the CDC, the FDA, the DEA, and the general public about the addictive nature of opioids and the risk of serious latent disease associated with in utero exposure to opioids so that their profits would increase."); JA05321, ¶101 (same).

[18] *See, e.g. Bragg*, 741 S.E.2d, 96; *Kizer v. Harper,* 561 S.E.2d 368 (W. Va. 2001) (per curiam); *Louk v. Isuzu Motors, Inc.*, 479 S.E.2d 911 (W. Va. 1996); *Robertson*, 301 S.E.2d, 568-69 (reversing a directed verdict, because the defendants could have reasonably foreseen that their exhausted employee would pose

Plaintiffs' complaints allege that Defendants engaged in conduct which created an unreasonable risk of harm to the Plaintiffs, including, but not limited to: (a) consciously supplying the market with highly addictive opioids, including misrepresenting, understating, or obfuscating the highly addictive propensities; (b) failing to warn or advise physicians to conduct an addiction family history of each and every potential patient; (c) failing to act as a last line of defense against diversion; (d) failing to properly train or investigate their employees; (e) failing to properly review and analyze for red flags; (f) failing to report suspicious orders and refusing to fill them; (g) failing to provide effective controls and procedures to detect and/or guard against theft and diversion; (h) failing to police the integrity of their supply chains; (i) creating misleading information with the intention of having prescribing physicians rely upon it; (j) failing to stop supplying or report customers who they knew or should have known were engaged in misleading physicians and patients that opioids were not nearly as addictive as claimed; and (k) failing to investigate monitor and prevent the suspicious and excessive opioid orders. *See e.g.,* JA04922-4923 at ¶ 98a.-j; JA04609-10 at ¶70a-j; JA05317 at 82a.-j; JA04920 at ¶ 85; JA05314-15 at ¶ 69; JA04605 at ¶ 49; JA04607 at ¶57; JA04607-08 at ¶62.

2. The unreasonable risk created by Defendants' conduct was foreseeable.

The Plaintiffs allege that the Defendants were aware of the potentially dangerous situation involving opioids, including but not limited to the addiction, abuse and diversion that was occurring, and the dangers and risks associated with opioid use during pregnancy to children in utero. *See e.g.,* JA04913, ¶¶ 57, 60; JA04920, ¶ 87.d; JA04922, ¶ 94; JA04607, ¶59.d; JA04608, ¶ 66; JA05315, ¶71.d; JA05316, ¶78; JA00425, ¶¶ 141-179 (risks to infants associated with opioid use).

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a risk to other motorists while driving home and "liability may be imposed regardless of the existence of a relationship between the defendant and the party injured.").

The applicable West Virginia laws, and the industry standards applicable to the marketing, distribution and sale of opioids drugs exist to control addiction, abuse, and/or diversion associated with these dangerous drugs. The FDA and other regulators warned the Defendants and Defendants had access to scientific studies, detailed prescription data, and reports of adverse events, including reports of addiction, hospitalization, and deaths – all of which made clear the harms from long-term opioid use and that patients were suffering from addiction, overdoses, and death in alarming numbers. *See e.g.*, JA04913, ¶ 57; *see also id.,* ¶ 60 (JA04914) (describing August 2016 U.S. Surgeon General letter enlisting physicians help in combating this "urgent health crisis" and linking that crisis to negligent marketing); JA05309, ¶ 47 (same). The escalating amounts of highly addictive drugs being distributed, and the sheer volume of these prescription opioids, further alerted the Defendants that addiction was fueling increased addiction, abuse and diversion, and that legitimate medical purposes were not being served. JA04914, ¶ 60; JA04916-18, ¶¶ 66-74 (allegations regarding the volume of opioids supplied in West Virginia); JA05312, ¶¶ 53-60 (same); JA04921, ¶90; JA05309, ¶ 47; JA05314, ¶ 67; JA05315, ¶74; JA04606, ¶¶ 54-55.

In recent years, there has been a dramatic rise in the proportion of infants who have been exposed to opioids and the incidence of NAS.[19] Available literature documents the potential harms associated with opioid use during pregnancy, including poor fetal growth, preterm birth, birth defects, and neonatal opioid withdrawal syndrome ("NOWS"). *See e.g.*, JA 00402, ¶ 44. It is well

[19] *See e.g.*, JA04898-99, ¶¶ 22-24; JA04590-91, ¶¶ 15-17 (same); JA05302 ¶¶ 22-24 (same); *see also* JA00402, ¶ 43 (*Blankenship* Cmpl.). The Circuit Court considered the Defendants' motions to dismiss collectively and issued a collective ruling (with the exception of *Sparks* however, a substantively similar Order was entered). Construing the Plaintiffs' Complaint here in the light most favorable to the Plaintiffs, this Court should consider these plausible allegations made in the other Plaintiffs' Complaints. Alternatively, these allegations would have been included in the Amended Complaints Plaintiffs requested leave to file, *see supra* p. 14.

documented that opioid use during pregnancy has a significant risk of being detrimental to the embryo.[20]

West Virginia has long recognized that the existence of a duty depends on the foreseeability of the injury.

> The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?

Bragg v. United States, 741 S.E.2d 90, 98 (W. Va. 2013) (cit. om.). The task of a court in determining duty

> is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.

Strahin, 603 S.E.2d at 207 (cit. om.) (emphasis in original).

[20] *See e.g.*, JA04898-99, ¶¶ 22-24 ("Research suggest that newborns with NAS (most commonly associated with opioid misuse during pregnancy) are more likely than all other hospital births to have low birthweight and respiratory complications."); JA04590-91, ¶¶ 15-17 () (same); JA05302, ¶¶ 22-24 (same); *see also Blankenship* Compl. JA00402, ¶ 45; JA00402-04, 46-63, JA00411, ¶¶ 94-96 (describing effects of opioids on embryos), JA00406-09, ¶¶70-88 (describing certain Manufacturers' OSHA safe handling warnings pertaining to bulk quantities of opioids being handled by pregnant women and potential adverse effects on the development of offspring and lack of harmonization of disclosures of risks associated with opioid use); JA00409-411, JA00464, ¶¶ 89-96, 372-374 (detailing warnings used in other countries regarding contraindications for opioid use during pregnancy); JA00418, ¶ 129 (Defendants knew that opioid dependent individuals would be constrained to obtain opioids through illegal distribution channels and that "a significant number of those individuals are adult women of childbearing ages that would give (and have given) birth to babies dependent upon opioids … (as a result of those addicted mothers' ingestion of opioids during pregnancy."); JA00419-20, ¶¶ 141-149 (describing the dramatic increase in the number of fetuses exposed to opioids in the United States and West Virginia); JA00423-26, ¶¶ 156-179 (describing the pharmacological effects of opioids on embryos and infants and treatment); JA00426, ¶ 180-182 (the risks of serious latent negative health impacts were available to the Manufacturing Defendants and Distributor Defendants and the Defendants purposely misrepresented the potential of opioids to result in the negative health impacts);

It is up to the jury – and thus not appropriate for a Motion to Dismiss – to consider foreseeability, that is, in the context of the facts of the case, whether Defendants' conduct falls within the scope of the duty as defined by the court. *Id*.

C. Public policy supports imposing a duty on Defendants.

The existence of a duty also involves policy considerations such as: (1) the likelihood of injury, (2) the magnitude of the burden of guarding against it, and (3) the consequences of placing that burden on the defendant. *Brooke County Dist. Order* at 5 ¶10 (citing *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983); *Stevens*, 788 S.E.2d at 62-63 (cit. om.); *Bragg*, 741 S.E.2d at 98 (cit. om.). The Circuit Court gave lip service to this test, instead merely stating that to do so would "*stretches the concept of due care too far*." JA00115.

An actual application of the three-part test establishes that Plaintiffs adequately alleged a duty. Public policy considerations support the imposition of a duty of care here because the likelihood and risk of injury caused to the minors in utero by highly addictive opioids is high, the burden imposed on the Defendants to guard against injury and damage is no greater than they already face, and there is an absence of adverse consequences of placing the burden on the Defendants to guard against the likely injury. *See Brooke County Commission v. Purdue Pharma, L.P.*, No. 17-C-248 (W. Va. Marshall Co. Cir. Ct. Dec. 28, 2018) (Order denying Motion to Dismiss filed by distributors at 6 ¶ 13), writ denied, *State ex rel. Cardinal Health v. Hummel*, No. 19-0210 (W. Va. June 4, 2019).

1. <u>Likelihood of injury</u>

The U. S. Supreme Court has long recognized the inherent causal relationship between opioid diversion and harm flows from the very nature of these drugs:

> [Ordinary goods are not] restricted as to sale by order form, registration, or other requirements. . The difference is like that between toy pistols or hunting-rifles and

> machine guns. All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade. *Direct Sales Co. v. United States*, 319 U.S. 703, 710, 63 S. Ct. 1265, 1269 (1943).

Direct Sales Co. v. United States, 319 U.S. 703, 710-11 (1943); *see also United States v. Moore*, 423 U.S. 122, 135 (1975) (when enacting the CSA, "Congress was particularly concerned with the diversion of drugs from legitimate channels to illegitimate channels."); *Gonzales v. Raich*, 545 U.S. 1, 12–13, (2005) (same). Given the abusive and addictive characteristics of prescriptions opioid pills, the likelihood of injury is extremely high, and the potential harms caused by improper distribution of these drugs are catastrophic. In fact, the potential that opioids could cause widespread harm to communities was so foreseeable that federal and state laws were enacted to attempt to prevent addition, abuse, and diversion from occurring. *See*, *e.g.*, 1970 U.S.C.C.A.N. 4566, 4569 (Prescription opiate drugs provide serious addiction or abuse problems).

Congress was particularly concerned with the diversion of drugs from legitimate channels. It was aware that registrants, who have the greatest access to controlled substances and therefore the greatest opportunity for diversion, were responsible for a large part of the illegal drug traffic." *United States v. Moore*, 423 U.S. 122, 135 (1975). To prevent diversion, the CSA was designed to improve the administration and regulation of the manufacturing, distribution, and dispensing of controlled substances by providing for a "closed" system of drug distribution for legitimate handlers of such drugs. *Such a closed system is intended to reduce the widespread diversion of these drugs out of legitimate channels into the illicit market,* while at the same time providing the legitimate drug industry with a unified approach to narcotic and dangerous drug control. 1970 U.S.C.C.A.N. 4566, 4571-72 (emphasis added). Under this closed system, all participants in the

distribution chain have a duty to prevent diversion of the drugs into non-medical channels. 21 U.S.C. § 823(a)(1); W. Va. Code § 60A-3-303(a)(1); *see also* 21 C.F.R. §1301.71(a) (all registrants "shall provide effective controls and procedures to guard against theft and diversion of controlled substances"); W. Va. Code St. R. § 15-2-5.1.1 (same).

In the government entities case, the Circuit Court previously held that the questions of what legal duties the federal CSA and West Virginia CSA and their implementing regulations impose upon Defendants as distributors of controlled substances are both material to the Plaintiffs' claims for public nuisance. *In re: Opioid Litigation*, 21-C-9000 (Distributor) (Transaction ID 67706109), Order Granting City/County Plaintiffs' Motion for Partial Summary Judgment Regarding Duties Arising Out of the Controlled Substances Act at 2 (June 8, 2022). Inexplicably, the Circuit Court contradicted itself in this case finding that Plaintiffs sought to impose civil liability on Defendants based on the statutes which did not confer a private cause of action. JA00114, n41, JA00166, n21. Plaintiffs, like the government entities, reference the statutes not because Plaintiffs seek to enforce them through a private cause of action, but to help establish the standard of care owed by Defendants under the common law. Defendants' liability arises from their failure to use reasonable care, not their violations of federal and state laws. In West Virginia, a violation of a statute is *prima facie* evidence of negligence. *See, e.g. Marcus*, 736 S.E.2d at 368 (citing *Anderson v. Moulder*, 394 S.E.2d 61, 66-67 (W. Va. 1990)); *Arbaugh*, 591 S.E.2d 235, 239 (W. Va. 2003); *Yourtee v. Hubbard*, 474 S.E. 2d 613, 617 (W. Va. 1996); *Brooke County Commission v. Purdue Pharma, L.P.*, No. 17-C-248 (W. Va. Marshall Co. Cir. Ct. Dec. 28, 2018) (Order denying Motions to Dismiss filed by distributors at 4 ¶7), writ denied, *State ex rel. Cardinal Health v. Hummel*, No. 19-0210 (W. Va. June 4, 2019). Similarly, violations of regulations are also prima facie evidence of negligence. *See Brooke County Distributor Order, supra* at 4 ¶ 7 (finding the Plaintiffs were

not asserting a private right of action under the WVCSA but were using it "to help establish a standard of care"); *Miller v. Warren*, 390 S.E.2d 207, 209 (W. Va. 1990).

Preventing injuries such as those to infants of physically dependent, pregnant women who use or abuse opioids is why the duties in the CSA and WVCSA exist.

2. Magnitude of the burden

Under the WVCSA and the CSA, the Defendants are a limited class of registrants in a closed distribution system allowing them to distribute and maintain exclusive control over dangerous and addictive drugs. 1970 U.S.C.C.A.N. 4566, 4571-72.

The privilege given to the Defendants places them in a position of great trust and grave responsibility: namely, their obligation to exercise and maintain proper control over the distribution of their opioid products throughout the supply chain such that they do not cause foreseeable harm to the public health through addiction, abuse, and diversion. Defendants, in their roles as manufacturers and distributors of dangerous drugs, were also under an obligation to evaluate whether their failure to exercise adequate control of the marketing and distribution of their products would be likely to cause injury. *See e.g.*, JA04924, ¶ 102; JA04610, ¶74; JA05318, ¶86 (same). This was a responsibility of great magnitude and one that Defendants were in the best position to guard against. *See e.g.*, JA04924, ¶ 104; JA04611, ¶76; JA05319, ¶88; JA04896, ¶¶ 15, 135, 137 (BOP has mandatory duties "to review records in the Controlled Substance Monitoring Program ("CSMP") … to identify abnormal or unusual practices…" and "the power and duty to investigate alleged violations of the laws and rules governing pharmacies, wholesalers, manufacturers, and other distributors of controlled substances within the State of West Virginia."); JA04615, ¶100, 102; JA05299, ¶ 13 (same); JA05307-08, ¶ 38 ("West Virginia law and West Virginia Courts recognize, BOP has an affirmative duty and "clear and unequivocal directives" to

"police and investigate" opioid distributors "to ensure they had effective controls in place to prevent the diversion of opioids.").

3. Consequences of placing the burden on the defendant

The consequences of placing the burden of this duty on the Defendants are minimal. The statutory scheme already places this burden on Defendants as registrants in the closed system. Imposing this duty simply requires the Defendants to comply with their obligations under the WVCSA and CSA and act reasonably given the nature of their business, and that is the same duty that is required daily of other businesses. *See, e.g. Lemongello v. Will Co., Inc.*, No. 02-cv-2952, 2003 WL 21488208, at *2 (W. Va. Cir. Ct. June 19, 2003).

The Circuit Court relied on *Stevens* in support of its conclusion that public policy precluded the imposition of a duty, however, the policy considerations underlying *Stevens*' interpretation of the statutory and regulatory framework do not exist here as the gambling at issue there was specifically approved by the legislature and regulatory bodies. 237 W. Va. at 538, 788 S.E.2d at 66. With gambling, there are inherent risks and dangers, which the Legislature took into consideration, but nonetheless found were outweighed by the potential "economic boon" and other economic benefits to the State. 237 W. Va. at 537-38, 788 S.E.2d at 65-66. Obviously, no comparable benefits are conferred upon society when opioids are diverted and abused. Additionally, unlike gambling, the opioid distribution system is designed to prevent abuse and diversion by affirmatively imposing the duty to prevent diversion on all participants in the chain of distribution.

4. Intervening acts do not relieve Defendants from owing Plaintiffs a duty

Here, the Circuit Court failed to analyze foreseeability; rather, it conducted a proximate cause analysis and reached the incorrect conclusion that *any* intervening act, even foreseeable ones, relieves the Defendants from owing a duty of care. This is simply incorrect.

First, the Circuit Court erred in finding that "[a]ny "duty" owed to reduce the exposure of birth mothers or the Minors to alleged harms associated with the medical use of prescription opioids" was not from the Defendants but rather, "owed by doctors (as to the proper prescribing of opioids to women who are or may become pregnant) or by the birth mothers (as to the ingesting of prescription opioids in accordance with medical direction while pregnant)." JA00115.

The fact that doctors and mothers also owe a duty of care does not absolve the Defendants. In fact, by placing the full burden on the doctors and mothers, the Circuit Court overlooked the allegations that the doctors and patients were misled by Defendants in their marketing of the drugs. *See, e.g.*, JA04913, ¶ 57; JA04914, ¶ 60 (2016 U.S. Surgeon General letter enlisting physicians help in combating this "urgent health crisis" and linking that crisis to negligent marketing); JA04609, ¶ 70; JA04614, ¶¶ 95 (misrepresentations regarding likelihood of addiction); JA4907, ¶ 43; JA04919, ¶ 83; JA04926-27, ¶¶ 116-118) (physicians' reliance on false representations regarding addiction) JA05319, ¶¶ 92-94 (physicians' reliance on false representations regarding addiction); JA04613, ¶¶ 87-89 (physicians' reliance on false representations regarding addiction). Again, the Supreme Court's warnings in *Direct Sales* are instructive:

> But this is not to say that a seller of harmful restricted goods has license to sell in unlimited quantities, to stimulate such sales by all the high-pressure methods, legal if not always appropriate, in the sale of free commodities. . Such a view would assume that the market for opiates may be developed as any other market. But that is not true. Mass advertising and bargain-counter discounts are not appropriate to commodities so surrounded with restrictions. They do not create new legal demand and new classes of legitimate patrons, as they do for sugar, tobacco and other free commodities. Beyond narrow limits, the normal legal market for opiates is not

> capable of being extended by such methods. The primary effect is rather to create black markets for dope and to increase illegal demand and consumption.

319 U.S. at 712. That addiction and diversion is the inevitable result of the improper marketing of opioids is no less foreseeable today than it was in 1943 when *Direct Sales* was decided.

Second, the Circuit Court erred in concluding "to the extent Plaintiffs allege injuries caused by birth mothers' illicit ingestion of opioids … 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.*, JA00116 (citing *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 economic consequences of placing such a duty on a person.")).

Any illegal conduct of the mother and/or others does not absolve the Defendants. Furthermore, the Circuit Court ignored allegations regarding the Defendants' knowledge that actors "further down in the supply chain" were "incompetent or acting illegally and should not be entrusted with the opioids"; and knowing that "(a) there was a substantial likelihood many of the ultimate sales were for non-medical purposes, and (b) opioids are an inherently dangerous product when used for non-medical purposes." *See, e.g.*, JA04610, ¶¶ 71-73; JA05318, ¶¶ 83-84; JA04923, ¶¶ 99-100.

The Circuit Court's holding is contrary to West Virginia law. In *Marcus v. Staubs*, the West Virginia Supreme Court reaffirmed the principles of duty and foreseeability delineated above, and rejected the contention that there is no duty to protect someone from the intentional, criminal acts of third parties. 736 S.E.2d 360, 370-71 (W. Va. 2012). Instead, the court held that it was a jury question whether the harm was foreseeable. *Id*. Other cases, including the one cited by the Court,

have held the same.[21] Although the Circuit Court acknowledged that *Miller* recognized exceptions to this principle, it found those exceptions "inapplicable" without explaining its reasoning. The recognized exceptions are: "(1) when a person has a special relationship which gives rise to a duty to protect another person from intentional misconduct or (2) when the person's affirmative actions or omissions have exposed another to foreseeable high risk of harm from the intentional misconduct." *Strahin*, 216 W. Va. at 184, 603 S.E.2d at 206 (2004) ("An exception exists if the Defendant, by action or omission, unreasonably created or increased the risk of injury from the criminal activity of a third party.").

The Plaintiffs' Complaints set forth in detail the factual basis for the conclusion that the claims meet the exceptions noted in *Miller*. Plaintiffs pled that the Defendants engaged in affirmative conduct, which they realized or should have realized created an unreasonable risk of harm to another, including the Plaintiff Minor children, such that it owed a duty to exercise reasonable care to prevent the threatened harm. *See, supra* note 18. The Complaints further describe actions by Defendants which exposed the Plaintiffs to foreseeable high risk of harm from

[21] *See Miller v. Whitworth*, 455 S.E.2d 821, 827 (W. Va. 1995) (duty will be imposed when a defendant's acts or omissions have unreasonably created or increased the foreseeable risk of injury from the criminal activity or intentional misconduct of a third party); *see also Strahin*, 603 S.E. 2d at 209 (when negligence concurred with intentional, criminal acts jury must make determination if it was foreseeable that the conduct could have created an unreasonable risk of harm); *Wal-Mart Stores E. L.P. v. Ankrom*, 244 W. Va. 437, 448, 854 S.E.2d 257, 268 (2020) (finding that a reasonable juror could have concluded that the Wal-Mart employees exposed a customer to a foreseeable high risk of harm in the course of apprehending a shoplifter, thus, owing the customer a duty to protect her from the shoplifter's criminal conduct); *Estate of Hough by & Through LeMaster v. Estate of Hough by & Through Berkely Cty. Sheriff*, 205 W. Va. 537, 545, 519 S.E.2d 640, 648 (1999) (finding appellant's claim should not have been dismissed when a landlord should have known of Mr. Hough's violent actions toward Mrs. Hough and realized the risk of harm he created by permitting him to live across the street from her and then requiring her to cut her lawn which she was doing when shot by Mr. Hough); *Price v. Halstead*, 177 W. Va. 592, 600, 355 S.E.2d 380, 389 (1987) (reversing order dismissing case against passengers who had substantially contributed to and assisted the driver's continued use of alcohol and drugs while he was already impaired).

criminal activity of a third party, i.e., the use of illicit opioids. *See, e.g.*, JA04610, ¶¶ 71-73; JA05318, ¶¶ 83-84; JA04923, ¶¶ 99-100.

In addition, Plaintiffs' allegations do not rely on the existence of criminal conduct. While criminal conduct may have exacerbated the opioid crisis, the Plaintiffs' claims are rooted in the breach by Defendants of their duty of care regardless of the acts of non-parties.

Finally, the Circuit Court's attempt to distinguish the prior recognition of the existence of the duty owed to governmental entities by these defendants is inexplicable. Prior to transfer to the MLP, the Circuit Court of Marshall County found that that participants in the opioid supply chain "owe a common-law duty of reasonable care." *Brooke County Comm'n v. Purdue Pharma, L.P.*, Civil Action No. 17-C-248, Cir. Ct. Marshall Cty., W. Va. (Dec. 28, 2018) (orders denying motions filed by manufacturers, distributors, and pharmacies) ("*Brooke Cty* Orders"). A writ challenging these rulings was rejected by the Supreme Court of Appeals. *State ex rel. Cardinal Health v. Hummel*, No. 19-0210 (W. Va. June 4, 2019). Subsequently, the Mass Litigation Panel expressly adopted this ruling as the "law of the case," and the Supreme Court of Appeals declined review of that decision. *Monongalia County Commission, et al. v. Purdue Pharma L.P., et al.*, Civil Action Nos. 18-C-222 (MSH) - 18-C-236 (MSH), Cir. Ct. Kanawha Cty., W. Va., Order Denying Pharmacy Defendants' Motion to Dismiss Plaintiffs' Complaint (adopting and applying the reasoning and rulings from *Brooke County* Pharmacy Order as law of the case), writ denied, *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, No. 19-1051 (W. Va. Jan. 30, 2020). The Circuit Court of Boone County also found a duty (and the Supreme Court refused the Defendants' writs) in the Attorney General's case against some of the defendants here. *West Virginia v. AmerisourceBergen Drug Corp.*, No. 12-C-141 (W.Va. Cir. Ct. Boone Cty. Dec. 12, 2014) (denying opioid manufacturers and distributors motions to dismiss on negligence, public nuisance,

and causation), *writ denied, State ex. rel. AmerisourceBergen Drug Corp v. Thompson,* No. 15-1026 (W. Va. January 5, 2016).

Here, the Circuit Court provided no compelling reasoning as to why the Plaintiffs' private "personal injury claims" were different from the government entities cases in which it had "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." JA00115; JA00166. The Circuit Court's concerns over extending liability overlooks the fact that the claims brought by the governmental entities and the governmental harms are even further down the foreseeability chain than the Plaintiffs here because the governmental harms primarily result from and are caused by the individual injuries like the injuries to those who suffer from NAS.[22]

IV. The Circuit Court erred in holding, as a matter of law, that Plaintiffs cannot establish proximate cause in these cases.

The Circuit Court proffered two reasons for concluding that proximate causation cannot exist as a matter of law. Neither is supported by West Virginia precedent. JA 00101. First, in a section captioned "Remoteness," the Circuit Court pointed to actions of prescribing physicians, illegal drug distributors (but only "in some cases"), and birth mothers who ingested "prescribed opioids and/or illegally obtained opioids during their pregnancies[.]" JA 00116. Then, in a section

[22] In fact, Distributor Defendants' Petition for Writ of Prohibition regarding the *Brooke County* Dismissal Orders argued that by the point the Counties incur any additional costs for providing government services to those who misuse or abuse opioids, those costs are many steps removed from Distributors' conduct and are derivative of whatever harm there was to the individual. *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, No. 19-1051, March 8, 2019 Petition for Writ of Prohibition at 37. Distributors argued that the Court should follow the lead of *City of New Haven*, which held the cities' allegations were "too attenuated to support a claim" and "we prefer to compensate just the directly injured because it is sound judicial policy to hold people responsible only to the degree we can reasonably connect a legally prohibited act to a directly resulting harm. In this regard, the addicts' claims are clearly superior claims." *AmerisourceBergen* Petition for Writ at 38 (quoting *City of New Haven v. Purdue Pharma, L.P.*, No. X07-HHD-CV-6086134-S, 2019 WL 423990 at *6-7 (Conn. Super. Ct. Jan. 8, 2019)).

captioned "Sole Proximate Cause," the Circuit Court concluded that "the birth mothers' ingestion of opioids during pregnancy is the sole proximate cause of the Minors' alleged injuries." JA 00121. Neither withstands appellate scrutiny.

Apart from the respective captions, it is not at all clear that these are two distinct grounds for the Circuit Court's decision. Both sections of the decision fundamentally raise the question of whether one or more intervening acts broke the chain of causation—with the second varying from the first only in its decision to highlight the role of birth mothers as sufficient, even without the prescribing physicians and (in some cases) illegal drug dealers. And both sections rely heavily on *Webb v. Sessler*, 135 W. Va. 341, 63 S.E.2d 65 (1950). JA 00118, 00120-21.

Another similarity is that the Circuit Court did not attach any significance—in either section—to the distinction between those Minor Plaintiffs whose mothers ingested "illegally obtained opioids" during pregnancy and those who only ingested "prescribed opioids." *See* JA 00119 (noting that "third parties provided illegally obtained opioids" only "in some cases" and that the birth mothers "ingested medically prescribed opioids and/or illegally obtained opioids" without distinguishing one scenario from the other for purposes of the holding or reasoning). In the "Sole Proximate Cause" section, the Circuit Court stated at least four times, with only minor variations in wording, that the fact that "birth mothers ingested opioids"—without more, and without tying the birth mothers' ingestion of opioids to conduct that was necessarily illegal, wrongful, or negligent itself—was sufficient to find as a matter of law that the birth mothers were the sole proximate cause of the resulting injuries. *See* JA 00120-21; *see, e.g., id.* at 23 ("[T]he alleged injuries that form the basis of Plaintiffs' claims necessarily occurred because the Minors' birth mothers ingested opioids during their pregnancies, and they would not have occurred otherwise.").

The Circuit Court's sweeping conclusions are breathtaking and alarming. If affirmed, the Circuit Court's holding—that, as a matter of law, a baby harmed in the womb by a drug taken by its mother cannot bring a product liability case against the sellers of the drug, including even the manufacturers, because "physicians prescribed" the drug and the "birth mother ingested medically prescribed" pills—would provide sellers and manufacturers of prescription drugs with *blanket immunity* against all product liability claims premised on birth defects, no matter how negligent or even fraudulent. That is not the law in this State or in any State.

Moreover, it would be impossible under ordinary legal principles to prevent that holding—that a *pregnant* individual's act of ingesting a legally prescribed pill cuts off the liability of a manufacturer or other seller for injuries to an innocent *gestating baby*—from applying with equal force to any individual's act of ingesting any legally prescribed pill with respect to bodily injuries suffered by the individual himself or herself. The Circuit Court's reasoning leads inexorably to blanket immunity for all prescription drug sellers in all reasonably foreseeable circumstances, because before any individual is injured by any drug, a physician prescribes it, and some individual—usually the injured individual but sometimes another individual such as an injured baby's "birth mother"—has to "ingest" the drug. Such a result would be clearly contrary to the law of this State and every State.

A. "Remoteness" is not an issue in this case independent of the jury question of intervening cause.

The Circuit Court's holding makes clear that its finding of "remoteness" is not based on remoteness *per se* but rather on certain intervening acts of others—by the prescribing physicians, by the birth mothers, and, in some but not all cases, by criminals who sold or provided the drugs to the birth mothers illegally. JA 00117. According to the Circuit Court, it was these "independent actions of multiple actors over whom Defendants had no control" that "defeat proximate causation

as a matter of law" because these intervening acts by others "render Defendants' conduct too remote from Plaintiffs' alleged injuries." *Id*. The Circuit Court simply referred to its actual conclusion—that the actions of physicians, criminals (in some cases), and birth mothers break the chain of causation—by a different name ("Remoteness") to avoid the requisite foreseeability analysis that attends intervening acts. *See* JA 00118 (acknowledging that a "tortfeasor is 'not relieved from liability' by 'reasonably foreseeable' acts of third parties" under the Supreme Court's holding in *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990), but concluding that "[l]ack of remoteness is a separate and distinct element of proximate causation" that applies "regardless of whether the harm was foreseeable").

In doing so, the Circuit Court not only applied the wrong analytical framework—"remoteness" rather than "intervening acts"—but committed multiple other errors. First, the recent decision of the Supreme Court of Appeals in *Wal-Mart Stores East, L.P. v. Ankrom*, 244 W. Va. 437, 854 S.E.2d 257 (2020), brings the "remoteness" framework of *Webb v. Sessler*, 135 W. Va. 341, 63 S.E.2d 65 (1950), squarely back under the umbrella of the "foreseeability" and "intervening cause" framework of *Anderson v. Moulder*. The Supreme Court expressly cautions, immediately after citing *Webb*, that "not every intervening event wipes out another's preceding negligence[:]" "In fact," the Court continued, "[a] tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct." 244 W. Va. at 450, 854 S.E.2d at 270 (quoting syl. pt. 13, *Anderson v. Moulder*).

Moreover, even if West Virginia law still supports a doctrine of "remoteness" that is materially distinct from questions of intervening cause and foreseeability, such a doctrine clearly

does not apply to these facts. The Minor Plaintiffs' allegations include standard products liability claims against product manufacturers and sellers. A product, sold by the defendants (or at least sold by some of them), directly caused injury to the Minor Plaintiffs through the product's intended or clearly foreseeable uses—by being consumed by individuals, as intended, as a consequence of which it was absorbed into the bloodstream of those individuals and their gestating babies, and resulted in the poisoning of the gestating babies, causing acute, chronic, and permanent injuries. No court has ever held that the relationship between a product seller and an end user or bystander injured *directly* and *physically* by the seller's product is simply "too remote" to support proximate causation in the absence of some intervening act by others.

The Circuit Court cited six cases: three West Virginia Supreme Court cases and three from the federal district court for the Southern District of West Virginia. JA 00118 (citing *Metro v. Smith*, 146 W. Va. 983, 990, 124 S.E.2d 460 (1962); *Webb v. Sessler*, 135 W. Va. 341, 348-49, 63 S.E.2d 65 (1950); *Aikens v. Debow*, 208 W. Va. 486, 492, 541 S.E.2d 576 (2000); *City of Huntington*, 609 F. Supp. 3d 408, 481 (S.D.W. Va. 2022); *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)). Not even one of those cases involves a plaintiff who was physically and directly injured by a product manufactured or sold by a defendant.

Two of the three West Virginia cases mention the word "remote" only in passing, in contrast to "proximate." *See Metro*, 146 W. Va. at 990, 124 S.E.2d at 464 (using the word "remote" only once, in direct contrast to "proximate"); *Webb*, 135 W. Va. at 348-49, 63 S.E.2d at 69 (using the word "remote" only twice, both times in contrast to "proximate"). In the third West Virginia case, the Supreme Court explains that claims for purely economic harms—as opposed to physical harm

directly caused by a product—are often disallowed because courts regard purely economic harms as "too remote." *See Aikens*, 208 W. Va. at 494-96, 541 S.E.2d at 584-86. None of the three cases involved a suit against product manufacturers or sellers for physical harm caused directly by the product, which is a material distinction.

The three federal cases fare no better. In *City of Charleston*, the court specifically distinguished cases brought against the sellers of opioids in other courts from the court's reasoning in dismissing a pure economic loss suit (for "widespread societal ills and costs") brought by a municipality against a hospital-accrediting organization that endorsed certain pain management principles that the drug companies advocated. Proximate cause was lacking (along with an actionable injury, a duty, and many other things) the court held, because "[u]nlike [other cases], defendants had no role in manufacturing, distributing, or marketing opioids." 473 F. Supp. 3d at 630–31; *see also id*. at 621 (finding that the harm was not foreseeable by the defendants at issue because, "[u]nlike the manufacturer and distributor defendants in [a different opioid case], defendants here had no control or responsibility over the manufacturing or distributing of opioids"). Again, this is a material distinction.

The final two federal cases are distinguishable for a different reason. In both *Employer Teamsters* and *City of Huntington*, the court's holding on proximate cause turned on the lack of a "direct relation between the injury asserted and the injurious conduct alleged." *See Employer Teamsters* 969 F. Supp. 2d at 473 (quoting *Holmes v. Securities Investor Protection Corp*., 503 U.S. 258, 268 (1992)); *City of Huntington*, 609 F. Supp. 3d at 482 (citing *Holmes*) for the requirement of a "direct relation between the injury asserted and defendants' injurious conduct"). All three of these cases involved claims for purely economic loss; not one of them resembled a

traditional products liability claim where, as here, Plaintiffs allege bodily injuries caused directly by a product sold by the defendants.

Holmes, the United States Supreme Court opinion relied upon by the Southern District court in both of its decisions, involved a RICO Act claim for economic losses stemming from an alleged stock manipulation scheme. *Employer Teamsters* involved a claim by unions for the deceptive marketing of an allegedly ineffective prescription drug prescribed to some of the unions' members, resulting in (disputed) economic-only losses to the unions.[23] In *City of Huntington*, the court held that political subdivisions' claims for "remuneration for the costs of treating the horrendous downstream harms of opioid use and abuse . . . have no direct relation to any of defendants' alleged misconduct." 609 F. Supp. 3d at 483. Judge Copenhaver also relied on the *Holmes* "direct relation" test in *City of Charleston*, a case that explicitly distinguished claims against drug sellers. *See* 473 F. Supp. 3d at 627–28.

So far as Plaintiffs can discern, the "direct relation" rule announced in *Holmes* and relied upon in the holdings in *City of Charleston*, *Employers Teamsters*, and *City of Huntington* has never been applied to a traditional products liability action against the seller of a drug or any other product alleging an injury from the drug or other product. It has certainly never been applied in such a fashion by the West Virginia Supreme Court. It would be a significant overreach to apply such a rule—which has been applied to limit expanding tort liability through innovative lawsuits seeking recovery of purely economic losses under novel theories of liability—to traditional products liability tort suits, such as the instant cases.

This brings us to a final point. The same Circuit Court that dismissed the Minor Plaintiffs' claims against opioids manufacturers and distributors in this case previously rejected a nearly

[23] Defendants argued that the unions had not suffered any losses. 969 F. Supp. 2d at 467.

identical remoteness argument brought by these same defendants against the political subdivisions, whose harms are plainly downstream—i.e., more remote or further removed from the allegedly tortious acts of the defendants—of the harms suffered by individuals such as the Minor Plaintiffs who have become addicted to and suffered injuries as a result of the opioid epidemic.[24] Harm to individuals at least in the form of addiction, is the starting point to the opioid epidemic and consequent interference with public rights. Put another way, the "costs of treating the . . . harms of opioid use and abuse" are very clearly downstream and more remote than the physical harms of opioid use and abuse suffered by addicted persons and by babies born to addicted mothers.[25] The Circuit Court's two deeply conflicting orders—finding that physical harm to babies is "too remote" while the harm to political subdivisions from having to address the harm to babies and others suffering from addiction are *not* too remote—simply cannot be reconciled in any rational way.

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[24] See In Re: Opioid Litigation Civil Action, No. 21-C-9000 (DTB), Findings of Fact and Conclusions of Law and Order Denying Defendants' Motion for Summary Judgement re "Factual Issue # 1," July 1, 2022, at 12–13 (TID: 67786183) (denying Distributors' Motion for Summary Judgment on causation in Subdivision cases); *see also In Re Opioid Litigation,* Civil Action No. 21-C-9000 (MFR), Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference (TID 67434309 (denying Manufacturers' Joint Motion for Summary Judgment on causation); *City of Huntington and Cabell County v. AmerisourceBergen Drug Corp., et al*., 17-cv- 01362, Dkt. 1291 (S.D.W. Va. Apr. 28, 2021) (Judge Faber denied summary judgment motions brought by Distributor Defendants in MDL Case Track Two which raised similar causation arguments).

The Circuit Court's previous summary judgment orders on causation were, of course, decided on a full record after ample discovery. The order on appeal was entered without the benefit of any discovery. These defendants' previous attempts at dismissal on proximate cause grounds at the pleading stage were all denied at the circuit court level and writs to the Supreme Court of Appeals were all refused. *State ex rel. Morrisey v. AmerisourceBergen Drug Corp.,* No. 12-C-1412014, 2014 WL 12814021 (W.Va. Boone Co. Cir. Ct. Dec. 12, 2014), *writ denied, State ex. rel. AmerisourceBergen Drug Corp v. Thompson,* No. 15-1026 (W.Va. January 5, 2016); *County Commission v. Purdue Pharma, L.P.,* No. 17-C-248, p. 11 (W.Va. Marshall Co. Cir. Ct. Dec. 28, 2018), *writ denied, State ex rel. Cardinal Health v. Hummel,* No. 19-0210 (W.Va. June 4, 2019). Indeed, the Marshall County orders were deemed law of the case by the Circuit Court after the cases were transferred to the Mass Litigation Panel, *Monongalia County, et al. v. Purdue Pharma L.P*., *et al*., Nos. 18-C-222-236 (W.Va. Mass. Lit. Panel Oct 31, 2019) (TID 64374611), and the Supreme Court once again refused to overturn that decision. *State ex rel. AmerisourceBergen Drug Corp. v. Moats,* No. 19-1051 (W. Va. January 30, 2020) (denying writ in *Monongalia County*).

[25] In fact, economic harm is the primary example of harm that is usually classified as too remote. *See Aikens v. Debow*, 208 W. Va. 486, 494-96, 541 S.E.2d 576, 584-86 (2000).

B. Questions of proximate cause and intervening cause are questions for the jury, and foreseeability is the touchstone.

It is well-settled that questions of proximate and intervening cause are ordinarily questions for the jury. Syl. pt. 17, *Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (internal quotation marks and citations omitted); *see also* syl. pt. 14, *Marcus v. Staubs*, 230 W. Va. 127, 736 S.E.2d 360 (2012). In the context of one or more possible intervening causes such as this—whether the list of intervening actors includes physicians who prescribed opioids and third parties who provided illegal opioids, JA 00119, or is limited to just the birth mother who ingested the opioids that poisoned their gestating babies, (JA 00120-21)—that fact question turns squarely on the foreseeability of the third parties' conduct from the perspective of the defendant. "A tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct." *See* Syl. pt. 13, *Moulder*, 183 W. Va. 77, 394 S.E.2d 61.[26] The Circuit Court erred in rejecting these black-letter principles.

C. The intervening acts of prescribing physicians, addicted mothers, and even criminal drug dealers were clearly foreseeable to the defendants.

The third-party conduct at issue was foreseeable to the defendants—at least sufficiently foreseeable to pass the pleading stage. According to the Minor Plaintiffs' allegations, the very *purpose* of the alleged conspiracy between the Defendants to flood high-volume prescribers with sales calls was to create an illegal secondary market of drugs that have been diverted from these high-volume and unscrupulous prescribers, for sale to persons who have become addicted to them.

[26] The Circuit Court did not distinguish between Minors whose birth mothers obtained pills legally through prescription and minors whose birth mothers obtained pills illegally. Note, however, that *Moulder* itself concerns a very similar circumstance—the illegal but entirely foreseeable transfer or distribution of an intoxicating substance from one person to another. The intervening act was the illegal distribution of an alcoholic beverage purchased (illegally) by one minor and then given—also illegally—to another minor.

JA 04919-24. Moreover, avoiding the diversion and "abuse" of controlled substances—and, ultimately, avoiding bodily harm to addicted users, abusers, and their gestating babies—is the *purpose* of the WVCSA. *See* W. Va. Code § 60A-2-201(a).

V. The Complaint Asserts a Claim for Civil Conspiracy.

Plaintiffs' Complaints set forth detailed allegations regarding the wide-ranging conspiracies among various defendants which, in addition to creating and fueling the opioid epidemic in West Virginia, resulted in direct harm to Minor Plaintiffs. Plaintiffs acknowledge that the claims for civil conspiracy are founded upon the underlying tortious conduct alleged and supporting the substantive counts. The Circuit Court dismissed the civil conspiracy count based on its rulings as to other claims. Accordingly, since the allegations are more than adequate to survive the pleading stage, the civil conspiracy count cannot be dismissed.

VI. The Circuit Court erred in concluding that Plaintiffs' claims against the BOP are barred by the public duty doctrine and qualified immunity.

The Circuit Court erred in concluding that Petitioners' claims against the WVBOP are barred by the public duty doctrine and qualified immunity. JA 00123-26. The Circuit Court's reasoning is not only flawed, but conflicts with an order on the same question issued by the Circuit Court of Marshall County. *See Brooke Cty. Comm'n, v. Purdue Pharma, L.P.*, Case. No. 17-C-248 (Marshall Cty. Cir. Ct. Dec. 28, 2018). The allegations in this case demonstrate that there exist material facts that the BOP acted willfully and maliciously in violation of clearly established laws such that qualified immunity is no bar to the claims and the public duty doctrine provides no shield to these Defendants for their acts.[27]

[27] The Joint Appendix includes the Response of Plaintiff to Defendant WVBOP's Motion to Dismiss. Plaintiff incorporates all of the arguments made therein.

The Circuit Court also failed to follow the reasoning from *Holsten v. Massey*, 200 W. Va. 775, 787 (1997), which recognizes a wanton or reckless conduct exception to the public duty doctrine for subdivisions, and that the same reasoning applies with equal force to liability cases against state agencies. *See Parkulo v. W. Virginia Bd. of Prob. & Parole*, 199 W. Va. 161, 176 (1996).

The BOP willfully and maliciously failed to investigate over 7,200 reports of suspicious orders between 2012 and 2017 alone. The disturbing quantity of ignored reports illustrates the scope of the BOP's misconduct. Multiple reports of suspicious orders pre-dated the mothers' ingestion and abuse of opioids during pregnancy, which should have triggered thousands of investigations by the BOP and would have prevented the injuries to the Plaintiffs and other similarly situated children. Instead, as noted by David Potters, the Executive Director and General Counsel of BOP during the relevant time period, the BOP ignored the 7,200 suspicious order reports and failed to "trigger any alarms or concerns", instead stuffing the same into filing cabinets, and then, after they grew too large, placing them in a vacant room in their offices. Such a position is untenable. The sheer number of the reports and the information contained in them required an investigation by BOP under its mandatory legal duties.[28] The BOP had the duty to investigate alleged violations of state statutes and rules and had the duty to protect the public, including these minor children, by doing so. *W. Va. Code* § 30-1-1a, W. Va. Code § 30-5-6. Instead, Defendant turned a blind eye to more than 7,200 reports and ignored its obligations to the public and, especially, to the Plaintiffs' infant children. These facts alone compel reversal, especially at this early notice-pleading stage.

[28] Plaintiff relies upon the statutes and rules effective as of the date of birth of the Plaintiff's infant cited below.

Plaintiff's allegations against the BOP are based upon the Defendant's failure to (1) review and investigate suspicious order reports and opioid orders; (2) identify and report abnormal or unusual practices of patients; and (3) ensure that each pharmacy registered maintained effective controls against diversion of controlled substances. Statutory requirements and state rules establish multiple requirements and duties of the BOP, which were not followed, and it is alleged that they acted maliciously.[29]

The statutes and rules clearly establish a duty to protect the public, including these minor Plaintiffs; to review suspicious order reports; and to take specific actions. These laws are *mandatory*, not discretionary; they require actions that exceed general regulatory oversight; and are not merely an optional list of suggestions. "The word 'shall' in the absences of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation." Syl. Pt. 2, *Terry v. Sencindiver,* 153 W. Va. 651, 171 S.E.2d 480 (1969). *See also*, *Rogers v. Hechler,* 348 S.E.2d 299, 176 W. Va. 713 (1986); *State v. Julie G.,* 201 W. Va. 764, 500 S. E. 2d 877 (1997).

A. The Public Duty Doctrine is Inapplicable.

The public duty doctrine does not insulate the BOP from Plaintiff's claims of willful, wanton, or reckless behavior. As with general negligence claims, there must be a duty on the part of a defendant and a breach of that duty, but there must also be a pleading of a malicious, reckless, and intentional disregard of that duty. Once that is established, the protections afforded by the public policy doctrine fall away. In the instant case, Plaintiffs have alleged precisely that: malicious, reckless, and intentional conduct. *See Count VI of Complaint*.

[29] *See*, Chapter 30 of the West Virginia, Code, the Uniform Controlled Substances Act; W. Va. Code § 30-1-1, W. Va. § 30-5-6, W. Va. Code § 60A-3-303; W. Va. Code St. R. § 15-2-5.1.1, W. Va. Code St. R. § 15-8-7.7.8.

The BOP was required to follow clearly established laws and these duties are reflected in Chapter 30 of the W. Va. Code, the Uniform Controlled Substances Act, and the applicable BOP Rules. The use of "shall" in these statutes and rules render the duties and obligations of Defendant *mandatory* and not discretionary. *See* Syl. Pt. 2, *Terry v. Sencindiver*, 153 W. Va. 651, 171 S.E.2d 480 (1969); *See also, Rogers v. Hechler*, 348 S.E.2d 299, 176 W. Va. 713 (1986); *State v. Julie G.*, 201 W. Va. 764, 500 S.E.2d 877 (1997). "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). Syl. Pt. 1, *Peyton v. City Council of Lewisburg*, 182 W. Va. 297, 387 S.E.2d 532 (1989); Syl. Pt. 3, *Hose v. Berkeley County Planning Commission*, 194 W. Va. 515, 460 S.E.2d 761 (1995); *Holsten v. Massey*, 200 W. Va. 775, 490 S.E.2d 864 (1997).

"Under the public duty doctrine, a government entity or officer cannot be held liable for breaching a general, non-discretionary duty owed to the public as a whole." *W. Va. State Police v. Hughes*, 238 W. Va. 406, 412, 796 S.E.2d 193, 199 (2017). Generally, the public duty doctrine is restricted to liability for nondiscretionary, ministerial, or operational functions. *Hughes*, 238 W. Va. at 412, 796 S.E.2d at 199. A political subdivision is generally immune from those sorts of claims unless a special relationship had been established between the political subdivision and the injured party. *Id.*

> To establish that a special relationship exists between a local governmental entity and an individual, which is the basis for a special duty of care owed to such individual, the following elements must be shown: (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking.

Syl. Pt. 2, *Wolfe v. City of Wheeling*, 182 W. Va. 253, 387 S.E.2d 307 (1989).

However, "the public duty doctrine must be applied in a manner consistent with provisions of the Governmental Tort Claims and Insurance Reform Act[.]" *Holsten,* 200 W. Va. at 781, 490 S.E.2d at 876. That act provides immunity to a state employee or agency *except* where "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." W. Va. Code § 29-12A-5. Accordingly, "the wanton or reckless conduct exception to an employee's immunity under…the Governmental Tort Claims and Insurance Reform Act is an exception to the public duty doctrine separate and distinct from the common-law special relationship exception to the public duty doctrine." *Id,* at 786, 490 S.E.2d at 875.

The holding—the "wanton or reckless conduct exception"—in *Holsten* was recently applied in litigation involving these same defendants by the Circuit Court of Marshall County, West Virginia, in *Brooke County Commission v. Purdue Pharma, LP., et al.,* Civil Action No. 17-C-248. That Court specifically held that "protections of the public duty doctrine are not limitless and its application to Plaintiffs' claims here is inappropriate." *Brooke County Commission* at p. 4. The Court there denied the BOP's motion to dismiss, finding that the allegations of willful, wanton, or reckless behavior created an exception that precludes the protections claimed by a state agency under the public duty doctrine. The same approach applies here—at this early stage of litigation, on a motion to dismiss, it is improper to conclude that Plaintiffs could make no case against BOP under this doctrine.

The elements required to establish a special relationship under a negligence claim are thus not even required when the plaintiff, as here, has alleged that a defendant has acted maliciously, in bad faith, or in a wanton or reckless manner. The exceptions to the public policy doctrine are recognized in both state and federal courts in West Virginia and should have been recognized here.

"Wanton or reckless behavior under West Virginia law means that the person 'has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences." *Bygum v. City of Montgomery* (S.D. W. Va. 2021) (memorandum opinion), citing *Holsten,* 490 S.E.2d at 878. This definition perfectly reflects Plaintiffs' allegations—and early evidence—against BOP in this case. Certainly, ignoring more than 7,200 reports of suspicious orders in a five-year time period constitutes "an act of an unreasonable character in disregard of a risk known to [BOP] or so obvious that [BOP] must be taken to have been aware of it, and so great as to make it highly probable that harm would follow."

Further, the Defendant's reliance on the opinion of Ohio District Judge Polster in MDL No. 2804, *In re: National Prescription Opioid Litigation* is flawed and improper, as that opinion is completely contrary to the established law in West Virginia. That opinion failed to set forth the proper legal standards for fraudulent joinder; completely ignored the holdings of *Holsten* that malicious conduct, bad faith, or wanton and reckless behavior bar immunity under the public policy doctrine; and instead, improperly relied upon a general negligence analysis. Unfortunately, the Court below appears to have followed this misguided legal analysis.

The duty of the BOP to review and properly investigate the suspicious orders that flooded its office was not a general regulatory duty of a state agency. Receiving, reviewing, and investigating suspicious orders and reports is several steps above administrative duties such as annual license reviews and registrations. It is an investigative function to prevent harm. The applicable rules require major affirmative actions on the part of BOP, ranging from review, to reporting to the Review Committee, to actually contacting and investigating suspicious registrants.

Those duties far exceed any general ministerial obligations. Plaintiff alleges that these failures were reckless, malicious, and intentional. Under the applicable facts and law, there was no basis to grant a motion to dismiss the BOP from this action under the public policy doctrine.[30]

B. The West Virginia BOP Is Not Entitled to Qualified Immunity.

The facts as alleged by the Plaintiffs set forth detailed violations of state laws and make specific allegations of failing to follow mandatory duties—not discretionary acts. Such allegations recognize the dismal failure of the BOP to act as it was mandated under statutes and rules. Plaintiffs' complaints assert malicious and intentional conduct on the part of WVBOP as well as statutory violations. The Respondent BOP violated multiple mandatory and non-discretionary state statutes and rules and knew or should have known that its actions and inactions were contributing to the opioid epidemic in this state. As such, dismissal based upon an assertion of qualified immunity, before any factual development had taken place, was improper.

> [W]henever a defendant raises the issue of qualified immunity in a motion to dismiss, the circuit court must look to our qualified immunity body of law and follow the steps this Court expressly has outlined to make the determination of whether qualified immunity applies under the specific circumstances of that particular case. Specifically, these steps include whether: (1) a state agency or employee is involved; (2) there is an insurance contract waiving the defense of qualified immunity; (3) the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1 et seq. would apply; (4) the matter involves discretionary judgments, decisions, and/or actions; (5) the acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive; and (6) the State employee was acting within his/her scope of employment.

W. Va. Regional Jail & Correctional Authority v. Grove, 852 S.E.2d at 784 (2020).

[30] Plaintiff incorporates prior arguments that alleged a special duty between the BOP and Plaintiff, and the exception to the Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 39-12A-5 that is triggered where a state agency acts with malicious purpose, in bad faith, or in a wanton or reckless manner. *Holstein,* 200 W. Va. at 781, 490 S.E.2d at 876; *Brook County Commission v. Purdue Pharma, LP, et al,* Civil Action No. 17-C-248.

As applied to the present matter, the first elements are easily ascertained. The BOP is a state agency and there is no insurance contract that waives the defense of qualified immunity for Defendant BOP. Thus, the analysis quickly turns to whether the actions complained of involved discretionary judgments, decisions, or actions. *W. Va. State Police v. J.H.*, 856 S.E.2d 696, 737 (2021). "This critical first step may be evident from the nature of the allegations themselves." *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.,* 234 W. Va. 492, 766 S.E.2d at 773. A finding of whether an agency was acting in a discretionary manner directly affects whether that party is entitled to qualified immunity that may bar a claim of mere negligence. *See* Syl. Pt. 6, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374; *W. Va. State Police v. J.H.*, 856 S.E.2d 679.

Certain governmental actions or functions may involve both discretionary and non-discretionary aspects. *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B*., 776 S.E.2d at 774. A broadly characterized governmental action may fall under the "umbrella" of a discretionary function, but may also include "particular laws, rights, statutes, or regulations which impose ministerial duties on the official charged with these functions." *Id*.

> Should such actions ultimately be deemed discretionary functions, a reviewing court must then "determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc*., 188 W. Va. 356, 424 S.E.2d 591 (1992).

W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B., 766 S.E.2d at 765.

> [W]here a public official or employee's conduct which properly gives rise to a cause of action is found to be within the scope of his authority or employment, neither the public official nor the State is entitled to immunity and the State may therefore be liable under the principles of respondeat superior. We find that this approach is consistent with the modern view that "the cost of compensating for many such losses is regarded as an ordinary expense of government to be borne indirectly by all who benefit from the services that government provides." [citation omitted]. Much like the negligent performance of ministerial duties for which the State

> enjoys no immunity, we believe that situations wherein State actors violate clearly established rights while acting within the scope of their authority and/or employment, are reasonably borne by the State.

W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B., 766 S.E.2d at 766.

The basic focus of any claim against a state agency is whether the agency failed to do what it was specifically required to do under a clearly established law or right. The pleadings must establish that the agency itself acted in a manner which violated a clearly established right, one of which a reasonable official would have known. *Id.* at 776, 777. As argued in Plaintiff's briefing below, all of the requirements of *Grove* have been met, especially the establishment that the duties of the BOP were not discretionary, but rather mandatory. However, even if the actions and inactions were found to fall within the discretionary functions of the agency, they are not immune where the discretionary actions violate "clearly established laws of which a reasonable official would have known" and that the agency would understand that what is was doing violated that right or that the unlawfulness of the action was apparent. *Id.*, 234 W. Va. 515; *Payne*, 231 W. Va. at 572, 746 S.E.2d at 563; *Anderson v. Creighton,* 483 U.S. 635, 640 (1987); *Hutchison v. City of Huntington*, 198 W. Va. 139, 149 n. 11, 479 S.E.2d 649, 659 n. 11; *W. Va. State Police v. J.H.*, 856 S.E.2d 679.

As alleged, a discretionary duty is not involved here—the BOP had multiple mandatory duties set forth both in statute and by rule. *See* W. Va. Code § 30-1-1; W. Va. Code § 30-5-6; W. Va. Code § 60A-3-303; W. Va. Code St. R. § 15-2-5.1.1; W. Va. Code St. R. § 15-8-7.7.8. Even if those duties were deemed discretionary, which they are not, the BOP still would not be entitled to qualified immunity because Plaintiffs have alleged that the BOP knowingly violated clearly established laws that required it to protect the interests of the public. The obligation and duty of the BOP to notice suspicious reports— all 7,200 of them; to realize something was wrong; to

investigate, report, communicate and *do something to effectively control* the diversion of controlled substances was clear. It defies logic that the BOP accidentally misplaced or accidentally failed to investigate the thousands of suspicious orders. At an absolute minimum, Plaintiffs are entitled to proceed with discovery to shed light on the circumstances surrounding these voluminous ignored warnings.

The facts in this case differ substantially from the facts in *Crouch v. Gillispie*, 809 S.E.2d 699 (W. Va. 2018), relied upon by the BOP below. In *Crouch,* the plaintiff's allegations that a single CPS employee failed to do her job were ultimately found to be insufficient—though *only after discovery and a dispositive motion analysis*. The present matter is not focused on vague allegations regarding a single employee. The Complaints reflect a failure of an entire state agency and its employees on a much greater scale. The failure of the BOP to follow state statutes and rules was not only an intentional and reckless disregard for state law, but also malicious. It is obvious that the BOP did not have the best interests of the public in mind, but rather was more concerned with the financial well-being of its registrant pharmacies. In considering the conflict between investigating suspicious reports and maintaining the substantial income received each year from registrations, the BOP chose the easier and more lucrative option.

Additionally, the Court below erred in finding insufficient support for Plaintiff's allegations of state law violations. The Complaints allege the same and to avoid any doubt the Minor Plaintiffs requested the opportunity to amend their pleadings. The BOP's failure to do its job was a direct causal relation to the ultimate injury. The failure to comply with state statutes and rules, regardless of whether those actions and inactions were discretionary or mandatory, were violations of clearly established state law.

The Court further erred in finding that the duties imposed upon the BOP by statute and by

rule constituted discretionary actions that fell within the protections of qualified and absolute immunity. Count VII of Plaintiff's Complaint is based upon violations of state statutes, and in particular, violation of a crucial agency rule, W. Va. C.S.R. § 15-8-7.7.8 (2018). This rule clearly establishes specific actions the BOP needed to take: review, identify, report, and communicate. These were not general discretionary administrative policy-making functions; they were *mandated* directives to take specific actions upon receipt and review of suspicious order reports. Combined with the obligations of *W. Va. Code* § 30-1-1a to investigate all violations of state law, the BOP had a duty to take extraordinary steps to prevent opioid diversions—and the Defendant failed in an extraordinary manner.

The BOP maliciously, intentionally, and recklessly failed to adhere to its legal duties, comprising a total dereliction of multiple West Virginia laws and contributing to the brutal harms perpetrated upon these minor children. As such, BOP is not entitled to any immunities or protections, and the Order granting the motion to dismiss Plaintiff's Complaint against BOP should be reversed and the cases remanded. Plaintiffs respectfully request that result.

VII. The Circuit Court erred in dismissing Plaintiffs' causes of action pertaining to fraud or intentional misrepresentation.

The Circuit Court also erred in dismissing Plaintiffs' causes of action pertaining to "fraud," JA 00121-22, to the extent that includes the Plaintiffs' claims for intentional misrepresentation. That conclusion was based solely on the Circuit Court's erroneous proximate cause analysis. *Id*. Therefore, it is erroneous for the same reasons that the Circuit Court's conclusion on proximate cause is erroneous. *See* Argument Part IV, *supra.*

VIII. The Complaint Asserts a Claim for Punitive Damages.

The actions of defendants go far beyond negligence or simply creating a nuisance causing separate harm to Minor Plaintiffs. Rather, the Defendants' conduct is reckless, willful, and

malicious, which gives rise to Plaintiffs' prayer and request for punitive damages. These claims for relief are set forth separate and apart from the individual liability claims but they are not intended as a stand-alone cause of action. Plaintiffs acknowledge their claim for punitive damages is dependent on the underlying tort claims. As the dismissal of these claims should be reversed, the prayer for punitive damages should be reinstated as well.

IX. The Circuit Court erred by failing to liberally construe Plaintiffs' complaints and failing to allow leave to amend.

As noted above, the West Virginia Supreme Court of Appeals adheres to its liberal pleading standard: "Complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 776, 461 S.E.2d 516, 522 (1995). The Supreme Court of Appeals reminded us that courts should liberally construe plaintiffs' complaints and take all their allegations as true when evaluating a defendant's motion to dismiss:

> A trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice. Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true. Therefore, the trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Burke v. Wetzel County Commission, 240 W. Va. 709, 717, 815 S.E.2d 520, 528 (2018).

Side by side serving the same purpose is Rule 15: "Rule 12(b)(6) is not to be read or applied in a vacuum; it is intermeshed with numerous other rules. . . . Rule 15(a) permits liberal amendments to a party's pleadings, while Rule 15(b) makes clear that pleadings may be amended not only as late as trial, but 'even after judgment' 'to cause them to conform to the

evidence[.]'" *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 520-21, 854 S.E.2d 870, 882-83 (2020).

"Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard[.]" *Id.* at 522 (quoting *Swierkiewicz v. Sorema N. A*., 534 U.S. 506, 512 (2002)). Thus, "a complaint is sufficient against a motion to dismiss under Rule 12(b)(6), if it appears from the complaint that the plaintiff may be entitled to *any form of relief*, even though the particular relief he has demanded and the theory on which he seems to rely are not appropriate." *Mountaineer Fire & Rescue Equip.,* 244 W. Va. at 522 (quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1219 (3rd Ed. 2020) (emphasis by Court)).

The Circuit Court's order does not take into consideration or address the numerous allegations of the complaints that allege common law duties, breaches on the part of the Defendants, and the resulting foreseeable injuries to the Minor Plaintiffs. Rather, the Court limits the analysis to the prescribing of opioids by physicians and the ingestion of opioids by the birth mothers.

These constructions of our rules are especially appropriate to apply where, as here, the claims are ones that had never been litigated or discovered anywhere. At the hearing on the Defendants' motions to dismiss, Plaintiffs' counsel opposing the motions pointed all this out and requested that the Circuit Court apply these liberal standards, deny the motions or grant leave to amend, and then permit discovery. JA 00247, 00329, 00331, 00350. Instead, the Court adopted Defendants' arguments and dismissed the cases.

Given the magnitude and significance of these actions, if there exists any doubt as to whether the complaints withstand scrutiny under Rule 12, Plaintiffs should, at a minimum, be granted leave to amend the pleadings. However, Plaintiffs reiterate that in its de novo review this Court should apply the settled standards for pleadings and reverse the Circuit Court's Order and remand these cases for discovery.

CONCLUSION

Neither the defendants nor the Circuit Court dispute either the opioid epidemic or the existence of NAS suffered by persons whose birth mothers were addicted to or ingested opioids during their pregnancies. Without question the Complaints suffice to state claims on behalf of all Plaintiffs against each of the defendants for these injuries. The Circuit Court's order commits myriad fundamental legal errors which would deny Minor Plaintiffs even the opportunity to engage in discovery and present their cases to a jury. West Virginia law recognizes and supports all of the claims pleaded in the Complaints and denying Plaintiffs the opportunity to proceed beyond the pleading stage not only contradicts existing precedent from this very Court, but creates an injustice more grave than the opioid epidemic itself.

A.D.A., as next friend of L.R.A., a minor child under the age of 18, A.N.C., as next friend of J.J.S., a minor child under the age of 19, and Trey Sparks,
By counsel,

/s/ R. Booth Goodwin II

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CERTIFICATE OF SERVICE

I, R. Booth Goodwin II, do hereby certify that the foregoing "**PETITIONERS' BRIEF**" was served through the Court's E-Filing System in accordance with Rule of Appellate Procedure 38A(q) on all counsel of record on this 17th day of November.

A.D.A., as next friend of L.R.A., a minor child under the age of 18,
A.N.C., as next friend of J.J.S., a minor child under the age of 19, and
Trey Sparks,

By counsel,

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