IN THE INTERMEDIATE COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

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 18, and TREY SPARKS, *Plaintiffs Below, Petitioners*, v. JOHNSON & JOHNSON ET AL., *Defendants Below, Respondents*.	Nos. 23-ICA-275, 23-ICA-276, 23-ICA-307

RESPONSE BRIEF FOR MCKINSEY DEFENDANTS

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INTRODUCTION

For the reasons set forth in the Mass Litigation Panel's decision, Plaintiffs cannot plead any claims against any of the defendants. The joint brief filed by the manufacturer and distributor defendants, which McKinsey incorporates by reference here, details these fundamental defects. McKinsey submits this separate brief only to emphasize that Plaintiffs' attempt to impose liability on McKinsey—a professional consultant that, at most, advised its clients how to increase sales of a legal, FDA-approved and DEA-regulated product—falls still farther short. Indeed, Plaintiffs' brief on appeal appears to effectively concede as much, making no effort to explain how McKinsey could have proximately caused Plaintiffs' injuries, or what public policy considerations could justify imposing a duty of care on a professional advisor. The judgment for McKinsey should be affirmed.

STATEMENT OF THE CASE

A. Factual Background

1. McKinsey

McKinsey is a global management consulting firm. It provides professional advice to numerous companies and entities. JA04593; JA04901. Two of the companies McKinsey advised manufactured opioids: defendant Johnson & Johnson, and non-party Purdue Pharma. JA04597; JA04900.

In 2002, McKinsey advised Johnson & Johnson about how to increase the sales of a skin patch product that provided an extended-release delivery system for fentanyl. JA04597; JA04905.

Beginning "as early as 2004," McKinsey provided sales advice to Purdue. JA04905; JA04598. According to the complaints, Purdue had begun "falsely market[ing]" the opioid OxyContin "beginning in 1996." JA04907, JA04599.

2. L.R.A. and J.J.S.

Both L.R.A. and J.J.S. were born addicted to opioids—L.R.A. in 2017, and J.J.S. in 2019. JA04589; JA04897.[1] They were each diagnosed with neonatal abstinence syndrome ("NAS"). JA04589; JA04897. Both of their birth mothers had, during their pregnancies, "obtained oxycodone pills both 'legally' through prescriptions written for [them]" by doctors, "and illegally, through the diversion of pills from suspicious prescriptions written for others, including friends as well as criminal drug dealers." JA04590, JA04898. According to the complaints, a Johnson & Johnson subsidiary, defendant Noramco, had likely manufactured the active ingredient in the opioids that L.R.A.'s and J.J.S.'s birth mothers consumed (along with, in the case of J.J.S., defendant Allergan). JA04590; JA04898.

B. Procedural Background

1. Plaintiffs' Complaints

Plaintiffs A.D.A. and A.N.C., acting on behalf of L.R.A. and J.S.S., filed the underlying complaints seeking to recover for the injuries caused by their in utero exposure to opioids. JA04587; JA04892. The complaints named as defendants a wide variety of entities that had manufactured, distributed, or regulated opioids in West Virginia. JA04587; JA04892-93.

They also named McKinsey. As both complaints expressly acknowledged, McKinsey "does not make anything or sell anything other than its consulting services and expertise." JA04593; JA04901. But the complaints nevertheless insisted that "McKinsey's status as a defendant in the instant lawsuit should not be attributed to a search for solvent defendants." JA04597; JA04904.

[1] Trey Sparks, who filed the third case that has been consolidated in this appeal, did not sue McKinsey. JA05296.

The complaints attempted to tie McKinsey to L.R.A.'s and J.S.S.'s injuries through the advice McKinsey had given its clients. None of the alleged recommended sales strategies targeted pregnant women. *See* JA04600-01; JA04908-09. Instead, the complaints principally alleged that McKinsey's advice to Purdue had led Purdue to pursue a marketing strategy that led to increased sales for other manufacturers, including Johnson & Johnson, whose subsidiary had allegedly manufactured the opioids L.R.A.'s and J.S.S.'s birth mothers consumed. JA04600; JA04908. In addition, while the complaints identified no specific advice that McKinsey provided Johnson & Johnson following its 2002 consultation on the fentanyl skin patch, the complaints speculated that McKinsey may have advised Johnson & Johnson during the relevant timeframe more than a decade later (advice that, if followed, theoretically might have increased Johnson & Johnson's sales of the relevant opioids). JA04600-01; JA04908-09.[2] On these bases, the complaints asserted claims of public nuisance, negligence, misrepresentation, and conspiracy against McKinsey. JA04605-15; JA04918-29.

2. The Mass Litigation Panel dismisses the complaints

McKinsey moved to dismiss both complaints. As most relevant here, McKinsey's motions explained that Plaintiffs had failed to plead the "special injury" necessary to have standing to bring a public nuisance claim, that McKinsey owed no duty to L.R.A. or J.S.S., and that McKinsey was not the proximate cause of their injuries. *See* JA04670-80; JA04967, JA04969-76. [3]

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[2] The complaints also asserted that McKinsey's consulting activities in the decades prior—including, in particular, its purported efforts in helping to convince the Clinton administration and Congress to normalize trade relations with China—had contributed to the economic conditions that had, in turn, since led many individuals to abuse opioids. JA04593-96; JA04901-05. Plaintiffs appear to have abandoned that contention, making no mention of it in their brief on appeal.

[3] McKinsey also identified a number of additional grounds for dismissal, including that Plaintiffs failed to establish personal jurisdiction over McKinsey in West Virginia, that McKinsey's conduct was not a cause-in-fact of L.R.A.'s and J.S.S.'s injuries, that McKinsey never

The Mass Litigation Panel granted McKinsey's motions to dismiss, along with those of all other defendants. As the Panel determined, Plaintiffs failed to plead: (1) their standing to bring a public nuisance action; (2) that any of the defendants owed any applicable duty of care; or (3) or that any of the defendants proximately caused the alleged injuries. JA00107-28.

SUMMARY OF ARGUMENT

The Mass Litigation Panel correctly dismissed Plaintiffs' claims against all defendants. Dismissal of the claims against McKinsey was additionally warranted for two reasons.

I. Plaintiffs cannot plead that McKinsey was the proximate cause of L.R.A.'s or J.J.S.'s injuries. It was not reasonably foreseeable that, in providing sales advice to its clients, McKinsey allegedly set in motion the particular chain of events that led to L.R.A. and J.J.S. suffering from NAS. And even if those injuries were foreseeable, McKinsey's conduct was still too remote—separated by far too many different links in the causal chain—to constitute a proximate cause. That failure dooms all Plaintiffs' claims.

II. Plaintiffs also cannot plead that McKinsey owed a duty of care to either L.R.A. or J.J.S., as is independently required to state a negligence claim. Again, because L.R.A.'s and J.J.S.'s injuries were not a foreseeable result of McKinsey advising its clients, McKinsey cannot have owed a duty to prevent that harm. And policy considerations preclude imposing a duty on McKinsey in any event: it would substantially burden every professional advisory business—and raise significant constitutional concerns—to require advisors to prevent harm to remote downstream parties affected by their clients' products.

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made any representations to Plaintiffs' mothers or their doctors, that Plaintiffs failed to plead that McKinsey agreed or intentionally participated in any civil conspiracy, and that the First Amendment barred Plaintiffs' claims. JA04644-56, JA4677, JA4683-86; JA04957-66, JA04973, JA04979-82. The Panel below did not reach any of these arguments, and McKinsey will reassert them on remand if this Court reverses the judgment. JA00127.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

McKinsey respectfully requests that the issues raised on this appeal be addressed in oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. McKinsey further requests that the Court allow 30 minutes per side for oral argument.

STANDARD OF REVIEW

This Court's review of the Panel's order is de novo. Syl. Pt. 1, *Jefferson Cnty. Found., Inc. v. W. Va. Econ. Dev. Auth.*, 247 W. Va. 25, 875 S.E.2d 162 (2022) (citing Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995)). This Court is "not confined to affirming the judgment strictly on the grounds given by the lower court," but may "uphold the judgment if there is another valid legal ground to sustain it." *Yourtee v. Hubbard*, 196 W. Va. 683, 690 n.9, 474 S.E.2d 613, 620 n.9 (1996).

ARGUMENT

As set forth in the Joint Defendants' brief, the Mass Litigation Panel correctly dismissed Plaintiffs' claims against all defendants. McKinsey incorporates the arguments made in the Joint Defendants' brief by reference here. It writes separately only to emphasize that the correct result is particularly clear with respect to McKinsey. Given McKinsey's still-more attenuated relationship to the chain of events that led to L.R.A.'s and J.J.S.'s injuries, Plaintiffs cannot plead that McKinsey (1) proximately caused the relevant harm—an element of all their claims—or (2) owed any duty to L.R.A. or J.J.S.—an independent requirement of their negligence claims.

I. MCKINSEY DID NOT PROXIMATELY CAUSE L.R.A.'S OR J.J.S.'S INJURIES

Plaintiffs' inability to plead that McKinsey proximately caused their injury defeats all their claims. As the Joint Defendants' brief explains, Plaintiffs' fundamental problem is that any link between the defendants' alleged actions and the harm at issue here is too attenuated to qualify as a legal cause. Joint Defendants' Br. 8-14. That defect is still more glaring for their claims against

McKinsey, which is at least one substantial additional step even further removed from this already-attenuated causal chain.

Indeed, Plaintiffs' brief on appeal appears to all but concede that Plaintiffs failed to plead that McKinsey was a proximate cause of L.R.A.'s or J.J.S.'s NAS. Plaintiffs assert that, notwithstanding the many subsequent actors and actions that were necessary causal predicates of the underlying injuries, the "*manufacturers and sellers*" of opioids may still be deemed proximate causes of those injuries. Pet Br. 48 (emphasis added). And Plaintiffs attempt to distinguish the various decisions on which the Panel below relied based on rationales that, even if valid, would apply only to "product manufacturers and sellers"—not third-party consultants like McKinsey. Pet. Br. 48-50. Nowhere do Plaintiffs explain how a professional advisor like McKinsey could have proximately caused their injuries.

That is because they cannot. *First*, L.R.A.'s and J.J.S.'s NAS was not a reasonably foreseeable result of any of McKinsey's alleged actions. "One requisite of proximate cause is an act or an omission which a person of ordinary prudence could reasonably foresee might naturally or probably produce an injury." Syl. Pt. 4, in part, *Boyce v. Monongahela Power Co.*, ___ W. Va. ___, 894 S.E.2d 913, 2023 WL 7384348 (2023) (citing Syl. Pt. 4, *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W. Va. 639, 77 S.E.2d 180 (1953)). It is not enough that the defendant might foresee that its conduct could cause some sort of general harm; the defendant must be able to reasonably foresee the specific actions and injuries that led to the plaintiff's suit. *Id.* at *8 n. 10.

Particularly given the numerous independent actors standing between McKinsey's consulting work and Plaintiffs' harm, Plaintiffs' allegations fall far short of meeting that standard. It was not "reasonably foreseeable" (*Boyce*, 2023 WL 7384348 at *8) that, by providing advice to Johnson & Johnson (either in 2002 alone, or accepting Plaintiffs' speculation, in subsequent years)

and Purdue about their marketing practices (JA04905; JA04597-98), McKinsey would set in motion the particular chain of events that led to L.R.A.'s and J.J.S.'s birth mothers ingesting opioids while they were pregnant (assuming, for the sake of argument, that there is any causal link between McKinsey's advice and Plaintiffs' injuries at all). There is no allegation that any of McKinsey's advice to its clients involved encouraging the prescription of opioids to pregnant women. JA04600-01; JA04908-09; *see In re: McKinsey & Co., Inc.*, Case No. 21-md-02996-CRB, 2023 WL 4670291, at *5 (N.D. Cal. July 20, 2023) (emphasizing the absence of such allegations in rejecting parallel claims). And standing between McKinsey's advice and any ultimate harm were numerous third parties that were free to act in independent—and often unpredictable—ways. These include: (1) McKinsey's clients, who could accept or reject McKinsey's advice as they saw fit; (2) regulators like the FDA, who determined whether and how these products would be sold; (3) physicians, who determined whether and when to prescribe these drugs; (4) distributors and pharmacies, who supplied the drugs; (5) criminal actors, who also supplied some of the opioids that L.R.A.'s and J.J.S.'s birth mothers ingested; and (6) L.R.A.'s and J.J.S.'s birth mothers themselves.[4]

Second, even assuming for the sake of argument that L.R.A.'s and J.J.S.'s particular injuries were a "foreseeable" result of McKinsey's advice to its clients, McKinsey's conduct was far too remote from those injuries to constitute their proximate cause. "The proximate cause of an injury is the last negligent act contributing to the injury and without which the injury would not

[4] To the extent that Plaintiffs continue to press the theory, the same is also true of Plaintiffs' allegations that McKinsey's consulting efforts in the 1990s related to labor issues and U.S. trade with China somehow caused Plaintiffs' injuries. JA04593-96; JA04901-05. McKinsey's advice was separated from Plaintiffs' harm by numerous independent actors in addition to all of the actors described above, including (to name a few) the Clinton Administration, Congress, the Chinese government, and various other forces that shaped world markets over the subsequent decades.

have resulted." Syl. Pt. 5, *Boyce v. Monongahela Power Co.*, ___ W. Va. ___, 894 S.E.2d 913, 2023 WL 7384348 (2023) (citing Syl. Pt. 5, *Matthew v. Cumberland & Allegheny Gas Co.*, 138 W. Va. 639, 77 S.E.2d 180 (1953)). Applying that principal, the Supreme Court of Appeals has held that those responsible for negligently designing an airport too close to a highway could not be the proximate cause of a plane crash killing a motorist on that highway—presumably a foreseeable result of that negligent design—because the plane's pilot had committed numerous acts of negligence that more proximately led to the crash. *Webb v. Sessler*, 135 W. Va. 341, 348, 63 S.E.2d 65, 68 (1950); *see also, e.g.*, *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 202 (2017) (even where harm is foreseeable, "proximate cause 'generally bars suits for alleged harm that is "too remote" from the defendant's unlawful conduct'").

Likewise here, McKinsey's advice to Johnson & Johnson and Purdue was by no means the "*last* negligent act contributing" to Plaintiffs' injury. *Webb*, 135 W. Va. at 347 (emphasis added). Rather, numerous other intervening acts—including those of McKinsey's clients, regulators, prescribing physicians, distributors and pharmacies, criminal actors, and the birth mothers—separated McKinsey's actions from Plaintiffs' harm. McKinsey's alleged conduct is thus "remote as distinguished from proximate, and, therefore, not actionable." *Id.* at 348.

Courts applying West Virginia law have consistently rejected any claim of proximate causation when confronted with similar opioid-related theories. *See, e.g.*, *City of Charleston, W. Va. v. Joint Comm'n*, 473 F.Supp.3d 596, 631 (S.D. W. Va. 2020) (holding organization that set healthcare standards allegedly leading to opioid abuse could not be a proximate cause because "no injury would occur unless the physician proceeded to unnecessarily prescribe opioid treatments or if patients obtained the drugs through some other illegal means"); *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F.Supp.3d 408, 482 (S.D. W. Va. 2022) (holding that

wholesale distributors of opioids could not be a proximate cause because "such oversupply and diversion were made possible, beyond the supply of opioids by defendants, by overprescribing by doctors, dispensing by pharmacists of the excessive prescriptions, and diversion of the drugs to illegal usage—all effective intervening causes beyond the control of defendants"). This Court should likewise reject Plaintiffs' attempt to impose liability on McKinsey based on a still-more attenuated causal chain.

II. MCKINSEY DID NOT OWE L.R.A. OR J.J.S. ANY DUTY

Independently, Plaintiffs also cannot plead that McKinsey owed either L.R.A. or J.J.S. a duty of care. That failure dooms their negligence claims. As the Joint Defendants' brief explains, while courts carefully limit the scope of duties of care to ensure there are "'finite boundaries to liability,'" Plaintiffs' negligence claims are premised on purported duties that would permit the imposition of essentially "limitless liability." Joint Defendants' Br. 28 (quoting *McNair v. Johnson & Johnson*, 241 W. Va. 26, 39, 818 S.E.2d 852, 865 (2018)). That is particularly true of any negligence claim against McKinsey, which simply provided consulting advice to manufacturers like Johnson & Johnson and Purdue.

Once again, Plaintiffs appear to concede as much on appeal, offering no argument that McKinsey owed any duty to L.R.A. or J.J.S. As Plaintiffs seemingly acknowledge, to plead a duty of care, plaintiffs must establish (among other things) both that the defendant's conduct created a foreseeable, unreasonable risk *and* that policy considerations favor imposing a duty. Pet. Br. 35; *see, e.g.*, *Stevens v. MTR Gaming Grp., Inc.*, 237 W. Va. 531, 535, 788 S.E.2d 59, 63 (2016) (in addition to foreseeable harm, "the existence of duty also involves policy considerations underlying the core issue of the scope of the legal system's protection") (quotation marks omitted); *Aikens v. Debow*, 208 W. Va. 486, 491, 541 S.E.2d 576, 581 (2000) (same). But in contending that "policy

considerations" warrant imposing a duty of care here, Plaintiffs rely entirely on rationales applicable to "registrants" in the "closed system" established by the federal and state Controlled Substances Acts to govern the "manufacturing, distribution, and dispensing of controlled substances." Pet. Br. 36-39. McKinsey is not a registrant in that closed system, and it does not manufacture, distribute, or dispense any drugs. Plaintiffs do not even attempt to identify a reason for this Court to hold that McKinsey nevertheless owed a duty of care to those who might be harmed by the use of such drugs.

Plaintiffs would have been unable to establish that McKinsey owes a duty even had they made the attempt. To start, Plaintiffs cannot plead that McKinsey "realize[d] or should [have] realize[d]" that its conduct "created an unreasonable risk of harm" to L.R.A. and J.J.S. *Stevens*, 237 W.Va. at 535 (quotation marks omitted); *see Speedway LLC v. Jarrett*, 248 W. Va. 448, 457, 889 S.E.2d 21, 30 (2023) (reversing jury verdict where evidence failed to show that defendant's affirmative conduct created a foreseeable, unreasonable risk). For all the reasons explained above, Plaintiffs' injuries were not a foreseeable result of McKinsey's sales advice to Johnson & Johnson and Purdue (or, to the extent relevant, McKinsey's consulting activities and efforts relating to trade with China in the 1990s). *Supra* pp. 6-7.

And even setting foreseeability aside, policy considerations would clearly militate against imposing a duty on a consultant like McKinsey. In approaching this inquiry, courts consider factors including "the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant." *Stevens*, 237 W. Va. at 535 (quotation marks omitted). Those factors weigh heavily against imposing a duty on McKinsey here. McKinsey's actions in offering advice to its clients are unlikely, on their own, to have a significant effect on the likelihood that their clients' products will ultimately cause harm. *See In re: McKinsey*

& Co., Inc., 2023 WL 4670291, at *5 ("McKinsey's advisory role did not necessarily create the undue risk that led to the NAS Plaintiffs' harms."). But the costs associated with imposing a duty on McKinsey to somehow prevent such harm are significant. Indeed, if Plaintiffs' theory were accepted—that is, if a professional advisor such as McKinsey owes a duty to *any* downstream party, no matter how remote, who is allegedly harmed by the conduct of the advisor's client related to the subject matter of the advisor's work—then the potential scope of liability would be breathtakingly broad, threatening every professional advisory business. Not only would such expansive liability substantially chill publicly beneficial business activities, it would also likely violate the First Amendment by punishing McKinsey's professional speech about a lawful product to its clients. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371-75 (2018) (rejecting argument that professional speech is subject to diminished First Amendment protection). That potential affront to governing law is reason enough to decline to impose any duty on McKinsey here. *Cf. Stevens*, 237 W. Va. at 535 (refusing to impose duty on casino to protect against compulsive gambling, which would upset Legislature's statutory scheme to promote casino gambling).

Courts addressing the question have consistently declined to impose a duty of care on third-party advisors or other similarly situated entities. *See, e.g.*, *In re: McKinsey & Co*, 2023 WL 4670291, at *6 (applying the law of West Virginia and other states in rejecting claims brought by similar NAS plaintiffs and holding there was no "duty between the consultant and the consumer"); *City of Charleston*, 473 F.Supp.3d at 621 (applying West Virginia law and rejecting claim that independent standards organizations owed a duty to those allegedly harmed by opioid abuse); *Abdulaziz v. McKinsey & Co.*, No. 21-2921, 2022 WL 2444925, at *6 (2d Cir. July 5, 2022)

(rejecting claim that McKinsey had a duty of care to individual allegedly harmed by McKinsey client). This Court should follow suit and reject Plaintiffs' expansive theory of liability.

CONCLUSION

For the foregoing reasons, along with the reasons set forth in the Joint Defendants' brief, the judgment should be affirmed.

Dated: January 19, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Keith J. George, hereby certify that on this 19th day of January, 2024, a true and correct copy of the above and foregoing **RESPONSE BRIEF FOR MCKINSEY DEFENDANTS** was served upon all parties via the CM/ECF Court system.

/s/ Keith J. George
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