**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**



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.

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

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# PETITIONERS' REPLY BRIEF

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**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*
R. Booth Goodwin II. Esq. (WVSB #7165)
Benjamin B. Ware, Esq. (WVSB #10008)
Stephanie H. Daly, Esq. (WVSB #8835)
GOODWIN & GOODWIN, LLP
300 Summers Street, Suite 1500

L. Danté diTrapano, Esq. (WVSB #6778)
Alex McLaughlin, Esq. (WVSB #9696)
CALWELL LUCE DITRAPANO
500 Randolph Street
Charleston, WV 25302

T: (304) 343-4323
F: (304) 344-3684
dditrapano@cldlaw.com
amclaughline@cldlaw.com

Charleston, WV 25301
T: (304) 346-7000
F: (304) 344-9692
rbg@goodwingoodwin.com
bbw@goodwingoodwin.com
shd@goodwingoodwin.com

W. Jesse Forbes, Esq. (WVSB #9958)
FORBES LAW OFFICES, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301
T: (304) 343-4050
F: (304) 343-7450
wjforbes@forbeslawwv.com

P. Rodney Jackson, Esq. (WVSB #1861)
LAW OFFICES OF P. RODNEY JACKSON
Fifth Third Center
700 Virginia Street, East
Charleston, WV 25301
T: (843) 870-6879
prodjackson27@icould.com

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## 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*., 672 S.E.2d 255, 259 (W.Va. 2008).

### I. Defendants' Remoteness and Sole Proximate Cause Arguments Are Wrong.

#### A. No Court Has Ever Held that Claims Against Product Sellers by Individuals Injured Directly by the Product Are "Too Remote" to Support Proximate Cause.

Plaintiffs' opening brief explains that although the Circuit Court had referred to its holding on proximate cause as falling under the rubric of "remoteness"—which in this context simply means lacking the "proximate" requirement of "proximate cause"—what the Circuit Court actually held was that the intervening acts of multiple other actors broke the chain of causation. Pet. Br. at 46–47. While the Circuit Court used the phrase "too remote" in its holding, it nonetheless based that remoteness finding specifically on the "independent actions of multiple actors over whom Defendants had no control"—a phrase that precisely describes a potential intervening cause or causes. *Id.* By analyzing potential intervening causes under the wrong framework—remoteness rather than intervening cause—the Circuit Court erroneously omitted the foreseeability analysis required under the intervening cause framework. *Id*. at 47. Questions of intervening cause and foreseeability are almost always questions for the jury. *See id.* at 52. The Circuit Court erred in using the wrong analysis.

The Circuit Court's holding under the incorrect remoteness framework, however, is also wrong. *Id*. at 47–51.[1] As Plaintiffs explained, "[t]he Minor Plaintiffs' allegations include standard products liability claims against product manufacturers and sellers," and the causal chain was no

[1] Defendants rely primarily on the same cases. Def. Br. at 8–14. They add little, if anything, of significance to the erroneous analysis included in the Circuit Court's order. Plaintiffs have already addressed those cases and arguments fully and completely in our opening brief. *See* Pet. Br. at 48–51.

more complex or "remote" than in any other products liability action, at least any other products liability action involving a gestating baby. *Id.* at 48. "A product, sold by the defendants . . . 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." *Id*. Plaintiffs also included a detailed discussion of all six cases cited in support of the Circuit Court's remoteness holding, showing that not one of them involved a plaintiff who was physically and directly injured by a product manufactured or sold by a defendant. *Id*. at 48–51.

Defendants ignore these flaws in their argument and instead double down on remoteness, insisting that remoteness, not intervening cause, defeats causation as a matter of law:

> [T]he MLP's holding on remoteness was not based on the conclusion that these other actors were unforeseeable intervening causes that broke the chain of causation, but instead was based on the MLP's distinct finding that these *multiple steps in the causal chain* rendered Defendants' conduct too remote and attenuated from the alleged injuries to establish proximate causation. JA 00117–120.

Def. Br. at 12 (emphasis added).

Defendants list what they describe in the passage above as the "multiple steps in the causal chain" elsewhere in their brief, stating: (1) "medicines were prescribed by doctors," (2) "those medicines were dispensed by pharmacies," (3) "those medicines were used either medically pursuant to a prescription or were stolen or sold illegally to third parties," and (4) "the birth mothers chose to ingest those opioids during pregnancy." *Id*. at 8. Defendants' description of the allegedly "attenuated" chain of causation effectively reads as follows: "[M]edicines were prescribed by doctors . . . dispensed by pharmacies . . . used . . . pursuant to a prescription [and] the birth mothers chose to ingest those opioids during pregnancy." *Id*. at 8. Far from being too attenuated or too

remote to find causation as a matter of law, these steps simply describe the ordinary chain of distribution of every prescription drug sold in the United States, with the trivial and obviously immaterial caveat that the birth mother rather than the injured party ingested the drug that injured her gestating baby, the injured party.

Unless this Court intends to break with decades of precedent from West Virginia and every other jurisdiction in the United States, Defendants' remoteness argument is a non-starter. No court has *ever* held that a tort case involving a manufacturer or distributor of prescription drugs fails as a matter of law for lack of proximate cause or "remoteness" because a doctor prescribed the drug,[2] a pharmacy dispensed it, and an individual (whether pregnant or not) ingested it.

Under the intervening cause framework, Defendants could at least hope to persuade a jury that the birth mothers who obtained opioids from the (illegal) alternative path described by Defendants—the one where "medicines were prescribed by doctors . . . dispensed by pharmacies . . . [and] sold illegally to third parties," Def. Br. at 8—broke the chain of causation. By choosing to double down on remoteness, however, Defendants have essentially abandoned this argument for purposes of the instant Appeal. *Id.* at 12 ("[T]he MLP's holding on remoteness was not based on the conclusion that these other actors were unforeseeable intervening causes that broke the chain of causation[.]"). In any event, Defendants' abandoned argument clearly fails at this stage because the issue of whether an intervening actor's conduct, even illegal conduct, breaks the chain of causation is a question of fact that turns on the foreseeability of the intervening actor's conduct from the perspective of the original tortfeasor. *See* Syl. pt. 13, *Anderson v. Moulder*, 394 S.E.2d

[2] There is, of course, a fact-based affirmative defense available to manufacturers and distributors known as the "learned intermediary defense," and non-manufacturer sellers can potentially avail themselves of the fact-based "innocent seller" defense, but neither of these were raised below or were ever at issue in any of the motions to dismiss.

61 (W.Va. 1990) ("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.").[3]

The Restatement and other jurisdictions embrace the same rule with respect to a third person's illegal conduct. *Landeros v. Flood*, 551 P.2d 389, 395 (Cal. 1976) ("[A]n intervening act does not amount to a 'superseding cause' relieving the . . . defendant of liability if it was reasonably foreseeable."); *id*. (quoting Rest. 2d Torts § 449) ("If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby."). In a remarkably analogous case involving a public nuisance claim brought by individuals with gunshot wounds from an illegally-acquired handgun, the Ninth Circuit held that even the classic criminal act of shooting an innocent person does not cut off the tort liability of manufacturers who "foster the illegal secondary gun market," because the increased risk of an innocent person getting shot by a criminal is exactly why gun regulations and restrictions exist. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1209 (9th Cir. 2003).

As Plaintiffs noted in their opening brief, "[n]o 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 too remote for proximate causation. Pet. Br. at 48. Defendants do not cite any case to refute this statement. Though they contend that the Circuit Court's holding on remoteness is supported by "decades of decisions" by the West Virginia Supreme Court of Appeals, they do not

[3] *Anderson* is even more directly on point than the syllabus point alone reveals. The case raised a question of causation against a product seller for allegedly selling a keg of beer to a minor (in violation of the law) who then illegally distributed that beer to friends (also minors), including one who was intoxicated while driving a car in a fatal crash. Thus, the intervening actor's conduct in that case was also illegal and even involved the informal and illegal (but foreseeable) transfer of an intoxicating substance.

cite a single decision from our Supreme Court—or any other court—in which the court applied "remoteness" to a products liability claim against the seller of the product brought by a person injured directly by a product.

Instead, Defendants attack a strawman, falsely claiming that "Plaintiffs assert that the remoteness standard for proximate causation has been applied only in so-called 'non-traditional' tort cases involving economic harms rather than 'traditional' cases involving alleged personal injuries," Def. Br. at 13 (citing Pet. Br. at 50), and then attempting to refute *that* statement. Plaintiffs never said that. Plaintiffs nowhere claim that the "remoteness" doctrine has never been applied to a "traditional" tort case, such as negligence, "involving alleged personal injuries."

To the contrary, Plaintiffs said that no "traditional *products liability* action" had ever been found to fail under the "direct relation" test relied upon in the three federal court cases cited by Defendants, Pet. Br. at 50 (emphasis added);[4] that "[n]one of the three [West Virginia Supreme Court] cases [cited by Defendants] involved a suit *against product manufacturers or sellers for physical harm caused directly by the product*," *id*. at 49 (emphasis added); and that no case between "a *product seller and an end user or bystander injured directly and physically by the seller's product*" had failed as a matter of law for remoteness or lack of proximate cause. *Id*. at 48 (emphasis added). In these and other statements, Plaintiffs referred directly to the relationship between the Defendants and Plaintiffs in the instant cases—*product sellers*, on the one hand, and

[4] *See* Pet. Br. at 50 ("So far as Plaintiffs can discern, the 'direct relation' rule announced in *Holmes* [v. *Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992)] and relied upon in the holdings in *City of Charleston* [*v. Joint Comm'n*, 473 F. Supp. 3d 596, 631 (S.D.W. Va. 2020)], *Employers 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)], and *City of Huntington* [*v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 419–21 (S.D. W. Va. 2022)] 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."); *see also* id. at 49–50 ("All three of these cases [*City of Charleston*, *City of Huntington*, and *Employer Teamsters*] 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.").

*individuals directly injured by product*, on the other—as the distinguishing factor that eliminates any possibility of causation failing due to "remoteness." Defendants either completely missed these points or else they recognize the impossibility of the argument they are attempting to defend, and therefore seek to misdirect the Court away from their flawed position.

### B. Defendants' "Sole Proximate Cause" Argument Is a Thinly Veiled Intervening Cause Argument.

A similar analysis applies to Defendants' argument in support of the MLP's holding that the birth mothers "were the sole proximate cause of the Minors' alleged injuries." Def. Br. at 14 (citing JA 00008). The only difference is that Defendants attempt to disguise this argument—which, like the "remoteness" argument, only makes any sense under the framework of intervening cause—under the rubric of a mysterious "sole proximate cause" doctrine that simply does not exist. They write: "The birth mothers' actions 'constitute[] a new effective cause and operate[] independently of any other act, making [them] and [them] only, the proximate cause of the injury.'" Def. Br. at 15 (quoting Syl. pt. 12, *Marcus v. Staubs*, 736 S.E.2d 360, 372 (W.Va. 2012)). That syllabus point expressly deals with the doctrine of *intervening cause*—not the imaginary doctrine of "sole proximate cause." Defendants simply omit that part of the syllabus point. *See,* Syl. Pt. 2*, Marcus,* 736 S.E.2d 360 ("An *intervening cause*, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new cause. . .") (emphasis added).

Despite their best efforts to keep up this subterfuge for close to ten pages, *see* Def. Br. at 7–15, Defendants eventually drop the mask and make the argument they want to make: That the allegedly criminal conduct of *some* of the birth mothers of the Plaintiffs at issue breaks the chain of causation. Def. Br. at 15–16. According to Defendants, what makes Plaintiffs' theories "a far cry from traditional theories of causation . . . in conventional products liability cases" is that the

birth mothers consumed opioids "through criminal conduct." *Id*. One can safely ignore Defendants' rants in the same passage about how it was a "third party" (i.e., the "birth mothers") and not the babies who used the product—that wrinkle exists in literally every product liability suit alleging harm from a product to a gestating baby and has never been regarded as material—and about how the birth mothers' conduct in ingesting pills was "willful" even in cases where it was not criminal—almost all product liability suits involve the "willful" (i.e., intentional) use of a product by someone, whether the injured party or a third party, and that is plainly no obstacle to such claims. All that remains is the naked claim that because some of the birth mothers' conduct was criminal, the birth mothers are an intervening cause.

For reasons already discussed, that simply is not the law. If that criminal conduct was foreseeable—as Plaintiffs specifically allege[5]—then Defendants are not relieved of liability because of it. *See* Rest. 2d Torts § 449 (explaining that foreseeable criminal conduct does not break chain of causation); *Anderson v. Moulder*, 394 S.E.2d 61 (W.Va. 1990) (holding that foreseeable illegal conduct of minor in distributing intoxicating beer to other minors and foreseeable illegal conduct of other minor in consuming beer and driving did not break causal chain against beer seller); *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1209 (9th Cir. 2003) (holding that foreseeable criminal act of shooting another with an illegally-obtained handgun does not break chain of causation against manufacturer for fostering growth of illegal secondary market for handguns).

[5] *See* Pet. Br. at 52–53.

### C. McKinsey's Causation Argument Fails Under Plaintiffs' Civil Conspiracy and Aiding and Abetting Claims.

McKinsey filed a separate Response Brief to advance arguments specific to McKinsey regarding proximate cause and duty that the Circuit Court itself did not consider or decide. *See* McKinsey Br. at 5–12. While McKinsey attempts to couch these arguments as mere *a fortiori* versions of the Circuit Court's remoteness and absence of duty holdings, that framing fundamentally misapprehends the nature of Plaintiffs' claims against McKinsey. While Plaintiffs admittedly asserted negligence claims directly against McKinsey, Plaintiffs' other and stronger claims against McKinsey are concerted action claims—civil conspiracy and aiding and abetting. JA 04613–15, 04927–29.

Plaintiffs adequately pled the elements of a civil conspiracy and aiding and abetting against McKinsey—for conspiring and aiding and abetting the tortious conduct of opioid manufacturers, including Johnson & Johnson, Noramco, and Purdue, JA 04613–15, 04927–29—but caution that this Court need not reach or review that issue because the Circuit Court did not decide it. *See* JA 00126–27 (noting that Circuit Court did not decide whether "Plaintiffs' civil conspiracy claims fail to plead the elements of civil conspiracy, including an agreement to commit tortious acts for a common purpose"); McKinsey Br. at 3–4 n. 3 (conceding that the Circuit Court did not reach the argument that "Plaintiffs failed to plead that McKinsey agreed or intentionally participated in any civil conspiracy"). Instead, the Circuit Court decided that the torts underlying the civil conspiracies—the tort claims against the manufacturers and distributors—failed with respect to public nuisance for lack of "special injury" standing, JA 00107–10; with respect to negligence for lack a duty owed even by the sellers of opioids (manufacturers and distributors), JA 00113–17; and for lack of proximate cause, JA 00117–121. Therefore, the Circuit Court reasoned, there can

be no concerted action or conspiracy liability for anyone because no one has any tort liability in the first instance. JA 00122. These erroneous decisions are the main subjects of the instant Appeal.

**1. The Nature of Conspiracy and Concerted Action Liability.**

Claims for concerted action—conspiracy and aiding and abetting—do not require an independent basis or finding of duty or proximate causation against a co-conspirator such as McKinsey. So long as the rules and requirements for civil conspiracy or aiding and abetting liability are satisfied with respect to McKinsey's connection to the underlying tortious conduct of McKinsey's alleged conspirators (opioid manufacturers), then McKinsey, as a co-conspirator, is also liable for the underlying tort committed by those manufacturers. *See Dunn v. Rockwell*, 689 S.E.2d 255, 269 (W.Va. 2009) ("[C]ivil conspiracy . . . is . . . a legal doctrine under which liability for a tort may be imposed on people who did not actually commit a tort themselves but who shared a common plan for its commission with the actual perpetrators"); Rest. 2d Torts § 876 ("For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.").

In other words, under Plaintiffs' concerted action theories of McKinsey's liability for the torts committed by Johnson & Johnson, Noramco, and Purdue, the elements of proximate cause and duty do not apply separately to McKinsey's conduct. JA 04613–15, 04927–29. Instead, the allegedly tortious conduct of McKinsey's conspirators, the manufacturers, must satisfy the elements of proximate cause and duty. Then the elements specific of concerted action liability—conspiracy and aiding and abetting—apply to determine whether "liability for" the manufacturer's "tort may be imposed on people [here, McKinsey] who did not actually commit a tort themselves"—namely, McKinsey. *Dunn*, 689 S.E.2d at 269.

### 2. While Plaintiffs Adequately Pled Conspiracy and Aiding and Abetting, the Circuit Court Did Not Decide that Issue, and Therefore this Court Cannot Review It.

Plaintiffs adequately pled civil conspiracy and aiding and abetting liability against McKinsey for its conspiracy to engage in, knowingly encourage, and substantially assist Johnson & Johnson's, Noramco's, and Purdue's unlawful conduct. Assuming those concerted-action allegations to be true and sufficient, McKinsey is liable so long as its co-conspirator's conduct was, indeed, a proximate cause of Plaintiffs' injuries.[6] While McKinsey attacked Plaintiffs' concerted-action allegations, the Circuit Court chose not to decide whether they were sufficient. JA 00126–27 (noting that order does not decide whether "Plaintiffs' civil conspiracy claims fail to plead the elements of civil conspiracy, including an agreement to commit tortious acts for a common purpose"); McKinsey Br. at 3–4 n. 3 (conceding that the MLP did not reach the argument that "Plaintiffs failed to plead that McKinsey agreed or intentionally participated in any civil conspiracy"). Instead, the Circuit Court held only that the manufacturers and distributors themselves do not have tort liability as a matter of law, and therefore there can be no conspiracy or concerted action liability. JA 00122.

Appellate courts should not "decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." *Wang-Yu Lin v. Shin Yi Lin*, 687

[6] *See* Rest. 2d Torts § 876 ("For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself[.]"). Section 876(a) is commonly referred to as "civil conspiracy" and section 876(b) as "aiding and abetting." While Plaintiffs referred to these allegations as "civil conspiracy" only, JA 04613–15, 04927–29, without specifically referring to "aiding and abetting" as a separate claim or "count," the complaints clearly include allegations that McKinsey provided encouragement and substantial assistance to client manufacturers while knowing that what it was encouraging and assisting them to do constituted a breach of their legal duties. JA 4614–15. Had the Circuit Court reached and decided any issue pertaining to the elements of civil conspiracy and concerted action liability, Plaintiffs would have sought leave to amend to include a claim specifically for "aiding and abetting," but that was not one of the issues considered in either the preliminary order or final order.

S.E.2d 403, 407 (W.Va. 2009) (quoting Syl. pt. 1, *Mowery v. Hitt*, 181 S.E.2d 334 (W.Va. 1971)). The rule ensures fundamental fairness to litigants and that appellate courts "have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom." *Whitlow v. Bd. of Educ. of Kanawha Cnty.*, 438 S.E.2d 15, 18 (W.Va. 1993).

There are good reasons not to consider the adequacy of conspiracy and aiding and abetting allegations for the first time on appeal. For one thing, any finding that the complaints state valid claims against the manufacturers but not against McKinsey for conspiring, encouraging, or substantially assisting those same manufacturers would necessarily turn on the perceived insufficiency of the conspiracy allegations, a deficiency that Plaintiffs might be able to cure at the trial court level by way of amending their pleadings. By not deciding the issue, the Circuit Court gave no indication that there was a problem with the *sufficiency* of the conspiracy allegations, so Plaintiffs had no reason to seek to amend their complaints to cure any such perceived deficiency.

McKinsey acknowledges that the Circuit Court did not reach the issue of whether Plaintiffs adequately pleaded their conspiracy claims against it and appears to recognize that the issue is therefore not appropriate for appellate review at this time. McKinsey Br. at 3–4 n. 3. However, McKinsey nonetheless asks this Court to conclude that the claims against McKinsey fail for lack of proximate cause and lack of duty even if this Court concludes that the Circuit Court erred in dismissing the claims against McKinsey's alleged co-conspirators. That is impossible without considering the sufficiency of Plaintiffs' conspiracy and concerted action allegations. Plaintiffs maintain that their concerted action allegations are sufficient, but the question falls outside the scope of permissible appellate review.

## II. Plaintiffs Have Standing to Bring Public Nuisance Claims for Individual Damages.

Defendants advance two main arguments to support the Circuit Court's holding that Plaintiffs lack standing to bring a public nuisance claim. Both are flawed.

First, Defendants assert there is no simple rule that personal injuries always qualify as special injuries. Def. Br. at 19–22). Defendants claim that such a rule would be "contrary to decades of West Virginia cases," *id*. at 21, but they do not cite a single case decided by a West Virginia appellate court, relying instead on federal court decisions interpreting West Virginia law and one interpreting California law. *Id*. at 19–22.[7] Compounding this error, Defendants misrepresent the holdings of these cases, *id.* at 21–22, most blatantly the decision in *Rhodes v. E.I. du Pont de Nemours & Co.*, 657 F. Supp. 2d 751 (S.D.W. Va. 2009). The *Rhodes* court *clearly and unambiguously* explained that "the private nature of personal injuries and private property damage qualify such injuries as 'special injuries.'" *Id*. at 769 n. 16. In short, apart from the erroneous order entered by the Circuit Court in this action, *no* West Virginia cases support Defendants' argument.

Second, Defendants argue the proper comparison group for deciding whether Plaintiffs have met the special injury requirement is confined to "others exposed to opioids in utero." *Id*. at 17–18 (repeating claim that Plaintiffs' injuries are not different in kind from those of others "exposed to opioids" "in utero" or "born with NAS" at least five times over two pages); *id.* at 22–25 (explicitly arguing that the comparison group cannot include anyone who was "not exposed to opioids"). The argument is based on a fundamental misapprehension of the nature of the harm to the *public* from the interference with *public* rights associated with a public nuisance versus the *private* nature of a bodily injury. Once again, Defendants misread federal district court decisions and ignore all other legal precedent. Def. Br. at 23–24 (citing *Rhodes*, 657 F. Supp. 2d 751 (S.D.W. Va. 2009), and *Callihan v. Surnaik Holdings. of W. Va., LLC*, No. 2:17-cv-04386, 2018 WL

[7] One of the federal court cases is an unpublished district court decision that merely dismissed the public nuisance claims *without prejudice*, finding that the special injury issue was "unclear" from the complaint, following a very brief discussion of the law of public nuisance and the allegations. *Callihan v. Surnaik Holdings. of W. Va., LLC*, No. 2:17-cv-04386, 2018 WL 6313012, 2018 U.S. Dist. LEXIS 203851, at *15 (S.D.W. Va. Dec. 3, 2018).

6313012, 2018 U.S. Dist. LEXIS 203851 (S.D.W. Va. Dec. 3, 2018), and dismissing *Ileto v. Glock, Inc.*, 349 F.3d 1191 (9th Cir. 2003), out of hand because it arose under California law).

In addition, Defendants' make other errors of law and fact, contending that every infant "exposed to opioids *in utero*" has suffered a manifest bodily injury, *see id*. at 17–18, and contending that the "special injury" requirement imposes some kind of express or implied numerical limit on the number of injured persons who can recover bring a claim. Def. Br. at 23. These arguments are wrong.

### A. Manifest Bodily Injuries Always Confer Standing to Bring a Public Nuisance Claim for an Individual's Own Damages.

Despite proclaiming it "would be contrary to decades of West Virginia cases" to find that "any allegation of 'personal injury' always suffices to satisfy the 'special injury' requirement," Def. Br. at 21, Defendants cite only four cases. *See id*. at 19–22 (citing, in order: *Callihan v. Surnaik Holdings. of W. Va., LLC*, No. 2:17-cv-04386, 2018 WL 6313012, 2018 U.S. Dist. LEXIS 203851 (S.D.W. Va. Dec. 3, 2018); *In re: McKinsey & Co., Inc. Nat'l Prescription Opiate Consultant Litig.*, No. 21-md-02996-CRB, 2023 WL 4670291 (N.D. Cal. July 20, 2023); *Rhodes*, 657 F. Supp. 2d 751 (S.D.W. Va. 2009); and *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88 (4th Cir. 2011)). Not a single one of these decisions comes from a West Virginia appellate court, and, upon review of the actual opinions, the only one of those four cases in which a plaintiff with a clear, manifest bodily injury or detrimental effect (rather than just an "exposure") was denied standing to pursue a public nuisance claim is the unpublished decision from a federal court in California.

Moreover, one of those cases, *Rhodes*, 657 F. Supp. 2d at 769 n. 16, holds that manifest personal injuries *always* and *easily* confer "special injury" standing. *Id.* at 769 n. 16. The *Rhodes* court noted that the plaintiffs "have made clear . . . that they are not claiming that they are currently suffering from any particular manifest illness or disease as a result of their PFOA exposure." *Id.* at

766. The court inserted a footnote to ensure the basis of its decision was absolutely clear: "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." *Id.* at 769 n. 16.

Defendants' contention that the Fourth Circuit, in affirming the district court's decision, rejected the argument "that a physical injury is by itself sufficient to establish public-nuisance standing" misreads the opinion. The panel found that the plaintiffs' argument in that case was "'not supported either by the facts alleged in the plaintiffs' complaint or by West Virginia law.'" *See* Def. Br. at 21 (quoting *Rhodes*, 636 F.3d 88, 98 (4th Cir. 2011)). The argument that the Fourth Circuit held was "not supported either by the facts alleged . . . or by West Virginia law" was the argument that plaintiffs had, in fact, "suffered a personal injury or property damage." *Rhodes*, 636 F.3d at 98. In earlier sections of its opinion, the Fourth Circuit analyzed the plaintiffs' claims for personal injury and property damage, compared the facts alleged by the plaintiffs to the traditional tort law of West Virginia, and found the allegations to be deficient even for a negligence or a private nuisance action. *See id*. at 95 (rejecting the plaintiffs' argument that the mere "presence of PFOA in their bodies" and the "increased risk of disease satisfies the 'injury' requirement for negligence and gross negligence under West Virginia law"); *id*. at 96–97 (finding that because the alleged "release of pollutants directly affects a municipal water supply and does not interfere with any private water source" it did not give rise to a claim for private nuisance). The Fourth Circuit's discussion of the "personal injury" question is illuminating:

> [T]he plaintiffs concede that they do not suffer currently from any illness or disease caused by their exposure to PFOA. Instead, the plaintiffs assert that they are injured because PFOA has accumulated in their blood. . . . The presence of PFOA in the public water supply or in the plaintiffs' blood does not, standing alone, establish harm or injury for purposes of proving a negligence claim under West Virginia law. *In such situations, a plaintiff also*

> *must produce evidence of a detrimental effect to the plaintiffs' health that actually has occurred or is reasonably certain to occur due to a present harm.*

*Id*. at 95 (emphasis added). In other words, the Fourth Circuit affirmed the district court's holding that the plaintiffs had not suffered a compensable personal injury but, contrary to Defendants' assertions, did *not* find that a compensable personal injury was insufficient by itself to satisfy the "special injury" requirement.

Defendants also call attention to the Fourth Circuit's statement that "because the plaintiffs allege that all the water customers exposed to PFOA since 2005 have suffered the same personal injury, the plaintiffs' own pleadings refute their contention of 'special injury.'" Def. Br. at 21 (quoting *Rhodes*, 636 F.3d at 98). That statement does not apply to the instant case for several reasons. First, both courts in *Rhodes* had already found that "the same personal injury" that plaintiffs allegedly suffered was not a "personal injury" at all. Second, Plaintiffs in the instant case have not alleged and do not allege that all persons harmed by the opioid epidemic have "suffered the same personal injury" or any personal injury at all. Third, Plaintiffs do not even allege that all babies exposed to opioids during gestation have "suffered the same personal injury" that they allege they have suffered—neonatal abstinence syndrome ("NAS") and permanent developmental effects—or *any* injury or detrimental health effect at all. Many babies exposed to opioids *in utero* do not suffer any manifest bodily injuries or detrimental effects, and do not require treatment or qualify for a diagnosis of NAS, much less suffer from permanent developmental effects. Defendants ignore these distinctions.

Defendants also rely heavily on *Callihan*, which, like *Rhodes*, is another case in which the plaintiffs alleged only that they had been exposed to toxic substances (through smoke inhalation) but not—at least, in *Callihan*, not clearly—that they had suffered any kind of observable,

diagnosable, or otherwise manifest bodily injury or detrimental effect from inhaling the smoke. Defendants call attention to the *Callihan* court's denial of the motion to dismiss with respect to plaintiffs' negligence claims and quote the court as holding that the allegations in the complaint are "'sufficient to establish injury at this stage.'" Def. Br. at 21 (quoting *Callihan*, 2018 WL 6313012, at *2, 2018 U.S. Dist. LEXIS 203851, at *7). The full sentence, however, refers to the allegations of injury as "vague with respect to any non-economic loss." *Callihan*, 2018 WL 6313012, at *2, 2018 U.S. Dist. LEXIS 203851, at *7 ("The allegations of past injury—although rather vague with respect to any non-economic loss Plaintiffs have suffered—are sufficient to establish injury at this stage."). The *Callihan* court expressly called into question the allegations of "bodily injury" and "property damage" in dismissing the private nuisance claims—without prejudice—noting that "Plaintiffs fail to explain the nature of their alleged bodily injury and property damage." 2018 WL 6313012, at *4, 2018 U.S. Dist. LEXIS 203851, at *13.

It is therefore unsurprising and not illuminating that the *Callihan* court dismissed plaintiffs' public nuisance claims *without* prejudice, concluding that "it is unclear whether Plaintiffs in fact can allege a special injury." 2018 WL 6313012, at *5, 2018 U.S. Dist. LEXIS 203851, at *14–15. Defendants emphasize the word "uniquely" in the court's statement that "Plaintiffs . . . fail to explain how they were uniquely affected by the fire," Def. Br. at 21, but the court's mischaracterization of the requirement of special injury as a requirement of "unique" injury is just a careless and inconsequential error in an unpublished order riddled with errors.[8] It is telling that

[8] One of the clear and obvious errors was the *Callihan* court's dismissal of plaintiffs' private nuisance claims as disguised public nuisance claims, writing, "Plaintiffs' claims for private nuisance—at least insofar as they are based on Plaintiffs' exposure to 'fallout material' from the fire—are more appropriately brought as claims for public nuisance" and dismissed the claims without prejudice. 2018 WL 6313012, at *4, 2018 U.S. Dist. LEXIS 203851, at *13–14. It is axiomatic that claims for "fallout material" from a fire that invade and interfere with the use and enjoyment of *private* property are claims for private nuisance, not public nuisance. The West Virginia Supreme Court subsequently affirmed a state circuit court's certification of a class action brought by a different plaintiff but arising from the *same* fire against the *same* defendant

Defendants rely so heavily on their own misinterpretation or over-interpretation of such a brief, vague, unpublished opinion—which, all errors aside, merely dismissed the public nuisance claims before it *without* prejudice for lack of clarity in the pleadings.

Thus, in reality, Defendants' "decades of West Virginia cases" are nothing more than a single unpublished California case applying a mishmash of laws of multiple states. Plaintiffs demonstrated in their main brief that the decision in *McKinsey* was erroneously based on a discredited precedent from a California appellate court, a fact that Defendants acknowledge in a different section of their brief, but do not refute or dispute. Def. Br. at 19.[9]

*Rhodes*, on the other hand, is published, applies only West Virginia law, does not rely on discredited precedent, and is unmistakably clear in both its holding and its reasoning. The plaintiffs in that case did not allege an actual, compensable, manifest bodily injury or detrimental health effect as a result of drinking allegedly contaminated water. Had they done so they would have met the special injury requirement for individuals to bring public nuisance claims to recover their own damages. 657 F. Supp. 2d 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."); *id.* (quoting Prosser & Keeton, Torts (5th Ed.), § 90, at 648) ("Where the plaintiff suffers personal injury, or harm to his health . .

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alleging class-wide nuisance from indistinguishable allegations of "fallout" (i.e., "smoke particulates") on class members' private properties. *See State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, 247 W. Va. 41, 47, 875 S.E.2d 179, 185 (2022) ("[T]he evidence supports the circuit court's threshold finding that all properties within the geographically designated isopleths . . . were exposed to levels of smoke particulates at levels sufficient to cause interference with the use and enjoyment of those properties.").

[9] As Plaintiffs previously explained, the *McKinsey* court cited only to a single treatise in support of its holding that personal injuries do not confer "special injury" standing automatically. *See* 2023 WL 4670291, *8–9 (citing Dobbs, Law on Torts, § 403, at 643 n. 35). The Dobbs treatise, in turn, cited only to *Venuto v. Owens-Corning Fiberglas Corp*., 22 Cal. App. 3d 116, 125 (Cal. App. 1971), in support of that proposition. *Venuto* has twice been criticized as wrong on this exact point, and never followed on this point, by sister California appellate courts. *See* Pet. Br. at 15.

. there is no difficulty in finding a different kind of damage."). Plaintiffs have satisfied those requirements here.

### B. The Proper Comparison Group for Evaluating a "Special Injury" Claim Is Not Those Who Suffered Similar Injuries But Instead "Other Members of the Public Exercising the Right Common to the General Public".

Defendants' repeat the irrelevant (and erroneous) claim that Plaintiffs' injuries are no different than those of "others exposed to opioids *in utero*" (Def. Br. at 17) like a broken record. Strangely—given that Part II.A of their Response consists of little more than the repetitive invocation of the patently improper comparison between Plaintiffs and the relatively tiny slice of the public that consists only of "others exposed to opioids *in utero*"—Defendants return to this argument in Part II.C, where they explicitly claim that Plaintiffs cannot show a special injury by comparing their injuries to the injuries of "other members of the public" who were *not* exposed to opioids. *Id*. at 23.

Defendants' argument is absurd. It fundamentally misunderstands the public nature of the interference with public rights at the center of every public nuisance. If and only if an "interest that is invaded is an interest shared equally by members of the public" is "the alleged nuisance . . . public in nature." *Rhodes*, 636 F.3d at 96. Classic examples include the pollution of a public waterway and the obstruction of a public highway. *See Int'l Shoe Co. v. Heatwole*, 30 S.E.2d 537, 540 (W.Va. 1944) (recognizing that pollution of a stream is a public nuisance and that the entire public has the right to fish and swim in its waters and enjoy its beauty); Rest. 2d Torts § 821C, illust. 2 (using the obstruction of a public highway as an example of a public nuisance).

On the other hand, if the only harm from Defendants' conduct is harm to specific individuals—however many there may be—and not the entire public, then there is no public nuisance, merely a collection of private injuries caused by the invasion of purely private rights.

These same Defendants recognized this exact principle in the context of this same alleged public nuisance—that there is no *public* nuisance if the only harm suffered by members of the "public" are personal injuries from "exposure" to opioids—in arguing against the public nuisance claims brought by the political subdivisions. *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 harms Plaintiffs seek to abate 'implicate only the inherently private right that each individual has to not be injured by a product.'"). The Circuit Court allowed the subdivisions' public nuisance claims to proceed precisely because the Circuit Court found that "there is a triable issue of fact concerning Plaintiffs' claims of interference with public rights" affecting "the community as a whole." *Id*. at 7–8. Plaintiffs in the instant case allege that the public nuisance caused by Defendants interferes with the "public health, quality of life, and safety," JA 04607, 04920, and more specifically that it "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" the creation an illegal secondary market for opioids. Pet. Br. at 19.

The proper comparison group for considering whether any individual or group of individuals suffered a "special injury" is the harm suffered by the public exercising those public rights—e.g., the harm suffered by the public from the loss of the recreational use of a beautiful river or the inconvenience of being unable to travel on a public highway—not others in the same particular circumstances who suffered the same injury. *See* Rest. 2d. 821C(1) (explaining that to bring a public nuisance claim for individual damages "one must have suffered harm of a kind different from that suffered by *other members of the public exercising the right common to the*

*general public that was the subject of interference*") (emphasis added). Thus, the economic injury suffered by commercial fishermen with commercial fishing licenses following an oil spill must be compared to the *public's* right to travel on and to enjoy the public waters by swimming, boating, and recreational fishing—not to *other* commercial fishermen with similar commercial fishing licenses, no matter how many there may be. *See, e.g.*, *Union Oil Co. v. Oppen*, 501 F.2d 558, 570 (9th Cir. 1974) ("The injury here asserted by the plaintiff is a pecuniary loss of a particular and special nature, limited to the *class* of commercial fishermen which they represent.") (emphasis added). The gunshot wounds suffered by individuals shot by handguns obtained from an illegal secondary market must be compared to the "danger, fear, inconvenience, and interference with the use and enjoyment of public places . . . that plaintiffs allege are suffered by the general public"—not to the gunshot wounds suffered by all of the other individuals in the United States who have been shot by an illegally obtained handgun. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1212 (9th Cir. 2003). If an entire busload of tourists suffers bodily injuries such as broken bones when a bus driver unwittingly drives into a trench dug across a public highway because there are no warning signs, each passenger's injuries must be compared to the harm suffered by members of the public who are inconvenienced by being unable to use the public road for travel—not to the bodily injuries of *other* passengers on the bus. *See* Rest. 2d Torts § 821C, illust. 2 (explaining that bodily injury from hitting an unmarked trench across a public highway is a "special injury").

In the instant case, it follows that the bodily injuries of these Plaintiffs must be compared to the "interference with public rights" affecting "the community as a whole," as the Circuit Court explained the public harm in its ruling in the subdivision cases, not to the bodily injuries suffered by the tiny sliver of the "community as a whole" consisting of other babies who were also exposed to opioids in *utero* and who also suffered manifest bodily injuries such as diagnosable NAS and

lasting developmental impacts. Plaintiffs define the "harm . . . suffered by other members of the public exercising the right common to the general public" as the interference 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 the creation an illegal secondary market for opioids. Pet. Br. at 19. Plaintiffs' bodily injuries are clearly different in kind and character from the interference with public safety and the use of public spaces suffered by members of the public, and their claims should be allowed to proceed.

### C. Defendants Are Wrong That Every Infant "Exposed To Opioids *In Utero*" Has Suffered A Manifest Bodily Injury.

Defendants treat as a given that every infant "exposed to opioids in utero" has suffered manifest bodily injuries. *See* Def. Br. at 17–18; *id*. at 20 (claiming without record citation that "the harms allegedly suffered by these three Minors from opioid exposure in utero are not different 'in character' from the harms that would be suffered by other infants exposed to opioids in utero"). The comparison group used by Defendants ("other infants exposed to opioids in utero") is patently wrong, but Defendants' argument is wrong for a different reason as well. Many infants whose mothers ingest opioids never develop NAS at birth, and fewer still suffer "lasting developmental impacts." JA 04589, 04897, 05300. Plaintiffs *never* alleged anywhere in their complaint that *all* opioid-exposed gestational infants develop a manifest personal injury.

This fact alone—in addition to many others discussed elsewhere—makes this case plainly distinguishable from the federal cases arising out of West Virginia relied upon by Defendants. *See* Def. Br. at 21–22 (citing *Callihan v. Surnaik Holdings. of W. Va., LLC*, No. 2:17-cv-04386, 2018 WL 6313012, 2018 U.S. Dist. LEXIS 203851 (S.D.W. Va. Dec. 3, 2018); *Rhodes*, 657 F. Supp. 2d 751 (S.D.W. Va. 2009); and *Rhodes*, 636 F.3d 88 (4th Cir. 2011)); Def. Br. at 23–24 (citing *Rhodes,* 657 F. Supp. 2d 751, and *Callihan*). In all three of those cases, the plaintiffs defined the injury to

the public and the entire community as mere "exposure" to toxic substances and the associated increased risk of future disease, and specifically alleged that every single person in the community suffered from that same injury. *See Callihan*, 2018 WL 6313012, at *5, 2018 U.S. Dist. LEXIS 203851, at *14–15 ("Plaintiffs' claim that they 'allege that they sustained personal injuries, including those closest to the fire, by inhaling toxic fumes that others were not exposed to who lived farther away.'"); *Rhodes*, 636 F.3d at 95 ("[P]laintiffs assert that they are injured because PFOA has accumulated in their blood."); *Rhodes*, 636 F.3d at 98 ("[P]laintiffs allege that all the water customers exposed to PFOA since 2005 have suffered the same personal injury[.]"). Those plaintiffs then tried to characterize that "exposure"—suffered by everyone—as a "personal injury." In contrast, in the instant case, Plaintiffs only bring claims on behalf of themselves to recover for their actual, manifest bodily injuries—not on behalf of a class of all opioid-"exposed" babies seeking medical monitoring because of increased risk but without any present injury.

### D. Defendants Are Wrong As A Matter Of Law To The Extent That They Contend That The "Special Injury" Requirement Imposes An Express Or Implied Limit On The Number Of Injured Persons Who Can Seek Individual Damages From A Public Nuisance.

Defendants argue in Part II.C, without elaboration, that, at the very least, Plaintiffs' injuries cannot be "special" when "Plaintiffs' alleged injuries are the same in character as the injuries allegedly suffered by *many* others." Def. Br. at 23 (emphasis added); *see also id*. at 24 (arguing that special injury cannot be found where there may be "millions" of other persons with similar special injuries in the United States). This argument is undercut by just about every public nuisance claim ever brought to recover individual damages, including the paradigm public nuisance claim for individual damages from something other than a bodily injury—that of commercial fishermen, a large group constituting "many" in number, following oil spills. *See, e.g.*, *Union Oil Co. v. Oppen*, 501 F.2d 558, 570 (9th Cir. 1974) ("The injury here asserted by the plaintiff is a pecuniary loss of

a particular and special nature, limited to the *class* of commercial fishermen which they represent.") (emphasis added). Similarly, according to the Bureau of Justice Statistics, there were hundreds of thousands of fatal and nonfatal fire-arm related homicides and "nonfatal firearm-related victimizations" *each year* between 1993 and 2011 in the United States, an estimated 40% of which were committed using illegally obtained guns.[10] Yet those numbers did not prevent the Ninth Circuit from finding that gunshot wounds and trauma from witnessing a shooting were "special injuries" for purposes of standing to bring a claim for damages arising out of the defendant's creation of a public nuisance—by fostering an illegal secondary market for guns. *See Ileto v. Glock Inc.*, 349 F.3d 1191, 1212 (9th Cir. 2003).

**E. The Political Subdivision Settlements Are Still Irrelevant.**

Defendants attempt to rehabilitate the portion of the Circuit Court's order that was premised on prior settlements with the political subdivisions by claiming that the Circuit Court was merely recognizing "the specter of duplicative, repeated litigation." *Id*. at 25–26. This concern applies primarily to suits seeking to *abate* a public nuisance—the "[r]edress of the wrong to the entire community"—and secondarily to suits seeking to recover damages for the "harm or interference shared by the public at large [which] will normally be . . . theoretical or . . . minor, petty and trivial." *See* Rest. 2d Torts § 821C, comment a. There is nothing unusual about many individuals bringing individual damages lawsuits against one or several tortfeasors arising out of a single course of conduct, a circumstance that, regardless of the cause of action, always invokes the "specter of duplicative, repeated litigation." Defendants do not get immunity from liability for

[10] *See* Planty, et al., Firearm Violence, 1993–2011, U.S. Department of Justice, Bureau of Justice Statistics (2013), at 2 (Table 2) and 13 (Table 14), available at https://bjs.ojp.gov/content/pub/pdf/fv9311.pdf.

causing bodily injuries by means of a public nuisance simply because they caused a large number of bodily injuries in addition to interfering with public rights.

## III. Defendants Owed Plaintiffs a Duty of Care.

The Circuit Court erred in failing to address the facts establishing duty and substituted its own policy judgments for those of the West Virginia Legislature. Still, Defendants defend the Circuit Court's dismissal order—devoid of any foreseeability analysis—arguing that the policy considerations alone are sufficient to answer this legal question. McKinsey Br. at 9 (complaining that a duty here would be "the imposition of essentially limitless liability"); Def. Br. at 30 ("in making the policy determination of whether a legal duty exists, a court is obligated to draw a line beyond which the law will not extend its protection in tort and to impose finite boundaries to liability.") (cit. om.); BOP Br. at 24 (same).[11] But the mere presence of a duty of care does not threaten businesses otherwise in compliance with the law. Additionally, neither the Circuit Court nor Defendants offer any compelling justification for how the dismissal order here is compatible with the same court's decision in the government entities case.

Plaintiffs were owed a duty of care because the harms suffered were unreasonable, foreseeable to all Defendants, and preventable by all Defendants. Policy considerations unequivocally impose such a duty here. The Circuit Court erred in finding otherwise.

### A. Defendants Did Not Act With Reasonable Care To Prevent Plaintiffs' Foreseeable And Unreasonable Harms, In Violation Of West Virginia Law.

Despite its previous conclusion "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[,]" the Circuit Court dismissed Plaintiffs'

[11] The BOP's response incorporates the other Defendants' arguments related to duty. BOP Br. at 24. Petitioners' arguments establishing a duty apply equally to the BOP, and the BOP's public duty doctrine argument is discussed *infra.* at 36.

"personal injury claims" as inferior, untethered to any common law duty. JA 00166; JA 00115. But "the addicts' claims are clearly superior claims." *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, No. 19-1051, March 8, 2019 Petition for Writ of Prohibition at 38 (relying on *City of New Haven v. Purdue Pharma, L.P.*, No. X07-HHD-CV-6086034-S, 2019 WL 423990, at *6-7 (Conn. Super. Ct. Jan 8, 2019)). As mentioned in Petitioners' opening brief, "the governmental harms are even further down the foreseeability chain" than Plaintiffs' harms because those governmental harms cannot exist without individual personal injuries—like Plaintiffs'." Pet. Br. at 44.

Defendants acknowledge they owed a duty to West Virginia's government entities but maintain the duty owed to the State's citizens "is different." Def. Br. at 29. Leaving it at that, Defendants say policy precludes imposing a duty here because then anyone could "claim that entities associated with the supply of prescription opioids (or active pharmaceutical ingredients) owe[s] . . . a duty of care in their activities." *Id.* at 30. McKinsey takes it a step further, asserting its consultant status as a shield to deflect responsibility because "its advice to clients" was "unlikely" to increase "the likelihood that their clients' products will ultimately cause harm." McKinsey Br. at 11.

What Defendants fear is the same negligence standard and duty of care applicable to every person or business in West Virginia. Defendants argue that as "heavily regulated" "entities authorized to do business involving controlled substances" there is no need to apply West Virginia's common law duty of care. Def. Br. at 32. But "[o]perating a business or providing a service that has societal benefits does not give a corporate entity license to freely pollute the waters of this State or to negatively affect the use and enjoyment of privately owned property." *Taylor v. Culloden Pub. Serv. Dist.*, 649, 591 S.E.2d 197, 207 (W.Va. 2003) (rejecting a regulated utility-

defendant's argument that it should be held to a different standard of reasonable conduct). The same is true for businesses profiting off addiction.

When it comes to pleading duty:

> [t]he 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?

Syl. Pt. 3, *Sewell v. Gregory*, 371 S.E.2d 82 (W.Va. 1988).[12] Plaintiffs' complaint alleged Defendants knew opioid use and abuse increased the likelihood that Plaintiffs would experience the same injuries from which they in fact suffered (e.g. NAS). *See* Pet. Br. at 34, n. 20. Plaintiffs alleged that Defendants intentionally misrepresented the risks associated with opioids to the public, to doctors, and to the government. *Id.* at 31, n. 17. The complaint identified different warning labels distributed in different countries. *Id.* at 34, n. 20. Plaintiffs' conspiracy count alleges McKinsey knowingly assisted its clients in breaching their duties of care, skirting government reporting requirements, and mitigating regulatory enforcement to preserve the bottom line. Plaintiffs additionally alleged that the BOP failed to investigate suspicious orders, willfully abdicating its mandatory obligations under the law—furthering Plaintiffs' harms and the conspiracy between all Defendants. Pet. Br. at 53.

Thus, the operative duty question is whether an ordinary person that knew of the risk of opioids, downplayed those risks to the medical community and the government to sell more pills than medically necessary, sold those pills without disclosing the risks, and did not comply with

[12] Contrary to West Virginia law, the Circuit Court intermixed the foreseeability analyses for duty and causation when it required Plaintiffs to plead specific facts establishing "a duty ran ***from*** Defendants ***to*** these private plaintiffs." JA 00115 (emphasis original) (cit. om.); *Strahin v. Cleavenger*, 603 S.E.2d 197, 207 (W.Va. 2004) (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 harm experienced.").

statutory obligations to mitigate the known potential for such risks should anticipate addiction, diversion, and other opioid related harms—like NAS)—would result. The answer must be yes.

Defendants argue halfheartedly that foreseeability is not dispositive because "Defendants had no duty to prevent the exercise of independent medical judgment" and "Defendants had no duty to prevent the birth mothers' illicit ingestion of opioids during pregnancy." Def. Br. at 31. Plaintiffs, however, alleged that Defendants directly inserted themselves into doctors' medical judgment with misleading advice and warnings to the government, prescribers, and patients, corrupted the science relied upon by medical professionals, and also specifically targeted markets likely to prescribe increasingly large quantities of pills. Plaintiffs also alleged that diversion of opioids into illegal markets was part of Defendants' sales strategy, precluding the criminal conduct of others from extinguishing Defendants' duty. Pet. Br. at 41. McKinsey contests the foreseeability of any harm stemming from its conduct because, unlike its clients, McKinsey is not subject to CSA reporting requirements. But the complaint places McKinsey at the center of creating, disseminating, and strategically manipulating the misleading information for its clients' and co-defendants' benefit. McKinsey Br. at 10. Plaintiffs' Complaint absolutely alleged facts sufficient to establish a duty of care as a matter of law. *See Wal-Mart Stores E. L.P. v. Ankrom*, 854 S.E.2d 257, 268 (W.Va. 2020).

Defendants contend that Plaintiffs "do not even attempt to argue they have a 'special relationship' with any Defendant" which would create an exception to the generality that "a person does not have a duty to protect others from the deliberate criminal conduct of third parties." Def. Br. at 32. Plaintiffs are not relying on the "special relationship exception." Rather, as set forth in detail in the Petition, this case fits squarely into the second recognized exception – "when the

person's affirmative actions or omissions have exposed another to a foreseeable high risk of harm from the intentional misconduct."[13]

**B. Policy Considerations Support Defendants Owing Plaintiffs A Duty.**

While Defendants confuse the proper weight to apply to foreseeability and policy considerations in establishing duty, it is true that "the existence of duty also involves policy considerations underlying the core issue of the scope of the legal system's protection." Def. Br. at 27 (citing *Stevens*, 788 S.E.2d at 63). Those considerations are: (1) the likelihood of injury; (2) the magnitude of the burden guarding against it; and (3) the consequences of placing that burden on the defendant. *Brooke Cty. Comm'n, v. Purdue Pharma, L.P., Case* No. 17-C-248 (Marshall Cty.), *Order* at 5 ¶ 10 (citing *Robertson v. LeMaster*, 301 S.E.2d 563 (W.Va. 1983)). All three weigh in Plaintiffs' favor and confirm Defendants owed a duty here.

1. The likelihood of injury.

The likelihood of injury is evident. Indeed, both the United States Congress and the West Virginia Legislature have enacted laws designed to prevent the very conduct of Defendants that harmed Plaintiffs. *See* 21 U.S.C. ¶ 823(a)(1); W. Va. Code § 60A-3-303 (a)(1). Nonetheless, Defendants recite familiar objections to expanding the reach of duty to hypothetical extremes. Def. Br. at 30-31 ("it would be absurd to expect landlords to protect tenants against all crime since it is foreseeable anywhere in the United States." *Miller v. Whitworth*, 455 S.E.2d 821, 826 (W.Va. 1995)). Or that McKinsey's "advisory role did not necessarily create the undue risk that led to the NAS Plaintiffs' claims." McKinsey Br. at 11. But the Court in *Miller* acknowledged "[t]he circumstances which give rise to imposing a duty on the landlord vary according to the facts of

[13] *See* Pet. Br. at 31-35 (defendants' conduct created a foreseeable and unreasonable risk of harm to the minor plaintiffs); 40-44 (intervening acts do not relieve Defendants from owing Plaintiffs a duty).

each particular case." 455 S.E.2d at 826 (blessing a duty "when the landlord could reasonably foresee that his own actions or omissions have unreasonably created or increased the risk of injury from the intentional criminal activity). And, as alleged in Plaintiffs' complaint, Defendants were aware of the risk attributable to their pills and acted unreasonably in selling and marketing the pills—increasing the risk, not necessarily creating the risk.

"All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use." *Direct Sales Co. v. United States*, 319 U.S. 703, 710 (1943). Just as "[g]angsters, not hunters or small boys, comprise the normal private market for machine guns[,]" Defendants were on notice by the very nature of the products they peddled that "drug addicts furnish the normal outlet for [opioids] which get[] outside the restricted channels of legitimate trade." *Id.* The circumstances of this case, including Defendants' alleged conduct and knowledge, Plaintiffs' injuries and claims for relief, and Defendants noncompliance with legal obligations make clear that the harms alleged were more likely to occur because of Defendants' conduct.

2. The magnitude of the burden guarding against it.

Plaintiffs ask this Court to recognize the existence of a duty no more burdensome than Defendants' existing legal obligations as "heavily regulated" "entities authorized to do business involving controlled substances." Def. Br. at 32. Nor do Plaintiffs suggest McKinsey is subject to the burdens of "registrants in the closed system established by the federal and state Controlled Substances Acts." McKinsey Br. at 10. Rather, Plaintiffs argue Defendants' duty of care is consistent with existing obligations and would not "unduly interrupt and interfere with the detailed regulatory scheme governing [Defendants' conduct]." Def. Br. at 32 (citing *Stevens*, 788 S.E.2d at

66). What distinguishes *Stevens* from this case, however, is the correlation between the harm alleged and the conduct proscribed by law.

In *Stevens*, a casino did not owe a duty to prevent a patrons' suicide related to compulsive gambling because "the State has plainly weighed the societal costs of the machines—specifically including their contribution to compulsive gambling and the potential consequences thereof—against their economic benefits, and it has nonetheless elected to make them available to the public." *Stevens v. MTR Gaming Grp., Inc.*, 788 S.E.2d 59, 66). But here Defendants' conduct is specifically proscribed by statute. Just as a casino could not host a machine that did not "[a]llow a player at any time to simultaneously clear all game credits and print a redemption ticket," Defendants may not fill suspicious orders, must investigate suspicious orders, and must disclose risks associated with their products. *Id.* at 65-66.

Plaintiffs simply ask this Court to find, under commonly accepted legal principles, that violations of statutes or regulations are *prima facie* evidence of negligence, that one who knowing assists a tortfeasor in breaching a duty is also a tortfeasor, and that regulators may be liable for allowing tortious conduct to persist. W.Va. Code § 55-7-9; syl. pt. 1, *Anderson v. Moulder*, 394 S.E.2d 61 (W.Va. 1990) ("violation of a statute is *prima facie* evidence of negligence"); *Price v. Halstead*, 355 S.E.2d 380, 386 (W.Va. 1987) (citing Restatement (Second) of Torts § 876(b)) ("for harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself").

3. <u>The consequences of placing that burden on the defendant.</u>

Contrary to Defendants' assertion, Plaintiffs are not asking "the Court to disrupt" the balance between "accepted medical use" and "potential for abuse" by "creating a cause of action

for all private parties affected by opioid harms and abuse in West Virginia." Def. Br. at 33. That balance has been established by the WV CSA and federal CSA and their implementing regulations. Plaintiffs' allegations that Defendants violated these regulations establishes that it is Defendants that are disrupting the balance. The West Virginia Legislature has already considered the consequences and enacted laws imposing burdens and duties on those dealing narcotics or otherwise involved with controlled substances. W. Va. Code § 60A-3-301 *et seq.* Should Defendants be found to owe a duty here, the only consequence that may stem from that determination is that current statutory and regulatory obligations may be enforced. Neither the Circuit Court nor the Defendant have provided a compelling reason as to why the Plaintiffs' private "personal injury claims" should be distinguished from the government entities cases for which the same Circuit Court held that a duty of care existed.

Defendants concerns over "chill[ed] publicly beneficial business activities" and chilled "professional speech" in violation of the First Amendment can be disposed of summarily. McKinsey Br. at 11. The First Amendment does not protect speech that constitutes civil aiding and abetting or conspiracy. *E.g., Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646, 656 (D.C. Cir. 1994) ("That 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality."); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1971) (same, civil conspiracy). Further, Plaintiffs' alleged that Defendants' commercial speech was false and misleading, removing any protection the First Amendment may have provided. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). Finally, Plaintiffs' claims target conduct, not mere speech. *NIFLA v. Becerra*, 585 U.S. 755, 769 (2018) ("The First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.").

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. 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 addiction, abuse, and diversion from occurring. 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.

**C. Plaintiffs Can Establish That McKinsey Owes A Duty Of Care.**

McKinsey is wrong in its claim that "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." McKinsey Resp 10. Contrary to McKinsey's assertions, Plaintiffs' Complaints clearly set forth such allegations, including, *inter alia*, that, "McKinsey repeatedly urged its clients to increase their marketing efforts of opioids and to focus those marketing efforts on physicians that were already the high-volume prescribers of opioids."[14] Plaintiffs also alleged that McKinsey played a key role in a conspiracy to increase sales of OxyContin and other opioids through deceptive and fraudulent means, including by agreeing to falsely downplay the risk of addiction in an attempt to increase sales.[15] McKinsey's knowledge must be judged in light of the products involved—highly addictive opioids. *Direct Sales*, 319 U.S. at 711.

[14] *See* A.D.A. Complaint – JA 04597-99 at ¶¶ 30-31; JA 04606 at ¶¶ 54, 56; JA 0461-12 at ¶¶ 80-84; JA 04613 at ¶¶ 87-88**;** *see also* A.N.C. Complaint – JA 04905-6 at ¶¶ 38-39; JA 04919-20 at ¶¶ 82-84; JA 04925 at ¶¶ 109-112; and JA 04926-27 at ¶¶ 116-117.

[15] *See*; A.D.A Complaint at JA 04614-15 at ¶ 96; *see also* A.N.C. Complaint at 04928 at ¶¶ 125-126.

McKinsey is involved in similar litigation in the federal MDL. *In re: McKinsey & Co., Inc*., Case No. 21-md-02996-CRB, 2023 WL 4670291 (N.D. Cal. July 20, 2023). Judge Breyer permitted the Plaintiffs to file an Amended Complaint which included allegations which could similarly be incorporated into Plaintiffs' Amended Complaint. The allegations include, *inter alia*,

- McKinsey encouraged targeting high-abuse-risk patients and knew doing so would foster an illegal secondary market for opioids;
- McKinsey was aware that Purdue omitted evidence in its labels of studies showing birth defects related to early pregnancy opioid use;
- McKinsey was aware of the widespread opioid abuse and that the CDC recognized efforts in "advanced markets" to curb those abuses were working. It identified specific areas of the country where sales were declining for clients and targeted entire healthcare systems in those same specific "advanced markets;"
- McKinsey was aware that the ongoing NAS epidemic was escalating due to opioid prescribing to pregnant women, yet identified OB/GYNs for clients to target.

Further, McKinsey had actual knowledge because it developed, implemented, and monitored the very strategies its clients tortiously used. Plaintiffs can, and should be permitted to, file an Amended Complaint that plausibly alleges that McKinsey's advice to its clients was directed at marketing dangerous and addictive opioids to those who were most likely to illegally abuse them, and to specifically counter the efforts of regulators and responsible companies that had led to reduced sales.

## IV. The Complaint Asserts a Claim for Civil Conspiracy.

The Circuit Court's error in dismissing the tort claims asserted led to the erroneous dismissal of the conspiracy count. While this claim requires evidence of an underlying tort,

Plaintiffs allege both substantive tort claims and wide-ranging conspiracies among various defendants which created and fueled the opioid epidemic, in turn causing Plaintiffs' injuries. Accordingly, the civil conspiracy count cannot be dismissed.

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

The Circuit Court relied on its decision regarding proximate cause to dismiss Plaintiffs' causes of action pertaining to fraud. JA 00121-22. Because the rulings regarding proximate cause are wrong, dismissal of the fraud claims likewise constitutes error.

## VI. The Complaint Asserts a Claim for Punitive Damages.

Plaintiffs seek punitive damages based upon the allegations of conduct that goes far beyond negligence or simply creating a nuisance. The request for punitive damages is not intended as a stand-alone cause of action, and relief is dependent on the underlying tort claims. Those tort claims were erroneously dismissed, making dismissal of the prayer for punitive damages erroneous as well.

## VII. The Circuit Court Erred By Failing To Liberally Construe Plaintiffs' Complaints And Failing To Allow Leave To Amend.

Finally, the Circuit Court erred by failing to liberally construe Plaintiffs' complaints and failing to allow leave to amend. Defendants ignore Plaintiffs' arguments regarding liberal construction and misstate the law governing leave to amend.

Defendants contend Plaintiffs waived the issue and alternatively that amendment is futile. Def. Br. at 35-36. But the Supreme Court of Appeals has repeatedly reaffirmed that "[l]eave to amend should be freely given when justice so requires." Syl. Pt. 2, *Donahue v. Mammoth Restoration & Cleaning*, 874 S.E.2d 1 (W.Va. 2022). And Plaintiffs brought the potential need to amend to the attention of the Circuit Court. JA 00247, 00329, 00331, 00350. Contrary to Defendants' assertions, Plaintiffs belief in the sufficiency of their original complaint does not

disavow their interest in amending their complaint. Def. Br. at 35. The purpose of W. Va. R. of Civ. P. 15(a) "is to secure adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments." Syl. Pt. 2, *State ex rel. Vedder v. Zakaib*, 618 S.E.2d 537 (W.Va. 2005).

Plaintiffs are unaware of, and Defendants fail to identify, any West Virginia cases that articulate the Fourth Circuit's requirement of a formal motion for leave to amend. Def. Br. at 35 (citing *ACA Fin. Guar. Corp. v. City of Buena Vista*, 917 F.3d 206, 218 (4th Cir. 2019)). Other courts have recognized that a formal motion is not necessary. *See, e.g., United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 733-34 (1st Cir. 2007) (collecting cases treating requests to amend as motions to amend); *N. Slope Borough v. Rogstad (In re Rogstad)*, 126 F.3d 1224, 1228-29 (9th Cir. 1997) (citations omitted). Oral requests suffice. *Invest Almaz* v. *Temple-Inland Forest Prods. Corp.*, 243 F.3d 57, 71 (1st Cir. 2001). And even when a party stands by its complaint and appeals an order of dismissal, the appellate court may nevertheless grant leave to amend in furtherance of the interests of justice. *Degnan v. Publicker Indus.*, 83 F.3d 27, 29 (1st Cir. 1996). Allowing oral requests to amend is consistent with West Virginia caselaw liberally permitting amendments. Indeed, the Rules of Civil Procedure specifically permit oral motions at hearings. W. Va. R. Civ. P. 7(b)(1) ("An application to the court for an order shall be by motion which, *unless made during a hearing* or trial, shall be in writing…." (emphasis added)).

Thus, "leave to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of amendment; and (3) the adverse party can be given opportunity to meet the issue." Syl. Pt. 2, *Zakaib*, 618 S.E.2d 537. Those factors all weigh in favor of amendment here. Given the procedural posture of this case, Defendants' familiarity with the claims

asserted, and the interests at stake in this litigation, the Circuit Court erred in denying Plaintiffs' request for leave to amend their complaint.

If this Court affirms the dismissal of Plaintiffs' complaint, this Court should remand with instructions to grant Plaintiffs leave to replead after this Court resolves the disputed legal standards. This was the course followed in *McKinsey. In re: McKinsey & Co., Inc*., Case No. 21-md-02996-CRB, 2023 WL 4670291 (N.D. Cal. July 20, 2023).

## VIII. Petitioners' Claims Against The West Virginia Board Of Pharmacy Are Not Barred By The Public Duty Doctrine.

The Circuit Court failed to recognize the wanton or reckless exception to the public duty doctrine; erroneously found that the special relationship exception was the only exception to said doctrine; and failed to apply the wanton and reckless exception to a state agency in a manner consistent with prior holdings.

Public duty is a doctrine that evolved through common law to reflect the obligation of a government entity to perform specific functions.

> In West Virginia, "[a] governmental entity's duty in the context of an alleged failure to provide any, or sufficient, emergency public service to a particular individual is defined at common law by the public duty doctrine." [citation omitted] "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." In other words, when "government owes a duty to the public in general, it does not owe a duty to any individual citizen," so "no private liability attaches when a . . . police department fails to provide adequate protection to an individual." The public duty doctrine is not based on immunity but, rather, an absence of a duty in the first instance.

*Eagon v. Cabell Cnty. Emergency Med. Servs.*, No. 3:23-0013, 2023 WL 8853727, at *8, 2023 U.S. Dist. LEXIS 227612, at *27-29 (S.D.W.Va. Sept. 21, 2023) (internal citations omitted).

The courts have long emphasized the requirement that the duty at issue must be a specific obligation on the part of the government entity:

> 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. "Often referred to as the 'duty to all, duty to no one' doctrine, the public duty doctrine provides that since government owes a duty to the public in general, it does not owe a duty to any individual citizen." For example, under the public duty doctrine, "the duty to fight fires or to provide police protection runs to all citizens and is to protect the safety and well-being of the public at large[.] "Generally, no private liability attaches when a fire department or police department fails to provide adequate protection to an individual. The public duty doctrine is restricted to "liability for nondiscretionary (or 'ministerial' or 'operational') functions[.]"

*W. Va. State Police v. Hughes*, 796 S.E.2d 193, 199 (W.Va. 2017).

Petitioners' Complaints clearly set forth the duties required of the BOP, which are not merely general, non-discretionary duties, but rather specific, mandated duties that require attention and, more importantly, action on the part of the BOP. The requirements of *W.Va. Code* §30-1-1; *W.Va. Code §*30-5-6; *W.Va. Code* § 60A-3-303; *W.Va. C.S.R.* §15-2-5.1.1; *W.Va. C.S.R.* §15-8-7.7.8, and other policies impose precise obligations upon the BOP regarding its control of the manufacture and distribution of controlled substances, performing investigations into the distribution of controlled substances, and preventing improper diversions.

The primary method for the BOP to "identify abnormal or unusual practices of patients who exceed" established parameters is to review suspicious orders reports required by the federal Drug Enforcement Agency ("DEA"). The DEA is the federal agency tasked with administering and enforcing the Controlled Substances Act (CSA)[16] and regulating registrants licensed to manufacture, distribute, and prescribe controlled substances in the United States. Suspicious orders include orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency. Distributors are required to submit the reports to the BOP as well.

[16] The Controlled Substances Act, Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91 – 413, 84 Stat.1236 (1970).

The BOP's argument that a suspicious order does not mean that the order is illegal, improper, or a diversion begs the question as to why the order is suspicious to begin with. The further assertion that the BOP "plays no role in determining what a suspicious order is, how it is determined, or if the order is shipped, as that is determined by two private business entities" reflects the position of the Plaintiffs—that the BOP ignored its obligations and now tries to pass the buck to someone else.

The BOP is required to review records in the CSMP to identify abnormal or unusual practices. There is no evidence that the BOP ever did so, even after receiving (and ignoring) over 7,200 suspicious order reports. The BOP did next to nothing to prevent the opioid crisis in West Virginia, apparently determining that those 7,200 reports were not enough to trigger an investigation. Meanwhile, West Virginia became the poster child for substance abuse, taking the lead in the number of deaths attributed to opioid addictions. The rates for children born with NAS skyrocketed as well.

The public duty doctrine provides no protection to an agency that engages in willful, wanton, or reckless behavior. *Holstein v. Massey,* 490 S.E.2d 775, 875 (W.Va. 1997). In *Holstein,* the West Virginia Supreme Court of Appeals combined the statutory exceptions to immunity available to political subdivisions under *W.Va. Code* §29-12A-5 with the common law principles of public duty and concluded that willful, wanton, or reckless behavior would not shield the governmental agency from liability. *Id.* Moreover, the Court recognized that the willful and wanton exception is *in addition to* the special relationship exception:

> Accordingly, we hold that the wanton or reckless conduct exception to an employee's (as the term "employee" is defined in the Governmental Tort Claims and Insurance Reform Act) immunity under *W. Va. Code*, 29-12A-5(b)(2) [1986] of 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.

*Holsten v. Massey,* 490 S.E.2d at 876-877 (emphasis added). The Court pointedly reasoned that incorporating a willful and wanton requirement into the special duty doctrine "would therefore yield the anomalous result of making recovery more difficult under the doctrine than it already is under the statute." *Id., citing Leone v. City of Chicago,* 619 N.E.2d 119 (Ill. 1993).

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, amounting almost to a wiliness that they should follow." *Holsten,* 490 S.E.2d 864, 878; *Bygum v. City of Montgomery,* No. 2:19-cv-00456, 2021 WL 4487610 (S.D.W.Va. Sept. 30, 2021) (memorandum opinion); *Hall v. City of Huntington*, No. 3:06-0070, 2007 WL 2119261, 2007 U.S. Dist. LEXIS 53511, at *13 (S.D.W.Va. July 20, 2017); *Eagon*, 2023 WL 8853727, 2023 U.S. Dist. LEXIS 227612, *35.

The wanton and reckless exception to the public duty doctrine applies to state agencies as well as political subdivisions:

> Just as it was found applicable to cases against local governments in *Randall,* we hold that, *the public duty doctrine and its "special relationship" exception apply to W.Va. Code § 29-12-5 actions against the State* and its instrumentalities, unless the doctrine is expressly waived or altered by the terms of the applicable insurance contract. *The doctrine and its exceptions are a recognized part of our law on the liability of governmental bodies*, providing a means of determining the duties for whose breach such an action may be brought against such governmental bodies. "[A] governmental entity is not liable because of its failure to enforce regulatory or penal statutes". Syl. pt. 1, *Benson v. Kutsch*, *supra*. Likewise, we adopt the factors to be considered to determine the applicability of the "special relationship" exception, found in syllabus point 2 of *Wolfe v. City of Wheeling*, 182 W. Va. 253, 387 S.E.2d 307 (1989), and reiterate its holding in syllabus point 3: In cases arising under W.Va. Code § 29-12-5 the question of whether a special duty arises to protect an individual from a state governmental entity's negligence is ordinarily a question of fact for the trier of the facts.

*Parkulo v. W.Va. Bd. of Probation and Parole,* 483 S.E.2d 507, 524 (W.Va. 1996) (emphasis added.)[17]

In *Parkulo,* the West Virginia Supreme Court of Appeals held that not only did the doctrine of public duty apply to state agencies, but the exceptions to the doctrine did as well. *Id.* The Marshall County Circuit Court recognized this holding in its order entered in *Brooke Cty. Comm'n, v. Purdue Pharma, L.P.* "The protections of the public duty doctrine are not limitless . . . In West Virginia, the public duty doctrine does not apply in cases involving willful, wanton, or reckless behavior." *Id.; Holstein v. Massey,* 490 S. E.2d at 875, 877; *Randall v. Fairmont City Police Dept.,* 412 S.E.2d 737, 748 (W.Va. 1991). The *Brooke* order correctly applied *all* common law exceptions to both state agencies and local governments:

> Significantly, in cases involving the State and its agencies, the West Virginia Supreme Court has stated that it "will apply to the issue of the State's liability in *W.Va. Code* §29-12-5 cases the immunities and defenses that have been sanctioned in analogous governmental tort cases, including cases involving the immunity of local governments not entitled to the sovereign immunity of the State.

*Brooke,* p. 5, citing *Parkulo,* 483 S.E.2d at 522. Thus, the public duty willful and wanton exception applies to both political subdivisions falling under the prevue of *W.Va. Code* §29-12A-5 *and* state agencies subject to *W.Va. Code* §29-12-5.

Petitioners alleged in their Complaints that the BOP acted in a willful, wanton, or reckless manner in ignoring the 7,200 suspicious orders report that flooded its offices over a five-year period. Incredibly, the BOP asserts the agency "saw no large numbers that would trigger an investigation in all of the suspicious order reports" reviewed. If 7,200 reports, an average of 40

[17] The *Parkulo* decision stated that the public duty doctrine and its exceptions apply to entities that fall under both, *W.Va. Code* §23-12-5 as well as *W.Va. Code* §20-12A-1 *et seq.* Petitioners do not argue that the BOP is a political subdivision subject to the requirements of the Governmental Tort Claims Act. Petitioners DO argue that a state agency such as the BOP is subject to the same doctrines and exceptions applicable to a political subdivision.

reports per month, were not enough to trigger some alarm, one is left to ponder exactly *how many more r*eports would be needed to pique the interest of the BOP. The sheer number of reports made it obvious that there was a risk, and the BOP intentionally failed to take any significant action.

As the regulatory agency for physicians, pharmacies and pharmacists who were making the news on a regular basis, the BOP was not oblivious to the rising opioid crisis developing throughout West Virginia, and its purposeful decisions to not get involved in the matter constitutes a willful, wanton, and reckless dereliction of its public duty to the Plaintiffs and every person throughout the state ultimately damaged by the BOP's inactions.

The lower court erred by holding that there is only one exception to the public duty defense, the special relationship exception. That is not correct.[18] The West Virginia Supreme Court of Appeals has clearly recognized the wanton and reckless exception and has applied it to state agencies. *See*, *Eagon*, 2023 WL 8853727, 2023 U.S. Dist. LEXIS 227612, *35.

The Circuit Court Order ignored the wanton and reckless exception, dismissing the cases by saying—in error—that the only exception to the public duty doctrine was a special relationship. The lower court then found that Plaintiffs did not assert the special relationship exception.

There are two distinct exceptions to the public duty doctrine. There is no requirement that a party must meet every exception to the public policy doctrine. The *Holstein* decision made it perfectly clear that the willful and wanton exception should *not* be incorporated into the special relationship doctrine. The purpose of Plaintiff's appeal is to point out that the Circuit Court did not

[18] As argued previously, the reliance upon the opinion of Ohio District Judge Polster in MDL No. 2804, *In re: National Prescription Opioid Litigation* is flawed, 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.

even *consider* the wanton and reckless exception, but instead erroneously focused solely on the special relationship exception. The wanton and reckless exception to the public policy doctrine applies in this matter, and Plaintiffs met the requirements for that exception.[19]

There was no basis to grant the BOP's motion to dismiss this action based on the public policy doctrine, and at the very least leave to amend, as requested, should have been granted. Plaintiffs clearly met the requirements for the wanton and reckless exception and were not required to meet *every* exception to that doctrine.

**A. The BOP Is Not Entitled to Qualified Immunity.**

The BOP is not entitled to qualified immunity because, as a state agency, it violated multiple state statutes and rules by failing to perform mandatory, non-discretionary duties. The Complaints specifically alleged malicious and intentional conduct on the part of BOP, which allegations must be taken as true at this preliminary stage of the matters.

A determination of whether qualified immunity applies in an action must include consideration of 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 773, 784 (W.Va. 2020).

[19] In cases arising under *W. Va. Code* § 29-12-5, the question of whether a special duty arises to protect an individual from a state governmental entity's negligence is ordinarily a question of fact for the trier of fact. *Parkulo,* 483 S.E.2d at 510, Syl. Pt. 11; *J. H. v. W. Va. Div. of Rehab. Servs*., 680 S.E.2d 392, 404 (W.Va. 2009).

The BOP is a state agency; there is no insurance contract that waives the defense of qualified immunity; and the provisions of *W.Va. Code* §29-12A-1 do not apply. Plaintiffs have specifically alleged that the actions of the BOP were not discretionary judgments, decisions, or actions, but rather were intentional decisions that ultimately became malicious and wanton, thus meeting the basic requirement of properly pleading their claims. See *W.Va. Reg'l Jail & Corr. Facility Auth. v. A.B.,* 766 S.E.2d 751, 773 (W.Va. 2014). 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*, 465 S.E.2d 374; *W.Va. State Police v. J.H.*, 856 S.E.2d 679 (W.Va. 2021).

> [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 751, 765 (W.Va. 2014).

The duties of the BOP were not discretionary. *W.Va. Code* §30-1-1, *W.Va. Code §*30-5-6, *W.Va. Code* § 60A-3-303, *W.Va. C.S.R.* §15-2-5.1.1, and *W.Va. C.S.R*. §15-8-7.7.8 require the BOP to protect the public interests, to regulate and control the manufacture and distribution of controlled substances, and to *investigate violations of state law.* Given the submission of over 7,200 suspicious order reports, the implication that the BOP was not required to take any action or was unable to stretches the bounds of credibility. The BOP made a conscious, purposeful decision not

to take action on the suspicious order reports, which was a violation of several non-discretionary laws as pled in the Complaints.

A state agency is not entitled to qualified immunity where the discretionary actions violate "clearly established laws of which a reasonable official would have known" and that the agency would understand that what it was doing violated that right or that the unlawfulness of the action was apparent. *Id.*, 766 S.E.2d at 774; *West Virginia Dept. of Health and Human Res. v. Payne*, 746 S.E.2d 554, 563 (W.Va. 2013); *Anderson v. Creighton,* 483 U.S. 635, 640 (1987); *Hutchison v. City of Huntington*, 479 S.E.2d 649, 659 n. 11 (W.Va. 1996); *W. Va. State Police v. J.H.*, 856 S.E.2d 679 (W.Va. 2021).

The BOP did not have discretionary duties, it had multiple mandatory duties. Even if those duties were somehow deemed discretionary, the Respondent still would not be entitled to qualified immunity because it knowingly violated clearly established laws as specifically pled in the Complaints. The obligations and duty of the BOP to consider the 7,200 suspicious order reports; to investigate, report, communicate and *do something to effectively control* the diversion of controlled substances was clear and dismissal was improper, particularly at this early stage based entirely on the allegations in the Complaints.

The allegations of the Petitioners in the Complaints are clear and must be taken at face value at this stage of the proceedings. Moreover, the allegations are supported by admissions by BOP employees that the agency did nothing more than review the first few suspicious order reports, and determine it needed to do nothing further. Such a position begs the question: why bother requiring or receiving suspicious order reports if nothing will be undertaken?

The BOP maliciously, intentionally, and recklessly failed to adhere to clearly established laws and is not entitled to any immunities or protections. Therefore, the order granting the motion to dismiss Plaintiff's Complaint against the BOP should be reversed.

**B. The BOP is Not Entitled to Absolute Immunity.**

The BOP is not entitled to absolute immunity for the same reasons it is not entitled to qualified immunity. The decision not to investigate the suspicious order reports was not an executive/administrative policy-making act, but rather was an intentional, purposeful decision to not follow clearly established laws. The BOP did not create a policy; it merely failed to follow existing laws and rules. "[I]n West Virginia, the type of immunity afforded by the discretionary acts immunity, which is a *qualified* immunity, should not be conceptually commingled with the executive/administrative act immunity for policy-making acts which is absolute." *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 776 S.E.2d 751, fn. 15.; Syl. Pt. 7, *Parkulo*, 483 S.E.2d 507. The BOP has not demonstrated that it is entitled to absolute immunity, and the decision of the Circuit Court to the contrary should be reversed.

## CONCLUSION

The Circuit Court erred in dismissing Plaintiffs' Complaints without leave to amend. The Order is contrary to long-standing precedent, as evidenced by Defendants' failure to provide any legal authority to support the lower court's decision. Plaintiffs allege sufficient facts which, taken as true at this stage, establish their claims of nuisance and negligence, including proximate cause. Further, the BOP is not immune as a matter of law. In the alternative, fairness dictates that Plaintiffs be given an opportunity to amend their pleadings should any question exist as the sufficiency of the Complaints.

**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*

L. Danté diTrapano, Esq. (WVSB #6778)
Alex McLaughlin, Esq. (WVSB #9696)
CALWELL LUCE DITRAPANO
500 Randolph Street
Charleston, WV 25302
T: (304) 343-4323
F: (304) 344-3684
dditrapano@cldlaw.com
amclaughline@cldlaw.com

R. Booth Goodwin II. Esq. (WVSB #7165)
Benjamin B. Ware, Esq. (WVSB #10008)
Stephanie H. Daly, Esq. (WVSB #8835)
GOODWIN & GOODWIN, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301
T: (304) 346-7000
F: (304) 344-9692
rbg@goodwingoodwin.com
bbw@goodwingoodwin.com
shd@goodwingoodwin.com

W. Jesse Forbes, Esq. (WVSB #9958)
FORBES LAW OFFICES, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301
T: (304) 343-4050
F: (304) 343-7450
wjforbes@forbeslawwv.com

P. Rodney Jackson, Esq. (WVSB #1861)
LAW OFFICES OF P. RODNEY JACKSON
Fifth Third Center
700 Virginia Street, East
Charleston, WV 25301
T: (843) 870-6879
prodjackson27@icould.com

## CERTIFICATE OF SERVICE

I, R. Booth Goodwin II, do hereby certify that the foregoing "**PETITIONERS' REPLY 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 16th day of February, 2024.

**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
R. Booth Goodwin II (WVSB #7165)
Benjamin B. Ware (WVSB # 10008)
Stephanie H. Daly (WVSB # 8835)
GOODWIN & GOODWIN, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301
P: (304) 346-7000
F: (304) 346-9692
rbg@goodwingoodwin.com
bbw@goodwingoodwin.com
shd@goodwingoodwin.com