

**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**  
**No. 23-ICA-287**

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TRAVIS BLANKENSHIP,  
Next Friend and Guardian of  
Minor Child Z.D.B., (L)

Plaintiffs Below, Petitioner,

v.

McKESSON CORPORATION, et al.,

Defendants Below, Respondent.

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**PETITIONERS' OPENING BRIEF**

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Anthony J. Majestro (WVSB 5165)  
Christina L. Smith (WVSB 7509)  
Counsel of Record  
POWELL & MAJESTRO PLLC  
405 Capitol Street, Suite 807  
Charleston, WV 25301  
Phone: 304-346-2889  
Fax: 304-346-2895  
amajestro@powellmajestro.com  
csmith@powellmajestro.com  
*Counsel for Petitioners Blankenship, et al.*

Stephen P. New, Esq.  
Emilee B. Withrow, Esq.  
NEW, TAYLOR & ASSOCIATES  
430 Harper Park Drive  
PO Box 5516  
Beckley, WV 25801  
Phone: 304-250-6017  
steve@newlawoffice.com  
*Counsel for Petitioners Blankenship, et al.*

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## **INTRODUCTION**

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

These actions, among several related cases collectively referred to below as “NAS Cases,” were filed on behalf of innocent children who are the most tragic victims of the opioid crisis. Each Complaint contains factual allegations which, when accepted as true together with all reasonable inferences drawn in favor of Plaintiffs, state claims under West Virginia law. Nonetheless, the Mass Litigation Panel (hereinafter referred to as the “Circuit Court”), acting through the Circuit Court of Kanawha County, dismissed the actions at the pleading stage.

In dismissing the NAS Cases en mass, the Circuit Court failed to examine the allegations in the complaints, governing West Virginia law, and the decisions of the Supreme Court of Appeals. In sweeping away these claims of the most vulnerable victims of the opioid crisis, the Circuit Court rendered a decision that conflicted with even its prior decisions in the opioid litigation. Dismissal was clear error. This Court should reverse and remand for discovery and trial.

## **ASSIGNMENTS OF ERROR**

1. The Circuit Court erred in dismissing Plaintiffs’ causes of action against the pharmacy Defendants for failing to comply with the West Virginia Medical Professional Liability Act, W. Va. Code § 55-7B-1 *et seq.*

2. The Circuit Court erred in dismissing Plaintiffs’ causes of action pertaining to



medical monitoring.

3. The Circuit Court erred in granting Defendant Indivior's motion to dismiss.

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

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

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

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

8. The Circuit Court erred in dismissing Plaintiffs' fraud causes of action.

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

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

### **STATEMENT OF THE CASE**

Like thousands of children born every year, Plaintiffs were born addicted to opioids, such as Oxycontin, oxycodone, Percocet, and other opioids obtained both legally from prescriptions and illegally. Prenatal exposure to opioids causes both severe withdrawal symptoms – a condition referred as NAS – and lasting developmental impairments. The first days of their lives were spent in excruciating pain as doctors weaned them from opioid addiction, requiring years of treatment and counseling to deal with the effects of prenatal exposure to opioid medications. The tragic stories of the eighteen Plaintiff groups subject to this appeal are described below.

## **I. Adams**

Jacqueline Adams is the grandmother and legal guardian of minor children S.D.L. (DOB 10/11/2016) and H.G.L. (DOB 5/16/2018), who were both born dependent on opioids. Monica Adams, the minors' birth mother, was treated with opioids for pain resulting from multiple dental procedures.<sup>1</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or more of the named Defendants.<sup>2</sup> Her addiction to opioids began prior to the minors' gestations.<sup>3</sup> She was prescribed Subutex upon discovering her pregnancies.<sup>4</sup>

Both minors were diagnosed with NAS and treatment in a Neonatal Intensive Care Unit ("NICU") for detoxification and withdrawal.<sup>5</sup> S.D.L. required 19 days of inpatient care with administration of morphine for weaning.<sup>6</sup> H.G.L. required 17 days of inpatient care with methadone therapy for weaning.<sup>7</sup> Both minors suffer medical issues and problems as a result of opioid exposure in utero, including, but not limited to, significant NAS symptoms at birth, insomnia, behavioral issues, and developmental delays.<sup>8</sup>

## **II. Adkins**

Floretta Adkins is the grandmother and legal guardian of minor child M.J.A. (DOB 6/12/2004), who was born dependent on opioids.<sup>9</sup> Melody Farmer, M.J.A.'s birth mother, was

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<sup>1</sup> JA 03506 at ¶4.

<sup>2</sup> *Id.* at ¶¶4-5, 7-8.

<sup>3</sup> *Id.* at ¶5.

<sup>4</sup> *Id.* at ¶6.

<sup>5</sup> JA 03505 at ¶2.

<sup>6</sup> *Id.* at ¶3.

<sup>7</sup> *Id.*

<sup>8</sup> JA 03507 at ¶11.

<sup>9</sup> JA 03271 at ¶1.

prescribed opioids for pain resulting from an injury in 2003.<sup>10</sup> She consumed opioids manufactured and distributed by one or more of the named Defendants.<sup>11</sup> Her addiction began prior to M.J.A.'s gestation.<sup>12</sup>

M.J.A. has suffered from health problems as a result of opioid exposure in utero, including, but not limited to, recurring ear infections, asthma, heart murmur, behavioral issues, anxiety disorder, ADHD, syncope and personality disorder.<sup>13</sup>

### **III. Anderson**

Stacey Anderson is the mother and legal guardian of minors A.L.A. (DOB 1/18/2005) and T.L.A (DOB 10/27/2020) who were both dependent on opioids.<sup>14</sup> Stacey Anderson was treated with opioids for chronic thoracic back pain, migraine and carpal tunnel by her primary care physician, Dr. Derakhshan.<sup>15</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or more of the named Defendants.<sup>16</sup> Her addiction began prior to the minors' gestations.<sup>17</sup> She continued to consume opioids throughout her pregnancies, including the use of Methadone (A.L.A.) and Buprenorphine (T.L.A).<sup>18</sup>

Both minors were diagnosed with NAS and spent their first days in a NICU for detoxification and withdrawal.<sup>19</sup> The minors suffer from medical issues and problems as a result

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<sup>10</sup> *Id.* at ¶3.

<sup>11</sup> JA 03271-72 at ¶¶6-7.

<sup>12</sup> JA 03271 at ¶5.

<sup>13</sup> JA 03271 at ¶2; JA 03273 at ¶10.

<sup>14</sup> JA 03622 at ¶1.

<sup>15</sup> JA 03623 at ¶4.

<sup>16</sup> *Id.* at ¶¶ 5, 8-9.

<sup>17</sup> JA 03623 at ¶5.

<sup>18</sup> *Id.* at ¶¶6-7.

<sup>19</sup> JA 03622 at ¶2.

of opioid exposure in utero, including, but not limited to, significant NAS symptoms at birth requiring several weeks of inpatient care including Methadone for weaning, asthma, growth developmental and learning delays, cardiomegaly, astigmatism, and headache.<sup>20</sup>

#### **IV. Blankenship**

Travis Blankenship is the father and legal guardian of minor child Z.D.B. (DOB 5/29/2017), who was born dependent on opioids.<sup>21</sup> Christina Blankenship, Z.D.B.'s birth mother, was treated with opioids for chronic back pain related to a motor vehicle collision in 2005 and complications during the birth of Z.D.B.'s older sister in 2011.<sup>22</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or more of the named Defendants.<sup>23</sup> Her addiction began prior to Z.D.B.'s gestation.<sup>24</sup> She continued to consume opioids through the first four months gestation, at which point she switched to Methadone.<sup>25</sup>

Z.D.B. was diagnosed with NAS and spent his first days in NICU for detoxification and withdrawal, feeding issues, and respiratory distress.<sup>26</sup> Z.D.B. required twenty-eight days of inpatient care, which included intravenous nutrition and methadone therapy.<sup>27</sup> He remained on methadone treatment for the first month of his life.<sup>28</sup> He suffers from medical issues and problems as a result of opioid exposure in utero, including, but not limited to, significant NAS symptoms at

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<sup>20</sup> JA 03625 at ¶12.

<sup>21</sup> JA 00391 at ¶1; JA 00394-95 at ¶¶15-16.

<sup>22</sup> JA 00392 at ¶5.

<sup>23</sup> *Id.* at ¶8; JA 00393 at ¶¶11-12.

<sup>24</sup> JA 00392 at ¶8.

<sup>25</sup> JA 00393 at ¶¶9-10.

<sup>26</sup> JA 00391 at ¶2; JA 00394 at ¶15.

<sup>27</sup> JA 00392 at ¶3.

<sup>28</sup> JA 00392 at ¶4; JA 00394 at ¶15.

birth, premature delivery at thirty-four weeks gestation, recurring ear and upper respiratory infections, and severe cognitive and developmental delays.<sup>29</sup>

## **V. Boswell**

Tammy Boswell is the grandmother and legal guardian of minor children B.E.B. (D.O.B. 3/29/2013) and S.F.B. (D.O.B. 7/15/2014) who were born dependent on opioids and diagnosed with NAS.<sup>30</sup> Eden Boswell, the birth mother, was treated with opioids for pain resulting from a vehicle collision in 2011.<sup>31</sup> She consistently consumed prescriptions opioids manufactured and distributed by one or more of the named Defendants.<sup>32</sup> Her addiction began prior to B.E.B. and S.F.B.'s gestations.<sup>33</sup> She continued to consume opioids during both pregnancies.<sup>34</sup>

S.F.B. required twenty-six days of inpatient care for withdrawal symptoms, feeding issues, respiratory distress, and administration of morphine for weaning.<sup>35</sup> Both suffer from medical issues and problems as a result of opioid exposure in utero, including, but not limited to, significant NAS symptoms at birth, recurring ear and upper respiratory infections, feeding problems, and tremors.<sup>36</sup>

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<sup>29</sup> JA 00394 at ¶15.

<sup>30</sup> JA 02059 at ¶¶1-2; JA 02062 at ¶13.

<sup>31</sup> JA 02060 at ¶4.

<sup>32</sup> *Id.* at ¶¶5, 8-9.

<sup>33</sup> *Id.* at ¶5.

<sup>34</sup> *Id.* at ¶7.

<sup>35</sup> JA 02059 at ¶3.

<sup>36</sup> JA 02061 at ¶12.

## **VI. Brooks**

Dianna Brooks is the grandmother and legal guardian of minor child W.A.R. (D.O.B. 4/22/2012), who was born dependent on opioids and diagnosed with NAS.<sup>37</sup> Carri Jo Upton Reed (deceased), W.A.R.'s birth mother, was prescribed Oxycodone by Dr. Derakhshan for pain due to injuries sustained in a motor vehicle collision in 2011.<sup>38</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or more of the named Defendants.<sup>39</sup> Her addiction began prior to W.A.R.'s gestation and she continued to consume opioids throughout her pregnancy.<sup>40</sup>

W.A.R. was diagnosed with NAS and required treatment in NICU for detoxification and withdrawal.<sup>41</sup> He required two months of methadone treatment.<sup>42</sup> He suffers from medical issues and problems as a result of opioid exposure in utero, including, but not limited to, significant NAS symptoms at birth, asthma, recurring ear and upper respiratory infections, adjustment disorder, anxiety disorder, and ADHD requiring IEP for school.<sup>43</sup>

## **VII. Fuller**

Patricia Fuller is the grandmother and legal guardian of minor child A.J.F. (D.O.B. 6/3/2015), who was born dependent on opioids and diagnosed with NAS.<sup>44</sup> Amber Fuller, A.J.F.'s birth mother, was treated with opioids for chronic pain resulting from a motor vehicle collision in

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<sup>37</sup> JA 03387 at ¶¶1-2; JA 03390 at ¶13.

<sup>38</sup> JA 03387 at ¶1; JA 03388 at ¶5.

<sup>39</sup> JA 03387 at ¶6, 8-9.

<sup>40</sup> *Id.* at ¶¶6, 7.

<sup>41</sup> JA 03387 at ¶2.

<sup>42</sup> JA 03388 at ¶4.

<sup>43</sup> JA 03389 at ¶12.

<sup>44</sup> JA 04022 at ¶1; JA 04025 at ¶¶12-13.

early 2005.<sup>45</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or more of the named Defendants.<sup>46</sup> Her addiction started prior to A.J.F.'s gestation and she consumed Buprenorphine throughout her pregnancy.<sup>47</sup>

A.J.F. was diagnosed with NAS and required care in the NICU for detoxification and withdrawal.<sup>48</sup> She required morphine therapy for the first week of her life.<sup>49</sup> She suffers from medical issues and problems as a result of opioid exposure in utero, including, but not limited to, significant NAS symptoms at birth, feeding problems and failure to thrive, recurring ear and upper respiratory infections, and behavioral and emotional disorders.<sup>50</sup>

### **VIII. Harris**

Stacey Harris is the mother and legal guardian of minor child N.M.B. (D.O.B. 5/16/2015), who was born dependent on opioids.<sup>51</sup> Stacey Harris, N.M.B.'s birth mother, was treated with opioids for dental issues, Graves' disease and Rheumatoid Arthritis.<sup>52</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or more of the named Defendants.<sup>53</sup> Her addiction began prior to N.M.B.'s gestation and she continued use of Buprenorphine daily during her pregnancy.<sup>54</sup>

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<sup>45</sup> JA 04023 at ¶5.

<sup>46</sup> *Id.* at ¶¶6, 8-9.

<sup>47</sup> *Id.* at ¶¶6-7.

<sup>48</sup> JA 04022 at ¶2.

<sup>49</sup> JA 04023 at ¶4.

<sup>50</sup> JA 04025 at ¶12.

<sup>51</sup> JA 02785 at ¶1; JA 02788 at ¶¶12-13.

<sup>52</sup> JA 02786 at ¶5.

<sup>53</sup> *Id.* at ¶¶6, 8-9.

<sup>54</sup> *Id.* at ¶¶6-7.

N.M.B. was diagnosed with NAS and required thirty-nine days of inpatient care in the NICU for detoxification and withdrawal.<sup>55</sup> He required five weeks of methadone therapy.<sup>56</sup> He suffers from medical issues and problems as a result of opioid exposure in utero, including, but not limited to, significant NAS symptoms, premature delivery at thirty-six weeks gestation, recurring ear and upper respiratory infections, lactose intolerance with continued feeding and swallowing issues, ADHD, and sensory issues requiring IEP.<sup>57</sup>

#### **IX. D. Johnson**

Donna Johnson is the grandmother and legal guardian of L.M.J. (DOB 7/31/2012), who was born dependent on opioids.<sup>58</sup> Chasity Cassidy, L.M.J.'s birth mother, was treated with opioids for back injuries sustained in a motor vehicle collision in 2011.<sup>59</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or more of the named Defendants.<sup>60</sup> Her addiction began prior to gestation, and she continued to consume opioids throughout her pregnancy.<sup>61</sup>

L.M.J. was diagnosed with NAS and required care in the NICU for detoxification and withdrawal, including morphine and methadone therapy.<sup>62</sup> He required methadone treatment for the first six months of his life.<sup>63</sup> He suffers from medical issues and problems as a result of opioid

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<sup>55</sup> JA 02785 at ¶¶2-3; JA 02788 at ¶12.

<sup>56</sup> JA 02785-86 at ¶¶3-4.

<sup>57</sup> JA 02788 at ¶12.

<sup>58</sup> JA 04141 at ¶1; JA 04144 at ¶13.

<sup>59</sup> JA 04142 at ¶5.

<sup>60</sup> *Id.* at ¶¶6, 8-9.

<sup>61</sup> *Id.* at ¶¶6-7.

<sup>62</sup> JA 04141 at ¶2; JA 04142 at ¶3.

<sup>63</sup> *Id.* at ¶4.



exposure in utero, including, but not limited to, significant NAS symptoms at birth, allergies and skin rash, severe cognitive and developmental delays, ADHD, ODD, and autism.<sup>64</sup>

#### **X. R. Johnson**

Roger Johnson is the cousin and legal guardian of minor child S.A.J. (DOB 5/30/2008), who was born dependent on opioids.<sup>65</sup> Christin Taylor, S.A.J.'s birth mother, was treated with opioids for pain as a result of an accident.<sup>66</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or more of the named Defendants.<sup>67</sup> Her addiction began prior to S.A.J.'s gestation and she continued to consume opioids throughout her pregnancy.<sup>68</sup>

S.A.J. was diagnosed with NAS and required care in the NICU for detoxification and withdrawal.<sup>69</sup> He suffers from medical issues and problems as a result of opioid exposure in utero, including, but not limited to, NAS symptoms at birth, developmental feeding disorder, recurring ear and upper respiratory infections, asthma and eczema, speech articulation disorder, and anxiety and panic disorder.<sup>70</sup>

#### **XI. Lambert**

Timothy Lambert is the father and legal guardian of M.D.L. (DOB 12/21/2010) and T.J.L. (DOB 10, 3, 2003), who were both born dependent on opioids.<sup>71</sup> Stephanie Lambert, the minors'

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<sup>64</sup> JA 04143 at ¶12.

<sup>65</sup> JA 04468 at ¶1; JA 04471 at ¶14.

<sup>66</sup> JA 04468 at ¶4.

<sup>67</sup> JA 04469 at ¶¶5, 9-10.

<sup>68</sup> *Id.* at ¶¶6-7.

<sup>69</sup> JA 04468 at ¶2.

<sup>70</sup> JA 04470 at ¶13.

<sup>71</sup> JA 02423 at ¶1; JA 02426 at ¶¶12-13.

birth mother, was treated with opioids for pain resulting from an injury sustained in a motor vehicle collision in the early 2000's.<sup>72</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or more of the named Defendants.<sup>73</sup> Her addiction began prior to both babies' gestation; she continued to consume opioids throughout both pregnancies.<sup>74</sup>

Both minors were diagnosed with NAS.<sup>75</sup> T.J.L. required twenty-six days of inpatient methadone therapy.<sup>76</sup> Both suffer from medical issues and problems as a result of opioid exposure in utero, including, but not limited to, significant NAS symptoms at birth, delivered prematurely, smaller and misshapen left elbow, vision problems, learning issues and disability, and ADHD.<sup>77</sup>

## **XII. Mangus**

Kelly Mangus is the mother and legal guardian of minor child, L.C.M. (DOB 5/26/2016), who was born dependent on opioids.<sup>78</sup> Kelly Mangus was first treated with opioids for pain resulting from a leg injury in 2005.<sup>79</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or more of the named Defendants.<sup>80</sup> Her addiction began prior to L.C.M.'s gestation and she continued to consume opioids throughout her pregnancy.<sup>81</sup> She began use of Buprenorphine daily during her last trimester.<sup>82</sup>

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<sup>72</sup> JA 02424 at ¶4.

<sup>73</sup> *Id.* at ¶¶5, 8-9.

<sup>74</sup> *Id.* at ¶¶6-7.

<sup>75</sup> JA 02423 at ¶2.

<sup>76</sup> *Id.* at ¶3.

<sup>77</sup> JA 02426 at ¶12.

<sup>78</sup> JA 02653 at ¶1; JA 02655-56 at ¶¶11-12.

<sup>79</sup> JA 02653 at ¶3.

<sup>80</sup> JA 02654 at ¶¶4, 7-8.

<sup>81</sup> *Id.* at ¶¶4-5

<sup>82</sup> *Id.* at ¶6.

L.C.M. was diagnosed with NAS and required care in the NICU.<sup>83</sup> He suffers from health problems as a result of opioid exposure in utero, including, but not limited to: NAS symptoms, jitteriness, recurring ear and upper respiratory infections, hearing loss, autism, and developmental delays with an IEP for school.<sup>84</sup>

### **XIII. Otwell**

Scott Otwell is the father and legal guardian of minor child R.G.O. (DOB 2/20/2019), who was born dependent on opioids.<sup>85</sup> Whitney Lidnsey, R.G.O.'s mother, was originally treated with opioids for chronic thoracic back pain caused by spinal stenosis.<sup>86</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or more of the named Defendants.<sup>87</sup> Her addiction began prior to R.G.O.'s gestation and she continued to consume opioids until she was approximately four months into gestation.<sup>88</sup> She continued to use Subutex daily during her pregnancy.<sup>89</sup>

R.G.O. was diagnosed with NAS and required care in the NICU for twenty-eight days for detoxification and withdrawal.<sup>90</sup> She required methadone therapy and phenobarbital treatment.<sup>91</sup> She suffers from medical issues and problems because of opioid exposure in utero, including, but

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<sup>83</sup> JA 02653 at ¶2.

<sup>84</sup> JA 02655 at ¶11.

<sup>85</sup> JA 01459 at ¶13; JA 01460 at ¶14.

<sup>86</sup> JA 01458 at ¶5.

<sup>87</sup> JA 01458 at ¶¶6, 9-10.

<sup>88</sup> *Id.* at ¶¶6-7.

<sup>89</sup> *Id.* at ¶8.

<sup>90</sup> JA 01457 at ¶3; JA 01459 at ¶13.

<sup>91</sup> JA 01458 at ¶4.

not limited to, significant NAS symptoms, transfer to Lily's place for long term care beyond four weeks of life, and cognitive and developmental delays.<sup>92</sup>

#### **XIV. Paynter**

Thomas Paynter is the grandfather and legal guardian of Z.N.B. (DOB 12/14/2018), who was born dependent on opioids.<sup>93</sup> Megan Taynter, Z.N.B.'s mother, was treated with opioids for dental work in 2004.<sup>94</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or more of the named Defendants.<sup>95</sup> Her addiction began prior to Z.N.B.'s gestation and she continued to consume opioids throughout her pregnancy.<sup>96</sup>

Z.N.B. was diagnosed with NAS and required treatment in the NICU for detoxification and withdrawal.<sup>97</sup> He required morphine therapy and twenty-seven days of inpatient care.<sup>98</sup> He suffers from medical issues and problems as a result of opioid exposure in utero, including, but not limited to, significant NAS symptoms, delayed maturation of left femoral head and tibial torsion causing limp, growth and development delay, speech delay resulting in the need for sign language, sleep disorder requiring medication, sensory disorder, behavioral issues, and ADHD.<sup>99</sup>

#### **XV. Stacey**

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<sup>92</sup> JA 01459 at ¶13.

<sup>93</sup> JA 03807 at ¶1; JA 03809-10 at ¶¶12-13.

<sup>94</sup> JA 03808 at ¶5.

<sup>95</sup> *Id.* at ¶¶6, 8-9.

<sup>96</sup> *Id.* at ¶¶6-7.

<sup>97</sup> JA 03807 at ¶3.

<sup>98</sup> JA 03808 at ¶4.

<sup>99</sup> JA 03809 at ¶12.

Stacy Stacey is the mother and legal guardian of minor child T.K.L. (DOB 11/24/2008), who was born dependent to opioids.<sup>100</sup> Ms. Stacey was treated with opioids due to injuries sustained in an accident resulting in chronic pain in 2001.<sup>101</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or more of the named Defendants.<sup>102</sup> Her addiction began prior to T.K.L.'s gestation and she continued to consume opioids throughout her pregnancy.<sup>103</sup>

T.K.L. was diagnosed with NAS and required treatment in the NICU for detoxification and withdrawal, including the administration of methadone therapy.<sup>104</sup> He suffers from health problems as a result of opioid exposure in utero, including, but not limited to, significant NAS symptoms, including eight days of inpatient care, recurring skin rash and respiratory infections, sleep disturbance issues, ADHD, and ODD.<sup>105</sup>

## **XVI. Swift**

Brandy Swift is the mother and legal guardian of minor children S.R.S. (DOB 4/5/2007), M.K.S. (DOB 6/26/2009) and J.A.S. (DOB 8/17/2002), who were all born dependent on opioids.<sup>106</sup> Brandy Swift was first treated with opioids for dental problems and procedures.<sup>107</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or

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<sup>100</sup> JA 04363 at ¶1; JA 04365-66 at ¶¶11-12.

<sup>101</sup> JA 04364 at ¶4.

<sup>102</sup> *Id.* at ¶¶5, 7-8.

<sup>103</sup> *Id.* at ¶¶5-6.

<sup>104</sup> JA 04363 at ¶¶2-3.

<sup>105</sup> JA 04365 at ¶11.

<sup>106</sup> JA 04260 at ¶1; JA 04263 at ¶¶11-12.

<sup>107</sup> JA 04261 at ¶4.

more of the named Defendants.<sup>108</sup> Her addiction began prior to the gestation of the three minors, and she continued to consume prescribed opioids daily during her pregnancies.<sup>109</sup>

The minor children were diagnosed with NAS.<sup>110</sup> S.R.S. required methadone therapy and forty-five days of inpatient care followed by continued methadone at home and outpatient physical therapy.<sup>111</sup> M.K.S. required methadone therapy and fifteen days of inpatient care with continued methadone therapy at home.<sup>112</sup> The minor children suffer from health problems as a result of opioid exposure in utero, including, but not limited to, significant NAS symptoms at birth, vomiting and GERD, behavioral problems and depression, learning cognitive and speech delays, and vision issues.<sup>113</sup>

## **XVII. Whited**

Debra Whited is the grandmother and legal guardian of minor children C.D.W. (DOB. 9/1/2009) and C.G.W. (DOB 12/9/2012), who were both born dependent on opioids.<sup>114</sup> Angela Whited, the minors' birth mother, was treated with opioids for sciatica in 2001.<sup>115</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or more of the

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<sup>108</sup> *Id.* at ¶¶5, 7-8.

<sup>109</sup> *Id.* at ¶¶5-6.

<sup>110</sup> JA 04260 at ¶2.

<sup>111</sup> JA 04261 at ¶3.

<sup>112</sup> *Id.*

<sup>113</sup> JA 04263 at ¶11.

<sup>114</sup> JA 03097 at ¶1; JA 03100 at ¶¶13-16.

<sup>115</sup> JA 03098 at ¶6.

named Defendants.<sup>116</sup> Her addiction began prior to the minors' gestations, and she consumed opioids throughout both pregnancies.<sup>117</sup>

Both minor children were diagnosed with NAS and required care in the NICU for detoxification and withdrawal.<sup>118</sup> C.D.W. required ten days of inpatient care including administration of Phenobarbital for three months.<sup>119</sup> C.G.W. required five days of inpatient care including administration of Morphine followed by Methadone for two months.<sup>120</sup> The minors suffer from health problems as a result of opioid exposure in utero, including, but not limited to, significant NAS symptoms at birth, developmental and cognitive delays, disruptive behavior disorder, depression, anxiety, ADHD and ODD, IEP for Education, hypertonia requiring leg braces before two years of age, and esophoria, asthenopia and alternating exotropia.<sup>121</sup>

### **XVIII. Woolwine**

Cynthia Woolwine is the mother and legal guardian of minor children E.G.W. (DOB 11/14/2012) and B.D.W. (DOB 10/27/2003), who were both born dependent on opioids.<sup>122</sup> Ms. Woolwine was first treated with opioids in 2003 for chronic back pain resulting from a compression fracture developed during her two decades of work as a paramedic.<sup>123</sup> She consistently filled prescriptions and consumed opioids manufactured and distributed by one or

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<sup>116</sup> *Id.* at ¶¶7, 9-10.

<sup>117</sup> *Id.* at ¶¶7-8.

<sup>118</sup> JA 03097 at ¶2.

<sup>119</sup> JA 03098 at ¶4.

<sup>120</sup> *Id.*

<sup>121</sup> JA 03100 at ¶15.

<sup>122</sup> JA 02933 at ¶1.

<sup>123</sup> JA 02933 at ¶4.

more of the named Defendants.<sup>124</sup> Her addiction began prior to E.G.W. and B.D.W.’s gestation.<sup>125</sup> She continued to consume opioid pain medications until her second month of pregnancy with E.G.W., at which time she was transitioned to Buprenorphine treatment.<sup>126</sup>

Both minors were diagnosed with NAS.<sup>127</sup> Both suffer medical issues and problems as a result of opioid exposure in utero, including, but not limited to prematurity, low birth weight, feeding problems, acid reflux and poor weight gain, recurring ear and upper respiratory infections, heart murmur, and developmental delays and ADHD.<sup>128</sup>

### **XIX. Procedural History**

These eighteen lawsuits were filed in the Circuit Court of Marshall County, West Virginia, in early 2022, naming several categories of defendants which, prior to our clients’ births, were affiliated companies engaged in the manufacture, marketing, distribution, and sale of opioids and opioid active ingredients by and through chain pharmacies and local pharmacies. In addition, Plaintiffs brought claims against McKinsey & Co., a consulting company that assisted multiple manufacturers, including Johnson & Johnson, in devising sales tactics for the promotion of their opioids. McKinsey’s primary advice was to focus all sales efforts on physicians that were already prescribing alarming quantities of opioids to their patients, so-called “high-volume prescribers.” Finally, defendant West Virginia Board of Pharmacy (“BOP”) is an agency of the State of West

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<sup>124</sup> JA 02934 at ¶¶5, 7-8.

<sup>125</sup> JA 02933 at ¶4.

<sup>126</sup> JA 02934 at ¶6.

<sup>127</sup> JA 02933 at ¶3.

<sup>128</sup> *Id.*; JA 02936 at ¶11.



Virginia that had the power and duty to investigate the wave of excessive and unusual orders and shipments of opioids throughout the State of West Virginia in the mid-2010s, but failed to do so.

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

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

The Pharmacy Defendants distributed and dispensed the opioid pills impacting the Minor Plaintiffs to pharmacies. The Pharmacy Defendants were required by law to monitor quantities of drugs distributed and dispensed and enhanced the risk of harm by failing to act as a last line of defense against diversion, through their actions and inactions, including, but not limited to, failing to properly review and analyze prescription orders and data for red flags, failing to report suspicious orders, and failing to provide effective controls and procedures to detect and/or guard against theft and diversion of the opioid pills, fueling the diversionary market, opioid addiction, and cases of NAS.

The McKinsey Defendants are global management and business consulting firms which enabled opioid manufacturers to increase sales of addictive opioid drugs by growing the diversionary market, thwarting the regulatory process and fostering a conspiracy. The West Virginia Board of Pharmacy is the state regulatory board charged with overseeing the operations and activities of pharmacies in West Virginia and had mandatory duties that it willfully ignored. The BOP is specifically tasked with investigating the flows of controlled substances like

oxycodone within the State of West Virginia and to individual pharmacies. One of its core missions is to investigate “suspicious orders,” which are orders for controlled substances of unusual quantity or frequency.

The central allegations in the 18 complaints are: (1) fraud as a result of, in particular, the manufacturing defendants’ wrongful conduct; (2) negligence and gross negligence as a result of the Defendants’ conduct falling below the reasonable standard of care; and (3) civil conspiracy between all Defendants as they acted in concert to mislead medical professionals, patients, the scientific community, the CDC, the FDA, the DEA, and the general public about the addictive nature of opioids and the risk of serious latent disease associated with in utero exposure to opioids so that their profits would increase. The Defendants conspired to create an illegal secondary market for opioids, knowing this would lead to soaring profits from sales of their addictive products. The Complaints also include traditional products liability allegations as a result of their opioid products’ unreasonably dangerous and defective designs and inadequate warnings of their opioids’ additive properties, a count for malicious and intentional misconduct by the BOP, as well as punitive damages.

The 18 NAS Complaints were referred to the Mass Litigation Panel (“MLP”) on August 9, 2022. The cases were then transferred from Marshall County to the Circuit Court of Kanawha County by order of the MLP on August 15, 2022 (TID 67932827).

The Defendants filed motions to dismiss the instant 18 NAS cases, as well as two additional NAS cases. The MLP set a briefing schedule and held an omnibus-style hearing on them on March 24, 2023. On April 17, 2023, the MLP entered a preliminary “Order Regarding Rulings on Motions to Dismiss,” concluding in 12 paragraphs that all defendants should be dismissed in all NAS cases. That Order stated that it “shall not be considered a final Order for appeal purposes,”

and instructed the defendants to prepare a “detailed proposed order . . . granting the motions to dismiss.” On May 31, 2023, the MLP entered the “Order Granting Defendants’ Motions to Dismiss,” dismissing all NAS cases in their entirety with prejudice, as to all defendants.

Plaintiffs then timely filed their notices of appeal.<sup>129</sup> Plaintiffs seek an order from this Court reversing the Order of May 31, 2023, and remanding each of these cases back to the Circuit Court of Kanawha County with instructions to commence discovery.

### **SUMMARY OF ARGUMENT**

The claims at issue are brought on behalf of minors who suffered distinct and tragic personal injuries: Neonatal Abstinence Syndrome, known as NAS, and permanent or long-lasting developmental injuries as a result of gestational poisoning when their biological mothers ingested opioids during pregnancy. Newborns suffering from NAS encounter excruciating withdrawal symptoms immediately following birth. Long-term developmental effects are common, and all three Minor Plaintiffs allege that they suffer from them. The opioid epidemic has been fueled by the acts and omissions of Defendants—a group that includes manufacturers, distributors, wholesalers, pharmacies, and the global consulting firm they conspired with. The Defendants seek to avoid their responsibility, denying any duty of care and even going so far as to blame the birth mothers. However, West Virginia law recognizes numerous entirely viable causes of action for which Plaintiffs may recover damages from the Defendants.

The Circuit Court erred in dismissing Plaintiffs’ causes of action against the Pharmacy Defendants for failing to comply with the West Virginia Medical Professional Liability Act, W.Va. Code § 55-7B-1 *et seq.* (“MPLA”). The Circuit Court applied the MPLA to certain Plaintiffs’

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<sup>129</sup> Pursuant to this Court’s request, Plaintiffs have attached charts specifically indicating, for each Plaintiff, which assignments of error are applicable, and which specific Defendants each assignment of error is raised against. *See* attached charts.

claims which arose prior to the inclusion in the MPLA of claims against pharmacies and pharmacists. The Circuit Court compounded that error by dismissing Plaintiffs' claims against the Pharmacy Defendants with prejudice, thus precluding them from filing Amended Complaints that complied with the MPLA.

The Circuit Court erred in dismissing the Plaintiffs' medical monitoring claims – which was the direct result of its error in dismissing the Plaintiffs' underlying tort claims.

The Circuit Court erred in holding that Defendant Indivior was independently entitled to dismissal as a matter of law as it was the manufacturer of Suboxone and Subutex, which are Schedule III buprenorphine-based medications indicated for the treatment of opioid use disorder (“OUD”) and not for the treatment of chronic pain. The Circuit Court further incorrectly concluded that the Plaintiffs' allegations regarding other Manufacturer Defendants could not be applied to Indivior.

The Circuit Court erred in failing to follow longstanding law governing the duty of care. Simply stated, duty is primarily a question of foreseeability, and Plaintiffs' allegations clearly support a finding that the Defendants had reason to foresee the harm to Plaintiffs and others who are similarly situated. The Circuit Court ignored the question of foreseeability entirely, and erroneously found that “policy considerations” overrode it. Plaintiffs allege that the Defendants were well aware of the clear dangers surrounding opioids, including addiction, abuse, and diversion, all of which present foreseeable risks of opioid use during pregnancy. Moreover, the Defendants already have statutory and other duties to take care to avoid this foreseeable harm, so these lawsuits do not seek to impose an additional burden.

The Circuit Court committed further error in its attempt to justify and bolster its erroneous conclusions. It asserted that causation is too remote and then posited that the actions of the birth

mothers constitute an intervening cause. Both arguments raise the issue of whether an intervening cause broke the chain of causation, which at its core is a quintessential question of fact for jury consideration. Moreover, the Circuit Court applied the wrong analytical framework and its ruling contravenes the principles expressed by the Supreme Court of Appeals in *Wal-Mart Stores East, L.P. v. Ankrom*, 244 W. Va. 437, 854 S.E.2d 257 (2020).

The Circuit Court erred in dismissing Plaintiffs' conspiracy claims which was based solely on its erroneous dismissals of the underlying tort claims.

With regard to the West Virginia Board of Pharmacy, the Circuit Court erroneously applied the public duty doctrine and qualified immunity. The Circuit Court's reasoning is flawed, and it conflicts with an order on the same question issued by the Circuit Court of Marshall County.<sup>130</sup> The Circuit Court also failed to consider that *Holsten v. Massey*<sup>131</sup>, which recognizes a wanton or reckless conduct exception to the public duty doctrine for subdivisions, applies with equal force to liability cases against state agencies. Plaintiffs have clearly pleaded a viable claim against the Board of Pharmacy under governing law.

The Circuit Court's erroneous conclusion that there was a lack of causation led to the erroneous dismissal of the Plaintiffs' fraud claims. Similarly, the Circuit Court erred in dismissing Plaintiffs' claim for punitive damages based on its erroneous dismissals of Plaintiffs' underlying tort claims.

Lastly, the Circuit Court erred by granting the motions to dismiss without liberally construing the Minor Plaintiffs' complaints and without granting the plaintiffs leave to amend their complaints. It is axiomatic that trial courts are required to liberally construe a plaintiff's complaint

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<sup>130</sup> See *Brooke Cty. Comm'n, v. Purdue Pharma, L.P.*, Case. No. 17-C-248, (Marshall Cty. Cir. Ct. Dec. 28, 2018).

<sup>131</sup> 200 W. Va. 775, 787 (1997).

and take all allegations as true when evaluating a defendant's motion to dismiss. The Circuit Court erroneously ignored these requirements here.

### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Plaintiffs respectfully submit that these matters are appropriate for Rule 20 argument. While these appeals arise from dismissal of actions at the pleading stage despite detailed allegations to support well-established causes of action, the matters at issue are of fundamental public importance, including redress of serious, special injury to the most vulnerable victims of the opioid epidemic. In addition, the appeals reveal inconsistencies and conflicts among the decisions of lower tribunals. Due to the number of assignments of error, Plaintiffs believe that the minimum time set for argument under Rule 20 will be not sufficient and that additional time is necessary. Finally, Plaintiffs also believe that combining the oral argument of these matters with *A.D.A. v. Johnson & Johnson, et al*, Docket No. 23-ICA-275, *A.N.C. v. Johnson & Johnson, et al*, Docket No. 23-ICA-276, and *Trey Sparks v. Johnson & Johnson, et al*, Docket No. 23-ICA-307 (collectively "*A.D.A. v. Johnson & Johnson*") would allow the efficient use of judicial resources and avoid duplicative arguments.

### ARGUMENT<sup>132</sup>

The Court has before it the briefs of the parties in *A.D.A. v. Johnson & Johnson*, the first three assignments of error involve claims not present in that appeal. The remaining assignments of error were all briefed by the parties in *A.D.A. v. Johnson & Johnson*. The Defendants in this appeal have agreed that these Plaintiffs may incorporate into this brief the arguments in the

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<sup>132</sup> This appeal arises from a Circuit Court's order dismissing Plaintiffs' claims in their entirety *at the pleading stage*. The standard of review is *de novo*. *Savarese v. Allstate Ins. Co.*, 223 W. Va. 119, 123, 672 S.E.2d 255, 259 (2008).

response brief in *A.D.A. v. Johnson & Johnson*.<sup>133</sup> With respect to those errors where briefing is incorporated from *A.D.A. v. Johnson & Johnson*, Plaintiffs here summarize the arguments and apply the facts of those cases to the legal arguments.

**I. The Circuit Court Erred in Dismissing with Prejudice Plaintiff's Claims Against the Pharmacy Defendants as Barred by The West Virginia Medical Professional Liability Act, W. Va. Code § 55-7B-1 *et seq.***

**A. The Circuit Court Erred in Finding that the WV MPLA Applied to Certain Plaintiffs' Claims Against the Pharmacy Defendants.**

The Circuit Court erred in finding that the claims of seventeen minor plaintiffs against the Pharmacy Defendants are barred because Plaintiffs failed to satisfy the jurisdictional pre-suit requirements of the West Virginia medical professional liability act, W. Va. Code § 55-7B-1 *et seq.* ("MPLA").<sup>134</sup> Simply put, Plaintiffs' claims arose prior to the inclusion in the MPLA of claims against pharmacies and pharmacists.

The Circuit Court found the Pharmacy Defendants are "health care provider[s]" as defined by the MPLA.<sup>135</sup> This was clear error. Prior to 2015, the MPLA statutory language did not extend the definition of "health care facility" or "health care provider" to pharmacies or pharmacists.<sup>136</sup> Only in 2015 was the MPLA amended to add "pharmacy" to the definition of "health care facility" and "pharmacist" to the definition of "health care provider."<sup>137</sup>

The Circuit Court failed to recognize or distinguish its ruling as it pertains to the majority of the Plaintiffs who were born prior to the changes to the MPLA taking effect on March 10,

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<sup>133</sup> *A.D.A. v. Johnson & Johnson*, Petitioners' Brief (TID 71445181).

<sup>134</sup> JA 00101; JA 00110 (citing W. Va. Code § 55-7B-6).

<sup>135</sup> JA 00110-111 (finding "[t]hat term includes both 'pharmacist[s]' and 'health care facilit[ies],' which are expressly defined to include 'pharmac[ies].'" (citing W.Va. Code §§ 55-7B-2(f); (g))).

<sup>136</sup> W. Va. Code §§ 55-7B-2 (f) and (g) [2006]; Syl. Pt. 7, *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 647 S.E.2d 920 (2007).

<sup>137</sup> W. Va. Code §§ 55-7B-2 (f) and (g) [2015].

2015.<sup>138</sup> The MPLA did not apply to pharmacies or pharmacists prior to the 2015 amendments,<sup>139</sup> thus, the Circuit Court erred in dismissing the claims of the Plaintiffs born prior to March 10, 2015, as they were not required to comply with the pre-suit notice and certificate of merit provisions with respect to defendants who were not health care providers at the time they provided services.<sup>140</sup>

Second, the Circuit Court correctly found that “[m]any birth mothers were addicted to opioids prior to becoming pregnant.”<sup>141</sup> However, the Circuit Court failed to recognize or distinguish those Plaintiffs born after March 10, 2015 whose Complaints contained allegations that their birth mother began using opioids prior to the effective date.<sup>142</sup> The MPLA does not apply to the Pharmacy Defendants’ conduct to the extent it contributed to the creation of the opioid crisis prior to 2015 and, thus, the birth mothers’ addictions which occurred prior to the statutory revisions.

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<sup>138</sup> BEB born on 3/29/2013 (JA 02059); SFB born on 7/15/2014 (JA 02059); MDL born on 12/21/2010 (JA 02423); TJL born on 10/3/2003 (JA 02423); EGW born on 11/14/2012 (JA 02933); BDW born on 10/27/2003 (JA 02933); CDW born on 9/1/2009 (JA 03097); CGW born on 12/9/2012 (JA 03097); MJA born on 6/12/2004 (JA 03271); WAR born on 4/22/2012 (JA 03387); LMJ born on 7/31/2012 (JA 04141); JAS born on 8/17/2002 (JA 04260); SRS born on 4/5/2007 (JA 04260); MKS born on 6/26/2009 (JA 04260); TKL born on 11/24/2008 (JA 04363); SAJ born on 5/30/2008 (JA 04468); ALA born on 1/18/2005 (JA 036225).

<sup>139</sup> See *Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. at 493, 647 S.E.2d at 929.

<sup>140</sup> *State ex rel. W. Va. Div. of Corr. & Rehab. v. Ferguson*, 248 W. Va. 471, 480, 889 S.E.2d 44, 53 (2023).

<sup>141</sup> JA 00104 at ¶ 9.

<sup>142</sup> ZDB’s birth mother (2005) (JA 00392-93); LCM’s birth mother (2005) (JA 02653-54); NMB’s birth mother (“prior to N.M.B.’s gestation” (born on 5/16/2015)) (JA 02785); ZNB’s birth mother (2004) (JA 03808); AJF’s birth mother (2005) (JA 04023).



**B. The Circuit Court Erred in Dismissing the Claims Against the Pharmacy Defendants with Prejudice.**

The Circuit Court dismissed all of Plaintiffs' claims against the Pharmacy Defendants with Prejudice.<sup>143</sup> This was also clear error.

The Supreme Court has made clear that when a dismissal for failure to comply with the MPLA's notice provision occurs, "the medical malpractice action may be re-filed pursuant to W. Va. Code § 55-2-18 (2001) after compliance with the pre-suit notice of claim and screening certificate of merit provisions of W. Va. Code § 55-7B-6 (2003)."<sup>144</sup> To the extent that the MPLA applies to any of Plaintiffs' claims against the Pharmacy Defendants, this Court should vacate the dismissal with prejudice to permit compliance with the MPLA and refiling as "[t]he requirement of a pre-suit notice of claim and screening certificate of merit is not intended to restrict or deny citizens' access to the courts."<sup>145</sup>

**II. The Circuit Court Erred in Dismissing Plaintiffs' Medical Monitoring Claims.**

Plaintiffs brought claims for medical monitoring.<sup>146</sup> The Circuit Court dismissed those claims based on its rulings dismissing Plaintiffs' underlying claims.<sup>147</sup> As those underlying rulings were error, this Court should reverse the dismissal of the Medical Monitoring claims.

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<sup>143</sup> JA 00127-28.

<sup>144</sup> *State ex rel. Charleston Area Med. Ctr. v. Thompson*, 248 W. Va. 352, 361 n.15, 888 S.E.2d 852, 861 n.15 (2023); Syl. Pt. 3, in part, *Davis v. Mound View Health Care, Inc.*, 220 W. Va. 28, 640 S.E.2d 91 (2006).

<sup>145</sup> Syl. Pt. 2, in part, *Hinchman v. Gillette*, 217 W. Va. 378, 618 S.E.2d 387 (2005); *Thompson*, 248 W. Va. at 361 n.15, 888 S.E.2d at 861 n.15 (2023).

<sup>146</sup> See e.g., JA 00458-69 at ¶¶400-410.

<sup>147</sup> JA 00122.

### III. The Circuit Court Erred in Dismissing Plaintiffs' Claims Against Indivior.

The Circuit Court felt constrained to make an independent finding that Plaintiffs failed to state a claim against Defendant Indivior Inc. (“Indivior”). Indivior manufactures Suboxone and Subutex, which are used to treat opioid use disorder (“OUD”).<sup>148</sup> In dismissing Indivior, the Mass Panel failed to consider the entirety of the Complaints’ allegations and failed to make every reasonable inference in favor of Plaintiffs. Specifically, the Mass Panel failed to consider the interdependence of opioid use, which leads to addiction, and Indivior’s OUD products, which are used to treat addiction, but, in fact, create their own addiction. Further, the Mass Panel failed to consider the Plaintiffs’ allegations of conspiracy as they relate to Indivior.

Buprenorphine is one of the most commonly used agents for Opioid Replacement Therapy” (“ORT”).<sup>149</sup> Buprenorphine is an opioid.<sup>150</sup> Plaintiffs allege that buprenorphine is dangerous to the fetus and could damage the unborn child; cause skeletal abnormalities; and, cause NAS.<sup>151</sup> Further, Plaintiffs allege that buprenorphine is associated with numerous negative health impacts including “reduced brain and somatic growth; intractable nystagmus, altered visual evoked

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<sup>148</sup> JA 00252, transcript, 72:20-24.

<sup>149</sup> JA 00424 at ¶170.

<sup>150</sup> JA 00258, transcript, 78:8-11; “Suboxone contains buprenorphine, which is a comparatively mild opioid that has been approved by the FDA to treat opioid use disorder. *Buprenorphine*, Substance Abuse & Mental Health Servs. Admin. (Jan. 24, 2022), <https://www.samhsa.gov/medication-assisted-treatment/medications-counseling-related-conditions/buprenorphine>. ‘Because of buprenorphine's opioid effects, however, it can still “be misused, particularly by people who do not have an opioid dependency.”’” *Staub v. Nietzel*, Civil Action No. 3:15-cv-689-DJH-RSE, 2022 U.S. Dist. LEXIS 43386, at \*2 n.2 (W.D. Ky. Mar. 11, 2022) (internal citations omitted); *See also*, *United States v. Burkholder*, 816 F.3d 607, 610 (10th Cir. 2016) (“Suboxone is a prescription drug. An active ingredient in it is buprenorphine, a Schedule III controlled substance, which is an opioid commonly prescribed for treating heroin addicts.”).

<sup>151</sup> JA 00409 at ¶¶84-85.

potentials, delayed encephalopathy, respiratory depression, bradycardia, hypotension, urinary retention, reduced gut motility, and emesis.”<sup>152</sup>

Although widely-accepted, this “treatment” is associated with “a plethora of negative health impacts, including but not limited to reduced brain and somatic growth, intractable nystagmus, altered visual evoked potentials, delayed encephalopathy, respiratory depression, bradycardia, hypotension, urinary retention, reduced gut motility, and emesis.”<sup>153</sup> Specifically, buprenorphine has been associated with extremely poor outcomes, including congenital heart disease, urinary collecting system defects, ophthalmic defects, and maxillofacial defects.<sup>154</sup>

Thus, the mothers became addicted to opioids as a result of the wrongful conduct of Defendants as alleged in the Complaints. Subsequently, the mothers and/or the newborns were prescribed buprenorphine. Buprenorphine is an opioid and has the same effect on the unborn fetus or newborn as the opioids taken prior to beginning the ORT. Once a mother is addicted to opioids, the Defendants can keep them addicted through the use of buprenorphine.<sup>155</sup> The agents used in ORT are manufactured and distributed by Defendants, including Indivior, and create “a revenue stream not only from addicting adults who obtained opioids from the street or through a prescription, but also creating a revenue stream for Defendants by treating the babies born dependent on opioids.”<sup>156</sup>

Plaintiffs allege that Indivior participated in the conspiracy among the Defendants. The marketing and increased sales of opioids known to cause addiction ultimately results in a large

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<sup>152</sup> JA 00425 at ¶172.

<sup>153</sup> *Id.*

<sup>154</sup> JA 00425 at ¶177.

<sup>155</sup> JA 00258, transcript, 78:23-24; JA 00259, transcript, 79:1-4.

<sup>156</sup> JA 00425 at ¶171.

market for products to treat the addiction or OUD. The greater the number of people who became addicted to opioids, the greater the number of people who would need ORT. Thus, the conspiracy rested, in part, on a variation of the razor-razorblade model of marketing.<sup>157</sup> Pregnant women would become addicted to opioids, which would require ORT for the pregnant women and the newborns. The drive to increase opioid use in the general population would inevitably drive the increased need for Indivior's OUD products.

The crux of the Circuit Court's erroneous ruling is that "Plaintiffs allege that the Minors' birth mothers' addictions were initiated and caused by the use of opioids indicated for chronic pain *before* they ever used an Indivior product to treat their OUD; therefore, Plaintiffs' allegations regarding other Manufacturer Defendants cannot be applied to Indivior."<sup>158</sup>

The Circuit Court's conclusion completely disregarded the Plaintiffs' allegations of a conspiracy among the Defendants, including Indivior. The Circuit Court never engaged in an analysis to determine whether Plaintiffs sufficiently pleaded that Indivior could be liable as a co-conspirator despite the use of their products to treat OUD.

In conjunction with the other Defendant co-conspirators, Indivior was involved in the American Pain Foundation and was a beneficiary of all of the actions of their co-conspirators.<sup>159</sup>

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<sup>157</sup> "The company is founded on a 'razor-razorblade' business model, whereby the initial sale of Primo water dispensers (the razor) then creates a base of users who frequently purchase bottles of Primo water or refill their bottles at refill stations (the razorblades). . . . This business model ostensibly creates a recurring and constant demand for the company's products. . . ." *Plymouth Cty. Ret. Ass'n v. Primo Water Corp.*, 966 F. Supp. 2d 525, 533-34 (M.D.N.C. 2013) (taken from the allegations of the Complaint); *See also*, <https://www.investopedia.com/terms/r/razor-razorblademodel.asp>. (accessed November 7, 2023) ("The razor-razorblade model is a pricing tactic in which a dependent good is sold at a loss (or at cost) and a paired consumable good generates the profits.").

<sup>158</sup> JA 00121 (emphasis in original) (cit. om.).

<sup>159</sup> JA 00259-60, transcript, 79:23-24 and 80:1-3.

Plaintiffs’ allegations regarding the conspiracy are more than sufficient under West Virginia precedent to survive a Rule 12(b)(6) dismissal:

Further, a civil 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 perpetrator(s). Further, we recognize that not every member of a conspiracy must be aware of every action taken in furtherance of it. One may be held a member of a conspiracy and responsible for all its doings, although he was not aware of its entire scope, or all its details, or the identities, of all its members, and although his own share in its activities was small, did not begin until its activities were well under way. The general rule is that conspiracy liability is sufficiently established by proof showing concert of action or other facts and circumstances from which the natural inference arises that acts were committed in furtherance of the purpose of the alleged conspirators. It is not required that each and every act of a conspirator be shown to have been in concert with the others or that it be established by direct evidence that all combined at a given time prior to each transaction.<sup>160</sup>

The Defendant co-conspirators developed a fraudulent marketing strategy that permitted them to increase their profits both from creating the initial addiction and treating the addiction once it was created. “Once you get them addicted, you can keep them addicted through Suboxone and Subutex.”<sup>161</sup> And, what happens when the addicted individual can no longer obtain the OUD medications from a physician? They will turn to the illicit drug market because they are still addicted.

The Circuit Court also determined that Plaintiffs failed to allege sufficient facts to support a reasonable inference that the Minor Plaintiffs’ alleged injuries were proximately caused by their

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<sup>160</sup> *Doe v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 239 W. Va. 428, 458, 801 S.E.2d 443, 473 (2017) (cleaned up; citations and internal quotations omitted). “Although ‘not every member of a conspiracy must be aware of every action taken in furtherance of it,’ each conspirator is liable for every tort produced by the conspiracy, including one ‘who promoted but did not commit the tort.’” *Marietta Area Healthcare, Inc. v. Camden-Clark Mem’l Hosp. Corp.*, No. 5:23-CV-131, 2023 U.S. Dist. LEXIS 165841, at \*44-45 (N.D.W. Va. Sep. 18, 2023) (citing, *Doe*, 239 W.Va. at 458, 801 S.E.2d at 473).

<sup>161</sup> JA 00258, transcript, 78:23-24.

birth mothers' use of any Indivior product during their pregnancies with the Minors.<sup>162</sup> This conclusion also fails to consider whether Indivior would be liable as a co-conspirator regardless of whether the mother actually ingested any Indivior product during the pregnancy. Moreover, the use of Indivior's products are either alleged directly in the Complaints or the use arises from a reasonable inference from the allegations.

A.J.F.'s mother, Amber Fuller, "consistently filled prescriptions of opioids including but not limited to Acetaminophen/Codeine #3, Hydrocodone/Acetaminophen and others prior to the opioid treatment medications Suboxone and Buprenorphine," which include Indivior's product.<sup>163</sup> Ms. Fuller filled prescribed opioids, including but not limited to, Indivior's product, Suboxone.<sup>164</sup> From April 2012 through August 2012, Ms. Fuller filled multiple prescriptions for the Indivior product Suboxone.<sup>165</sup>

M.D.L.'s mother Stephanie Lambert, "continued use of Subutex daily during her pregnancy with M.D.L."<sup>166</sup> Ms. Lambert filled prescriptions for the Indivior product Subutex from May 2010 to March 2011, at minimum.<sup>167</sup> Additionally, Mrs. Lambert "consistently filled prescriptions of Defendants' opioids including but not limited to: Hydrocodone/Acetaminophen, Oxycodone HCL, Oxycodone and Acetaminophen and Subutex," which include Indivior's products.<sup>168</sup>

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<sup>162</sup> JA 00121.

<sup>163</sup> JA 04023 at ¶6.

<sup>164</sup> *Id.* at ¶8.

<sup>165</sup> JA 04064 at ¶220.

<sup>166</sup> JA 02424 at ¶7.

<sup>167</sup> JA 02465 at ¶221.

<sup>168</sup> JA 02424 at ¶¶ 5 and 8.

Stacey Harris, mother of N.M.B., consumed buprenorphine daily during her pregnancy.<sup>169</sup> Prior to gestation, she consumed Indivior's product Suboxone and buprenorphine among other opioids as part of her continuing addiction.<sup>170</sup> From January 2010 through May 2021, at minimum, Mrs. Harris filled prescriptions for Indivior's product Suboxone.<sup>171</sup> N.M.B. was born prematurely and suffered from NAS resulting from buprenorphine.<sup>172</sup> N.M.B. suffers from recurring ear and upper respiratory infections; lactose intolerance with continued feeding and swallowing issues; and, ADHD and sensory issues requiring and IEP.<sup>173</sup>

Angela Whited, mother of C.D.W. and C.G.W., filled prescriptions for Indivior's product Suboxone from March 2008 through February 2009, at a minimum.<sup>174</sup> Indivior admitted that Ms. Whited filled prescriptions for its product Suboxone in the early part of her pregnancy with C.D.W.<sup>175</sup> Ms. Whited also is alleged to have obtained and consumed opioids manufactured by Indivior prior to and throughout her pregnancies.<sup>176</sup>

Cynthia Woolwine, mother of E.G.W. and B.D.W., "was moved to Buprenorphine treatment" when she was two months pregnant with E.G.W.<sup>177</sup> Ms. Woolwine is also alleged to have consumed Indivior's product Suboxone.<sup>178</sup> The Complaint is not clear that the "Buprenorphine treatment" was not Suboxone. The Complaint further alleges that from November

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<sup>169</sup> JA 02786 at ¶7.

<sup>170</sup> *Id.* at ¶6.

<sup>171</sup> JA 02828 at ¶222.

<sup>172</sup> JA 02785 at ¶¶1-2; JA 02786 at ¶4.

<sup>173</sup> JA 02788 at ¶12.

<sup>174</sup> JA 03139 at ¶221.

<sup>175</sup> JA 00256, transcript, 76:11-16.

<sup>176</sup> JA 03098 at ¶¶8-9.

<sup>177</sup> JA 02934 at ¶6.

<sup>178</sup> *Id.* at ¶ 7.

2010 through May 2019, at minimum, Ms. Woolwine filled prescriptions for Indivior's product Suboxone.<sup>179</sup>

Further, Defendants rely upon the allegations that the birth mothers consumed opioids and/or were addicted to opioids prior to the pregnancy, as allegations that relieve them from liability. However, Defendants and the Circuit Court misunderstand the nature of Plaintiffs' claims, which those same allegations support.

Defendants, acting as co-conspirators, engaged in a fraudulent marketing scheme in order to increase the number of opioid prescriptions to individuals, including women who are or may become pregnant. Defendants succeeded in their goals and addiction became rampant. The addiction was not only fueled by the opioids themselves, but also by products such as Indivior's that were used for OUD. Indivior's products continued the opioid addiction in individuals. The products are not "cures;" they are only replacements. More importantly, the OUD's have the same adverse effects on the fetus as the opioids and cause the same harm.

Contrary to the Circuit Court's conclusions Plaintiffs' allegations are sufficient to withstand a Rule 12(b)(6) motion. Dismissal of these claims was error.

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

The Circuit Court rejected Plaintiffs' negligence claims concluding that the Plaintiffs' private "personal injury claims" were different from the government entities cases in which it had "previously held that manufacturers and distributors of prescription opioids and pharmacies that self-distribute and dispense prescription opioids owed certain duties of care to government entities in the State of West Virginia."<sup>180</sup> The Circuit Court reached this conclusion without applying

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<sup>179</sup> JA 02979 at ¶227.

<sup>180</sup> JA 00115; JA 00166.



established West Virginia law – essentially ignoring both its own prior decisions, decisions of other West Virginia courts in opioid cases, and binding decisions of the Supreme Court of Appeals.

Plaintiffs incorporate the briefing from *A.D.A v. Johnson & Johnson* Petitioner’s Brief, Section III<sup>181</sup>, which addresses this assignment of error, and summarize the arguments and apply the facts of the cases to the legal arguments.

**A. West Virginia Law Imposes a Duty on Defendants to Act with Reasonable Care to Avoid Creating a Foreseeable and Unreasonable Risk of Harm.**

The duty owed by the Defendants in this case stems from the common law duty of reasonable care. Under West Virginia law, every person is required to use reasonable care to avoid injuring another.<sup>182</sup>

**B. Plaintiffs’ Complaints Adequately Allege that Defendants’ Conduct Created a Foreseeable and Unreasonable Risk of Harm to the Minor Plaintiffs.**

The Circuit Court erred in concluding that “[e]ven assuming that any Defendant in these cases owed a duty of care to *some* entity, Plaintiffs have not properly alleged that such a duty ran *from* Defendants *to* these private Plaintiffs.”<sup>183</sup> The Circuit Court provided no analysis on foreseeability, instead conducting a proximate cause analysis which ignored the Plaintiffs’ allegations and theories of liability against the Defendants. The Circuit Court further erred in failing to find that under the circumstances alleged in Plaintiffs’ Complaints, it was foreseeable that the Defendants’ actions and inactions would result in an unreasonable risk of harm to the

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<sup>181</sup> TID 71445181.

<sup>182</sup> *Robertson v. LeMaster*, 171 W. Va. 607, 611, 301 S.E.2d 563, 567 (W. Va. 1983) (cit. om.); *Brooke County Dist. Order* at 6-7 ¶14 (citing Syl. Pt. 1, *Robertson*, 171 W. Va. at 607, 301 S.E.2d at 563); *In re Opioid Litigation*, No. 400000/2017, at 19 (“Here, the plaintiffs have adequately pled the existence of a duty owed by the distributor defendants by alleging that societal expectations required different behaviors on their part, including, but not limited to, refusing to fill suspicious orders for opioids[.]”).

<sup>183</sup> JA 00115 (emphasis in original) (cit. om.).

Plaintiffs and, therefore, Defendants owed a duty of care to Plaintiffs as alleged in Plaintiffs' Complaint.

Plaintiffs have adequately pled that Defendants owed a duty to the minor children. First, with respect to a direct duty, Plaintiffs' Complaints allege – and a jury applying West Virginia negligence law could find – that Defendants should have and did foresee that if they lied about the safety of opioids, oversupplied them and did not report or adequately respond to diversion, that serious harms would befall the Plaintiffs.<sup>184</sup> Moreover, even if the minor children were not owed

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<sup>184</sup> See JA 00464 at ¶378 ("Defendants owe a non-delegable duty to Plaintiff Minor child Z.D.B. to conform their behavior to the legal standard of reasonable conduct under the circumstances, in light of the apparent risks"); JA 01523 at ¶332 (same to child R.G.O.); JA 02147 at ¶436 (same to children B.E.B. and S.F.B.); JA 02495 at ¶372 (same to children M.D.L. and T.J.L.); JA 02726 at ¶ 360 (same to child L.C.M.); JA 02860 at ¶387 (same to child N.M.B.); JA 03004 at ¶ 344 (same to children E.G.W. and B.D.W.); JA 03353 at ¶414 (same to child M.J.A.); JA 03469 at ¶411 (same to child W.A.R.); JA 03586 at ¶405 (same to children S.D.L. and H.G.L.); JA 03704 at ¶378 (same to children A.L.A. and T.L.A.); JA 04092 at ¶358 (same to child A.J.F.); JA 04224 at ¶417 (same to L.M.J.); JA 04330 at ¶356 (same to children S.R.S., M.K.S., and J.A.S.); JA 04432 at ¶346 (same to child T.K.L.); JA 04548 at ¶399 (same to child S.A.J.); JA 00439-40 at ¶235 ("The FDA and other regulators warned" and Manufacturing Defendants had access to scientific studies, detailed prescription data, and reports of adverse events, including reports of addiction, hospitalization, and deaths"); JA 02104 at ¶226 (same); JA 02465-66 at ¶222 (same); JA 02699 at ¶229 (same); JA 02830 at ¶239; JA 02979 at ¶228 (same); JA 03310-11 at ¶210 (same); JA 03427-28 at ¶213 (same); JA 03546-47 at ¶218 (same); JA 04065 at ¶ 232 (same); JA 04182 at ¶214 (same); JA 04301 at ¶214 (same); JA 04508 at ¶212 (same); JA 00440 at ¶238 (2016 U.S. Surgeon General letter regarding "urgent health crisis" and 2016 CDC report that efforts to rein in the prescribing of opioids for chronic pain are critical "to reverse the epidemic of opioid drug overdose deaths and prevent opioid-related morbidity"); JA 01499-500 at ¶224 (same); JA 02105 at ¶ 229 (same); JA 02700 at ¶232 (same); JA 02466-67 at ¶225 (same); JA 02831 at ¶242 (same); JA 02980 at ¶231 (same); JA 03140-41 at ¶225 (same); JA 03311 at ¶213 (same); JA 03428-29 at ¶216 (same); JA 03547-47 at ¶221 (same); JA 03675 at ¶256 (same); JA 04066-67 at ¶235 (same); JA 04183 at ¶217 (same); JA 04302 at ¶217 (same); JA 04406-07 at ¶221 (same); JA 04509 at ¶215 (same); JA 00466 at ¶388 (Defendants "are in a limited class of registrants authorized to legally distribute controlled substances and opioid ingredients. This places Defendants in a position of great trust and responsibility vis-à-vis Plaintiff."); JA 01525 at ¶342 (same); JA 02149 at ¶446 (same); JA 02497 at ¶382 (same); JA 02728 at ¶370 (same); JA 02862 at ¶397 (same); JA 03355 at ¶424 (same); JA 03170 at ¶378 (same); JA 03471 at ¶421 (same); JA 03588 at ¶415 (same); JA 03706 at ¶388 (same); JA 04094 at ¶368 (same); JA 04226 at ¶427 (same); JA 04332 at ¶366 (same); JA 04550 at ¶409 (same); JA 00467 at ¶392 ("All Defendants acted in concert to mislead medical professionals, patients, the scientific community, the CDC, the FDA, the DEA, and the general public about the addictive nature of opioids and the risk of serious latent disease associated with in utero exposure to opioids so that their profits would increase."); JA 01526 at ¶346 (same); JA 02149 at ¶450 (same); JA 02498 at ¶386 (same); JA 02728 at ¶374 (same); JA 02862 at ¶401 (same); JA 03355 at ¶428 (same); JA 03171 at ¶382 (same); JA 03471 at ¶425 (same); JA 03589 at ¶419 (same); JA 03706 at ¶392 (same); JA 04094 at ¶372 (same); JA 04226 at ¶431 (same); JA 04332 at ¶370 (same); JA 04550 at ¶413 (same).

this duty directly, West Virginia law is replete with examples of cases in which a duty running to a third party can give rise to liability.<sup>185</sup>

Plaintiffs' complaints allege that Defendants engaged in conduct which created an unreasonable risk of harm to the Plaintiffs, including, but not limited to: (a) consciously supplying the market with highly addictive opioids, including misrepresenting, understating, or obfuscating the highly addictive propensities; (b) failing to warn or advise physicians to conduct an addiction family history of each and every potential patient; (c) failing to act as a last line of defense against diversion; (d) failing to properly train or investigate their employees; (e) failing to properly review and analyze for red flags; (f) failing to report suspicious orders and refusing to fill them; (g) failing to provide effective controls and procedures to detect and/or guard against theft and diversion; (h) failing to police the integrity of their supply chains; and (i) creating misleading information with the intention of having prescribing physicians rely upon it.<sup>186</sup>

The Plaintiffs also allege that the Defendants were aware of the potentially dangerous situation involving opioids, including but not limited to the addiction, abuse and diversion that was occurring, and the dangers and risks associated with opioid use during pregnancy to children in utero.<sup>187</sup> The applicable West Virginia laws, and the industry standards applicable to the

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<sup>185</sup> See, e.g. *Bragg*, 741 S.E.2d, 96; *Kizer v. Harper*, 561 S.E.2d 368 (W. Va. 2001) (per curiam); *Louk v. Isuzu Motors, Inc.*, 479 S.E.2d 911 (W. Va. 1996); *Robertson*, 301 S.E.2d, 568-69 (reversing a directed verdict, because the defendants could have reasonably foreseen that their exhausted employee would pose a risk to other motorists while driving home and "liability may be imposed regardless of the existence of a relationship between the defendant and the party injured.").

<sup>186</sup> See JA 00465-66 at ¶382a-i; JA 01524-25 at ¶336a-i; JA 02147-8 at ¶440a-i; JA 02496 at ¶376a-i; JA 02726-27 at ¶364a-i; JA 02860-61 at ¶391a-i; JA 03005-06 at ¶348a-i; JA 03353-54 at ¶418a-i; JA 03469-70 at ¶415a-i; JA 03704 at ¶382a-i; JA 03886-87 at ¶402a-i; JA 04092-93 at ¶362a-i; JA 04224-25 at ¶421a-i; JA 04330-31 at ¶360a-i; JA 04548-49 at ¶403a-i.

<sup>187</sup> See JA 00419-26, ¶¶141-179 (risks to infants associated with opioid use); JA 01482-89 at ¶¶139-177 (same); JA 02085-92 at ¶¶142-180 (same); JA 02450-56 at ¶¶144-182 (same); JA 02680-87 at ¶¶144-182 (same); JA 02812-19 at ¶¶146-184 (same); JA 02960-67 at ¶¶141-179 (same); JA 03124-30 at ¶¶145-183 (same); JA 03295-302 at ¶¶136-174 (same); JA 03412-19 at ¶¶139-177 (same); JA 03530-37 at ¶¶136-

marketing, distribution and sale of opioids drugs exist to control addiction, abuse, and/or diversion associated with these dangerous drugs. The FDA and other regulators warned the Defendants and Defendants had access to scientific studies, detailed prescription data, and reports of adverse events, including reports of addiction, hospitalization, and deaths – all of which made clear the harms from long-term opioid use and that patients were suffering from addiction, overdoses, and death in alarming numbers.<sup>188</sup> The escalating amounts of highly addictive drugs being distributed, and the sheer volume of these prescription opioids, further alerted the Defendants that addiction was fueling increased addiction, abuse and diversion, and that legitimate medical purposes were not being served.<sup>189</sup> In recent years, there has been a dramatic rise in the proportion of infants who have been exposed to opioids and the incidence of NAS.<sup>190</sup> Available literature documents the potential harms associated with opioid use during pregnancy, including poor fetal growth, preterm birth, birth defects, and neonatal opioid withdrawal syndrome (“NOWS”).<sup>191</sup> It is well

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174 (same); JA 03651-57 at ¶¶146-184 (same); JA 03835-42 at ¶¶149-187 (same); JA 04048-55 at ¶¶143-181 (same); JA 04286-93 at ¶¶140-178 (same); JA 04390-96 at ¶¶141-179 (same); JA 04493-99 at ¶¶138-176 (same).

<sup>188</sup> See e.g., JA 00439-40 at ¶235 (FDA and other regulator warnings); JA 00440 at ¶238 (2016 U.S. Surgeon General letter linking this “urgent health crisis” to negligent marketing).

<sup>189</sup> See e.g., JA 0444 at ¶¶254-255 (H.D. Smith distributed approximately 18 million opioid pills in West Virginia between 2007 and 2012); JA 00445-46 at ¶¶297-299 (Peterstown Pharmacy received over 1.5 million opioids between 2006 and 2015, enough for 30 pills per person per year in the town of 630 residents); see also JA 00445 at ¶257.

<sup>190</sup> See e.g., JA 00402 at ¶43 (“During the period of 2010-2017, mothers with opioid related diagnoses increased 131%, while babies born with neonatal abstinence syndrome (“NAS”) increased by 82% nationally.”). The Circuit Court considered the Defendants’ motions to dismiss collectively and issued a collective ruling (with the exception of *Sparks* however, a substantively similar Order was entered). Construing the Plaintiffs’ Complaint here in the light most favorable to the Plaintiffs, this Court should consider these plausible allegations made in the other Plaintiffs’ Complaints. Alternatively, these allegations would have been included in the Amended Complaints Plaintiffs requested leave to file, see *infra* § X.

<sup>191</sup> See e.g., JA 00402 at ¶44.

documented that opioid use during pregnancy has a significant risk of being detrimental to the embryo.<sup>192</sup>

West Virginia has long recognized that the existence of a duty depends on the foreseeability of the injury.<sup>193</sup> It is up to the jury – and thus not appropriate for a Motion to Dismiss – to consider foreseeability, that is, in the context of the facts of the case, whether Defendants’ conduct falls within the scope of the duty as defined by the court. *Id.*

### C. Public Policy Supports Imposing a Duty on Defendants.

The existence of a duty also involves policy considerations such as: (1) the likelihood of injury; (2) the magnitude of the burden of guarding against it; and (3) the consequences of placing that burden on the defendant.<sup>194</sup> The Circuit Court gave lip service to this test, instead merely stating that to do so would “*stretches the concept of due care too far.*”<sup>195</sup>

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<sup>192</sup> See e.g., JA 00402 at ¶45; JA 00402-05 at ¶¶46-63 (describing the effects of opioids on embryos and fetal development); JA 00411 at ¶¶94-96 (describing the inconsistent disclosures of pregnancy related risks from opioid use between the United States and Europe); JA 00464 at ¶372 (“while the Defendants’ marketing materials in the United Kingdom . . . and elsewhere globally warned of fetal opioid exposure and birth defects the same Defendants, by comparison chose not to warn users and prescribers within the United States of the same risks and birth defects”); JA 00406-09 at ¶¶70-88 (describing certain Manufacturers’ OSHA safe handling warnings pertaining to bulk quantities of opioids being handled by pregnant women and potential adverse effects on the development of offspring and lack of harmonization of disclosures of risks associated with opioid use); JA 00418 at ¶129 (“Defendants knew that opioid dependent individuals would be constrained to obtain opioids through illegal distribution channels and that “a significant number of those individuals are adult women of childbearing ages that would give (and have given) birth to babies dependent upon opioids”); JA 00419-20 at ¶¶141-149 (describing the dramatic increase in the number of fetuses exposed to opioids in the United States and West Virginia); JA 00423-26 at ¶¶156-179 (describing the pharmacological effects of opioids on embryos and infants and treatment); JA 00426 at ¶¶180-182 (the risks of serious latent negative health impacts were available to the Manufacturing Defendants and Distributor Defendants and the Defendants purposely misrepresented the potential of opioids to result in the negative health impacts).

<sup>193</sup> *Bragg v. United States*, 741 S.E.2d 90, 98 (W. Va. 2013) (cit. om.).

<sup>194</sup> *Brooke County Dist. Order* at 5 ¶10 (citing *Robertson*, 171 W. Va. 607, 301 S.E.2d 563 (1983); *Stevens*, 788 S.E.2d at 62-63 (cit. om.); *Bragg*, 741 S.E.2d at 98 (cit. om.).

<sup>195</sup> JA 00115.

An actual application of the three-part test establishes that Plaintiffs adequately alleged a duty. Public policy considerations support the imposition of a duty of care here because the likelihood and risk of injury caused to the minors in utero by highly addictive opioids is high, the burden imposed on the Defendants to guard against injury and damage is no greater than they already face, and there is an absence of adverse consequences of placing the burden on the Defendants to guard against the likely injury.

**D. Intervening Acts do not Relieve Defendants from Owing Plaintiffs a Duty.**

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

The fact that doctors and mothers also owe a duty of care does not absolve the Defendants. In fact, by placing the full burden on the doctors and mothers, the Circuit Court overlooked the allegations that the doctors and patients were misled by Defendants in their marketing of the drugs.<sup>196</sup> Addiction and diversion are the inevitable result of the improper marketing of opioids.<sup>197</sup> Second, the Circuit Court erred in holding that any illegal conduct of the mother and/or others absolved the Defendants. The Circuit Court ignored allegations regarding the Defendants' knowledge that actors "further down in the supply chain" were "incompetent or acting illegally and should not be entrusted with the opioids"; and knowing that "(a) there was a substantial

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<sup>196</sup> See, e.g., JA 00440-41 at ¶238 (2016 U.S. Surgeon General letter linking this "urgent health crisis" to negligent marketing); JA 00432 at ¶205 (Defendant's misleading marketing targeted the public, physicians, and medical community); JA 00436 at ¶219 (same); JA 00442-43 at ¶¶243-246 ("Defendants took steps to avoid detection of and to fraudulently conceal their negligent marketing and unlawful, unfair, and fraudulent conduct").

<sup>197</sup> *Direct Sales Co. v. United States*, 319 U.S. 703, 712 (1942).

likelihood many of the ultimate sales were for non-medical purposes, and (b) opioids are an inherently dangerous product when used for non-medical purposes.”<sup>198</sup>

The Circuit Court’s holding is contrary to West Virginia law which recognizes a duty to protect someone from the intentional, criminal acts of third parties when the harm was foreseeable.<sup>199</sup> The Plaintiffs’ Complaints set forth in detail the factual basis for the conclusion that the claims that the Defendants engaged in affirmative conduct, which they realized or should have realized created an unreasonable risk of harm to another, including the Plaintiff Minor children, such that it owed a duty to exercise reasonable care to prevent the threatened harm.<sup>200</sup> The Complaints further describe actions by Defendants which exposed the Plaintiffs to foreseeable high risk of harm from criminal activity of a third party, i.e., the use of illicit opioids.<sup>201</sup>

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<sup>198</sup> See, e.g., JA 00440-41 at ¶238 (2016 U.S. Surgeon General letter linking this “urgent health crisis” to negligent marketing); JA 00432 at ¶205 (Defendant’s misleading marketing targeted the public, physicians, and medical community); JA 00436 at ¶219 (same); JA 00442-43 at ¶¶243-246 (“Defendants took steps to avoid detection of and to fraudulently conceal their negligent marketing and unlawful, unfair, and fraudulent conduct”).

<sup>199</sup> *Marcus v. Staubs*, 736 S.E.2d 360, 370-71 (W. Va. 2012). See also *Miller v. Whitworth*, 455 S.E.2d 821, 827 (W. Va. 1995) (duty will be imposed when a defendant’s acts or omissions have unreasonably created or increased the foreseeable risk of injury from the criminal activity or intentional misconduct of a third party); see also *Strahin*, 603 S.E. 2d at 209 (when negligence concurred with intentional, criminal acts jury must make determination if it was foreseeable that the conduct could have created an unreasonable risk of harm); *Wal-Mart Stores E. L.P. v. Ankrom*, 244 W. Va. 437, 448, 854 S.E.2d 257, 268 (2020) (finding that a reasonable juror could have concluded that the Wal-Mart employees exposed a customer to a foreseeable high risk of harm in the course of apprehending a shoplifter, thus, owing the customer a duty to protect her from the shoplifter’s criminal conduct); *Estate of Hough by & Through LeMaster v. Estate of Hough by & Through Berkely Cty. Sheriff*, 205 W. Va. 537, 545, 519 S.E.2d 640, 648 (1999) (finding appellant’s claim should not have been dismissed when a landlord should have known of Mr. Hough’s violent actions toward Mrs. Hough and realized the risk of harm he created by permitting him to live across the street from her and then requiring her to cut her lawn which she was doing when shot by Mr. Hough); *Price v. Halstead*, 177 W. Va. 592, 600, 355 S.E.2d 380, 389 (1987) (reversing order dismissing case against passengers who had substantially contributed to and assisted the driver’s continued use of alcohol and drugs while he was already impaired).

<sup>200</sup> See, *supra*, n. 198.

<sup>201</sup> See e.g., JA 00466 at ¶¶383-385.

**V. The Circuit Court Erred in Holding, as a Matter of Law, that Plaintiffs cannot Establish Proximate Cause in these Cases.**

Plaintiffs incorporate the briefing from *A.D.A v. Johnson & Johnson* Petitioner’s Brief, Section IV<sup>202</sup>, which addresses this assignment of error, and summarize the arguments and apply the facts of the cases to the legal arguments.

The Circuit Court proffered two reasons for concluding that proximate causation cannot exist as a matter of law: (1) the actions of prescribing physicians, illegal drug distributors (but only “in some cases”), and birth mothers who ingested “prescribed opioids and/or illegally obtained opioids during their pregnancies”<sup>203</sup>; and (2) “the birth mothers’ ingestion of opioids during pregnancy is the sole proximate cause of the Minors’ alleged injuries.”<sup>204</sup> Neither is supported by West Virginia precedent.<sup>205</sup>

The Circuit Court failed to attach any significance to the distinction between those Minor Plaintiffs whose mothers ingested “illegally obtained opioids” during pregnancy and those who only ingested “prescribed opioids.”<sup>206</sup> The Circuit Court stated the fact that “birth mothers ingested opioids”—without more, and without tying the birth mothers’ ingestion of opioids to conduct that was necessarily illegal, wrongful, or negligent itself—was sufficient to find as a matter of law that the birth mothers were the sole proximate cause of the resulting injuries.<sup>207</sup>

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<sup>202</sup> TID 71445181.

<sup>203</sup> JA 00116.

<sup>204</sup> JA 00121.

<sup>205</sup> JA 00101.

<sup>206</sup> See JA 00119 (noting that “third parties provided illegally obtained opioids” only “in some cases” and that the birth mothers “ingested medically prescribed opioids and/or illegally obtained opioids” without distinguishing one scenario from the other for purposes of the holding or reasoning.

<sup>207</sup> See JA 00120-21; see e.g., *id.* at 23 (“[T]he alleged injuries that form the basis of Plaintiffs’ claims necessarily occurred because the Minors’ birth mothers ingested opioids during their pregnancies, and they would not have occurred otherwise.”).



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

**A. “Remoteness” is not an Issue in this Case Independent of the Jury Question of Intervening Cause.**

The Circuit Court’s holding makes clear that its finding of “remoteness” is not based on remoteness *per se* but rather on certain intervening acts of others—by the prescribing physicians, by the birth mothers, and, in some but not all cases, by criminals who sold or provided the drugs to the birth mothers illegally.<sup>208</sup> According to the Circuit Court, it was these “independent actions of multiple actors over whom Defendants had no control” that “defeat proximate causation as a matter of law” because these intervening acts by others “render Defendants’ conduct too remote from Plaintiffs’ alleged injuries.”<sup>209</sup> The Circuit Court simply referred to its actual conclusion—that the actions of physicians, criminals (in some cases), and birth mothers break the chain of causation—by a different name “Remoteness” to avoid the requisite foreseeability analysis that attends intervening acts.<sup>210</sup>

The Circuit Court applied the wrong analytical framework—“remoteness” rather than “intervening acts”—ignoring the recent decision of the Supreme Court of Appeals which brought

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<sup>208</sup> JA 00117.

<sup>209</sup> *Id.*

<sup>210</sup> JA 00118.

“remoteness” squarely back under the umbrella of the “foreseeability” and “intervening cause” framework.<sup>211</sup>

Moreover, even if West Virginia law still supported a doctrine of “remoteness” that is materially distinct from questions of intervening cause and foreseeability, such a doctrine clearly does not apply to these facts. The Minor Plaintiffs’ allegations include standard products liability claims against product manufacturers and sellers.<sup>212</sup> No court has ever held that the relationship between a product seller and an end user or bystander injured *directly* and *physically* by the seller’s product is simply “too remote” to support proximate causation in the absence of some intervening act by others. None of the cases cited by the Circuit Court in support of its conclusion involve a plaintiff who was physically and directly injured by a product manufactured or sold by a defendant.<sup>213</sup>

Furthermore, the same Circuit Court that dismissed the Minor Plaintiffs’ claims against opioids manufacturers, distributors, and pharmacies in this case previously rejected a nearly identical remoteness argument brought by these same defendants against the State and political subdivisions, whose harms are plainly downstream—i.e., more remote or further removed from the allegedly tortious acts of the defendants—of the harms suffered by individuals such as the Minor Plaintiffs who have become addicted to and suffered injuries as a result of the opioid epidemic.<sup>214</sup>

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<sup>211</sup> *Wal-Mart Stores East, L.P. v. Ankrom*, 244 W. Va. 437, 450-51 854 S.E.2d 257, 270-71 (2020).

<sup>212</sup> See e.g., JA 00402-404 at ¶¶ 45-63; JA 00423-426 at ¶¶ 156-182; JA 00469-71 at ¶¶ 411-429.

<sup>213</sup> See *A.D.A. v. Johnson & Johnson* Petitioner’s Brief, TID 71445181 at 48-50.

<sup>214</sup> *Id.* at n.24 (string cite); see also *In re: Opioid Litigation*, Civil Action No. 21-C-9000-PHARM, Findings of Fact and Conclusions of Law on Order Denying Pharmacy Defendants’ Motions to Dismiss Complaints and Amended Complaints at 32-35 (W. Va. M.L.P. Aug. 3, 2022) (TID 67895252) (denying Pharmacy Defendants’ motions to dismiss and rejecting proximate cause argument); *State ex rel. Morrissey v. The Kroger Co.*, No. 22-C-11 PNM, Findings of Fact and Conclusions of Law in Support of Order Denying

The Circuit Court’s deeply conflicting orders—finding that physical harm to babies is “too remote” while the harm to political subdivisions from having to address the harm to babies and others suffering from addiction are *not* too remote—simply cannot be reconciled in any rational way.

**B. Questions of Proximate Cause and Intervening Cause are Questions for the Jury, and Foreseeability is the Touchstone.**

It is well-settled that questions of proximate and intervening cause are ordinarily questions for the jury.<sup>215</sup> In the context of one or more possible intervening causes such as this—whether the list of intervening actors includes physicians who prescribed opioids and third parties who provided illegal opioids,<sup>216</sup> or is limited to just the birth mother who ingested the opioids that poisoned their gestating babies<sup>217</sup>—that fact question turns squarely on the foreseeability of the third parties’ conduct from the perspective of the defendant. “A tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct.”<sup>218</sup> The Circuit Court erred in rejecting these black-letter principles.

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Kroger’s Motion to Dismiss Plaintiff’s Complaint at 25-27 (W. Va. M.L.P. Nov. 15, 2022) (TID 68388011) (denying Kroger’s motion to dismiss and rejecting proximate cause argument).

<sup>215</sup> Syl. pt. 17, *Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (internal quotation marks and citations omitted); *see also* syl. pt. 14, *Marcus v. Staubs*, 230 W. Va. 127, 736 S.E.2d 360 (2012).

<sup>216</sup> JA 00119.

<sup>217</sup> JA 00120-21.

<sup>218</sup> Syl. pt. 13, *Moulder*, 183 W. Va. 77, 394 S.E.2d 61. The Circuit Court did not distinguish between Minors whose birth mothers obtained pills legally through prescription and minors whose birth mothers obtained pills illegally. Note, however, that *Moulder* itself concerns a very similar circumstance—the illegal but entirely foreseeable transfer or distribution of an intoxicating substance from one person to another. The intervening act was the illegal distribution of an alcoholic beverage purchased (illegally) by one minor and then given—also illegally—to another minor.

**C. The Intervening Acts of Prescribing Physicians, Addicted Mothers, and Even Criminal Drug Dealers were Clearly Foreseeable to the Defendants.**

The third-party conduct at issue was foreseeable to the Defendants. According to the Minor Plaintiffs' allegations, the very *purpose* of the alleged conspiracy between the Defendants to flood high-volume prescribers with sales calls was to create an illegal secondary market of drugs that have been diverted from these high-volume and unscrupulous prescribers, for sale to persons who have become addicted to them.<sup>219</sup> Moreover, avoiding the diversion and "abuse" of controlled substances—and, ultimately, avoiding bodily harm to addicted users, abusers, and their gestating babies—is the *purpose* of the WVCSA.<sup>220</sup>

**VI. The Circuit Court Erred in Dismissing Plaintiffs' Civil Conspiracy Claims.**

Plaintiffs' Complaints set forth detailed allegations regarding the wide-ranging conspiracies among various defendants which, in addition to creating and fueling the opioid epidemic in West Virginia, resulted in direct harm to Minor Plaintiffs.<sup>221</sup> While the claims for civil conspiracy are founded upon the underlying tortious conduct alleged and supporting the substantive counts. The Circuit Court dismissed the civil conspiracy count based on its rulings as to other claims. These rulings were error, and the civil conspiracy count cannot be dismissed.

**VII. Plaintiffs' Claims Against the West Virginia Board of Pharmacy are not Barred by the Public Duty Doctrine or Qualified Immunity.**

Plaintiffs incorporate the briefing from *A.D.A v. Johnson & Johnson* Petitioner's Brief, Section VI<sup>222</sup>, which addresses this assignment of error, and summarize the arguments and apply the facts of the cases to the legal arguments.

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<sup>219</sup> See e.g., JA 00441-46 at ¶¶239-301.

<sup>220</sup> See W. Va. Code § 60A-2-201(a).

<sup>221</sup> See e.g., JA 00467-68 at ¶¶391-399.

<sup>222</sup> TID 71445181.

The Circuit Court erred in concluding that Plaintiffs' claims against the WVBOP are barred by the public duty doctrine and qualified immunity.<sup>223</sup> The allegations in this case demonstrate that there exist material facts that the BOP acted willfully and maliciously in violation of clearly established laws such that qualified immunity is no bar to the claims and the public duty doctrine provides no shield to these Defendants for their acts.

**A. The Public Duty Doctrine is Inapplicable.**

The BOP willfully and maliciously failed to investigate over 7,200 reports of suspicious orders between 2012 and 2017 alone. The sheer number of the reports and the information contained in them required an investigation by BOP under its mandatory legal duties. Further, Defendant's reliance on cases from other jurisdictions is flawed, as the law applied in those cases is completely contrary to the established law in West Virginia. Unfortunately, the Court below appears to have followed this misguided legal analysis.

The duty of the BOP to review and properly investigate the suspicious orders that flooded its office was not a general regulatory duty of a state agency. Plaintiffs allege that these failures were reckless, malicious, and intentional. Under the applicable facts and law, there was no basis to grant a motion to dismiss the BOP from this action under the public policy doctrine.<sup>224</sup>

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<sup>223</sup> JA 00123-26; *see also Brooke Cty. Comm'n, v. Purdue Pharma, L.P.*, Case No. 17-C-248 (Marshall Cty. Cir. Ct. Dec. 28, 2018) (reaching opposite conclusion on the same question).

<sup>224</sup> A special duty between the BOP and Plaintiff (an exception to the Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-5) is triggered here where a state agency acts with malicious purpose, in bad faith, or in a wanton or reckless manner. *Holsten v. Massey*, 200 W. Va. 775, 781, 490 S.E.2d 864, 870 (1997); *Brook County Commission v. Purdue Pharma, LP, et al*, Civil Action No. 17-C-248. *See ADA v. Johnson & Johnson* Petitioners' Brief, TID 71445181 at 56-58.

**B. The West Virginia BOP is not Entitled to Qualified Immunity.**

The facts as alleged by the Plaintiffs set forth detailed violations of state laws and make specific allegations of failing to follow mandatory duties—not discretionary acts. Plaintiffs’ complaints assert malicious and intentional conduct on the part of WVBOP as well as statutory violations. As such, dismissal based upon an assertion of qualified immunity, before any factual development had taken place, was improper. The basic focus of any claim against a state agency is whether the agency failed to do what it was specifically required to do under a clearly established law or right.<sup>225</sup>

As alleged, a discretionary duty is not involved here—the BOP had multiple mandatory duties set forth both in statute and by rule.<sup>226</sup> At an absolute minimum, Plaintiffs are entitled to proceed with discovery to shed light on the circumstances surrounding these voluminous ignored warnings. As such, BOP is not entitled to any immunities or protections, and the Order granting the motion to dismiss Plaintiff’s Complaint against BOP should be reversed and the cases remanded.

**VIII. The Circuit Court erred in Dismissing Plaintiffs’ Causes of Action Pertaining to Fraud or Intentional Misrepresentation.**

The Circuit Court also erred in dismissing Plaintiffs’ causes of action pertaining to “fraud,” to the extent that includes the Plaintiffs’ claims for intentional misrepresentation.<sup>227</sup> That

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<sup>225</sup> *W. Va. Reg’l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 515, 776 S.E.2d 751, 774 (2014); *Payne*, 231 W. Va. at 572, 746 S.E.2d at 563; *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Hutchison v. City of Huntington*, 198 W. Va. 139, 149 n. 11, 479 S.E.2d 649, 659 n. 11 (1996); *W. Va. State Police v. J.H.*, 244 W. Va. 770, 856 S.E.2d 679 (2021).

<sup>226</sup> *See* 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.

<sup>227</sup> JA 00121-22.

conclusion was based solely on the Circuit Court's erroneous proximate cause analysis.<sup>228</sup> Therefore, it is erroneous for the same reasons that the Circuit Court's conclusion on proximate cause is erroneous.<sup>229</sup>

#### **IX. The Complaints Assert a Claim for Punitive Damages.**

The actions of defendants go far beyond negligence or simply creating a nuisance causing separate harm to Minor Plaintiffs. Rather, the Defendants' conduct is reckless, willful, and malicious, which gives rise to Plaintiffs' prayer and request for punitive damages. These claims for relief are set forth separate and apart from the individual liability claims but they are not intended as a stand-alone cause of action. Plaintiffs acknowledge their claim for punitive damages is dependent on the underlying tort claims. As the dismissal of these claims should be reversed, the prayer for punitive damages should be reinstated as well.

#### **X. The Circuit Court Erred in Dismissing Plaintiffs' Claims Without Providing Leave to Amend the Complaints.**

West Virginia adheres to its liberal pleading standard: "Complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure."<sup>230</sup> The Supreme Court of Appeals reminded us that courts should liberally construe plaintiffs' complaints and take all their allegations as true when evaluating a defendant's motion to dismiss should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.<sup>231</sup>

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<sup>228</sup> *Id.*

<sup>229</sup> See Argument Section V., *supra*.

<sup>230</sup> *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 776, 461 S.E.2d 516, 522 (1995).

<sup>231</sup> *Burke v. Wetzel County Commission*, 240 W. Va. 709, 717, 815 S.E.2d 520, 528 (2018).

Side by side serving the same purpose is Rule 15: “Rule 12(b)(6) is not to be read or applied in a vacuum; it is intermeshed with numerous other rules. . . . Rule 15(a) permits liberal amendments to a party's pleadings, while Rule 15(b) makes clear that pleadings may be amended not only as late as trial, but ‘even after judgment’ ‘to cause them to conform to the evidence[.]’”<sup>232</sup>

“Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard[.]”<sup>233</sup> Thus, “a complaint is sufficient against a motion to dismiss under Rule 12(b)(6), if it appears from the complaint that the plaintiff may be entitled to *any form of relief*, even though the particular relief he has demanded and the theory on which he seems to rely are not appropriate.”<sup>234</sup>

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

These constructions of our rules are especially appropriate to apply where, as here, the claims are ones that had never been litigated or discovered anywhere. At the hearing on the Defendants’ motions to dismiss, Plaintiffs’ counsel opposing the motions pointed all this out and

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<sup>232</sup> *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 520-21, 854 S.E.2d 870, 882-83 (2020).

<sup>233</sup> *Id.* at 522 (quoting *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002)).

<sup>234</sup> *Mountaineer Fire & Rescue Equip.*, 244 W. Va. at 522, 854 S.E.2d at 884 (quoting 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1219 (3rd Ed. 2020) (emphasis by Court)).



requested that the Circuit Court apply these liberal standards, deny the motions or grant leave to amend, and then permit discovery.<sup>235</sup> Instead, the Court adopted Defendants' arguments and dismissed the cases.<sup>236</sup>

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

### **CONCLUSION**

The opioid epidemic and the consequences of NAS suffered by persons whose birth mothers were addicted to or ingested opioids during their pregnancies is not disputed. Without question the Complaints suffice to state claims on behalf of all Plaintiffs against each of the defendants for these injuries. The Circuit Court's order commits myriad fundamental legal errors which would deny Minor Plaintiffs even the opportunity to engage in discovery and present their cases to a jury. West Virginia law recognizes all of the claims plead. Denying Plaintiffs the opportunity to proceed beyond the pleading stage not only contradicts existing precedent from this very Court but creates an injustice graver than the opioid epidemic itself.

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<sup>235</sup> JA 00247, 00329, 00331, 00350.

<sup>236</sup> Among other arguments, these Plaintiffs requested leave to plead public nuisance claims, JA 00331, transcript, 151:13-22. For the reasons set forth in the opening brief in *A.D.A.*, the public nuisance claims are viable claims that these Plaintiffs should be permitted to plead.

TRAVIS BLANKENSHIP

*By counsel*

/s/ Anthony J. Majestro  
Anthony J. Majestro (WVSB 5165)  
Christina L. Smith (WVSB 7509)  
*Counsel of Record*  
POWELL & MAJESTRO PLLC  
405 Capitol Street, Suite 807  
Charleston, WV 25301  
Phone: 304-346-2889  
Fax: 304-346-2895  
amajestro@powellmajestro.com  
csmith@powellmajestro.com  
*Counsel for Petitioners Blankenship, et al.*

Stephen P. New, Esq.  
Emilee B. Withrow, Esq.  
NEW, TAYLOR & ASSOCIATES  
430 Harper Park Drive  
PO Box 5516  
Beckley, WV 25801  
Phone: 304-250-6017  
steve@newlawoffice.com  
*Counsel for Petitioners Blankenship, et al.*

### **CERTIFICATE OF SERVICE**

I hereby certify that on May 7, 2024, I served a copy of the **PETITIONERS' OPENING BRIEF AND JOINT APPENDIX** upon counsel of record through the Court's Electronic Filing System (FileandServeXPress).

/s/ Anthony J. Majestro