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

TRAVIS BLANKENSHIP, next friend and guardian of Minor Child Z.D.B., *Plaintiffs Below, Petitioners*, v. MCKESSON CORPORATION, ET AL., *Defendants Below, Respondents*.	Nos. 23-ICA-287

RESPONSE BRIEF FOR MCKINSEY DEFENDANTS

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INTRODUCTION

The Mass Litigation Panel ("Panel") correctly determined that Petitioners ("Plaintiffs") cannot plead any claims against any of the Respondents ("Defendants"). The joint Brief of Respondents filed by the manufacturer and distributor defendants explains the fundamental defects with Plaintiffs' claims, and why the Panel's decision should be affirmed. McKinsey incorporates the joint Brief of Respondents by reference.[1]

Among other things, the joint Respondents' brief illustrates the attenuated nature of Plaintiffs' claims, and why that attenuation means Plaintiffs cannot recover as a matter of law. Plaintiffs' claims against McKinsey are even more attenuated and incredible. They seek to hold McKinsey—a professional consultant that advised its clients on how to increase the sale of a legal, FDA-approved, DEA-regulated product—liable for actions taken by its clients. (Yet Petitioners' Opening Brief fails to make any argument regarding why McKinsey specifically should be held liable.)

This Court should reject Plaintiffs' invitation to recognize such liability. McKinsey could not have proximately caused Plaintiffs' injuries by providing advice, which preceded all of the activities that Plaintiffs say caused them harm. The injuries were too remote and, conversely, not reasonably foreseeable: given that McKinsey is not alleged to have made any recommendations regarding pregnant women, it could not have reasonably anticipated that children born to women

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[1] The *Blankenship* appeal consists of 18 now-consolidated NAS cases. Plaintiffs named three McKinsey entities as Defendants—McKinsey & Company, Inc., McKinsey & Company, Inc. United States, and McKinsey & Company, Inc. Washington D.C.—in six of those cases: *Tammy Boswell, as next friend of B.E.B. and S.F.B. v. McKesson, et al.*; *Floretta Adkins, as next friend of M.J.A. v. McKesson, et al.*; *Dianna Brooks, as next friend of W.A.R. v. McKesson, et al.*; *Jacqueline Adams, as next friend of S.D.L. and H.G.L. v. McKesson, et al.*; *Donna Johnson, as next friend of L.M.J. v. McKesson, et al.*; and *Roger Johnson, as next friend of S.A.J. v. McKesson, et al*. Plaintiffs do not distinguish between the three entities, and refer to them collectively as "McKinsey."

who ingested opioids during their pregnancy would face a higher risk of neonatal abstinence syndrome ("NAS").

Because McKinsey could not have reasonably foreseen Plaintiffs' injuries, McKinsey also owed them no duty of care. Policy considerations also further militate against the extraordinary step of holding advisors liable for the potential consequences of the advice they dispense.

For these reasons, and those set forth in the joint Brief of Respondents, the Panel's dismissal of Plaintiffs' claims against McKinsey should be affirmed.[2]

STATEMENT OF THE CASE

A. Factual Background

McKinsey is a global business consulting firm.[3] It advises a number of companies in different industries,[4] including, as alleged by Plaintiffs here, Purdue Pharma (a non-party), as well as Defendant Johnson & Johnson.[5]

According to Plaintiffs, McKinsey began advising "Purdue and other pharmaceutical companies" "as early as 2004."[6] Most of Plaintiffs' allegations are about advice that McKinsey purportedly provided to Purdue. Plaintiffs say McKinsey provided "initial advice" to Purdue about

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[2] McKinsey raised other grounds for dismissal, including that Plaintiffs have not established personal jurisdiction over McKinsey in West Virginia, that McKinsey never made any representations to Plaintiffs' mothers or their doctors, that Plaintiffs failed to plead that McKinsey agreed or intentionally participated in any civil conspiracy, and that Plaintiffs' claims are barred by the First Amendment. JA02181-02188, JA02196-02202. The Panel did not reach any of these arguments, and McKinsey intends to reassert them on remand if this Court reverses the Panel's judgment.

[3] JA03553 ¶ 254; JA03320 ¶ 263; JA02114 ¶ 285; JA03436 ¶ 260; JA04191 ¶ 266; JA04515 ¶ 248.

[4] JA03558 ¶ 278; JA03324 ¶ 287; JA02119 ¶ 309; JA03440-03441 ¶ 284, JA04195-04196 ¶ 290, JA 04520 ¶ 272.

[5] JA03559 ¶ 283; JA03325-03326 ¶ 292; JA02120 ¶ 314; JA03441-03442 ¶ 289; JA 04196 ¶ 295; JA 04521 ¶ 277.

[6] *Id.*

"competitors working together" regarding "changes in the standard of care" relating to opioid use.[7] Later, McKinsey allegedly "recommended" to Purdue "the best ways to ensure loyalty to the brand" and also analyzed "growth opportunities for Purdue."[8] Plaintiffs further allege that McKinsey developed "targeted messaging" for Purdue to use in conjunction with its sales of OxyContin.[9]

Plaintiffs also aver that, "[a]s early as 2002,"[10] McKinsey advised "other opioid manufacturers" on opioid marketing. They claim McKinsey provided "recommendations" for Johnson & Johnson's "novel opioid product," which included a recommendation on "sales and marketing efforts on doctors."[11] (Aside from this one allegation, Plaintiffs do not allege any other specific facts about the relationship between McKinsey and Johnson & Johnson.) Plaintiffs contend that McKinsey announced in 2019 that it had stopped working for opioid manufacturers.[12]

Plaintiffs do not assert that McKinsey specifically advised its clients to market to pregnant women, or physicians tending to pregnant women. Rather, the crux of their factual allegations is that McKinsey's advice to Purdue resulted in Purdue pursuing a marketing strategy that other competitors ultimately followed,[13] and that those other competitors manufactured the opioids that

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[7] JA03559 ¶ 284; JA03325 ¶ 293; JA02120 ¶ 315; JA03442 ¶ 290; JA 04197 ¶ 296; JA 04521 ¶ 278.

[8] JA03560 ¶¶ 287, 289; JA 03326-03327 ¶¶ 296, 298; JA02120-02121 ¶¶ 318, 320; JA03442-03443 ¶¶ 293, 295; JA 04197-04198 ¶¶ 299, 301; JA 04521-04552 ¶ 281, 283.

[9] JA03560 ¶ 287; JA 03326 ¶ 296; JA02120 ¶ 318; JA03442 ¶ 293; JA 04197 ¶ 299; JA 04521 ¶ 281; JA03561 ¶ 291; JA03327 ¶ 300; JA02121 ¶ 322; JA03443 ¶ 297; JA04198 ¶ 303; JA04522 ¶ 285.

[10] JA03563 ¶ 302; JA03329 ¶ 311; JA02123 ¶ 333; JA03445 ¶ 308; JA04200 ¶ 314; JA04524 ¶ 296. Plaintiffs do not reconcile this allegation with their contrary allegation that McKinsey began providing services to opioid manufacturers in 2004. *See* note 6 and accompanying text, *supra*.

[11] JA03563 ¶ 303; JA03329 ¶ 312; JA02123-02124 ¶ 334; JA03445 ¶ 309; JA04200 ¶ 315; JA04524-04525 ¶ 297.

[12] JA03563 ¶ 301; JA03329 ¶ 310; JA02123 ¶ 332; JA03445 ¶ 307; JA04200 ¶ 313; JA04524 ¶ 295.

[13] JA03564 ¶ 309; JA03331 ¶ 318; JA02125 ¶ 340; JA03447 ¶ 315; JA 04201-04202 ¶ 321; JA04526 ¶ 303.

were ingested by the birth mothers of the minor children represented by Plaintiffs. Plaintiffs baldly assert that McKinsey must have known about the increased incidence of neonatal abstinence syndrome (NAS) in newborns born to opioid-using mothers because of McKinsey's "extensive research capacity."[14]

Plaintiffs represent minor children who were born addicted to opioids and who have been diagnosed with NAS. The children's birth mothers had previously been prescribed opioids for treatment of a condition or injury.[15] Later, during pregnancy, the birth mothers continued using opioid products that they "purchased from the diversionary market."[16]

B. Procedural Background

The six complaints that name McKinsey as a defendant also allege claims against a wide variety of entities responsible for manufacturing, distributing, or regulating opioids. Plaintiffs allege sweeping claims against all Defendants collectively, including claims based on theories of fraud, negligence (and gross negligence), conspiracy, and products liability.[17]

McKinsey filed a consolidated motion to dismiss the six complaints against it. JA02159-02162. As relevant here, McKinsey argued that (1) it owed no duty to the minor children allegedly affected by NAS, JA02189-02193; and (2) it did not proximately cause the injuries alleged, JA02194-02196.

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[14] JA03565 ¶ 314; JA03332 ¶ 323; JA02126 ¶ 345; JA03448 ¶ 320; JA04203 ¶ 326; JA04527 ¶ 308.

[15] JA03506 ¶ 4; JA03271 ¶ 3; JA02060 ¶ 4; JA03388 ¶ 5; JA04142 ¶ 5; JA04468-04469 ¶ 4.

[16] JA03554 ¶ 257; JA03320 ¶ 266; JA02114-02115 ¶ 288; JA03436 ¶ 263; JA04191 ¶ 269; JA04515-04516 ¶ 251.

[17] JA03569-03593; JA03335-03360; JA02129-02154; JA03451-03476; JA04206-04230; JA04530-04555. Plaintiffs have also alleged a count against the West Virginia Board of Pharmacy specifically. JA03593-03594.

The Panel granted McKinsey's motion to dismiss, along with the motions to dismiss filed by the other Defendants. Among other things, the Panel determined that Plaintiffs failed to allege that McKinsey owed Plaintiffs a common law duty of care, JA00007 ¶¶ 6-7, and that Plaintiffs failed to allege Defendants, including McKinsey, proximately caused the injuries alleged, JA00008 ¶¶ 8-9.

SUMMARY OF ARGUMENT

For the reasons provided in the joint Brief of Respondents, the Panel correctly dismissed Plaintiffs' claims against all Defendants. There are two additional reasons to affirm the dismissal of the claims against McKinsey.

First, Plaintiffs failed to plead that the advice McKinsey rendered was the proximate cause of the minor children's injuries. McKinsey's alleged conduct is too remote to be actionable under West Virginia tort law, especially as a long chain of events by a number of independent actors must follow McKinsey's purported conduct in order for the alleged injuries to arise. And Plaintiffs do not allege that McKinsey recommended to its clients that they focus on pregnant women, or that McKinsey knew opioid use by pregnant women increased the risk of NAS in a newborn child. So the alleged injuries were not reasonably foreseeable, either.

Second, McKinsey did not owe a duty of care to any of the minor children. A duty of care only exists when a risk of harm is reasonably foreseeable—and here, it was not. Moreover, policy considerations strongly weigh against imposing a duty of care on professional advisors in this context. Holding advisors responsible for the downstream effects of the advice they provide to clients would result in an extraordinary expansion of liability and would inevitably chill the free exchange of commercial ideas.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

McKinsey respectfully requests that the issues raised on this appeal be addressed in oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. McKinsey further requests that the Court allow additional time per side for oral argument per Rule 20(e) due to the multiple parties, including 5 minutes for McKinsey.

STANDARD OF REVIEW

This Court's review of the Panel's order is de novo. Syl. Pt. 1, *Jefferson Cnty. Found., Inc. v. W. Va. Econ. Dev. Auth.*, 247 W. Va. 24, 875 S.E.2d 162 (2022) (citing Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995)). This Court is "not confined to affirming the judgment strictly on the grounds given by the lower court," but may "uphold the judgment if there is another valid legal ground to sustain it." *Yourtee v. Hubbard*, 196 W. Va. 683, 690 n.9, 474 S.E.2d 613, 620 n.9 (1996).

ARGUMENT

I. PLAINTIFFS HAVE NOT ALLEGED THAT MCKINSEY PROXIMATELY CAUSED ANY INJURY.

"Proximate cause is a vital and an essential element of actionable negligence." Syl. Pt. 4, in part, *Sergent v. City of Charleston*, 209 W. Va. 437, 549 S.E.2d 311 (2001) (quoting Syl. Pt. 3, *McCoy v. Cohen*, 149 W. Va. 197, 140 S.E.2d 427 (1965)). It is "that cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred." Syl. Pt. 4, *White v. Wyeth*, 227 W. Va. 131, 705 S.E.2d 828 (2010) (quoting Syl. Pt. 3, in part, *Webb v. Sessler*, 135 W. Va. 341, 63 S.E.2d 65 (1950)).

"One requisite of proximate cause is an act or omission which a person of ordinary prudence could reasonably foresee might naturally or probably produce an injury." Syl. Pt. 4, in part, *Boyce v. Monongahela Power Co.*, 249 W. Va. 131, 894 S.E.2d 913 (2023) (quoting Syl. Pt.

4, *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W. Va. 639, 77 S.E.2d 180 (1953)). It is not enough that a defendant might foresee some kind of generalized harm; rather, proximate cause requires the defendant to reasonably foresee the specific actions and injuries that give rise to a plaintiff's suit. *See e.g.*, *Boyce*, 249 W. Va. at 922 n.10, 894 S.E.2d at 922 n.10. Remoteness is also "a component of proximate cause," *Aikens v. Debow*, 208 W. Va. 486, 492, 541 S.E.2d 576, 582 (2000); thus, negligence that is "remote as distinguished from proximate" to an injury is "not actionable," *Webb*, 135 W. Va. at 348, 63 S.E.2d at 69.

A. Plaintiffs' alleged injuries are too remote to have been proximately caused by McKinsey.

As explained in the joint Brief of Respondents, the Manufacturer Defendants' conduct is too attenuated from the injuries alleged by Plaintiffs to have been proximately caused by those Defendants. McKinsey's alleged conduct is even more remote—one step further removed than the alleged actions of the Manufacturer Defendants.

Assume for the sake of argument that there is, in fact, some connection between McKinsey's advice, the opioids purportedly consumed by the birth mothers here, and the injuries allegedly suffered by their minor children. Even under that assumption, Plaintiffs' theory of proximate causation still depends on a long, attenuated chain of events: (1) McKinsey provides advice on the sale of opioids to Purdue and Johnson & Johnson, which those manufacturers are free to accept, modify, or reject as they see fit;[18] (2) the manufacturers change their approach to marketing opioids; (3) if the new approach requires a labeling change, FDA reviews and approves it for safety and efficacy;[19] (4) a physician sees the manufacturers' marketing efforts; (5) that

[18] JA03552-JA03564; JA03319-JA03331; JA02113-JA02125; JA03435-JA03447; JA04190-JA04202; JA04514-JA 04526.

[19] JA03522 ¶ 92; JA03288 ¶ 92; JA02078 ¶ 98; JA03405 ¶ 95; JA04159 ¶ 96; JA04485 ¶ 94; JA03537 ¶ 175; JA03302 ¶ 175; JA02092 ¶ 181; JA03419 ¶ 178; JA04173 ¶ 179; JA04499 ¶ 177.

physician decides to prescribe opioids;[20] (6) the prescription is taken to a pharmacist, who decides to dispense the opioids;[21] (7) an individual who obtains opioids from the pharmacist decides to divert them for sale on an illicit secondary market;[22] and (8) the birth mother acquires and ingests the diverted opioids.[23]

As courts applying West Virginia law have recognized when considering similar opioid-related causes of action, proximate causation principles do not allow a downstream plaintiff to recover that far up the causal chain. One problem with doing so is that a long causal chain introduces many independent intervening factors often beyond the control of an upstream defendant, so there is a risk that a defendant will be held liable (based on remote conduct) for someone else's fault. *See Webb*, 135 W. Va. at 348, 63 S.E.2d at 68 (proximate cause is a "cause which, in actual sequence, *unbroken by any independent cause*, produced the event" (emphasis added)); *see also* Syl. Pt. 8, *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 543 S.E.2d 338 (2000) ("An intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury." (citation and internal quotation marks omitted)). Here, Plaintiffs' causation theory hinges on numerous third parties who may act in independent—and often unpredictable—ways, such as physicians (who determine whether and when to prescribe opioids), distributors and pharmacies (who supply the opioids directly to patients), criminals (who divert lawfully obtained opioids), and

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[20] JA03564 ¶ 308; JA03330 ¶ 317; JA02124 ¶ 339; JA03446 ¶ 314; JA04201 ¶ 320; JA04526 ¶ 302.

[21] JA03568 ¶ 328; JA03335 ¶ 337; JA02129 ¶ 359; JA03451 ¶ 334; JA04206 ¶ 340; JA04530 ¶ 322.

[22] *Id.*

[23] *See, e.g.*, JA03554 ¶ 257; JA03320 ¶ 266; JA02114 ¶ 288; JA03436 ¶ 263; JA04191 ¶ 269; JA04515 ¶ 251 (alleging that McKinsey should be liable because the minor children's birth mother … "was using opioid products purchased from the diversionary market").

the birth mothers themselves. These are just some of the other "effective intervening causes beyond the control of" McKinsey that are closer to the alleged injury—where such causes exist; proximate cause principles bar claims based on more attenuated links to an injury, like Plaintiffs' claims against McKinsey. *See City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 482 (S.D. W. Va. 2022) (holding that wholesale distributors of opioids could not be a proximate cause because "oversupply and diversion were made possible, beyond the supply of opioids by [the distributors], by overprescribing by doctors, dispensing by pharmacists of the excessive prescriptions, and diversion of the drugs to illegal usage—all effective intervening causes beyond the control of defendants"); *see also City of Charleston v. Joint Comm'n*, 473 F. Supp. 3d 596, 631 (S.D. W. Va. 2020) (holding that an organization responsible for healthcare standards allegedly facilitating opioid abuse could not be a proximate cause because "no injury would occur unless the physician proceeded to unnecessarily prescribe opioid treatments or if patients obtained the drugs through some other illegal means").

Indeed, under West Virginia law, proximate cause lies in "the last negligent act contributing to the injury and without which the injury would not have resulted," Syl. Pt. 5, *Boyce*, 249 W. Va. 131, 894 S.E.2d 913 (citations and internal quotation marks omitted). McKinsey's alleged acts, by contrast, are the very *first* acts in the purported causal chain, not the last; consequently, McKinsey's alleged actions are too remote to have proximately caused the injuries alleged by Plaintiffs.

Consider the facts of *Webb*, where the Supreme Court of Appeals held that the negligent placement of an airport too close to the highway did not proximately cause an accident where a plane collided into a traveling car. *Webb*, 135 W. Va. at 348, 63 S.E.2d at 68-69. The accident likely would not have happened had the airport been placed further away. But the accident also

would not have happened had the plane's pilot not acted negligently in his own right—an independent cause closer to the injury that rendered any prior negligence "remote as distinguished from proximate." *Id.*

So too here. Even assuming Plaintiffs are correct in alleging that McKinsey's advice set off the chain of events that led to birth mothers ingesting diverted opioids, the conduct of others, such as the prescribing doctor, the dispensing pharmacist, the diverting criminal, or the consuming birth mother, all are "effective intervening cause[s]" that render McKinsey's alleged conduct "remote as distinguished from proximate, and, therefore, not actionable." *See id.*

Plaintiffs' conclusory allegation that McKinsey should have foreseen "corrupt prescribers, corrupt pharmacists and staff, and/or criminals who buy and sell opioids for non-medical purposes"—does not make their negligence claims against McKinsey any less remote or any more actionable.[24] "[C]orrupt prescribers, corrupt pharmacists, and/or criminals" are all engaging in willful conduct, and "[g]enerally, a willful, malicious, or criminal act breaks the chain of causation." *Sergent*, 209 W. Va. at 446, 549 S.E.2d at 320 (quoting *Yourtee*, 196 W. Va. at 690, 474 S.E.2d at 620). Plaintiffs have not alleged that the exceptions to this general rule apply to McKinsey. They do not allege that McKinsey had a "special relationship" with any of the minor children represented by Plaintiffs "which gives rise to a duty to protect [the minor children] from intentional misconduct." *Miller v. Whitworth*, 193 W. Va. 262, 266, 455 S.E.2d 821, 825 (1995). Nor do they allege that McKinsey engaged in any affirmative conduct that specifically exposed minor children and their birth mothers "to a foreseeable high risk of harm from the intentional misconduct" of others, as McKinsey is not alleged to have known that intentional acts by intervening forces would lead to the unlawful dispensing or sale of opioids to pregnant mothers

[24] JA02129 ¶ 359; JA03335 ¶ 337; JA03451 ¶ 334; JA03568 ¶ 328; JA04206 ¶ 340; JA04530 ¶ 322.

when McKinsey advised its clients.[25] *See id.* at 268, 455 S.E.2d at 827 ("general knowledge" of "criminal activity occurring in the area" does not provide the foreseeability necessary to create a duty of care to hold a landlord liable for the "criminal activity of a third party"). All told, Plaintiffs have not alleged enough to hold McKinsey proximately responsible for the entire chain of events that purportedly followed the advice it gave to its clients.[26]

Nor do Plaintiffs allege enough to conflate McKinsey with the other Defendants based on their civil conspiracy theory. Generally, a conspiracy requires that "each member of the alleged conspiracy share[] the same conspiratorial objective." *Hinkle v. City of Clarksburg*, 81 F.3d 416, 421 (4th Cir. 1996). According to Plaintiffs, the conspiratorial objective here was to "mislead medical professionals, patients, the scientific community, the CDC, the FDA, the DEA, and the general public about … the risk of serious latent disease associated with in utero exposure to opioids."[27] But there are no allegations to support that McKinsey ever agreed to this objective—or could have agreed to it, explicitly or implicitly. Plaintiffs do not allege that McKinsey recommended to its clients that they direct their marketing efforts toward pregnant women. And they also do not allege that McKinsey knew of the link between birth-mother opioid use and newborn NAS at the time it allegedly advised its clients on opioid sales. Accordingly, Plaintiffs

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[25] *See, e.g.,* JA03553 ¶¶ 256-57 (alleging that McKinsey purportedly "exacerbat[ed] and fuel[ed] both the diversionary-opioid and prescription-opioid markets").

[26] Judge Breyer's contrary decision in *In re McKinsey & Co., Inc. National Prescription Opiate Litigation*, No. MDL 3084 CRB, 2024 WL 2261926 (N.D. Cal. May 16, 2024), conflicts with West Virginia law. Judge Breyer concluded that NAS plaintiffs had plausibly alleged McKinsey proximately caused the plaintiffs' injuries despite a long chain of events caused by independent actors, as the independent actors' actions were potentially foreseeable. *Id.* at *20. In so holding, Judge Breyer stated "[i]t is not the number or nature—innocent, tortious, or criminal—of the intervening acts that matters." *Id.* That squarely conflicts with the Supreme Court of Appeals' holding that willful, malicious, or criminal acts break the chain of causation, unless a plaintiff can meet the high bar of showing otherwise. *Sergent*, 209 W. Va. at 446, 549 S.E.2d at 320.

[27] JA02149 ¶ 450; JA03355 ¶ 428; JA03471 ¶ 425; JA03589 ¶ 419; JA04226 ¶ 431; JA04550 ¶ 413.

cannot seek to hold McKinsey liable for other Defendants' actions through their civil conspiracy claim.

B. McKinsey could not have reasonably foreseen the injuries alleged by Plaintiffs.

Plaintiffs contend that the Panel erred by framing the proximate causation inquiry as one of remoteness, not of foreseeability. Petitioners' Brief at 42-43. But by this measure (foreseeability), Plaintiffs still cannot establish that McKinsey proximately caused the injuries they allege.

Proximate cause does not "demand clairvoyance." *Miller v. Bd. of Governors of Fairmont State Univ.*, No. 15-0390, 2016 WL 2969662, at *6 (W. Va. May 20, 2016) (memorandum decision). "The law only requires reasonable foresight." *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W. Va. 639, 654, 77 S.E.2d 180, 189 (1953) (citation and internal quotation marks omitted). To be reasonably foreseeable, an injury must be "the natural and probable consequence of the negligent act and … ought to have been foreseen in the light of the attending circumstances." *Id.* (citations and internal quotation marks omitted).

Plaintiffs have not alleged any "attending circumstances" that would have made the minor children's alleged injuries a foreseeable outcome of the advice that McKinsey allegedly provided to its manufacturing clients. Plaintiffs do not allege that McKinsey specifically advised its clients to encourage the prescription of opioids to pregnant women. *See In re McKinsey & Co. Inc. Nat'l Prescription Opiate Consultant Litig.*, No. 21-md-02996-CRB, 2023 WL 4670291, at *5 (N.D. Cal. July 20, 2023) (in parallel litigation, concluding that injury to NAS-affected minor children was not reasonably foreseeable based on McKinsey's advisory conduct, and noting that, "McKinsey did not encourage the precise wrongful conduct here—that is, prescribing opioids to pregnant women"). Even with an overly generous reading of their Complaints—one in which

doctors attending to pregnant women are among those who receive marketing materials on which McKinsey provided advice—that still would not demonstrate that McKinsey specifically encouraged the prescription of opioids to pregnant women.

Nor do Plaintiffs allege any facts that demonstrate McKinsey "ought to have … foreseen" the injuries alleged by Plaintiffs. Syl. Pt. 3, *Matthews*, 138 W. Va. 639, 77 S.E.2d 180 (citations and internal quotation marks omitted). Plaintiffs say McKinsey "must have known of the extent of the NAS epidemic" because it has "extensive research capacity."[28] But Plaintiffs fail to allege any reason why McKinsey would have known about the handful of NAS studies cited in Plaintiffs' Complaints.[29] And they provide no authority for the proposition that access to resources makes a tort defendant knowledgeable about all contemporaneous medical studies for purposes of proximate cause. *See Hoschar v. Appalachian Power Co.*, 906 F. Supp. 2d 560, 566 (S.D. W. Va. 2012) (concluding that "the mere existence" of a publication describing the "risk of histoplasmosis," and the fact that the publication was available on a government website, did not make the risk "reasonably foreseeable to" the defendant).

Plaintiffs' Complaints do not allege that, when McKinsey was advising its clients, it was reasonably foreseeable that pregnant women would ingest opioids unlawfully obtained through diversion, thereby placing their unborn children at greater risk for NAS. Accordingly, even if the Panel had focused on foreseeability (and not remoteness), the Panel would have concluded McKinsey did not proximately cause the injuries alleged by Plaintiffs.

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[28] JA03565 ¶ 314; JA03332 ¶ 323; JA02126 ¶ 345; JA03448 ¶ 320; JA04203 ¶ 326; JA04527 ¶ 308.

[29] JA03565-03566 ¶ 315; JA03332-03333 ¶ 324; JA 02126-02127 ¶ 346; JA03448-03449 ¶ 321; JA04203 ¶ 327; JA04527-04528 ¶ 309.

II. PLAINTIFFS HAVE FAILED TO ALLEGE THAT MCKINSEY OWED ANY DUTY.

Plaintiffs have not alleged that McKinsey owed the minor children here a duty of care. Without meeting this critical "first step," their negligence claims against McKinsey must fail. *See Hayes v. Kanawha Valley Reg'l Transp. Auth.*, No. 22-0207, 2024 WL 2859453, at *3 (W. Va. June 6, 2024) ("A plaintiff's first step in any negligence lawsuit is proof of a duty that was breached by the defendant.").

A duty of care exists when: (1) the defendant's conduct creates a foreseeable, unreasonable risk, *and* (2) policy considerations favor imposing a duty. *Stevens v. MTR Gaming Grp., Inc.*, 237 W. Va. 531, 534-35, 788 S.E.2d 59, 62-63 (2016) (a duty of care requires not just foreseeable harm, but also "involves policy considerations underlying the core issue of the scope of the legal system's protection" (citation omitted)); *Aikens*, 208 W. Va. at 491, 541 S.E.2d at 581 (same). In weighing policy considerations, courts consider "the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant." *Stevens*, 237 W. Va. at 535, 788 S.E.2d at 63 (citations omitted).

At the outset, no duty of care exists because, as explained above, the minor children's alleged injuries were not reasonably foreseeable. Nothing in the Complaints suggests that McKinsey "realize[d] or should [have] realize[d]" that its conduct "created an unreasonable risk of harm" to the minor children. *Stevens*, 237 W. Va. at 534, 788 S.E.2d at 62; *see Speedway LLC v. Jarrett*, 248 W. Va. 448, 457, 889 S.E.2d 21, 30 (2023) (reversing jury verdict where the evidence failed to show that the defendant's affirmative conduct created a foreseeable, "unreasonable risk").

Policy considerations also weigh against imposing a duty of care on McKinsey. Plaintiffs provide a threadbare, conclusory, single-sentence explanation of why public policy supports the

imposition of a duty: (1) minors in utero face a high "likelihood and risk of injury … by highly addictive opioids"; (2) Defendants face "no greater [burden] than they already face"; and (3) there are no "adverse consequences of placing the burden on the Defendants to guard against the likely injury." Petitioners' Brief at 39.

But as to McKinsey specifically, Plaintiffs are wrong on all three factors. First, McKinsey's alleged conduct was providing advice to its clients—that conduct alone did not, and could not, injure minors in utero. *McKinsey*, 2023 WL 4670291, at *5 ("McKinsey's advisory role did not necessarily create the undue risk that led to the NAS Plaintiffs' harms.").

Second, the magnitude of the burden of guarding against the harm is high. Consider Plaintiffs' allegation that, because McKinsey had the resources to know about the relationship between opioids ingested by pregnant women and NAS, McKinsey "must have known" about it.[30] Under Plaintiffs' theory of negligence, an advisor or consultant must exhaustively research every conceivable harm that might eventually arise from the advice it gives, regardless of whether that advice is subsequently followed. That is an enormous, if not impossible, burden.

Finally, imposing that burden on advisors like McKinsey would have considerable adverse consequences—not just for McKinsey, but for the "corporations and governments across diverse industries" served by advisory firms like McKinsey.[31] Plaintiffs seek to create a duty of care that would subject a professional advisor to liability for any harm allegedly caused by the conduct of the advisor's client related to the subject matter of the advisor's work—an unprecedented, and breathtakingly broad, basis for liability. The mere threat of liability, in turn, would discourage professional advisors from rendering professional advice, thereby chilling their constitutionally

[30] JA03565-03566 ¶¶ 314, 315; JA03332-03333 ¶¶ 323, 324; JA02126-02127 ¶¶ 345, 346; JA03448-03449 ¶¶ 320, 321; JA04203 ¶¶ 326, 327; JA04527-04528 ¶¶ 308, 309.

[31] JA03558 ¶ 278; JA03324 ¶ 287; JA02119 ¶ 309; JA03440 ¶ 284, JA04195 ¶ 290, JA04520 ¶ 272.

protected speech. *Cf. Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766-73 (2018) (rejecting the argument that professional speech is subject to diminished First Amendment protections).

Given these concerns, it is no surprise that courts considering similar opioid-related claims have declined to impose a duty of care on third-party advisors or other similarly situated entities. *E.g.*, *McKinsey*, 2023 WL 4670291, at *6 (applying the law of West Virginia and other states to reject claims brought by similarly situated NAS plaintiffs and to hold that there was no "duty between the consultant and the consumer"); *City of Charleston*, 473 F. Supp. 3d at 621 (applying West Virginia law and rejecting the claim that an independent standards organization owed a duty to those allegedly harmed by opioid abuse); *see also Abdulaziz v. McKinsey & Co.*, No. 21-2921, 2022 WL 2444925, at *2 (2d Cir. July 5, 2022) (holding that McKinsey had no duty of care under New York law to the plaintiff based on harm allegedly caused by a McKinsey client, citing the lack of a "duty to control the conduct of third persons to prevent them from causing injury to others" (citation and internal quotation marks omitted)).

That McKinsey could not reasonably foresee the injuries alleged by Plaintiffs is reason alone to hold that McKinsey did not owe the minor children represented by Plaintiffs a duty of care. Policy considerations—specifically, the lack of harm caused by McKinsey's advice standing alone, the magnitude of the burden imposed by creating a duty of care for consultants to all those affected downstream by the consultants' advice, and the consequences of imposing that burden—also heavily weigh against concluding that McKinsey owed a duty of care.

III. MCKINSEY CANNOT BE LIABLE UNDER PLAINTIFFS' PRODUCTS LIABILITY THEORY.

Finally, Plaintiffs' products liability claim cannot be asserted against McKinsey. "[P]roducts liability law is abundantly clear: liability is premised upon the defendant being the

manufacturer or seller of the product in question." *McNair v. Johnson & Johnson*, 241 W. Va. 26, 34, 818 S.E.2d 852, 860 (2018). Plaintiffs do not allege that McKinsey manufactured or sold anything directly to the consumer public—thus, it cannot be held liable under a product liability theory.

CONCLUSION

For the foregoing reasons, along with the reasons set forth in the joint Brief of Respondents, the judgment should be affirmed.

Dated: June 21, 2024

Respectfully submitted,

/s/ Keith J. George

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CERTIFICATE OF SERVICE

I, Keith J. George, hereby certify that on this 21st day of June, 2024, a true and correct copy of the above and foregoing **RESPONSE BRIEF FOR MCKINSEY DEFENDANTS** was served upon all parties through the Court's electronic filing system, being File & ServeXpress.

/s/ Keith J. George
Keith J. George (WV Bar No. 5102)