IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-287

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

Plaintiffs Below, Petitioner,

v.

McKESSON CORPORATION, et al.,

Defendants Below, Respondent.

PETITIONERS' REPLY BRIEF

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INTRODUCTION

In dismissing the cases en mass, the Circuit Court failed to examine the allegations in the complaints, erred in its' application of West Virginia law, and misinterpreted the decisions of the Supreme Court of Appeals. Defendants' responses ignore these flaws and fail to offer legal authority supporting the Circuit Court's decision; a decision which conflicted with even its own prior decisions in the opioid litigation. Dismissal was clear error. Dismissal with prejudice was clearer error. This Court should reverse and remand for discovery and trial.

ARGUMENT

I. The Circuit Court Erred in Dismissing Plaintiffs' Claims Against the Pharmacy Defendants With Prejudice.

When a claim is dismissed on jurisdictional grounds, it is error for that dismissal to be with prejudice. The pre-suit notice requirements of the West Virginia Medical Professional Liability Act, W. Va. Code § 55-7B-1 *et seq*. ("MPLA") are jurisdictional.[1] The Circuit Court, which lacked subject matter jurisdiction, erred in granting the motions to dismiss with prejudice.

The Supreme Court of Appeals has made clear that when cases are dismissed for failure to comply with the MPLA's pre-suit notice requirements, "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)."[2] This ability to re-

[1] *State ex rel. Charleston Area Med. Ctr v. Thompson*, Syl. Pt. 2, 248 W. Va. 352, 888 S.E.2d 852, (2023) (quoting Syl. Pt. 2, *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth*, 242 W. Va. 335, 835 S.E.2d 579 (2019)).

[2] *Id.* at n.15 (quoting Syl. Pt. 3, in part, *Davis v. Mound View Health Care, Inc.*, 220 W. Va. 28, 640 S.E.2d 91 [2006]).

file "is consistent with this Court's finding that '[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.'"[3]

The legal authority provided by Defendants in support of the Circuit Court's dismissal with prejudice is not persuasive as both cases predate *State ex rel. Charleston Area Med. Ctr.*, which has clarified that pre-suit jurisdictional requirements were not meant to deny access to the courts.[4] In fact, at oral argument, counsel for the Defendants specifically and expressly recognized that any dismissal should be without prejudice, stating:

> So we're not here asking for the Panel to dismiss these claims forever. This is a request for a subject matter jurisdiction dismissal without prejudice, with a right to refile, so that we can proceed under the appropriate law that healthcare providers are protected by in this state.[5]

Defendants assert that "despite its clear application to their claims," Plaintiffs made no "reasonable, good-faith efforts to comply with the MPLA."[6] Defendants attempt to fabricate an argument of bad faith on the part of the Plaintiffs–devoting over three pages of their brief regarding the applicability of the MPLA to Plaintiffs' claims[7] and then stating "Plaintiffs no longer dispute any of this analysis."[8] Defendants' conclusion that bad faith motivated Plaintiffs is simply wrong.

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[3] *Id.* (quoting Syl. Pt. 2, in part, *Hinchman v. Gillette*, 217 W. Va. 378, 618 S.E.2d 387 (2005)).

[4] Def. Br. at 11-12. (citing *Tanner v. Raybuck*, 246 W. Va. 361, 369, 873 S.E.2d 892, 900 (2022) (reversing the lower court's dismissal with prejudice for failing to fulfill the pre-suit requirements of the MPLA as it appeared the circuit court reached the conclusion "at least in part, based on factors other than the fact that Petitioners filed their action prior to serving a certificate of merit"); *Pendleton v. Wexford Health Sources, Inc.*, 2015 W. Va. LEXIS 126, at *8, (W. Va. Dec. 7, 2015) (memorandum decision) (finding the circuit court did not err in dismissing petitioner's action under the MPLA with prejudice when the petitioner's statement in lieu of a screening of merit contained false statements and did not represent a good faith and reasonable effort to further the purposes of the MPLA)).

[5] JA 00328.

[6] Def. Br. at 12.

[7] Def. Br. at 5-8.

[8] Def. Br. at 9.

Plaintiffs chose not to contest the applicability of the MPLA in this appeal due to the recent *State ex rel. Charleston Area Med. Ctr.* decision which broadened the scope of "health care" as defined by W. Va. Code § 55-7B-2(e)(2) to include "the handling and transfer of the fetal remains" as "an act or service performed or furnished by a health care provider" on behalf of the mother "during her care, treatment, or confinement."[9] The *State ex rel. Charleston Area Med. Ctr.* decision was released almost two weeks after the Circuit Court entered its final Order Granting Defendants' Motion to Dismiss. That Defendants saw the need to devote three-pages of argument explaining why the MPLA applies to claims arising out of in utero injuries to an infant when prescription drugs are improperly dispensed to treat a pregnant woman says much about the clarity of the applicability of the MPLA now and prior to *State ex rel. Charleston Area Med. Ctr.*.[10] Plaintiffs did not act in bad faith.

This Court should vacate the Circuit Court's dismissal with prejudice to permit Plaintiffs to comply with the MPLA and refile their claims.[11]

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

Defendants' arguments regarding the decision of the Circuit Court dismissing Indivior rely upon erroneous assumptions and a revisionist view of the Complaints.[12] Indivior is not "unique." Indivior manufactures a product containing an opioid, just like the other Manufacturing Defendants. Indivior had the same financial incentive to fuel the opioid addiction crisis as the

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[9] 248 W. Va. at 359, 888 S.E.2d at 859.

[10] Notably, the dismissal ordered by the Supreme Court in *State ex rel. Charleston Area Med. Ctr.* was without prejudice. 248 W. Va. at n. 15, 888 S.E.2d at n. 15.

[11] Plaintiffs withdraw their arguments that the MPLA's amendments adding pharmacies to the scope of the act did not retroactively apply to their cases.

[12] Plaintiffs address the erroneous ruling of the Circuit Court regarding proximate causation in Section IV of this Reply and incorporate those arguments herein.

other Manufacturing Defendants. Indivior belonged to the same organizations and is alleged to have engaged in the same conspiracy. Furthermore, Plaintiffs alleged sufficient facts to support a claim for civil conspiracy.[13] The Circuit Court did not consider the factual allegations related to the conspiracy; rather the Court dismissed the conspiracy claim on the basis that the underlying tort claims did not survive the motions to dismiss.[14]

The Circuit Court and Defendants misapprehend, misunderstand, and misconstrue the allegations in Plaintiffs' Complaints. All opioids are addictive. Indivior's product Suboxone contains an opioid, specifically buprenorphine, which is classified as a Schedule III drug.[15] Use of Indivior's product does not eliminate opioid addiction since the product contains an opioid. Buprenorphine is also used to treat babies suffering from NAS.[16] Thus, the Complaints allege that a revenue stream is created by using products containing buprenorphine to treat babies born dependent on opioids.[17] Indivior financially benefited from the widespread use of opioids and Indivior had every incentive to support the fraudulent marketing scheme alleged in the Complaints.

Moreover, the Circuit Court erroneously reached and resolved a disputed issue of fact when the Court determined that the 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."[18] Opioid addiction is nefarious. Recovery often involves relapses to abuse. The Court erroneously concluded, without

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[13] *See, e.g. Timothy Lambert, Next Friend and Guardian of Minor Child M.D.L. and T.J.L. v. McKesson Corporation, et al.*, Case No. 22-3-22, Complaint at ¶¶218-228, 385-393 (JA 02465-2467, JA 02498-99).

[14] JA 00122.

[15] JA 02465.

[16] JA 02455.

[17] JA 00425 at ¶171.

[18] JA 00121.

the development of a factual record or expert testimony, that a single causative event exists in the development of the addictions at issue in these cases. This conclusion can be proven to be incorrect; however, Plaintiffs were erroneously denied even the opportunity to develop and present evidence to allow a trier of fact to reach a different conclusion.

Defendants contend that even if Indivior products were consumed during pregnancy, Plaintiffs allege that multiple other opioids were taken during the pregnancy.[19] This argument does not affect the proximate cause analysis. "A party in a tort action is not required to prove that the negligence of one sought to be charged with an injury was the sole proximate cause of the injury."[20] All the drugs ingested were opioids regardless of which Defendant manufactured the drug.

Plaintiffs previously detailed the allegations regarding the birth mothers' use of Indivior's products. The Circuit Court failed to make reasonable and readily available inferences regarding proximate cause from these allegations and incorrectly dismissed the Complaints.

Furthermore, the Defendants' argument regarding the dismissal of the conspiracy claim is a mischaracterization of the allegations of the Complaints.[21] The prescription of opioids for pain results in addiction—necessitating treatment. Increases in the number of people addicted that require treatment increases Indivior's revenues.[22] The opioids for the treatment of pain and the opioids for the treatment of addiction result in adverse effects on the fetus.[23]

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[19] Def. Br. at 14.

[20] Syl. Pt. 2, *Everly v. Columbia Gas*, 171 W. Va. 534, 535, 301 S.E.2d 165, 166 (1982).

[21] Def. Br. at 15. *See, e.g. Timothy Lambert, Next Friend and Guardian of Minor Child M.D.L. and T.J.L. v. McKesson Corporation, et al.*, Case No. 22-3-22, Complaint (JA 02422-2507).

[22] *See, e.g.* JA 02498-2499 (*Lambert* Complaint, Count III – Civil Conspiracy Count).

[23] JA 0 2433.

Still, the Circuit Court did not specifically address the viability of the conspiracy claim against Indivior and, to the extent Respondents' Brief implies otherwise, such implication is erroneous. The Defendants, including Indivior, are alleged to have engaged in a conspiracy that would result in increased profits, whether those profits come from opioids initially prescribed for pain or from the treatment of the addiction suffered by babies and adults resulting from the opioids. The Circuit Court, having erred in dismissing Plaintiffs' claims underlying the conspiracy, erred in dismissing the conspiracy claim against Indivior.

III. Defendants Owed Plaintiffs a Duty of Care.

Plaintiffs incorporate the briefing from *A.D.A. v. Johnson & Johnson* Reply Brief Section III,[24] which addresses this assignment of error, and summarize the arguments and apply the facts of the case to the legal arguments here as follows:

A. Plaintiffs' Complaints Contain Sufficient Facts Establishing that Defendants Owed Plaintiffs a Duty of Reasonable Care.

The Circuit Court erred in failing to address the facts set forth in Plaintiffs' Complaints establishing that Defendants owed Plaintiffs a duty of reasonable care. Defendants attempt to excuse the Circuit Court's lack of foreseeability analysis by claiming that "the existence of duty ***also involves*** policy considerations."[25] Their arguments, along with the Circuit Court's decision, are flawed for all the reasons set forth in the *A.D.A.* Reply Brief. Not only do they ignore the evidence regarding foreseeability, but the failure to analyze this evidence contributed to the erroneous finding that public policy considerations supported the Circuit Court's decision.[26]

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[24] TID 72066227 ("*A.D.A*. Reply Brief").

[25] Def. Br. at 16. (Emphasis in original). McKinsey Br. at 14 ("A duty of care exists when: (1) the defendant's conduct creates a foreseeable, unreasonable risk, and (2) policy considerations favor imposing a duty.") (citations omitted) (Emphasis in original).

[26] Def. Br. at 16.

McKinsey offers a self-serving, unsupported conclusion on foreseeability that, "[n]othing 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."[27] McKinsey is simply wrong. Plaintiffs' Complaints contain allegations regarding the foreseeability of harm as to all Defendants, including McKinsey, sufficient to establish the Defendants owed the Plaintiffs a duty of care, which the Circuit Court and the Defendants failed to address in a foreseeability analysis.[28]

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[27] McKinsey Br. at 14 (citing *Stevens v. MTR Gaming Grp., Inc.*, 237 W. Va. 531, 534 (2016); *Speedway LLC v. Jarrett*, 248 W. Va. 448, 457, 889 S.E.2d 21, 30) (2023)). Plaintiffs incorporate *A.D.A.* Reply Brief Section III.C in response to McKinsey's argument that it does not owe Plaintiffs a duty of care.

[28] *See e.g.* Complaint of *Tammy Boswell, Next Friend and Guardian of Minor Children B.E.B. and S.F.B v. McKesson Corporation, et al*, Case No. 22-C-21(H), JA 02114 at ¶285 (McKinsey dispensed advice to J&J, Purdue, Endo, ABCD that drove the Opioid Crisis) ¶286 (McKinsey provided consultancy services to certain manufacturers and distributors working together to alter the standard care for patients experiencing pain); ¶287 ("McKinsey skillfully crafted communications and developed campaigns for and on behalf of manufacturers and distributors deliberately intended to deflect and diffuse anti-Opioid messages to benefit manufacturers and distributors, alike, in terms of enhanced sales and increased profits. McKinsey is also responsible for exacerbating and fueling both the diversionary-opioid and prescription-opioid markets, and for proximately causing injury to the Plaintiff by reason of the fact that Plaintiffs' birth mother became addicted to the products manufactured by McKinsey client Endo and prescribed to her during a time period following dissemination of aforementioned McKinsey-created materials"); JA 02114-5 at ¶288-291 (allegations regarding McKinsey's development and implementation of sales strategies); JA 02115 at ¶¶292, JA 02126 at 344-346 (allegations regarding McKinsey misleading the federal government in its report regarding the opioid crisis); JA 02115 at ¶293 ("Defendant participated in a conspiracy to violate federal and state laws regulating the distribution of opioids"); JA 02119 at ¶308 ("McKinsey diligently advised entities involved with the manufacturing and sale of opioids on how to maximize profits by generating the maximum number of prescriptions for opioid drugs"; *id*. at ¶310 ("McKinsey advised Purdue and other manufacturers to target prescribers who write the most prescriptions, for the most patients, and thereby make the most money for McKinsey's clients"); JA 02119-2125 at ¶¶312-342 (allegations regarding how McKinsey's advice to co-conspirators spurred opioid prescription demand); JA 02124 at ¶336 ("McKinsey was aware that their advice to the pharmaceutical industry was contributing to opioid abuse and diversion. In 2013, McKinsey briefed Purdue on the ongoing concerns of oxycontin addiction and diversion among prescribers, advising Purdue's marketing and sales teams on how to tailor their messaging to doctors who were growing increasingly wary of prescribing such drugs."); JA 02126 at ¶343 ("McKinsey's advice to AmerisourceBergen to re-direct criticism onto the addict population"); *see also* Pet. Op. Br. at n. 184, 186-192, 196, 198, 201 (citations to allegations in Plaintiffs' Complaints pertaining to foreseeability as to Defendants). The Complaints

McKinsey reliance on *Hayes v. Kanawha Valley Reg'l Transp. Auth.* No. 22-0207, 2024 WL 2859453 (W.Va. June 6, 2024) for the proposition that Plaintiffs have failed to meet the critical "first step" of alleging that McKinsey owed the minor children a duty of care is misplaced.[29] *Hayes* is substantially different from this case. *Hayes* was decided after discovery and upon a motion for summary judgment.[30] *Hayes* involved the Court finding that KRT did not owe a heightened duty of care to a passenger who had safely exited the bus and was subsequently hit by a car while crossing the street, and that the passenger had offered no evidence that KRT breached its ordinary duty of reasonable care. Here, not only have Plaintiffs not been given the opportunity to conduct discovery, but the Circuit Court also failed to conduct a foreseeability analysis based on the allegations in Plaintiffs' Complaint, let alone accept those allegations as true and view them in the light most favorable to the Plaintiffs as required by law.[31]

B. Public Policy Considerations Support Finding Defendants Owe Plaintiffs a Duty of Reasonable Care.

Public Policy considerations do not support the dismissal of Plaintiffs' cases for lack of duty. The Defendants wrongly claim that "Plaintiffs do not seriously contest that these policy considerations support the MLP's dismissal for lack of duty."[32] As set forth in the *A.D.A.* Reply

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of the following Plaintiffs contain substantially similar allegations against McKinsey as *Boswell*: Plaintiffs *Floretta Adkins, Next Friend and Guardian of Minor Child M.J.A.* (JA 03270-3364); *Dianna Brooks, Next Friend and Guardian of Minor Child W.A.R.* (JA 03386- 3480); *Jacqueline Adams, Next Friend and Guardian of Minor Children S.D.L. and H.G.L.* (JA 03504-3598); *Donna Johnson, Next Friend and Guardian of Minor Child L.M.J.* (JA 04140-4235); and *Roger Johnson, Next Friend of Minor Child S.A.J.*, (JA 04467-4559).

[29] McKinsey Br. at 14.

[30] *Hayes*, 2024 WL 2859453, at *13-15.

[31] *Atkinson v. NCI Nursing Corps.*, 895 S.E.2d 846, 850 (W. Va. I.C.A. 2023) ("allegations of the complaint must be taken as true").

[32] Def. Br. at 17.

Brief, all three considerations – (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 – weigh in favor of confirming Defendants owed a duty to the Plaintiffs.[33] The Circuit Court's recital of these considerations followed by a conclusion that Defendants owing Plaintiffs a duty "stretches the concept of due of care too far"—hardly a robust public policy analysis— directly contradicts the Circuit Court's earlier ruling finding that a duty was owed to governmental entities in the State of West Virginia.[34] Neither the Defendants or the Circuit Court provide an explanation as to why public policy considerations would favor a duty for a governmental entity and not the high likelihood and risk of injury caused to the minors in utero by highly addictive opioids.

C. The Fact that Other Intervening Actors May Owe Plaintiffs a Duty of Reasonable Care Does Not Relieve Defendants from Their Duty of Care.

The Circuit Court compounded its failure to analyze foreseeability by improperly conducting a proximate cause analysis and reaching the incorrect conclusion that any intervening act, even a foreseeable one, relieves the Defendants from owing a duty of care. The Defendants' argument focuses on the Plaintiffs' use of the word ***any*** and contends that the Circuit Court found that "***three*** specific intervening actors — the doctors who allegedly prescribed opioids to the birth mothers, the birth mothers who allegedly took prescription or illicit opioids while pregnant and, in some cases, third parties who provided illegally-obtained opioids to the birth mothers — owe their own duties of care to the Minors to prevent harm arising from their own intentional acts."[35] The fact that other actors owed a duty of care to the Minors does not absolve the Defendants from their own duty. Multiple duties owed by multiple parties can and frequently do coexist under the law.

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[33] *A.D.A.* Reply Brief at 28-32.

[34] JA 00114-15.

[35] Def. Br. at 18 (citing JA 00115-16, 119).

The Circuit Court and the Defendants fail to even acknowledge the allegations in Plaintiffs' Complaints that doctors and patients were misled by Defendants in their marketing of the drugs.[36] Plaintiffs address the flaws in the Circuit Court's proximate cause analysis in Section IV below.

D. In the Federal NAS MDL 3084, the Court Recently Found that McKinsey Owed a Duty of Care to Minor Infants.

Finally, McKinsey relies on *In re McKinsey & Co. Inc. Nat'l Prescription Opiate Consultant Litig.*, No. 21-md-02996-CRB, 2023 WL 4670291 (N.D. Cal. July 20, 2023)[37] yet ignores the same court's more recent decision denying in part McKinsey's Motion to Dismiss the NAS Plaintiffs' Amended Complaint.[38]

In his May 16, 2024 opinion, Judge Breyer rejected McKinsey's argument that the First Amendment barred Plaintiffs' claims, finding:

> Plaintiffs do not seek to hold McKinsey liable for the ideas it expressed in its slide decks or the content of its conversations with its clients. The object of the alleged conspiracy—misleading the public and regulators about the risks of opioid use and increasing abuse and diversion of the drugs in order to increase the manufacturers' sales—has little if anything to do with core First Amendment activity.[39]

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[36] *See supra* n. 28; *see also* Plaintiffs' Opening Brief at 39-40.

[37] McKinsey Br. at 12, 15-16.

[38] *In re McKinsey & Co. Inc. Nat'l Prescription Opiate Consultant Litig.*, No. 21-md-02996-CRB, 2024 U.S. Dist. LEXIS 88772 (N.D. Cal. May 16, 2024). The MDL NAS Plaintiffs include plaintiffs born in West Virginia. As set forth in *A.D.A.* Reply Brief at 33, incorporated herein, Judge Breyer permitted the MDL Plaintiffs to file an Amended Complaint including allegations, *inter alia*, that McKinsey: (1) encouraged targeting high-abuse-risk patients and knew doing so would foster an illegal secondary market for opioids; (2) was aware Purdue omitted evidence in its labels of studies showing birth defects related to early pregnancy opioid use; (3) was aware of the widespread opioid abuse and that the CDC recognized efforts in "advanced markets" to curb those abused were working, yet identified specific areas of the country where sales were declining for clients and targeted entire healthcare systems in those same specific "advanced markets;"(4) aware that the ongoing NAS epidemic was escalating due to opioid prescribing to pregnant women, yet identified OB/GYNs for clients to target; and (5) had actual knowledge because it developed, implemented, and monitored the very strategies its clients tortiously used.

[39] 2024 U.S. Dist. LEXIS 88772, at * 113.

Plaintiffs have made similar allegations in support of their claims against McKinsey, which include a claim of civil conspiracy.[40] Judge Breyer also denied McKinsey's motion to dismiss Plaintiffs' conspiracy claims, finding:

> [t]he same is true of Plaintiffs' conspiracy claim predicated on an alleged failure to warn of the risks of opioids, including the risks of use during pregnancy. The allegations are that the failure to adequately disclose these risks was an intentional object of agreement between McKinsey and its clients, and that the failure to warn harmed the NAS Plaintiffs. That these underlying torts are not themselves usually categorized as "intentional torts" is irrelevant. ***Plaintiffs may hold McKinsey liable for harms caused by its clients' breaches of duty where these were carried out in furtherance of a common design with McKinsey***.[41]

Judge Breyer also denied McKinsey's motion to dismiss Plaintiffs' aiding and abetting claims and the West Virginia Medical Monitoring claims.[42] Judge Breyer's opinion regarding McKinsey's duty is directly applicable and highly persuasive here.

IV. Plaintiffs Can Establish Proximate Cause in These Cases.

Plaintiffs incorporate the briefing from *A.D.A.* Reply Brief Section I, which addresses this assignment of error, and summarize the arguments and apply the facts of the case to the legal arguments presented here.

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[40] *See*, *supra* n. 28.

[41] 2024 U.S. Dist. LEXIS 88772, at *118-119. (Emphasis added). Judge Breyer's civil conspiracy analysis included quoting *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255, 268 (2009) ("[A] civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means."). McKinsey also contends that it can't be liable to plaintiffs under a product liability theory. McKinsey Br. at 16-17. Judge Breyer's opinion correctly rejected this argument noting that McKinsey "misunderstands the nature of the claim, which is not that McKinsey's services should be regarded as a defective product, but rather that McKinsey knowingly encouraged the manufacturers to misrepresent the risks and benefits of their own products." 2024 U.S. Dist. LEXIS 88772, at *148. Plaintiffs here seek to hold McKinsey liable on a similar theory regarding McKinsey's conspiracy with the other Defendants. *See e.g. Boswell* Complaint, Count III (JA02149-2150).

[42] 2024 U.S. Dist. LEXIS 88772, at *143-155.

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

Defendants now argue that Plaintiffs' characterization of the Circuit Court's order is actually premised on intervening cause, not remoteness *per se*, "wholly misstates what the MLP did,"[43], and insist that the doctrine of "remoteness" is alive and well in West Virginia.[44] They then transition immediately into a discussion of how the illegal conduct of the birth mothers in ingesting prescription medication without a prescription[45]—and, if conduct of the birth mothers was not illegal, then the legal conduct of the physicians in prescribing the pills to the birth mothers[46]—"are intentional acts that 'constitute[] a new effective cause and operate[] independently of any other act, making [them] and [them] only, the proximate cause of the injury."[47] In other words, after

[43] Def. Br. at 19.

[44] *Id.* at 19–20.

[45] I*d*. at 20.

[46] *Id*.

[47] *Id*. at 20–21 (internal citations omitted).

insisting that they are relying on remoteness, not intervening cause, they immediately drop the pretense of remoteness and expressly turn to a discussion of how the conduct of birth mothers or physicians must be an intervening cause.

It simply does not matter that the doctrine of remoteness is alive and well in West Virginia (albeit rarely applied to cases involving non-economic injuries). Plaintiffs also dissected the Circuit Court's holding under its own (incorrect) remoteness framework in their opening brief. The Minor Plaintiffs' allegations include standard products liability claims against product manufacturers and sellers.[48] The causal chain is no more complex or "remote" than in any other products liability action. To the best of Plaintiffs' knowledge, no court has ever held that an injured person's claim against the manufacturer or seller of the product that allegedly caused his or her injury fails due to remoteness alone, and Defendants have certainly not cited any such cases. For that matter, no court has ever held—at least to Plaintiffs' knowledge, and Defendants have not cited any such holding—that the decisions of physicians to prescribe prescription drugs to patients "are intentional acts that 'constitute[] a new effective cause and operate[] independently of any other act, making [them] and [them] only, the proximate cause of the injury."[49] Such a holding would clearly eliminate cases against manufacturers and other sellers by persons injured as a result of taking prescription medication.

Defendants also quarrel with Plaintiffs' assertion that the Circuit Court's holding "would provide sellers and manufacturers of prescription drugs with blanket immunity against all product

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[48] *See, e.g.*, JA 03474–03476 ("Count V – Products Liability" in the Complaint of *Dianna Brooks, Next Friend and Guardian of Minor Child W.A.R. v. McKesson Corporation, et al.*, Case No. 22-C-28).

[49] Def. Resp. at 20–21 (internal citations omitted).

liability claims premised on birth defects, no matter how negligent or even fraudulent."[50] However, Defendants' explanation is based on a demonstrably false assumption. They write: "But Plaintiffs' claims are not based on any allegations or theory that any particular opioid medications were defective or that such a defect caused Plaintiffs' alleged harms, so it is wrong to suggest that the MLP's decision would extend to provide 'blanket immunity' beyond the facts of these cases." Actually, in the complaints at issue in the instant appeal, Plaintiffs did in fact allege that the opioids manufactured and sold by Defendants were defective, unreasonably dangerous, and contained inadequate warnings and labels.[51]

Defendants also claim that by pointing out that the Circuit Court failed to distinguish between birth mothers who obtained opioids legally through a prescription from those who obtained opioids illegally on the black market, Plaintiffs "implicitly recognize[] that the MLP's decision was unassailable for those Plaintiffs whose mothers engaged in intentional criminal behavior that proximately caused the harm in question."[52] That is also obviously false. Rather, Plaintiffs' point was (and is) that, in the case of birth mothers who only took pills by prescription, Defendants cannot even make a colorable argument—i.e., for a jury at trial—that the conduct of the birth mothers constitutes an intervening cause. Such *legal* conduct is indistinguishable from the conduct of any birth mother who lawfully ingests a prescribed drug that causes her gestating baby to suffer a birth defect. Also contrary to Defendants' argument, it is well-established in West Virginia (and elsewhere) that *foreseeable* criminal conduct does *not* cut off the chain of causation

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[50] Def. Resp. at 21.

[51] *See, e.g.,* JA 03474–03476 ("Count V – Products Liability" in the Complaint of *Dianna Brooks, Next Friend and Guardian of Minor Child W.A.R. v. McKesson Corporation, et al.*, Case No. 22-C-28).

[52] Resp. at 20.

and liability.[53] All of Defendants arguments on causation fail, and the MLP's order should be reversed.

V. Plaintiffs' Claims Against the West Virginia Board of Pharmacy Are Not Barred by the Public Duty Doctrine, Qualified Immunity or Absolute Immunity.

Plaintiffs incorporate the briefing from *A.D.A.* Reply Brief Section VIII, which addresses this assignment of error, and summarize the arguments and apply the facts of the case to the legal arguments presented here.

There was no basis to grant the BOP's motion to dismiss this action based on the public duty doctrine. The BOP is not entitled to qualified immunity.[54] Plaintiffs clearly met the requirements for the wanton and reckless exception and were not required to meet every exception to that doctrine. The BOP maliciously, intentionally, and recklessly failed to adhere to clearly established laws and is not entitled to any immunities or protections. The BOP has not demonstrated that it is entitled to absolute immunity.[55] The decision of the Circuit Court should be reversed.

VI. The Circuit Court Erred in Dismissing Plaintiffs' Claims for Medical Monitoring, Civil Conspiracy, Fraud or Intentional Misrepresentation, and Punitive Damages.

The Circuit Court's error in dismissing the Plaintiffs tort claims led to the erroneous dismissal of Plaintiffs' claims for medical monitoring, civil conspiracy, and punitive damages. The

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[53] *See* Rest. 2d Torts § 449 (explaining that foreseeable criminal conduct does not break chain of causation); Syl. Pt. 13, *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990) (holding that foreseeable illegal conduct of minor in distributing intoxicating beer to other minors and foreseeable illegal conduct of other minor in consuming beer and driving did not break causal chain against beer seller); *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1209 (9th Cir. 2003) (holding that foreseeable criminal act of shooting another with an illegally-obtained handgun does not break chain of causation against manufacturer for fostering growth of illegal secondary market for handguns).

[54] *A.D.A.* Reply Brief at §VIII.A.

[55] *A.D.A.* Reply Brief at §VIII.B.

Circuit Court's relied on its erroneous decision regarding proximate cause to dismiss Plaintiffs' cause of action for fraud. As set forth throughout this brief, as well as the opening brief and the briefs filed in the companion cases, *A.D.A. et al*, the Defendants are wrong and provide no legal authority in support of the Circuit Court's rulings.[56]

Plaintiffs allege both substantive tort claims and wide-ranging conspiracies among various defendants which created and fueled the opioid epidemic, in turn causing Plaintiffs' injuries. Plaintiffs allege that Defendants engaged in a conspiracy "to mislead medical professionals, patients, the scientific community, the CDC, the FDA, the DEA, and the general public about the addictive nature of opioid and the risks of serious latent disease associated with in utero exposure to opioids so that their profits would increase."[57]

The recent NAS MDL decision by Judge Breyer, discussed in Section III.D, supports Plaintiffs' claims for conspiracy against Defendants. Judge Breyer also denied McKinsey's motion to dismiss the West Virginia Plaintiffs' medical monitoring claims.[58] Defendants make no attempt to acknowledge let alone distinguish this decision interpreting West Virginia law.

VII. The Circuit Court Erred in Dismissing Plaintiffs' Claims Without Providing Leave to Amend Their Complaints.

Plaintiffs incorporate the briefing from *A.D.A.* Reply Brief Section VII, which addresses this assignment of error, and summarize the arguments and apply the facts of the case to the legal arguments presented here.

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[56] *See* Def. Br. at 22 (medical monitoring claim); 23 (conspiracy claim); 23 (fraud claim); and 23 (punitive damages). Plaintiffs incorporate the briefing from *A.D.A.* Reply Brief § IV, V, and VI, which addresses these assignments of error.

[57] *See, e.g.* Count III, Complaint of *Floretta Adkins, Next Friend and Guardian of Minor Child M.J.A.*, JA 03355.

[58] 2024 U.S. Dist. LEXIS 88772, at *155.

Defendants simply ignore Plaintiffs' arguments that the Circuit Court failed to liberally construe Plaintiffs' complaints or even address the numerous allegations in the complaints that allege common law duties, breaches by Defendants, and the resulting foreseeable injuries to the Minor Plaintiffs.[59] Further, as set forth in the *A.D.A.* Reply Brief Section VII, Defendants misstate the law governing leave to amend, wrongly claim Plaintiffs waived the issue, and alternatively argue that amendment is futile.[60]

At oral argument, counsel for these 18 Plaintiffs in this matter reiterated the liberal pleading standard and suggested that should the Court allow the Plaintiffs to amend their complaints, that any issues be resolved on summary judgment after the development of a full factual record.[61] Counsel also requested the opportunity to amend the Complaints to "bring pharmacies in the cases where the nuisances are and nuisance claims in the cases where the pharmacies are."[62]

Defendants misrepresent the record, claiming that "Plaintiffs specifically and expressly disavowed any intent to amend the Complaints" which is emphatically not true.[63] There was no express disavowal made by the attorney quoted by Defendants.[64] Rather, after noting that "there may be things here that we would seek to amend in the complaints[65]" and reminding the Circuit Court that "[t]his is a notice pleading state,"[66] counsel stated, "[i]f the Court has concerns about

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[59] *See supra,* n. 28.

[60] Def. Br. at 23-25.

[61] JA 00329.

[62] JA 00331.

[63] Def. Br. at 24 (citing JA00353).

[64] *See* JA00349-353. The comments referenced by Defendants were made by Mr. Forbes, who is counsel for the Plaintiffs in the *A.D.A. et al* companion cases.

[65] JA 00350.

[66] JA 00351.

what is pled in this complaint … we are going to look at whether or not a motion to amend is necessary; but that's not even necessary at this point."[67] It is disingenuous to suggest that such remarks constitute either a specific or express disavowal. Contrary to Defendants' assertions, Plaintiffs belief in the sufficiency of their original complaint does not disavow their interest in amending their complaint.

The idea of permitting NAS Plaintiffs the opportunity to amend their Complaint is not novel – Judge Breyer granted Plaintiffs leave to amend after granting McKinsey's motion to dismiss.[68] As discussed above in Section III.D., the MDL NAS Plaintiffs, which included Plaintiffs born in West Virginia, survived McKinsey's motion to dismiss claims for civil conspiracy, aiding and abetting, and West Virginia medical monitoring.[69] If granted leave to amend

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[67] JA 00353.

[68] *See In re McKinsey*, 2023 WL 4670291 at 31.

[69] Judge Breyer's ruling, while correct in practically every other respect, erroneously concluded that babies that have suffered permanent developmental or congenital injuries as a result of fetal opioid exposure cannot satisfy the "special injury" requirement for standing to bring a claim for public nuisance. 2024 U.S. Dist. LEXIS 88772, at *127-38. Judge Breyer's decision relied on *Venuto v. Owens-Corning Fiberglas Corp*., 99 Cal. Rptr. 350, 356, 22 Cal. App. 3d 116, 125 (Cal. App. 1971)—an opinion which other California appellate courts have expressly called into question. *See Birke v. Oakwood Worldwide*, 87 Cal. Rptr. 3d 602, 610, 169 Cal. App. 4th 1540, 1550 (Cal. App. 2009) ("In addition, to the extent *Venuto*, supra, 22 Cal. App. 3d 116, can be read as precluding an action to abate a public nuisance by a private individual who has suffered personal injuries as a result of the challenged condition, we believe it is an incorrect statement of the law."); *Hacala v. Bird Rides, Inc.*, 306 Cal. Rptr. 3d 900, 90 Cal. App. 5th 292, 326-327 (Cal. App. 2023) ("The *Venuto* holding has been criticized, reasonably in our view, for advancing an 'incorrect statement of the law' that is inconsistent with our Supreme Court's statements in *Lind* [*v. City of San Luis Obispo*, 109 Cal. 340 (1895)]."). Judge Breyer attempted to distinguish *Birke* from *Venuto* on the grounds that the court in *Birke* found that "childhood asthma and chronic allergies" from secondhand smoke alleged by the plaintiff in *Birke* were "different in kind from 'the increased risks of heart disease and lung cancer' faced by the general public when exposed to secondhand smoke." *McKinsey*, 2024 U.S. Dist. LEXIS 88772, at *130 (quoting *Birke*, 87 Cal. Rptr. 3d 602, 610); *see also id*. at *132 ("In *Birke*, the plaintiff suffered from aggravated asthma and respiratory problems, while the public merely faced the increased 'risks of heart disease and lung cancer.'"). If childhood asthma and chronic allergies suffered by *some* children are different in kind from the "increased risks of heart disease and lung cancer" suffered by *all* members of the general public, then it is impossible to understand why or how the "permanent developmental or congenital injury

their Complaint, Plaintiffs would likely incorporate allegations and claims, including aiding and abetting, against McKinsey similar to those asserted in the NAS McKinsey MDL Amended Complaint which, after amendment were largely upheld by Judge Breyer.

The Circuit Court erred in dismissing Plaintiffs' Complaints without leave to amend. The Order is contrary to long-standing precedent.

CONCLUSION

Without question, Plaintiffs' Complaints allege sufficient facts which, taken as true, establish their claims against each Defendant for these injuries, warranting reversal and remand for discovery and trial. West Virginia law recognizes all of the claims plead. In the alternative, fairness dictates that Plaintiffs be given an opportunity to amend their pleadings should any question exist as to the sufficiency of the Complaints.

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from in utero poisoning by opioids" alleged by each plaintiff in *McKinsey*, 2024 U.S. Dist. LEXIS 88772, at *135–36, is not different in kind from the increased risks of opioid addiction and dependency, withdrawal, and sudden death suffered by all members of the general public, including children, and "caused by the unlawful or fraudulent marketing, and resulting overprescription, of opioids," *id*. at *133. Even if the definition of the public nuisance were confined to the "creation and maintenance of an illegal secondary market for opioids and that market's effects on public health and public space," *McKinsey*, 2024 U.S. Dist. LEXIS 88772, at *135, one cannot conclude categorically that no plaintiffs were harmed by that nuisance without carefully considering the facts and allegations of each baby's case. Babies whose biological mothers consumed illegally obtained opioids during pregnancy undoubtedly were "injured while exercising their right 'to be free from the deleterious health and safety effect of an illegal drug trade.'" *See id.* Even if those same biological mothers had already become addicted to opioids prior to their pregnancies, the availability of opioids in an illegal secondary market created and maintained by Defendants is—at least at the motion to dismiss stage—sufficient to raise a question about causation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of July, 2024, the foregoing **PETITIONER'S REPLY BRIEF** was served using the File & ServeXpress system which will send notification of such filing to all counsel of record.

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