STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

STATE OF MICHIGAN, EX REL
DANA NESSEL, ATTORNEY GENERAL,

Plaintiff,

-v-

Case No. 19-016896-NZ
Hon. Patricia Perez Fresard

CARDINAL HEALTH, INC., McKESSON CORPORATION, AMERISOURCEBERGEN DRUG CORPORATION, and WALGREEN CO.,

Defendants.
_____/

OPINION AND ORDER

At a session of said Court,
held in the City of Detroit,
County of Wayne, State of Michigan
on February 10, 2023
PRESENT: Hon. Patricia Perez Fresard
Circuit Court Judge

Pending before the Court are Plaintiff's omnibus motion for partial summary disposition and Defendant Walgreens' omnibus motion for summary disposition. The Court, having heard oral argument, having reviewed the briefs, and otherwise being fully advised in the premises, issues the following opinion and order.

Background

The background of this case is explained in more detail in the Court's prior opinions and orders. Pursuant to a stipulated scheduling order, the parties filed omnibus motions for summary disposition/partial summary disposition covering multiple issues regarding Plaintiff's statutory nuisance and DDLA claims, and Walgreens' affirmative defenses.

In its motion for partial summary disposition, Plaintiff asks the Court to enter summary disposition declaring the scope of Walgreens' legal requirements and obligations as a dispenser and distributor of prescription opioids. More specifically, the State asks the Court to conclude as a matter of law that (1) the Controlled Substances Act (CSA) and Michigan law require effective anti-diversion controls, which include a requirement that pharmacies do not dispense prescriptions

unless issued for legitimate purposes; (2) the CSA and Michigan law require Walgreens to identify red flags of diversion and refuse to dispense unless and until red flags are resolved; (3) the aforementioned dispensing requirements apply to corporate owners of pharmacies; and (4) as a distributor, Walgreens must identify and report suspicious orders and halt shipments of suspicious orders. Plaintiff further argues that the Court should enter summary disposition on Walgreens' nonparty fault claims against governmental agencies. In addition, the State seeks summary disposition of multiple affirmative defenses raised by Walgreens.

Walgreens seeks summary disposition of Plaintiff's claims based on application of Michigan's safe harbor provisions with respect to pharmacy liability. In addition, Walgreens argues that Plaintiff's claims are subject to the six-year limitation period set forth in MCL 600.5813. Walgreens argues that Plaintiff's DDLA claim fails as a matter of law because Plaintiff cannot prove that the opioids that were "actually used by the individual abuser[s] who injured the [P]laintiff' were dispensed by Walgreens. With respect to Plaintiff's nuisance claim, Walgreens argues that the Court lacks jurisdiction pursuant to MCL 600.3815(3). Walgreens further argues that Plaintiff's requested relief goes beyond the scope of abatement.

Standard of Review

The parties' motions are based on MCR 2.116(C)(7), (C)(8), and (C)(10). MCR 2.116 (C)(7) requires the Court to grant a motion for summary disposition if "the claim is barred because of release, payment, . . . [or] the statute of limitations . . ." In evaluating a motion brought under this section, the court considers affidavits, pleadings, depositions, admissions, and other substantively admissible evidence submitted by the parties. MCR 2.116(G)(5).

Motions for summary disposition under MCR 2.116(C)(8) require the court to determine whether the plaintiff's allegations are sufficient to establish a prima facie case. *Spiek v Department of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Such motions should be granted only when the claim is so clearly unenforceable as a matter of law that no possible factual development could justify recovery. Motions under this subrule rely on the pleadings alone, and all well-pleaded allegations are taken as true, as well as any reasonable inferences or conclusions that can be drawn from allegations. MCR 2.116(G)(5). When deciding a motion under MCR 2.116(C)(8), the court must accept as true all factual allegations contained in the complaint as well as any reasonable inferences that may be drawn from those allegations. *Singerman v Municipal Serv Bureau*, 455 Mich 135, 139; 565 NW2d 383 (1997); *Peters v Department of Corr*, 215 Mich App 485, 486; 546 NW2d 668 (1996). The court may not consider the merits of the plaintiff's factual allegations, *Mieras v DeBona*, 452 Mich 278, 291; 550 NW2d 202 (1996), and it must construe those allegations in the plaintiff's favor. *Wortelboer v Benzie Cty*, 212 Mich App 208, 217; 537 NW2d 603 (1995). Mere conclusory statements, however, without supporting allegations of fact are insufficient to state a cause of action. *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

Under MCR 2.116(C)(10), the moving party has the burden of supporting its position by affidavits, depositions, admissions or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of facts exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere

allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts that a genuine issue of material fact exists. MCR 2.116(G)(4). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. MCR 2.116(G)(4); *see Smith v Globe Life Ins*, 460 Mich 446, 454-55 (1999). In evaluating a motion brought under this section, the court considers affidavits, pleadings, depositions, admissions, and other substantively admissible evidence submitted by the parties in the light most favorable to the party opposing the motion. MCR 2.116(G)(5); *see Maiden v Rozwood*, 461 Mich 109, 119-20 (1999). When the truth of a material factual assertion depends on a determination of credibility, a genuine factual issue exists and summary disposition may not be granted. *Arbelius v Poletti*, 188 Mich. App. 14 (1991). The courts may not make findings of fact or weigh credibility in deciding the motion. *Paul v U S Mutual Financial Corp*, 150 Mich App 773, 779 (1986). Courts are liberal in finding a genuine issue of material fact. *Id.*

1. <u>Questions of fact preclude summary disposition of Plaintiff's statutory nuisance and DDLA claims</u>.

Walgreens moves for summary disposition of Plaintiff's claims on the grounds that (1) under Michigan's safe harbor laws, pharmacies or pharmacists cannot be liable for filling facially valid prescriptions written by licensed physicians, and (2) Plaintiff's claims fail as a matter of law because it has no evidence that Walgreens engaged in the unlawful sale of prescription opioid medications. Not surprisingly, Plaintiff takes the completely opposite view, and asks the Court to find that Walgreens violated state and federal laws with respect to dispensing and distribution of opioids. For the reasons described below, the Court finds that questions of fact preclude summary disposition in favor of either party on these issues.

A. Safe harbor provisions do not apply to the determination of whether Walgreens' dispensing and distribution of opioids constitutes a nuisance that may be abated.

In *Buckeye Union Fire Ins Co v Mich*, 383 Mich 630, 636; 178 NW2d 476 (1970), the Court stated, "Primarily, nuisance is a condition. Liability is not predicated on tortious conduct through action or inaction on the part of those responsible for the condition. Nuisance may result from want of due care (like a hole in a highway), but may still exist as a dangerous, offensive, or hazardous condition even with the best of care." Nuisance law focuses on whether a nuisance exists, with the protection of the public is the paramount concern. Thus, the fact that an individual pharmacist cannot be liable so long as he or she fills a facially valid prescription is not dispositive. Instead, in a nuisance action, a court must make a case-by-case determination based on the character of the defendant's industry and the character, volume, time and duration of the alleged nuisance, and the court must act as a neutral arbiter whose only concern is the adjudication of a state common-law right. *Marshall v Consumers Power Co*, 65 Mich App 237; 237 NW2d 266 (1975). The question of what constitutes a nuisance cannot be considered in a vacuum; activity must be viewed with regard to surrounding circumstances. *Oak Haven Trailer Court, Inc v Western Wayne County Conservation Ass'n*, 3 Mich App 83; 141 NW2d 645 (1966), *affirmed* 380 Mich 526; 158 NW2d 463.

Walgreens argues that the "sale or furnishing of a controlled substance" will constitute a public nuisance under MCL 600.3801 only if it is "unlawful," citing *State v McQueen*, 493 Mich

135, 147-48; 828 NW2d 644, 650 (2013). Walgreens contends that for a licensed pharmacy's sale of opioid medications to fall within the scope of the nuisance statute, the customer must, at the very least, lack a valid prescription. Walgreens further contends that Plaintiff has adduced no evidence whatsoever of any unlawful sale of any opioid medication by any Walgreens pharmacist in Michigan (or anywhere else, for that matter).

In its motion and in its response to Walgreens, Plaintiff argues that there is a question of fact regarding the actual legitimacy of prescriptions, given that even prescriptions bearing indicia of illegitimacy or "red flags" were filled. In support of its position, Plaintiff cites various statistics compiled by its experts, including evidence from an expert witness that from 2006 to July 2020, Walgreens dispensed 8,937,626 opioid prescriptions that had red flags, amounting to 55 percent of the opioid prescriptions Walgreens dispensed. Plaintiff's expert, Dr. Ginsburg, concluded there was either no due diligence or inadequate due diligence associated with nearly all (95.5%) the red-flagged prescriptions in the Walgreens sample set.

In the context of a nuisance claim, the Court concludes that safe harbor provisions governing pharmacy liability are inapplicable. Plaintiff has presented evidence that although pharmacists at Walgreens were filling facially valid prescriptions, Walgreens failed to maintain systems, policies, and procedures that prevented the dispensing of illegitimate prescriptions, including those bearing red flags that the prescription was invalid or may be diverted. Accordingly, the Court declines to grant Walgreens' motion for summary disposition of Plaintiff's nuisance claim.

Plaintiff asks the Court to conclude that Walgreens had a duty to implement the aforementioned systems and failed to do so, in violation of state and federal law. Just as Plaintiff has produced evidence that Walgreens' conduct has created a nuisance, Walgreens has presented evidence that its pharmacy was filling valid prescriptions. For example, Walgreens notes that even Plaintiff's expert acknowledged the ability to resolve a large percentage of the red flags noted in her report. Based on the foregoing, the Court finds that creates a question of fact regarding whether Walgreens' dispensing and distribution of opioids constitutes a nuisance, and the Court declines to grant summary disposition to either party on this issue.

B. Questions of fact regarding Walgreens' practices and procedures that precludes summary disposition of Plaintiff's DDLA claim.

Under the DDLA, to "participate in illegal marketing" means "[m]anufacturing or delivering, or attempting to manufacture or deliver, a controlled substance . . . in violation of state or federal law." MCL 691.1604(3)(a). Opioids are "controlled substances" under the DDLA. MCL 691.1603(1); MCL 333.7104(3).

Walgreens takes the position that under Michigan law, prescriptions issued by licensed prescribers for legitimate medical purposes cannot give rise to a claim under the DDLA. Walgreens denies that any state or federal law prohibits a pharmacist from dispensing a medication pursuant to a facially valid prescription simply because certain aspects of the transaction may be suspicious, stating that "[w]hile the complete disregard of anti-diversion controls in a given transaction may violate certain regulations, the underlying sale of the prescription medication cannot itself be

deemed illegal when the prescription is lawful and serves a legitimate medical need." Walgreens notes that its pharmacies in Michigan passed every one of the hundreds of inspections conducted by LARA between 2000 and 2021. In response, Plaintiff cites federal and state laws imposing stringent requirements on pharmacies with respect to controlled substances.

As Plaintiff points out, the CSA's implementing regulations related to dispensing controlled substances specify that "all applicants and registrants shall provide effective controls and procedures to guard against theft and diversion of controlled substances." 21 CFR 1301.71(a). In addition, 21 CFR 1306.04(a) prohibits pharmacists, pharmacies, and the owners that operate them, from dispensing illegitimate prescriptions. Michigan law also prohibits pharmacists from dispensing controlled substances when there are objective signs, or "red flags," that a prescription may not be legitimate. Pursuant to MCL 333.7333, practitioners, which includes pharmacists, "in good faith, may dispense a controlled substance included in schedule 2" only upon receipt of a valid prescription from a licensed physician. MCL 333.7333(2). A pharmacist may not "dispense a controlled substance in violation of section 7333." MCL 333.7405(1)(a). Pharmacists who violate section 7333 are subject to civil and criminal penalties. MCL 333.7405(2); MCL 333.7406 (criminal prosecution requires that violation was committed knowingly or intentionally; civil violation does not contain these requirements). Subsection (1) of MCL 333.7333 provides standards under which pharmacists may "in good faith" dispense schedule 2 controlled substances:

> As used in this section, "good faith" means the prescribing or dispensing of a controlled substance by a practitioner licensed under section 7303 in the regular course of professional treatment to or for an individual who is under treatment by the practitioner for a pathology or condition[.] ...Application of good faith to a pharmacist means the dispensing of a controlled substance pursuant to a prescriber's order which, in the professional judgment of the pharmacist, is lawful. The pharmacist shall be guided by nationally accepted professional standards including, but not limited to, all of the following in making the judgment:
>
> (a) Lack of consistency in the doctor-patient relationship.
> (b) Frequency of prescriptions for the same drug by 1 prescriber for larger numbers of patients.
> (c) Quantities beyond those normally prescribed for the same drug.
> (d) Unusual dosages.
> (e) Unusual geographic distances between patient, pharmacist, and prescriber.

MCL § 333.7333(1)(a)-(e).

Plaintiff has cited evidence regarding Walgreens' practices and procedures that precludes summary disposition of Plaintiff's DDLA claim. While Walgreens denies that any state or federal law prohibits a pharmacist from dispensing a medication pursuant to a facially valid prescription simply because certain aspects of the transaction may be suspicious, both state and federal laws require pharmacists to take certain factors into account in judging whether a prescription is lawful.

2. <u>The Court has jurisdiction to consider Plaintiff's statutory nuisance claim</u>.

In an opinion and order dated September 24, 2021, the Court previously concluded that MCL 600.3815(3) does not bar Plaintiff's statutory nuisance claim. The Court declines to reconsider its previous ruling.

3. <u>The Statute of Limitations Set forth in MCL 600.5813 applies to the State's claims</u>.

Walgreens argues that Plaintiff's claims are subject to the limitations period set forth in MCL 600.5813, such that Plaintiff's claims to conduct and injuries after December 17, 2013 - six years prior to when Plaintiff filed those claims against Walgreens. The State agrees that any relevant limitations periods generally apply equally to the State but argues that "[a]ctions brought in the name of this state . . . for the recovery of the cost of maintenance, care, and treatment of persons in hospitals, homes, schools, and other state institutions" are exempt from a limitations period under MCL 600.5821(4). Plaintiff further argues that even if the six-year statute of limitations did apply, the State's nuisance-abatement action does not seek to recover for violations and injuries that occurred outside the limitations period, citing *Twp of Fraser v Haney*, 509 Mich 18; 983 NW2d 309 (2022). Plaintiff additionally asserts that equitable tolling due to fraudulent concealment should apply.

Upon review of the parties' arguments, the Court disagrees with the State that this is an action brought "for the recovery of the cost of maintenance, care, and treatment of persons in hospitals, homes, schools, and other state institutions." While the State may eventually recover funds for abatement and damages under the DDLA that it could ultimately use to cover the aforementioned costs, there is no support for the State's position that this is an action specifically brought to recover such costs. The Court also concludes that Plaintiff has failed to make the requisite showing that equitable tolling due to fraudulent concealment should apply. Accordingly, the six-year limitations period applies to limit the State's claims to violations and injuries after December 17, 2013.

4. <u>The Court will grant summary disposition on Walgreens' nonparty fault claims against governmental agencies</u>.

Plaintiff seeks summary disposition with respect to Walgreens' nonparty fault claims against thirteen state and federal governmental entities, which apply only to the DDLA claim. For each of the nonparties at fault named, Walgreens argues that the nonparty failed to regulate or enforce existing law effectively enough to stop other actors from creating Michigan's opioid crisis and harming the State. During oral argument, Walgreens argued that it takes the position that Plaintiff and the state governmental entities are one and the same. Walgreens suggested that it would dismiss its nonparty fault claims against state entities if Plaintiff agrees with that position. Citing prior orders issued by this Court, Plaintiff disagreed. Plaintiff moves to dismiss the nonparty fault claims against the governmental agencies on the grounds that (1) the governmental agencies owed no tort duty to regulate or enforce the law to prevent others from injuring the State, and (2) the comparative-fault statutes are inapplicable to a nonparty who caused a different injury.

The nonparty at fault can only be held responsible if the breach of that legal duty proximately caused the same injury and damages as those caused by the defendant. *Vandonkelaar v Kids' Kourt, LLC*, 290 Mich App 187, 200-03 (2010) (holding that under MCL 600.6304, nonparty must have caused the same injury and damages as defendant and that comparative-fault statutes are inapplicable to nonparty who caused a different injury); MCL 600.6304(1)(b) (permitting assignment of fault to those who "contributed to the death or injury" at issue in the suit); MCL 600.6304(2) (trier of fact must consider "causal relation between the conduct and the damages claimed"). In the present case, Walgreens claims that the governmental agencies failed to prevent other actors from creating the opioid crisis. The alleged causal relation between that alleged conduct and the damages claimed is too attenuated for comparative fault to apply. Accordingly, the Court will grant Plaintiff's motion to dismiss the governmental agencies as nonparties at fault.

5. Plaintiff has stated a DDLA claim for which relief may be granted.

Walgreens argues that the DDLA requires Plaintiff to prove that Walgreens dispensed the opioids that were abused by the individuals who ultimately caused Plaintiff's alleged harms in order to bring a claim under the DDLA.

The State's DDLA claim arises under MCL 691.1605, which authorizes a "person injured by an individual abuser" to bring an action for damages against a person who participated in illegal marketing of the controlled substance actually used by the individual abuser." MCL § 691.1605(1). If the plaintiff "proves that the defendant participated in illegal marketing of the controlled substance actually used by the individual abuser who injured the plaintiff, the defendant is presumed to have injured the plaintiff and to have acted willfully and wantonly." MCL 691.1605(2). "Person" is broadly defined in Michigan's DDLA to include both "governmental entit[ies]" and corporations. MCL § 691.1604(4).

Michigan's DDLA allows a plaintiff, like the State, to recover damages against any person who, at some point, illegally marketed (i.e., dispensed or distributed) the same sort of drug to the individual abuser that the individual abuser used when he harmed the plaintiff. The Court finds that the State's damage model sufficiently satisfies this standard to survive summary disposition of its DDLA claim.

6. The permissible scope of abatement and collateral sources will be addressed in other motions, pursuant to the parties' agreement.

The parties' arguments regarding the permissible scope of abatement include whether Michigan's collateral source rule applies. Both sides have agreed that the issue of collateral sources will be held in abeyance pending the filing of additional motions.

7. The State's motion for summary disposition of various affirmative defenses raised by Walgreens is granted in part and denied in part.

As discussed during oral argument, Walgreens has withdrawn its affirmative defenses of assumption of risk, free public services/municipal cost recovery doctrine, no public nuisance because real property not involved, and fraud on the DEA. Plaintiff seeks dismissal of the following affirmative defenses stated by Walgreens: lack of standing, implied preemption, derivative injury rule/remoteness doctrine, economic loss rule/doctrine, informed consent, learned intermediary doctrine, primary jurisdiction doctrine, and state of the art/industry customs. (The affirmative defenses of statutes of limitation/repose and collateral sources are previously addressed herein.)

A. Lack of Standing

With respect to the affirmative defense of lack of standing, the Court finds that Plaintiff has established standing to bring both its statutory nuisance and DDLA claims. The State's evidence shows that it has incurred a variety of costs, including costs for increased law enforcement; health care; care for people addicted to opioids and opioid-dependent infants and children; early childhood intervention; prosecution for opioid-related crimes; incarceration, and drug treatment. Walgreens has failed to establish the validity of lack of standing as an affirmative defense. The Court will grant the State's motion for dismissal of this affirmative defense.

B. Implied Preemption

On the issue of implied preemption, the Court finds that Walgreens has failed to demonstrate that Congress intended to preempt Michigan law. Michigan "does not favor preemption by federal law" *Konynenbelt v Flagstar Bank*, 242 Mich App 21, 30; 617 NW2d 706, 712 (2000). Michigan law should be preempted only where there is a "clear and manifest purpose of Congress" to do so. *Id.* Walgreens has failed to establish such a clear and manifest purpose here and the Court will grant the State's motion for dismissal of this affirmative defense.

C. Derivative Injury Rule/Remoteness Doctrine

Plaintiff claims that Walgreens raised this defense with respect to common law claims, only, which were subsequently dismissed. Walgreens denies that it intended for the derivative injury rule/remoteness doctrine to pertain only to common law claims. Accordingly, the Court will deny the State's motion for dismissal of this affirmative defense without prejudice.

D. Economic Loss Rule

In *Huron Tool & Eng'g Co v Precision Consulting Servs, Inc*, 209 Mich App 365, 371; 532 NW2d 541, 544 (1995), the Court described the economic loss rule as follows:

> The essence of the "economic loss" rule is that contract law and tort law are separate and distinct, and the courts should maintain that separation in the allowable remedies. There is a danger that tort remedies could simply engulf the contractual remedies and thereby undermine the reliability of commercial transactions. Once the contract has been made, the parties should be governed by it.

The present action does not involve contractual claims. Therefore, the economic loss doctrine is inapplicable and the Court will grant the State's motion for dismissal of this affirmative defense.

E. Informed Consent

Walgreens has the burden to establish that informed consent is "a valid defense to a claim." In Michigan, the doctrine of informed consent requires a physician to warn a patient of the risks and consequences of a medical procedure. *Lincoln v Gupta*, 142 Mich App 615, 625; 370 NW2d 312 (1985). Walgreens has failed to establish that the doctrine of informed consent applies to Plaintiff's DDLA or nuisance claims and the Court will grant the State's motion for dismissal of this affirmative defense.

F. Learned Intermediary

In *In re Certified Questions From U.S. Dist. Court For Eastern Dist. of Mich., Southern Div.*, 419 Mich 686; 358 NW2d 873 (1984), which was issued in response to a request from the federal district court for guidance as to the Michigan law on duty to warn in prescription drug marketing, the Court noted that the "learned intermediary" doctrine was involved, and said that it was not ready to decide whether a learned intermediary, such as a doctor or a pharmacist, should warn the patient of possible side effects. The court declined to make such a ruling because doctors and pharmacists were not represented in the proceedings. As Plaintiff points out, Michigan cases have only applied the learned intermediary doctrine in product liability actions. For the reasons described in Plaintiff's briefs, the Court declines to find that the learned intermediary doctrine applies as an affirmative defense to Plaintiff's nuisance and DDLA claims and will grant the State's motion for dismissal of this affirmative defense.

G. Primary Jurisdiction

The Michigan Supreme Court has "concluded that the doctrine of primary jurisdiction is not a defense, but rather a doctrine of judicial deference and discretion, a prudential doctrine, designed to accord respect to the separation of powers in our constitutional system." *Traveler's Ins Co v Detroit Edison Co*, 465 Mich 185, 211; 631 NW2d 733 (2001). Accordingly, the Court will grant the State's motion for dismissal of this affirmative defense.

H. State of the Art/Industry Custom

In support of its motion to dismiss Walgreens' "state of the art"/industry customs affirmative defense, Plaintiff argues that the DDLA and statutory public nuisance claims are not based on alleged violations of a generally recognized state of the art or any industry customs. Plaintiff notes that Michigan courts have only ever considered "state of the art" and industry customs in the context of medical malpractice and products liability actions. In response, Walgreens claims that Plaintiff is attempting to impute a duty to Walgreens based on industry customs and practices while denying that its claims are based on violations of such customs.

A review of Michigan case law indicates that while "state of the art" and industry customs are generally considered in the context of medical malpractice and product liability actions, they are not specifically limited to such claims. Accordingly, the Court declines to dismiss Walgreens' affirmative defense of "state of the art"/industry custom and will deny the State's motion for dismissal of this affirmative defense.

Conclusion

For the reasons stated herein, the Court holds in abeyance any determinations regarding application of the collateral source rule. It is hereby ordered that Walgreens' omnibus motion for summary disposition is granted with respect to application of the six-year limitations period to Plaintiff's claims, and denied in all other respects. It is further ordered that the State's omnibus motion for partial summary disposition is granted with respect to dismissal of the governmental agencies as nonparties at fault and dismissal of the affirmative defenses of lack of standing, implied preemption, economic loss rule/doctrine, informed consent, learned intermediary doctrine, and primary jurisdiction doctrine; and denied in all other respects (without prejudice with respect to the affirmative defense of derivative injury rule/remoteness doctrine only).

Date: February 10, 2023

/s/Patricia Fresard
Patricia Perez Fresard
Circuit Court Judge