Electronically RECEIVED on November 12, 2019
Appellate Court Clerk

Electronically FILED on November 12, 2019
Appellate Court Clerk

E2018-01994-SC-R11-CV

IN THE SUPREME COURT OF TENNESSEE

JARED EFFLER, *et al.*,

Plaintiffs,

v.

PURDUE PHARMA L.P., *et al.*,

Defendants.

Tennessee Supreme Court
No. _____

Tennessee Court of Appeals
No. E2018-01994-COA-R3-CV

On Appeal from the Circuit Court for Campbell County, Tennessee
No. 16596

APPLICATION FOR PERMISSION TO APPEAL BY MALLINCKRODT LLC, ENDO HEALTH SOLUTIONS INC., ENDO PHARMACEUTICALS INC., AND TEVA PHARMACEUTICALS USA, INC.

Jessalyn H. Zeigler (#16139)
Sarah B. Miller (#33441)
BASS, BERRY & SIMS PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
(615) 742-6289

Brien T. O'Connor
Andrew J. O'Connor
ROPES & GRAY LLP
Prudential Tower, 800 Boylston Street
Boston, MA 02199
(617) 235-4650

Attorneys for Defendant MALLINCKRODT LLC

Ronald S. Range, Jr. (#013928)
Chad E. Wallace (#021741)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
100 Med Tech Parkway, Suite 200
Johnson City, TN 37604
(423) 975-7602

Ingo W. Sprie, Jr.
ARNOLD & PORTER KAYE
SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000

R. Stanton Jones
ARNOLD & PORTER KAYE
SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, D.C. 20001
(202) 942-5855

Attorneys for Defendants
ENDO HEALTH SOLUTIONS INC.
and ENDO PHARMACEUTICALS
INC.

Tim Warnock (#012844)
Stuart Burkhalter (#029078)
RILEY WARNOCK & JACOBSON, PLC
1906 West End Ave.
Nashville, TN 37203
(615) 320-3700

Megan R. Braden
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, IL 60601
(312) 324-1145

Steven A. Reed MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
(215) 963-5603

Attorneys for Defendant
TEVA PHARMACEUTICALS USA, INC.

IF APPEAL IS GRANTED, ORAL ARGUMENT ON THE MERITS IS REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, Mallinckrodt LLC, Endo Health Solutions Inc., Endo Pharmaceuticals Inc., and Teva Pharmaceuticals USA, Inc. (the "Defendant-Applicants") respectfully urge this Court to grant permission to appeal the Judgment of the Court of Appeals originally entered on September 11, 2019. A copy of the Court of Appeals' opinion is attached as Exhibit A. No petition for rehearing was filed.

INTRODUCTION

The question underlying this appeal is whether a court may look past the plain text and structure of a statute to expand the statute's reach where it would further the legislature's - "remedial purpose." The answer will have far-reaching effects beyond the potentially billions of dollars at stake in this case and may fundamentally alter the Tennessee market for products from all types of legal pharmaceutical medications (well beyond opioids) to whiskey.

In the decision below, the Court of Appeals dramatically expanded the scope of Tennessee's Drug Dealer Liability Act ("DDLA" or the "Act"), rendering Tennessee an outlier among the 17 states to enact a DDLA. The Court of Appeals erred in at least two critical respects. First, it ignored the DDLA's express restrictions on eligible plaintiffs and the plain meaning of the word "represent" to permit the Plaintiff district attorneys general—represented by contingency fee lawyers—to sue in their own names, purportedly on behalf of local governments that did not consent to their lawsuit. Second, the Court of Appeals erroneously ruled that sales of *legal*, FDA-approved prescription pain medications to *legal* distributors may constitute knowing participation in an *illegal* drug

market. Although the trial courts in Tennessee have split on this latter question, no court in any of the other states that have implemented a DDLA have permitted such an expansive application.

The Court of Appeals claims its radical decision was necessary to effectuate the "remedial purpose" of the DDLA. But this Court has long held that its primary role in statutory interpretation is to "give effect to the legislative intent" and that, in doing so, the "text of the statute is of primary importance." *Tennessee Dep't of Correction v. Pressley*, 528 S.W.3d 506, 512–13 (Tenn. 2017). Although courts consider the text in light of a statute's general purpose, this Court has never held that a court should contort or ignore the plain text and structure of a statute to further what it perceives as a remedial legislative goal. *See Funk v. Scripps Media, Inc.*, 570 S.W.3d 205, 219 (Tenn. 2019) ("Our overarching purpose in construing statutes is to ascertain and effectuate legislative intent, *without expanding a statute beyond its intended scope*.") (internal quotation marks and citation omitted) (emphasis added). The Court should not endorse that view today.

From top to bottom, the text of the DDLA confirms that the General Assembly intended it to impose liability on *drug dealers*—"a recognizable segment of the illegal drug network." Tenn. Code. Ann. § 29-38-103(3). The DDLA permits recovery against the dealer of an "illegal drug" who "knowingly participates" in the "illegal drug market." *Id.* § 29-38-105(a). The scope of a drug dealer's liability depends on the number of "ounces" of the illegal drug involved, or—in the case of marijuana—the number of "pounds" or "plants." *Id.* § 29-38-104(5)–(8). The DDLA limits those who "may bring an action for damages" to five express categories—including

parents of drug users, employers of drug users, and local governments that expend money on behalf of drug users. *Id.* § 29-38-106(a). A later part of the Act provides that district attorneys general may "represent" localities in DDLA actions, as any lawyer would *represent a client*. *Id.* § 29-38-116(a).

In rendering its decision, the Court of Appeals bypassed this plain language and structure and instead placed dispositive weight on the "broader purposes" of the statute. (Ct. of App. Op. at 13).

First, despite acknowledging that "district attorneys are not mentioned" in the list of permissible plaintiffs, *id.* at 12, the Court of Appeals ruled that they could *sue as plaintiffs themselves* because the overall purpose of the statute is to "provide a civil remedy for damages to persons in a community injured as a result of illegal drug use." *Id.* at 13. By relying solely on the statute's broad "remedial purpose"—and forgoing any textual analysis—the Court of Appeals misconstrued the purpose of the particular provision at issue, which, after all, seeks to *limit* the types of people who can act as plaintiffs. It also ignored the plain meaning of "represent," which means working to effectuate a *client's* wishes. "Represent" does not mean asserting and controlling another person's claims as one's own—as the district attorneys general for the 4th, 6th-10th, and 12th Judicial Districts have done in this case—without their consent.

Second, the Court of Appeals similarly misinterpreted the DDLA's scope. By its express terms, the DDLA provides a cause of action only against someone "who knowingly participates in the illegal drug market within this state." Tenn. Code Ann. § 29-38-105(a). But rather than construe what this text says, the Court of Appeals asked whether

pharmaceutical manufacturers are wholly "exempt from the Act." (Ct. of App. Op. at 16). The Court of Appeals reasoned that because the DDLA did not carve out pharmaceutical companies by name, the statute must apply to their alleged marketing and sales misconduct—even if that alleged misconduct occurred in the *legal drug market*. The Court of Appeals found that a manufacturer who distributes *legal* medications to *legal* recipients "participates in the illegal drug market" if it *knows* that third parties may later illegally divert those medications for illegal use. *Id.* at 16–17. But such a boundless, malleable, and unprecedented theory has no basis in the text of the DDLA. Indeed, by that logic, whiskey manufacturers selling alcohol—a drug that is legally manufactured and sold in the United States—to licensed distributors would be liable as drug dealers, simply because they "know" that some portion of their whiskey would likely be consumed illegally by someone under the age of 21.

To prevent the far-reaching adverse consequences the ruling below will have on the availability of all manner of products in Tennessee (including but not limited to pharmaceutical medications and alcohol), provide needed guidance regarding its primary principle of statutory interpretation, and right the course of this historic litigation, the Court should grant review.

QUESTIONS PRESENTED FOR REVIEW

(1) Does § 29-38-116, which allows district attorneys general to "represent" local governments in DDLA suits, authorize district attorneys general to bring claims as plaintiffs—without consent from those local governments?

(2) Does § 29-38-105(a), which provides for liability against a "person who knowingly participates in the illegal drug

market," encompass a pharmaceutical company's lawful sale of legal prescription medications to legal, state-licensed distributors because a portion of those medications are ultimately diverted into illegal drug markets by the illegal acts of third parties?

STATEMENT OF THE CASE

I. Factual Background

Seven district attorneys general—proceeding as plaintiffs and represented by their own outside counsel—filed this lawsuit purportedly on behalf of the cities and counties in their judicial districts as well as the State itself. Plaintiffs also include two Baby Does who were allegedly exposed to opioids in utero. The complaint names two groups of defendants. The first group of defendants consists of several pharmaceutical companies that manufactured and sold prescription opioid medications: Purdue Pharma, L.P., Purdue Pharma, Inc., The Purdue Frederick Company, Mallinckrodt LLC, Endo Health Solutions Inc., Endo Pharmaceuticals Inc., and Teva Pharmaceuticals USA, Inc. (the "Manufacturer Defendants").[1] The second group consists of the Tennessee Pain Institute and three of its employees, who provided prescriptions to patients.

Plaintiffs initially asserted (1) DDLA claims on behalf of certain localities and (2) statutory and common-law public nuisance claims

[1] On September 15, 2019, Purdue Pharma, L.P. and Purdue Pharma, Inc. filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code. On October 11, 2019, the federal bankruptcy court enjoined litigation at this time against those debtors and certain related parties (including The Purdue Frederick Company). Those entities are therefore not parties to this application.

against both sets of Defendants. They alleged that the Manufacturer Defendants were liable under the DDLA for manufacturing and selling FDA-approved prescription opioid medications because they knew that third parties had illegally diverted some of those medications in Tennessee. Plaintiffs also claimed that the Manufacturer Defendants were liable for public nuisance by manufacturing and selling FDA-approved prescription opioid medications in a manner that adversely affected public health.

Plaintiffs later dropped their public nuisance claims after the State Attorney General moved to intervene on the ground that the district attorneys general and their private counsel did not have the authority to assert public nuisance claims, which were solely within the control of the State. Plaintiffs then filed the operative Third Amended Complaint dropping the nuisance claims entirely and the DDLA claims insofar as they were asserted on behalf of the State.

II. Circuit Court Judgment

The Manufacturer Defendants moved to dismiss the DDLA claims under Tennessee Rules of Civil Procedure 12.02(1) and 12.02(6). The Manufacturer Defendants argued, among other things, that (1) the district attorneys general lacked standing to bring DDLA claims as plaintiffs because they are not included in the statute's list of parties that "may bring an action," and (2) the DDLA's liability provision, which applies to knowing participation "in the illegal drug market," does not encompass alleged conduct in the legal drug market.

Plaintiffs responded by claiming that the statute authorizes district attorneys general to "represent" local governments "in an action brought

under" the DDLA. In Plaintiffs' view, "represent" means that district attorneys general can proceed as plaintiffs in their own right, without consent or oversight from the local governments. Plaintiffs also argued that—although the manufacture and sale of opioid medications is legal—the Manufacturer Defendants participated in the "illegal drug market" by promoting and selling high quantities of opioids, some of which they knew would be illegally diverted. Plaintiffs' argument, however, ignores the fact that the Manufacturer Defendants sell their opioid medications only to DEA-licensed wholesalers and distributors in accordance with DEA quotas. Those wholesalers and distributors, in turn, decide whether to distribute these medications to pharmacies. And those pharmacies decide whether to dispense the medication to a patient, and only when a licensed physician or other medical professional has exercised his or her independent medical judgment about whether to prescribe that medication.

After briefing and oral argument, the Circuit Court granted the Manufacturer Defendants' motion and dismissed Plaintiffs' DDLA claims against the Manufacturer Defendants for failure to state a claim.

In its decision, the Circuit Court explained that the "opioid medications the Manufacturer Defendants produce are legal under federal and state law and are FDA approved." (Cir. Ct. Op. at 3). It further recognized that the "Manufacturer Defendants sell and distribute opioid medications to licensed distributors" and that "*those licensed distributors*, not the Manufacturer Defendants, thereafter control distribution of the medications." *Id.* (emphasis added). Accordingly, the Circuit Court concluded that the "Plaintiffs' complaint, even if true and

correct, is void of any allegations showing that the Manufacturer Defendants distributed 'illegal drugs' or participated in an 'illegal drug market' as defined in the DDLA." *Id.* at 4. Moreover, the Circuit Court "disagree[d] with the [Plaintiffs'] assertion that because of the Manufacturer Defendants' business and marketing practices, the otherwise legal production and distribution of opioid medications becomes illegal by over producing and by the subsequent criminal conduct of other unrelated actors." *Id.* The Circuit Court therefore held that "the DDLA does not apply to manufacturers who are legally producing and distributing opioid medications." *Id.* Because the Circuit Court concluded that the DDLA's liability provision did not cover the Manufacturer Defendants' alleged conduct in the legal drug market, it did not address whether the district attorneys general lacked standing to pursue DDLA claims as plaintiffs. *See id.*

III. Court of Appeals' Opinion

Plaintiffs appealed the Circuit Court's decision to the Court of Appeals. On appeal, Plaintiffs reiterated their view that the Manufacturer Defendants "participated in the illegal drug market" because of their alleged misconduct in the legal drug market, including allegedly misleading promotion and oversupply. *See* Appellant's Br. at 39–51. Plaintiffs also asserted that "public policy cries out for reversal"—spuriously claiming that ruling against them would somehow mean that "individuals and local communities in Tennessee will get nothing or almost nothing for their losses." Appellant's Reply Br. at 24. Plaintiffs did not, however, reference or acknowledge the dozens of other pending lawsuits advancing non-DDLA legal claims brought by individuals and

local communities in Tennessee—including several of the local governments Plaintiffs claim to represent—which seek recovery for the same alleged misconduct.

In response, the Manufacturer Defendants again pointed out that the DDLA only imposes liability on "drug dealers" who make or sell "illegal drugs" in an "illegal drug market." Appellee's Br. at 1. The Manufacturer Defendants explained, "in determining whether a defendant has 'knowingly participate[d] in the illegal drug market,' the defendant's own conduct—not the conduct of some third party—is paramount." *Id.* at 25. By Plaintiffs' own admission, opioid medications were diverted and used illegally by third parties *after* the medications had left the Manufacturer Defendants' control. *Id.* at 25–26. And a prescription opioid medication "does not retroactively become an 'illegal drug' simply because it is illegally diverted or abused downstream by unrelated third parties." *Id.* at 8. As the Manufacturer Defendants explained, "Plaintiffs' expansive reading of the statute would unduly render all manufacturers of legal medications liable under the DDLA simply because those medications can be diverted by third parties after they leave a manufacturer's control." *Id.* at 9. In addition, the Manufacturer Defendants argued that the Court of Appeals should affirm the Circuit Court's dismissal because the district attorneys general lacked standing to bring DDLA lawsuits as plaintiffs on behalf of local governments, absent consent from the local governments themselves.

The Court of Appeals reversed the Circuit Court's order dismissing the DDLA claims. First, the Court of Appeals acknowledged that the

DDLA lists five types of parties who "may bring an action for damages caused by an individual's use of an illegal drug." (Ct. of App. Op. at 11 (quoting Tenn. Code Ann. § 29-38-106(a)). And it conceded that "district attorneys are not mentioned" in that list. *Id.* at 12. It noted, however, that "[e]lsewhere in the DDLA," there is another provision that allows government prosecutors to "represent the state or a political subdivision of the state in an action brought under this chapter." *Id.* (quoting Tenn. Code Ann. § 29-38-116(a)). Although Plaintiffs argued that this provision meant the district attorneys general could act as plaintiffs, the Manufacturer Defendants reasoned that it simply meant district attorneys general could serve as *counsel* to the state or a political subdivision—not that they could bring claims on their own. According to the Court of Appeals, both sides "advance[d] reasonable interpretations." *Id.* at 13. But rather than construe the meaning and purpose of this particular provision, the Court of Appeals felt that it "must look to the broader purposes of the DDLA to resolve the question." *Id.* Because the broader purpose of the DDLA aims to provide recovery for certain injuries, the Court of Appeals concluded that the district attorneys general could bring DDLA lawsuits as "independent parties." *Id.* at 14.

Second, the Court of Appeals determined that the DDLA applies to the Manufacturer Defendants' alleged conduct because the "DDLA does not confine itself to 'street drugs' or 'street dealers.'" *Id.* at 16. The Court of Appeals observed that "[n]o Tennessee case provides guidance on whether drug manufacturers may be liable under the DDLA." *Id.* at 15. And it acknowledged that courts in other states with DDLAs have not extended those statutes to the type of conduct alleged here. It

nonetheless distinguished those cases solely by noting that "they are not binding on this Court." *Id.* at 16. The Court of Appeals went on to explain that the statutory definition of "[p]articipation in the illegal drug market" included (1) distributing illegal drugs, and (2) "commit[ting] an act intended to facilitate the marketing or distribution of an illegal drug." *Id.* at 15. But it declined to analyze the meaning and scope of that text. Instead, the Court of Appeals simply concluded that pharmaceutical companies like the Manufacturer Defendants are not "exempt from the Act." *Id.* at 16.

STANDARD OF REVIEW

The questions presented for review involve pure questions of law—namely, the proper interpretation of the text of the DDLA. Accordingly, if this Court grants permission to appeal, it will review the Court of Appeals' decision de novo.

REASONS SUPPORTING REVIEW

Rule 11 of the Tennessee Rules of Appellate Procedure indicates that the Court will consider the following factors in determining whether to grant permission to file an appeal: (1) the need to secure uniformity of decision; (2) the need to secure settlement of important questions of law; (3) the need to secure settlement of questions of public interest; and (4) the need for the exercise of this Court's supervisory authority. Tenn. R. App. P. 11(a). All four support this Court's review.

I. There is a strong need for the Court to secure uniformity of decision and exercise its supervisory authority regarding statutory construction based on broad "purposes" rather than statutory text and structure.

The Court should grant review to secure uniformity of decision and provide needed guidance to the lower courts regarding how to "give effect to the legislative intent" in statutory interpretation cases. *Pressley*, 528 S.W.3d at 512–13. Although lower courts consistently acknowledge this duty, their implementation of the principle can vary widely in practice. Many lower court decisions have correctly recognized that courts should discern legislative intent from the statute's plain language and thereby give effect to the intent of the particular provision at issue. *See, e.g.*, *In re Estate of Starkey*, 556 S.W.3d 811, 815 (Tenn. Ct. App. 2018) ("When a statute's language is unambiguous, we derive legislative intent from the statute's plain language."); *Reynolds v. Gray Med. Inv'rs, LLC*, 578 S.W.3d 918, 920 (Tenn. Ct. App. 2018) ("In determining legislative intent, we first must look to the text of the statute."). But other lower court decisions including the decision below have inverted this approach and misused legislative intent to expand a statute's reach beyond its plain text. *See, e.g.*, *Harman v. Moore's Quality Snack Foods, Inc.*, 815 S.W.2d 519, 523 (Tenn. Ct. App. 1991) ("In ascertaining [legislative] intent we look to the general purpose to be accomplished by the legislation."); *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 83 (Tenn. 2001) (reversing Court of Appeals' interpretation that "expand[ed]" statutory exception and failed to "enforce the statute as written").

While nodding toward legislative intent, the decision below relied solely on the *broad remedial purpose* of the DDLA without analyzing the text and purpose of the specific provisions at hand. As the United States Supreme Court has observed, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the

statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam); *see also id.* ("[M]ost impermissibly, the Court of Appeals relied on its understanding of the broad purposes of the [statute]."). To be sure, "statutes must be understood in light of the purposes the Legislature intended to accomplish by their passage." *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 186 (Tenn. 2000) (quoting *Business Brokerage Ctr. v. Dixon*, 874 S.W.2d 1, 5 (Tenn. 1994)). But every statute has multiple—sometimes competing—purposes. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 18 (2012) ("Any provision of law . . . "can be said to have a number of purposes, which can be placed on a ladder of abstraction."). Simply invoking the statute's *broadest* purpose allows judges to veer "beyond the immediate purpose evident from the text" and give "unrealistically expansive interpretations to narrow provisions." *Id.* at 20.

Put another way, the fact that the *broad purpose* of a remedial statute is to allow certain people to recover for certain conduct does not mean that every aspect of that law should be interpreted in a way that enables recovery. If courts interpreted each provision of a remedial statute with an eye toward permitting recovery, they would fail to give effect to the *particular purposes* of the provisions that specify (1) who may bring a cause of action and (2) what kind of conduct should be proscribed. That is exactly what happened here. The Court of Appeals extrapolated the broad remedial goal of the DDLA into an all-purpose interpretive approach geared toward moving this lawsuit forward. In so doing, it chose to allow these district attorneys general to act as

plaintiffs—even while acknowledging that "district attorneys are *not mentioned*" in the DDLA's list of people who may bring suit. (Ct. of App. Op. at 12) (emphasis added). The Court of Appeals similarly misconstrued the DDLA to apply to a pharmaceutical company's marketing and sales practices—even though that alleged conduct occurs in the context of lawful sales of legal medications. *See id.* at 16–17. Rather than interpret the plain text of the DDLA's liability provision as a matter of law, the Court of Appeals merely asked whether that provision expressly exempted pharmaceutical manufacturers. *Id.* at 16.

A. The text and structure of the DDLA does not permit district attorneys general to act as plaintiffs.

The DDLA enumerates five types of permissible plaintiffs who may bring suit under the Act. Tenn. Code. Ann. § 29-38-106. As the Court of Appeals acknowledged, "district attorneys are not mentioned" in the list. (Ct. of App. Op. at 12). That should have ended the inquiry. Nonetheless, the district attorneys general sought to rely on a *separate* provision of the DDLA, which provides that prosecutors may "*represent* the state or a political subdivision of the state in an action brought under" the DDLA. Tenn. Code. Ann. § 29-38-116(a) (emphasis added). According to the district attorneys general, that provision allows them to bring DDLA suits as plaintiffs on their own initiative—standing in the shoes of a political subdivision—without permission or input from the political subdivision itself.

But if the General Assembly intended for district attorneys general to bring lawsuits as plaintiffs, it would have listed them among the permissible plaintiffs. As this Court has explained, the "structure" of a

"statute enables the Court to interpret the legislative intent." *State by Lockert v. Knott*, 631 S.W.2d 124, 127 (Tenn. 1982). If the General Assembly meant for district attorneys general to act as plaintiffs, why would it structure the DDLA to contain one list of permissible plaintiffs, and then include a *separate* provision specifying that government prosecutors—like the district attorneys general—can "represent" political subdivisions? The answer, of course, is that the DDLA simply authorizes district attorneys general to *act as counsel for*, i.e., "represent," political subdivisions asserting a DDLA claim. In other words, a district attorney general may represent a political subdivision that chooses to bring suit. A district attorney general cannot, by contrast, bring claims on behalf of—and without authorization from—a political subdivision. Otherwise, the statutory text and structure would make little sense.

In addition, this Court has repeatedly emphasized that courts should "determine [legislative] intent 'from the *natural and ordinary* meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning.'" *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 514 (Tenn. 2005) (emphasis added) (quoting *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000)). Here, the natural and ordinary meaning of the word "represent" confirms that district attorneys general may act as *counsel* to political subdivisions—not usurp their claims as substitute plaintiffs. *See* Cambridge Dictionary, (defining "represent" as "to speak, act, or be present officially for a person or group: His law firm is

representing a dozen of the families involved in that disaster."), https://dictionary.cambridge.org/us/dictionary/english/represent.

The Court of Appeals did not, however, conduct any textual analysis of the meaning of the word "represent"—let alone try to reconcile the representation provision with the DDLA's list of permissible plaintiffs. Instead, it decided to "look to the broader purposes of the DDLA to resolve the question." (Ct. of App. Op. at 13). And because the broad purpose of the statute "is to provide a civil remedy for damages to persons in a community injured as a result of illegal drug use," the Court of Appeals concluded that the district attorneys general may proceed as plaintiffs "on behalf of the political subdivisions within their respective judicial districts." *Id.* at 13, 14. By relying on the DDLA's broad remedial purpose, instead of the actual text, the Court of Appeals gave an unrealistically expansive interpretation to the word "represent."

The Court of Appeals also noted that "district attorneys regularly exercise their discretion to initiate criminal prosecutions without first obtaining permission from any political leader." (Ct. of App. Op. at 14). But it completely failed to grapple with statutory differences between the authority of district attorneys general in the criminal and civil spheres. Tennessee law provides that district attorneys general have the authority to "prosecute in the courts of the district all violations of the state's *criminal* statutes and perform *all prosecutorial functions* attendant thereto." Tenn. Code Ann. § 8-7-103 (emphasis added). But when a district attorney—such as Jared Effler—prosecutes a crime, he is not a *party* to the case. (No criminal case has ever been captioned, as this case has been, *Jared Effler vs. Defendant. See* Tenn Code Ann. § 40-

3-104 ("All criminal actions are prosecuted in the name of the state of Tennessee . . . .")).

Moreover, in a criminal prosecution, there is no client apart from the sovereign state; here, by contrast, the district attorneys general purport to act in the name of independent localities. Tennessee law vests counties and localities with broad power to manage their own civil litigation. It grants cities statutory authority to retain a "city attorney" to "[d]irect the management of all litigation in which the city is a party," and to "[r]epresent the city in all legal matters and proceedings in which the city or a party is interested . . . ." Tenn. Code Ann. § 6-21-202(a)(1), (2). "[M]ost counties" lack "an office of county attorney." Univ. of Tenn. County Tech. Assistance Serv., *County Attorney*, https://eli.ctas.tennessee.edu/reference/county-attorney. In such counties, the General Assembly explicitly granted county mayors authority to direct litigation, authorizing them to "employ or retain counsel . . . to represent the county either as plaintiff or defendant in such suits as may be brought by or against the county." Tenn. Code Ann. § 5-6-112(1). Simply by saying that district attorneys general "may represent" localities, Tenn. Code Ann. § 29-38-116(a), therefore does not reflect any intent to displace localities' traditional discretion to direct civil litigation occurring in their name. Instead, the DDLA bestows the cause of action upon the "governmental entity" *itself*—not upon district attorneys general suing on another's behalf. *See* Tenn. Code Ann. § 29-38-106(4). This is entirely consistent with the relief contemplated under the statute: The DDLA only allows a governmental entity to recover if it has "fund[ed] a drug treatment program" or "otherwise expended money

on behalf of [an] individual drug user." *Id.* The district attorneys general, by contrast, do not incur such costs.

B. The text and structure of the DDLA confirms that it does not apply to alleged misconduct in the legal drug market.

The DDLA only (and understandably) targets "drug dealers"—namely, people who make, distribute, or sell "illegal drugs" in an "illegal drug market." Tenn. Code Ann. §§ 29-38-101–116. Specifically, the liability provision of the statute states that a "person who knowingly participates in the illegal drug market within this state is liable for civil damages." *Id.* § 105(a). It further explains that participation in the illegal drug market means, as relevant here, (1) "to distribute" an "illegal drug," or (2) to "commit an act intended to facilitate the marketing or distribution of . . . an illegal drug." *Id.* § 104(9). The question in this case is whether allegedly downplaying the risks of addiction in promoting FDA-approved medications to doctors or selling those products to DEA-licensed distributors in large quantities amounts to (1) knowingly distributing an *illegal drug*, or (2) knowingly committing an act *intended to facilitate the distribution of an illegal drug*. The answer is unequivocally, no.

First of all, the plain text of the DDLA confirms that a pharmaceutical company that engages in misconduct in the *legal drug market* is not the same as a drug dealer who "knowingly participates in the illegal drug market." Under the DDLA, a drug is only an "illegal drug" if the "*distribution*" of it is illegal. Tenn. Code Ann. § 29-38-104(1) (emphasis added). The DDLA unsurprisingly lists "cocaine, heroin, [and] methamphetamine" as examples of "specified illegal drug[s]." *Id.* § 29-

38-104(14). "Under the doctrine of *noscitur a sociis,* 'the meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words or phrases associated with it.'" *Sallee v. Barrett*, 171 S.W.3d 822, 828 (Tenn. 2005) (quoting *Black's Law Dictionary* (6th ed. 1990)). So, although cocaine, heroin, and methamphetamine do not form an exhaustive list of illegal drugs, the *noscitur a sociis* canon—together with basic common sense—dictates that to be an "illegal drug" under the DDLA, a drug should be fundamentally like these drugs. FDA-approved pain medications are plainly not.

Second, the only entities to whom the Manufacturer Defendants distribute (i.e., sell) their opioid medications are DEA-registered wholesalers and distributors. And when a manufacturer sells its opioid medications to a wholesaler or distributor, it is not *knowingly distributing an illegal drug* for the simple fact that opioid medications are not "illegal drugs" at that time. It is assuredly not a violation of any law for a pharmaceutical manufacturer to sell FDA-approved opioid medications to DEA-registered wholesalers and distributors. The fact that third parties may *subsequently* divert opioid medications and distribute them illegally does not retroactively render the medication "illegal" when the manufacturer sold it.

To be sure, the General Assembly could have defined an "illegal drug" as "a drug, the *subsequent diversion* of which is a violation of state law." That language might have applied to the conduct alleged here, though it undoubtedly would have raised a host of due process concerns. But the Legislature did not include such a provision, and courts are

prohibited from inserting that language now. *Cf. Austin v. Memphis Pub. Co.*, 655 S.W.2d 146, 148 (Tenn. 1983) ("A pure 'casus omissus' occurring in a statute can never be supplied or relieved against by the court under any rule or canon of construction or interpretation." (quoting *Hickman v. Wright*, 210 S.W. 447, 448 (1918))).

Third, pharmaceutical companies do not "commit an act intended to facilitate the marketing or distribution of . . . an *illegal drug*" by committing acts intended to increase sales of *legal drugs*, even if they know some of those legal sales may later lead to illegal ones. Of course, that is not to say that any and all misconduct geared toward increasing sales of legal drugs is blameless or non-actionable. But there is a critical difference between (1) committing an act intended to facilitate diversion, and (2) committing an act intended to increase legal prescriptions, *a consequence of which* might be diversion. There is no textual basis for contorting the DDLA's liability provision in a way that conflates these separate notions.

Relatedly, the DDLA defines the term "illegal drug market" as "the support system of illegal drug related operations, from production to retail sales, through which an illegal drug reaches the user." Tenn. Code Ann. § 29-38-104(2). An illegal drug market is therefore one in which the relevant drug is an "illegal drug" *from start to finish*. Moreover, the DDLA expressly provides that a defendant's participation must occur "in" an illegal drug market. *Id.* § 29-38-105(a). Yet a pharmaceutical manufacturer's conduct—even any potential misconduct—all occurs within the legal drug market, well before the relevant illegal drug market is even created. Any illegal drug market would not come into existence

until after the fact, when a third-party criminal chooses to divert the medication. Accordingly, a manufacturer's misconduct in the legal drug market does not constitute participation "in" the illegal drug market.

In holding otherwise, the Court of Appeals misconstrued its task as deciding whether drug manufacturers are "*exempt* from the Act." (Ct. of App. Op. at 16) (emphasis added). But the Manufacturers argued —and the district attorneys general conceded—that the Manufacturer Defendants' sales to DEA-licensed distributors were legal, meaning the Manufacturer Defendants did not "knowingly participate[] in the illegal drug market." Tenn. Code Ann. § 29-38-105(a). The Court of Appeals did not even attempt to analyze the meaning of that operative phrase. Rather, it simply found that the DDLA should cover a pharmaceutical company's alleged misconduct in the legal drug market because the statute "does not make [a] distinction" between street dealers and pharmaceutical companies. (Ct. of App. Op. at 16). That misses the point. The fact that the DDLA fails to expressly *exempt* pharmaceutical companies from the Act does not mean that it *covers* alleged misconduct in the *legal* drug market.

II. Review is necessary to settle important questions of law and public interest.

A. The Court of Appeals' decision to allow attorneys to act as plaintiffs sets a dangerous precedent and will produce absurd results.

The same plaintiffs' law firm that launched this lawyer-driven litigation has instituted two virtually identical DDLA lawsuits in Tennessee, through different district attorneys general. *See Staubus v.*

Purdue Pharma L.P., Case No. C-41916 (Tenn. Cir. Ct. Sullivan County); *Dunaway v. Purdue Pharma, L.P.,* Case No. CCl-2018-cv-6347 (Cir. Ct. Cumberland Cty.). The trial court in the *Staubus* cases has similarly allowed the district attorneys general to proceed as plaintiffs standing in the shoes of local governments, without the consent—and sometimes in the face of direct repudiation—from the local governments themselves.[2] Granting review in this case will therefore provide vital guidance for the future of all three lawsuits, which purport to encompass 194 cities, counties, and towns in Tennessee, as well as any future litigation brought under the DDLA.

If the Court of Appeals' decision is left to stand, then these three lawsuits will adjudicate and conclusively resolve the rights of the cities, counties, and towns that the district attorneys general purport to "represent"—*all without those cities, counties, and towns ever having a say in the litigation and with a number of them having their own separate non-DDLA lawsuits pending over the same course of conduct*. Win or lose, those cities, counties, and towns will be stuck with the results. This Court should therefore grant review to resolve once and for all whether these district attorneys general and their outside counsel can commandeer the claims of local governments without authorization from those local governments. The need is particularly pressing given that several of those counties have instituted their *own* opioid-related lawsuits against the same Manufacturer Defendants based on the same

[2] The *Dunaway* court has not yet heard oral argument on the Defendants' Motions to Dismiss.

misconduct alleged in the DDLA suits. *See Campbell Cty. v. AmerisourceBergen Drug Corp.,* Case No. 3:18-cv-00006 (E.D. Tenn. Jan. 4, 2018); *Scott Cty. v. Purdue Pharma L.P.,* Case No. 3:18-cv-00083 (E.D. Tenn. Mar. 2, 2018); *Fentress Cty. v. AmerisourceBergen Drug Corp. et al.,* Case No. 2:18-cv-00028 (M.D. Tenn. Mar. 27, 2018). Absent this Court's intervention, those counties and the district attorneys general who purport to represent them will remain locked in a race to judgment.

Lastly, the Court of Appeals' decision has unleashed substantial questions regarding privilege, professional ethics, and discovery obligations that have made litigating these DDLA cases increasingly unworkable. Does the DDLA create an attorney-client relationship between the district attorneys generals' private lawyers and the local governments they "represent," regardless of whether the localities have authorized the litigation or want to be in an attorney-client relationship with those lawyers? Do these local governments have the same duties of disclosure in discovery that a normal plaintiff would? If not, can defendants' counsel speak to them directly, without plaintiffs' counsel present? Can the district attorneys general and their private lawyers adequately perform basic discovery tasks like identifying the most likely sources of relevant documents in the localities' possession; collecting and producing those documents; and answering interrogatories or Rule 30.02(6) deposition questions on behalf of the localities? Do Plaintiffs' lawyers owe a duty of loyalty to the local governments? And, if so, how can they fulfill that duty without taking direction from those local governments? If this suit is successful, will Jared Effler and the other

district attorneys general personally receive some portion of the potentially billions of dollars that they have requested as plaintiffs?

A definitive ruling that district attorneys general cannot bring DDLA suits in their own names would head off extensive confusion and needless litigation on these and many other subsidiary questions. *See Moore-Pennoyer v. State*, 515 S.W.3d 271, 276 (Tenn. 2017) (granting review to "to prevent needless litigation and eliminate confusion").

B. The Court of Appeals' decision will have far-reaching implications for the future of pharmaceutical medications in Tennessee.

Even more fundamentally, the decision below ushers in an unprecedented version of liability that has never before existed in Tennessee. According to the Court of Appeals, the DDLA allows recovery against a pharmaceutical manufacturer that continues selling legal medications so long as the manufacturer knows that criminal third parties might illegally divert those medications later on. For the first time ever, plaintiffs will be able to sue pharmaceutical companies for damages as a result of the illegal actions of third-party criminals over whom pharmaceutical companies *have no control*. If that really is the law (despite the serious due process issues such an interpretation would create) then this Court should say so. In the meantime, pharmaceutical manufacturers are left with substantial uncertainty about the risks they face doing business in Tennessee, and may be forced to make decisions to exit that market unnecessarily.

Not only pharmaceutical companies are at risk. According to the Court of Appeals' runaway logic, beer and whiskey makers may be liable

for selling alcohol—a drug that is legal to distribute under the right circumstance—to distributors if it knows that some bars or retailers will illegally serve minors. *See* National Institute on Drug Abuse, *Drugs of Abuse*, https://www.drugabuse.gov/drugs-abuse (listing alcohol as one of "most commonly abused drugs"). Indeed, the Court of Appeals' conclusion regarding acts *intended to facilitate the distribution of an illegal drug* could reach even further. The notion that a manufacturer's conduct in selling legal products may amount to facilitating the distribution of an illegal drug so long as the manufacturer knows those products can (and in some cases will) be used to carry out drug sales would mean that the DDLA also covers carmakers who know that their vehicles will be used in drug deals. So too for cell phone makers and messaging app developers. Surely they must know that drug dealers utilize and abuse their products to arrange and conceal drug deals and therefore—by the Court of Appeals' reasoning—intentionally facilitate the distribution of an illegal drug. Perhaps even district attorneys general who know about but decline to prosecute a drug dealer will be found to have "commit[ed] an act intended to facilitate" the distribution of an illegal drug.

Finally, it is a fallacy to suggest that denying Plaintiffs' DDLA claim will mean that affected communities "will get nothing or almost nothing for their losses." Appellants' Reply Br. at 24. Or that doing so will "give the Manufacturer Defendants immunity while the rest of the nation is holding them accountable." *Id.* Not so. As has been discussed, many of the same localities the district attorneys general and their private lawyers purport to "represent" have brought their own lawsuits,

just like other cities and counties around the country, seeking to hold the Manufacturer Defendants accountable for the same conduct alleged here, albeit not under DDLA claims. Whether *these district attorneys general* and *their lawyers* are entitled to pursue this case by transforming the DDLA is a separate question entirely.

In any event, the bottom line remains the same. Questions of statutory construction—including the proper interpretation of the DDLA—should not turn on that type of result-oriented approach. Courts have no license to ignore statutory language merely to reach corporate defendants (including opioid manufacturers), no matter how important, emotional, or politically preferable the cause is perceived to be. The ramifications of doing so extend far beyond opioid manufacturers.

C. The Court of Appeals' decision renders Tennessee a national outlier.

In addition to all the reasons set forth above, the Court should grant review because the decision below renders Tennessee a national outlier. None of the other 17 states that have adopted a DDLA has extended its statute to cover alleged misconduct in the promotion and sale of legal medications. To the contrary, every court in those other states to have issued a decision analyzing the scope of a DDLA statute has determined that the statute does not apply to manufacturers or other entities whose conduct (right or wrong) occurs in the *legal drug market*.

For example, in *Schafer v. Shopko Stores, Inc.,* 741 N.W.2d 758 (S.D. 2007), the South Dakota Supreme Court declined to hold a pharmacy liable under its DDLA for lawfully selling a prescription drug that was subsequently diverted. An individual with a legal prescription

for morphine had asked an acquaintance to fill the prescription at a pharmacy due to his physical inability to travel. The acquaintance did so, as South Dakota law permits pharmacies to distribute prescription medications to a patient's agent. *Schafer,* 741 N.W.2d at 762. The acquaintance proceeded to consume some of the morphine himself and fatally overdosed, and his surviving children filed suit against the pharmacy, alleging that it had "participat[ed] in the illegal drug market" by dispensing the morphine to someone other than the patient. The court affirmed the grant of summary judgment in favor of the pharmacy, finding that "[t]here is no evidence that the Legislature adopted the DDLA for any purpose other than to impose civil liability on illegal drug dealers." *Id.* at 762. The Court added that to "interpret and apply the law as [plaintiff] urges would make [the defendant pharmacy] liable for a legal act," and that such an interpretation "is strained and would cause an absurd result." *Id.* at 763.

Similarly, in *Cooper v. Purdue Frederick Company, Inc.,* No. 08-3757, 2008 WL 11355004 (E.D. La. Nov. 5, 2008), a federal court considered whether Louisiana's DDLA applied to pharmaceutical companies. The user of a prescription opioid medication sued the manufacturer under the DDLA alleging the manufacturer fraudulently misrepresented the prescription opioid medication's addictiveness. The court held that the DDLA "establishes a cause of action against drug dealers, not pharmaceutical companies." *Id.* at *3 (internal quotation marks omitted). It added that prescription opioid medications are controlled substances that may be dispensed with a prescription, and that the DDLA therefore did not apply. *See id.* Notably, the court held

that the DDLA's liability provision did not cover pharmaceutical manufacturers without even relying on the fact that Louisiana's DDLA included an express exemption for those companies.

Ashley County v. Pfizer, 552 F.3d 659 (8th Cir. 2009), is also instructive. In that case, several Arkansas counties sued various pharmaceutical companies seeking "compensation to recoup the costs expended by the counties in dealing with the societal effects of the methamphetamine epidemic in Arkansas, with liability premised on the use of the Defendants' products in the methamphetamine manufacturing process." *Id.* at 663. In particular, the counties alleged that the "Defendants marketed and sold their products in Arkansas knowing that the products were being used illegally to manufacture methamphetamine." *Id.* The Eighth Circuit, however, affirmed judgment on the pleadings for the pharmaceutical defendants. The court specifically rejected the counties' attempt to use the Arkansas DDLA to "extend civil liability as a matter of public policy to the pharmaceutical manufacturers in this case," reasoning that the Act "is premised on 'damages caused by use of an illegal drug by an individual' . . . with the individual drug user being critical to the Act's provisions." *Id.* at 672 (citation omitted). The court concluded that the "Counties' assertion that this Act establishes a public policy holding manufacturers of products containing pseudoephedrine liable for societal costs, as opposed to costs related to individual drug users, is unavailing." *Id.*

And in *Whittemore v. Owens Healthcare-Retail Pharmacy, Inc.,* 111 Cal. Rptr. 3d 227 (Cal. Ct. App. 2010), a California appellate court affirmed the dismissal of a DDLA suit brought against a pharmacy that

allegedly failed to supervise an employee who diverted prescription opioid medications. The plaintiff alleged that the pharmacy "failed to properly monitor and account for controlled medications in their possession, and failed to report to the federal drug enforcement agency that certain medications had been lost, missing or stolen." *Whittemore*, 111 Cal. Rptr. 3d at 229–30. The appellate court dismissed the suit, explaining that while the employee who diverted the drugs could be liable under the DDLA, the defendant pharmacies could not because they did not knowingly participate in the illegal drug market. *Id.* at 232.

The decision below was the first of its kind in another respect: It was the first decision that allowed a suit to be prosecuted by a type of plaintiff other than specified by the statute. It was the first decision to hold that local prosecutors may sue in their own names while purportedly bringing the action on behalf of localities that never consented to that representation. Nothing in the text, structure, history, or purpose of Tennessee's DDLA indicates that the General Assembly intended to enact a revolutionary law that departs so dramatically from the model act and DDLAs passed in other states. The decision below was the first of its kind; the statute it construed was not.

CONCLUSION

Each of the four considerations in Rule 11 of the Tennessee Rules of Appellate Procedure support granting the Defendant-Applicants' Application. The Court should accept review in this case.

Respectfully submitted,

/s/ Sarah B. Miller
Jessalyn H. Zeigler (#16139)
Sarah B. Miller (#33441)
BASS, BERRY & SIMS PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
(615) 742-6289
jzeigler@bassberry.com
smiller@bassberry.com

Brien T. O'Connor
Andrew J. O'Connor
ROPES & GRAY LLP
Prudential Tower, 800 Boylston Street
Boston, MA 02199
(617) 235-4650
Brien.O'Connor@ropesgray.com
Andrew.O'Connor@ropesgray.com

Attorneys for Defendant MALLINCKRODT LLC

/s/ Ronald S. Range, Jr.
Ronald S. Range, Jr. (# 013928)
Chad E. Wallace (# 021741)
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC
100 Med Tech Parkway, Suite 200

Johnson City, TN 37604
(423) 975-7602
rrange@bakerdonelson.com
cwallace@bakerdonelson.com

Ingo W. Sprie, Jr.
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000
Ingo.Sprie@apks.com

R. Stanton Jones
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, D.C. 20001
(202) 942-5855
Stanton.Jones@arnoldporter.com

Attorneys for Defendants ENDO HEALTH SOLUTIONS INC. and ENDO PHARMACEUTICALS INC.

/s/ *Stuart Burkhalter*
Tim Warnock (# 012844)
Stuart Burkhalter (# 029078)
RILEY WARNOCK & JACOBSON, PLC
1906 West End Ave.
Nashville, TN 37203
(615) 320-3700
twarnock@rwjplc.com
sburkhalter@rwkplc.com

Megan R. Braden (admitted *pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, IL 60601
(312) 324-1145
megan.braden@morganlewis.com

Steven A. Reed (admitted *pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
(215) 963-5603
steven.reed@morganlewis.com

Attorneys for Defendant
TEVA PHARMACEUTICALS USA, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via email and/or U.S. Mail to the following:

Attorneys for Plaintiffs
Michael J. Wall
James G. Stranch, III
J. Gerard Stranch, IV
Tricia A. Herzfeld
Benjamin A. Gastel
BRANSTETTER, STRANCH & JENNINGS, PLLC
The Freedom Center
223 Rosa L. Parks A venue, Suite 200
Nashville, TN 37203
Telephone: (615) 254-8801
Facsimile: (615) 255-5419
michaelw@bsjfirm.com
jims@bsjfirm.com
gerards@bsjfirm.com
triciah@bsjfirm.com
beng@bsjfirm.com

William Killian
CAVETT ABBOTT & WEISS
801 Broad Street, Suite 428
Chattanooga, TN 37402
(423) 265-8804
billkillian@cawpllc.com

L. Jeffrey Hagood
Bradley H. Hodge
Timothy A. Householder
HAGOOD MOODY HODGE

Defendant Joshua Hurst
Joshua Hurst, Inmate
TOMIS ID 00578005
Turney Center Industrial Complex
1499 RW Moore Memorial Rt. Hwy.
Only, TN 37140

Attorney for Defendant Gary Arlan Moore
Edward A. Hadley
NORTH, PURSELL & RAMOS, PLC
414 Union Street, Suite 1850
Nashville, TN 37219
Telephone: (615) 255-2555
Facsimile: (615) 255-0032
ehadley@nprattorneys.com

Attorney for Defendant Timothy Gowder
Gregory P. Isaacs
THE ISAACS LAW FIRM
618 s Gay Street, #300
Knoxville, TN 37902
Telephone: (865) 673-4953

900 S. Gay Street, Suite 2100
Knoxville, TN 37902
(865) 525-7313
jeffhagood@hagoodmoodyhodge.com
tim@hagoodmoodyhodge.com
bradhodge@hagoodmoodyhodge.com

Attorney for the Tennessee District Attorneys General Conference
Jerry Estes
226 Anne Dallas Boulevard, Suite 800
Nashville, TN 37243
Phone: (615) 741-1696
jnestes@tndagc.org

Defendant Tennessee Pain Institute
Tennessee Pain Institute
Via Its Registered Agent
Edward A. Hadley, Esq.
414 Union Street, Suite 1850
Nashville, TN 37219

Attorneys for Purdue Pharma L.P., Purdue Pharma, Inc. and The Purdue Frederick Company, Inc.
Aubrey B. Harwell, Jr.
James G. Thomas
Mariam A. Stockton
William J. Harbison, II
NEAL & HARWELL, PLC
1201 Demonbreum Street, Ste 1000
Nashville, TN 37203
(615) 244-1713
aharwell@nealharwell.com
jthomas@nealharwell.com
mstockton@nealharwell.com
jharbison@nealharwell.com

Sheila L. Birnbaum
Mark S. Cheffo
Bert Wolff
DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036
sheila.birnbaum@dechert.com
mark.cheffo@dechert.com
bert.wolff@dechert.com

Dated this the 12th day of November, 2019,

/s/ Sarah B. Miller

EXHIBIT A

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 18, 2019 Session

JARED EFFLER, ET AL. v. PURDUE PHARMA L.P., ET AL.

Appeal from the Circuit Court for Campbell County
No. 16596 John D. McAfee, Judge

No. E2018-01994-COA-R3-CV

JUDGMENT

This appeal came on to be heard upon the record of the Circuit Court of Campbell County, briefs filed on behalf of the respective parties, and oral argument. This Court is of the opinion that this appeal should be reversed.

It is therefore ORDERED and ADJUDGED by this Court that the judgment of the Circuit Court of Campbell County is reversed, and this cause is remanded to the Circuit Court of Campbell County for collection of costs below and for further proceedings consistent with our Opinion. Costs on appeal are taxed against the Appellees, Endo Health Solutions, Inc., Endo Pharmaceuticals, Inc., Purdue Pharma, L.P., Purdue Pharma, Inc., The Purdue Frederick Company, Inc., Mallinckrodt LLC, and Teva Pharmaceuticals USA, Inc.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 18, 2019 Session

JARED EFFLER, ET AL. v. PURDUE PHARMA L.P., ET AL.

Appeal from the Circuit Court for Campbell County
No. 16596 John D. McAfee, Judge

No. E2018-01994-COA-R3-CV

This appeal concerns the interpretation of the Drug Dealer Liability Act, Tenn. Code Ann. § 29-38-101, -116 ("DDLA"). A number of Tennessee district attorneys ("the District Attorney Plaintiffs"), as well as two minor children through their guardian ad litem ("Plaintiffs," all together), sued certain drug manufacturers ("Manufacturer Defendants") and others in the Circuit Court for Campbell County ("the Trial Court") alleging the diversion of opioids.[1] Manufacturer Defendants filed a motion to dismiss. The Trial Court, in granting the motion to dismiss, held that the DDLA does not apply to manufacturers who lawfully produce drugs and that Plaintiffs had failed to state a claim upon which relief can be granted. Plaintiffs appeal, arguing that their complaint contained allegations sufficient to withstand the motion to dismiss. Manufacturer Defendants contend that the DDLA applies to "street dealers," not regulated entities such as themselves. In addition, Manufacturer Defendants argue that the District Attorney Plaintiffs lack standing. We hold, first, that the DDLA allows district attorneys to pursue DDLA claims on behalf of the political subdivisions within their respective judicial districts. Thus, the District Attorney Plaintiffs have standing. We hold further that, taking as true Plaintiffs' detailed allegations that Manufacturer Defendants knowingly participated in the diversion of opioids, Plaintiffs have stated claims upon which relief can be granted. We reverse the judgment of the Trial Court and remand for this case to proceed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Case Remanded

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S. and THOMAS R. FRIERSON, II, J., joined.

[1] "Diversion" means, for these purposes, the redirection of a drug from a proper use to an illicit use.

Michael J. Wall, James G. Stranch, III, J. Gerard Stranch, IV, Tricia Herzfeld, Benjamin A. Gastel, and Anthony Orlandi, Nashville, Tennessee, for the appellants, Baby Doe #1 and Baby Doe #2, as well as District Attorneys Jared Effler, Eighth Judicial District; Charme Allen, Sixth Judicial District; Dave Clark, Seventh Judicial District; Russell Johnson, Ninth Judicial District; Stephen Crump, Tenth Judicial District; Jimmy Dunn, Fourth Judicial District; and, Mike Taylor, Twelfth Judicial District.[2]

Ronald S. Range, Jr. and Chad E. Wallace, Johnson City, Tennessee; Ingo W. Sprie, Jr., New York, New York; and, R. Stanton Jones, Washington, D.C., for the appellees, Endo Health Solutions, Inc. and Endo Pharmaceuticals, Inc.

Aubrey B. Harwell, Jr., James G. Thomas, Mariam A. Stockton, and William J. Harbison, II, Nashville, Tennessee; Sheila L. Birnbaum, Mark S. Cheffo, and Bert Wolff, New York, New York, for the appellees, Purdue Pharma, L.P., Purdue Pharma, Inc., and The Purdue Frederick Company, Inc.

Jessalyn H. Zeigler and Sarah B. Miller, Nashville, Tennessee; David H. Stanifer, Tazewell, Tennessee; and, Brien J. O'Connor and Andrew J. O'Connor, Boston, Massachusetts, for the appellee, Mallinckrodt LLC.

Tim Warnock and Stuart Burkhalter, Nashville, Tennessee; Tinos Diamantatos (admitted *pro hac vice*) and Megan R. Braden (admitted *pro hac vice*), Chicago, Illinois; Steven A. Reed (admitted *pro hac vice*), Philadelphia, Pennsylvania; and, Brian M. Ercole, Miami, Florida, for the appellee, Teva Pharmaceuticals USA, Inc.

Jerry N. Estes, Nashville, Tennessee, for amicus curiae, the Tennessee District Attorneys General Conference.

Douglas S. Johnston, Nashville, Tennessee, for amicus curiae, the Tennessee Municipal League.

Andrew E. Farmer, Sevierville, Tennessee, for amicus curiae, the United Way of Greater Kingsport.

Gary R. Wade, Knoxville, Tennessee, for amici curiae, the local Chambers of Commerce of Bristol, TN/VA and Johnson City.

---

[2] The District Attorney Plaintiffs purport to act in their official capacities on behalf of the political subdivisions within their respective judicial districts. Their standing to pursue DDLA claims in this manner is an issue we address herein.

OPINION

Background

In this appeal, we address questions regarding the DDLA, an Act establishing a civil cause of action for persons injured by illegal drugs against persons participating in the illegal drug market in Tennessee. This case began in September 2017 when Plaintiffs sued Manufacturer Defendants, as well as a pain clinic and certain individual defendants, in the Trial Court. Plaintiffs pursued DDLA and public nuisance claims stemming from the alleged diversion of prescription opioids. The Attorney General of Tennessee moved to intervene. Plaintiffs later voluntarily dismissed their nuisance claims as well as any DDLA claim on behalf of the State, and consequently the Attorney General withdrew his motion to intervene. In June 2018, Plaintiffs filed their Third Amended Complaint, which is the operative complaint. In the Third Amended Complaint, Plaintiffs pressed forward with their DDLA claims on behalf of the political subdivisions within the District Attorney Plaintiffs' judicial districts and the Baby Doe plaintiffs.

As this case was resolved on a motion to dismiss, the allegations contained in the Third Amended Complaint are of central importance. We therefore deem it appropriate to set out some, though not all, of the Third Amended Complaint, which takes up over an entire volume of the technical record. Plaintiffs alleged, in part:

> 276. After helping to create the opioid epidemic, Purdue has worked to sustain that illegal opioids market and to continue profiting from it.
> 277. There were nearly twelve million (11,788,252) prescriptions of popular branded and generic opioid products containing hydromorphone, oxymorphone, oxycodone, and hydrocodone in the State of Tennessee for the 24-month period of September, 2015 through August, 2017 according to IMS data.
> 278. Purdue's average market share of oxycodone in Tennessee from 2015 to 2017 was nearly 5%, led by its popular brand product OxyContin. Based on this market share over the course of this same period, OxyContin was prescribed approximately 32,750 times in Knoxville (population 186,239), 19,550 times in Chattanooga (population 177,571), and 3,417 times in Cleveland, TN (population 44,271).
> 279. Purdue knows exactly how much of its product flows into the Opioid Epidemic Affected Counties. On the heels of its 2007 plea agreement, Purdue approached wholesalers and struck agreements allowing the company access to their sales reports. This data allowed Purdue's security team to track all wholesalers' OxyContin sales to individual pharmacies, down to the pill.

280. Purdue is also put on notice when OxyContin is likely being diverted in the Opioid Epidemic Affected Counties, and can react by halting shipments into the affected areas. In July 2016, Purdue's general counsel acknowledged that the company is "required to monitor and report suspicious orders to the DEA," and that while Purdue cannot halt shipments to suspect pharmacies, they "can and have reduced the product they ship to a wholesaler if they have concerns about the customer at the end of the supply chain."

281. Purdue tracked physicians' prescribing practices by reviewing pharmacy prescription data it obtained from IMS Health. Rather than reporting highly suspicious prescribing practices, Purdue used the data to identify physicians who prescribed some opioids and might be persuaded to prescribe more.

***

314. Mallinckrodt knowingly entered and participated in the illegal drug market in Tennessee and the Opioid Epidemic Affected Counties. Mallinckrodt is aware of the extraordinary volume of opioid prescriptions in Tennessee in relation to other states referenced above, as well as the flood of opioids into East Tennessee at levels that cannot be medically justified. As reported by the CDC, Tennessee's oxycodone prescription rate is twenty-two times that of Minnesota's. Mallinckrodt knew (and knows) that such inflated prescribing necessarily reflects improper prescribing and diversion of opioids, including Mallinckrodt's products.

315. Mallinckrodt knowingly participated in the illegal drug market in Tennessee and elsewhere by knowingly shirking its responsibility to detect and investigate suspicious orders, for which it was cited by the DEA. It also admitted that it had failed to stop downstream diversion despite being on notice that diversion was occurring. Despite controlling nearly 25% of the opioids market in Tennessee, Mallinckrodt has failed to take meaningful or effective measures to stop the open and notorious downstream diversion that precipitated its July 2017 settlement. To the contrary, it has continued to supply opioids into Tennessee, East Tennessee, and the Opioid Epidemic Affected Counties unabated, despite awareness that a substantial volume of those drugs are being abused and diverted into an illegal market.

316. Additionally, Mallinckrodt possesses, or has access to, the non-public information necessary to monitor, investigate, report, and prevent suspicious orders and illegal diversion, but has knowingly failed to do so.

***

332. Endo knowingly entered and participated in the illegal drug marketing in Tennessee and the Opioid Epidemic Affected Counties. Endo is aware of the extraordinary and unjustifiable volume of opioid prescriptions in Tennessee in relation to other states. Endo knew that such inflated prescribing necessarily reflects improper prescribing and diversion of opioids, including Endo's products. On information and belief, Endo also knowingly participated in the illegal drug market in the Opioid Epidemic Affected Counties by supplying quantities of its products to physicians and pharmacies whose prescribing habits necessarily or likely reflected unlawful diversion.

333. Additionally, Endo possesses, or has access to, the non-public information necessary to monitor, investigate, report, and prevent suspicious orders and illegal diversion, but has knowingly failed to do so.

***

338. Teva continues to flood East Tennessee with opioids in an amount that clearly contributes to the illegal opioid drug market.

339. Teva's generic oxycodone and hydrocodone products both represent the largest market share for either product throughout Tennessee, as well as specific cities in and around the Opioid Epidemic Affected Counties, according to IMS Health Data. These quantities of opioid pills clearly exceed the number that would be appropriate for normally prescribed therapeutic use and contribute to the illegal East Tennessee opioid market.

340. On information and belief, Teva also knowingly participated in the illegal drug market in Tennessee by supplying suspicious quantities of its products to suspect physicians and pharmacies in Tennessee, without disclosing suspicious orders as required by applicable regulations.

***

349. Upon information and belief, Purdue, Mallinckrodt, Endo, and Teva each maintained an internal database of HCPs [healthcare providers] suspected of inappropriately prescribing opioids. HCPs could be added to the database based on observed indicators of illicit prescribing such as excessive numbers of patients, cash transactions, patient overdoses, and unusual prescribing of the highest-strength pills. In particular, Purdue, Mallinckrodt, Endo, and Teva tracked HCPs' prescribing practices using data obtained from IMS Health, which allowed them to identify HCPs

writing excessively large numbers of prescriptions, particularly for high doses, which is a potential sign of diversion and drug dealing.

350. Purdue, Mallinckrodt, Endo, and Teva failed to cut off these HCPs' prescription opioid supply at the pharmacy level — meaning the pharmaceutical drug producers continued to generate sales revenue from their prescriptions — and failed to report the unscrupulous providers to state medical boards and state and federal law enforcement agencies.

351. Upon information and belief, Purdue, Mallinckrodt, Endo, and Teva also possess what is known as "chargeback" data from their distributors that can be used to evaluate suspicious downstream orders of prescription opioids. As reported in the Washington Post, there is an "industry-wide practice" whereby pharmaceutical drug producers pay their distributors rebates and/or "chargebacks" on prescription opioid sales. In return, the distributors provide Purdue, Mallinckrodt, Endo, and Teva with downstream purchasing information, which allows them to track their prescription opioids down the entire supply chain, all the way to the retail level.

352. Using chargeback data, Purdue, Mallinckrodt, Endo, and Teva knew — just as the prescription opioid distributors knew — the volume, frequency, and pattern of prescription opioid orders being placed and filled. By failing to report and/or prevent suspicious orders, Purdue, Mallinckrodt, Endo, and Teva enabled the supply of prescription opioids to obviously suspicious physicians and pharmacies, enabled the illegal diversion of prescription opioids, aided criminal activity and disseminated massive quantities of prescription opioids into the black market.

***

450. Having illegally distributed hydrocodone, oxycodone, oxymorphone, OxyContin, Roxicodone, and Opana, the drugs used by their birth mothers in the "place of illegal drug activity" where the birth mothers consumed them during their pregnancies, and participated in that illegal distribution during their pregnancies, Defendants are liable to Plaintiffs BABY DOE #1 and BABY DOE #2 under the DDLA even for damages caused by opioids that were acquired from distribution channels in which Defendants were a market participant.

***

465. Defendants knowingly participated in the production and/or distribution of prescription opioids that reached the Opioid Epidemic

> Affected Counties during all times relevant to this complaint. For purposes of the DDLA, Defendants' "illegal drug market target community" is the entire state of Tennessee, because Defendants participated in the illegal drug market by distributing 4 ounces or more of a "specified illegal drug." Tenn. Code Ann §§ 29-38-104(8), 29-38-109(4). As noted by the Tennessee Department of Health in a 2015 presentation, the Tennessee market for hydrocodone and oxycodone pills comprised of 51 hydrocodone pills and 21 oxycodone pills for every Tennessean. Commissioner of Health Dreyzehner noted that 50% of mothers of NAS babies obtained their pills, in whole or in part, from diverted pills (28.7% solely from diverted drugs). Given that a single oxycodone tablet, on information and belief, weighs approximately 135 mg and contains at least 10 mg of opioid, there can be no question that each of Purdue, Mallinckrodt, Endo and Teva far exceeded the four-ounce level.
>
> 466. Purdue, Mallinckrodt, Endo, and Teva knowingly failed to implement effective controls and procedures in their supply chains to guard against theft, diversion, and abuse of prescription opioids, and failed to adequately design and operate a system to detect, halt, and report suspicious orders of prescription opioids.
>
> ***
>
> 475. The District Attorney Plaintiffs bring this action under the DDLA to hold the Defendants civilly liable for the devastation that their facilitation of the illegal opioids market in East Tennessee has wrought. In so doing, they are vindicating the stated purpose of the DDLA to undermine the sprawling illegal opioids market in their communities using civil liability.

(Footnotes omitted). In July 2018, Manufacturer Defendants filed a motion to dismiss the Third Amended Complaint, relying on Tenn. R. Civ. P. 12.02(1) and (6). On October 5, 2018, the Trial Court granted Manufacturer Defendants' motion to dismiss for failure to state a claim upon which relief can be granted. On October 22, 2018, the Trial Court directed entry of final judgment as to Manufacturer Defendants.[3] In its October 5, 2018 order granting Manufacturer Defendants' motion to dismiss, the Trial Court stated, as pertinent to this appeal:

> 4. The Plaintiffs seek to hold the Manufacturer Defendants liable under the Tennessee Drug Dealer Liability Act (DDLA), Tenn. Code Ann. 29-38-

[3] The claims against the local defendants remain active. This appeal pertains to Manufacturer Defendants only.

101, *et seq.*, for the harm caused by third parties who have illegally distributed opioid medications. Plaintiffs argue that, by over producing opioid medications and not preventing third parties from illegally distributing those medications, the Manufacturer Defendants became drug dealers participating in an "illegal drug market" and are subject to the DDLA.

5. The Manufacturer Defendants move to dismiss arguing that the plaintiffs have failed to state a claim upon which relief can be granted and assert four grounds in their motion: (1) that the plaintiffs have failed to state a claim under the DDLA; (2) that the plaintiffs have failed to link alleged damages to specific drug users; (3) that the district attorneys general lack standing to assert claims for damages allegedly incurred by counties and cities; and (4) that all claims outside the two year statute of limitation period should be barred.

LEGAL STANDARD

6. Tennessee has a high bar for granting a motion to dismiss pursuant to Tenn. R. Civ. P. 12.02(6). The court must construe the complaint in the light most favorable to the nonmoving party and presume the pleadings to be true. The motion only tests the legal sufficiency of the plaintiff's pleadings, not the strength of its proof. The motion contemplates that all relevant and material allegations in the complaint, even if true and correct, do not constitute a cause of action.

DISCUSSION

7. The DDLA provides a civil remedy for damages to persons in a community injured as a result of illegal drug use. It enables injured persons to recover damages, including attorney fees, from those persons in the community who have joined the illegal drug market. Please see Tenn. Code Ann. 29-38-102. The DDLA defines an "illegal drug market" as the support system of illegal drug related operations, from production to retail sales, through which an illegal drug reaches the user. The DDLA defines an "illegal drug" as a drug, the distribution of which is a violation of state law. Please see Tenn. Code Ann. 29-38-104.

8. The opioid medications the Manufacturer Defendants produce are legal under federal and state law and are FDA approved. The Manufacturer Defendants sell and distribute opioid medications to licensed distributors;

those licensed distributors, not the Manufacturer Defendants, thereafter control distribution of the medications. The Manufacturer Defendants and licensed distributors are registered with the Drug Enforcement Administration (DEA).

9. The plaintiffs are claiming that the Manufacturer Defendants distributed "illegal drugs" and participated in an "illegal drug market" by selling more opioid tablets than could be appropriately prescribed by doctors and by not preventing third parties from illegally diverting or improperly prescribing opioid medications. Although the original manufacturing and distribution of opioid medication may have been legal, the plaintiffs argue by failing to take necessary and appropriate steps to limit production and prevent subsequent illegal distribution subjects the Manufacturing Defendants to liability under the DDLA. In essence, the plaintiffs purport that the Manufacturer Defendants have a duty to protect the plaintiffs from the excess production of opioid medications and the criminal activity of other unrelated actors.

CONCLUSION

10. As a matter of Tennessee law, it is legal for the Manufacturer Defendants to make FDA-approved medications and sell them to DEA-registered distributors. Please see Tenn. Code Ann. 53-11-303(d), 63-1-154(a)(8). The Manufacturer Defendants have obligations to monitor and report suspicious opioid medication orders to the DEA. Please see 21 C.F.R. 1301.74(b). (The court is unaware of any such reporting obligations to counties or cities or anyone else.)

11. The Plaintiffs' complaint, even if true and correct, is void of any allegations showing that the Manufacturer Defendants distributed "illegal drugs" or participated in an "illegal drug market" as defined in the DDLA. The Manufacturer Defendants produced and distributed legal opioid medications. The Court disagrees with the plaintiff's assertion that because of the Manufacturer Defendants' business and marketing practices, the otherwise legal production and distribution of opioid medications becomes illegal by over producing and by the subsequent criminal conduct of other unrelated actors. Pharmaceutical companies that manufacture FDA-approved opioid medications and sell to DEA-licensed distributors are not "drug dealers" as contemplated by the DDLA. In other words, the DDLA does not apply to manufacturers who are legally producing and distributing

opioid medications. Therefore, the Manufacturer Defendants' Motion to Dismiss is GRANTED.

12. Having already resolved in favor of the Manufacturer Defendants, it is not necessary for the court to consider the remaining grounds to dismiss, and the court declines to do so.

Plaintiffs timely appealed to this Court.

Discussion

Although not stated exactly as such, Plaintiffs raise the following single issue on appeal: whether the Trial Court erred by granting Manufacturer Defendants' motion to dismiss for failure to state a claim. Manufacturer Defendants raise a separate additional issue on appeal: whether the District Attorney Plaintiffs lack standing under the DDLA to bring this suit without authorization from the counties, cities, and towns they purport to represent. A number of organizations have filed amicus curiae briefs in support of Plaintiffs.

The issues on appeal require us to interpret the DDLA. Our Supreme Court has given guidance with regard to the interpretation of statutes, stating:

> Statutory interpretation and the application of a statute to the facts of a case involve questions of law and are reviewed under a de novo standard of review with no presumption of correctness afforded to the trial court. *Tenn. Dep't of Corr. v. Pressley*, 528 S.W.3d 506, 512 (Tenn. 2017); *Arden v. Kozawa*, 466 S.W.3d 758, 764 (Tenn. 2015). We thus independently review the relevant provisions of the Charter without any deference to the interpretations of the Commission or the trial court. *See Pressley*, 528 S.W.3d at 512.
>
> The overriding purpose of a court in construing a statute is to ascertain and effectuate the legislative intent, without either expanding or contracting the statute's intended scope. *Ray v. Madison Cnty., Tenn.*, 536 S.W.3d 824, 831 (Tenn. 2017); *Pressley*, 528 S.W.3d at 512. Legislative intent is first and foremost reflected in the language of the statute. *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010). "We presume that the Legislature intended each word in a statute to have a specific purpose and meaning." *Arden*, 466 S.W.3d at 764. The words used in a statute are to be given their natural and ordinary meaning, and, because "words are known by the company they keep," we construe them

in the context in which they appear and in light of the general purpose of the statute. *Lee Medical*, 312 S.W.3d at 526; *Ray*, 536 S.W.3d at 831. "We endeavor to construe statutes in a reasonable manner 'which avoids statutory conflict and provides for harmonious operation of the laws.' " *Ray*, 536 S.W.3d at 831 (citation omitted). When a statute's text is clear and unambiguous, we need look no further than the language of the statute itself. *Lee Medical*, 312 S.W.3d at 527. "We simply apply the plain meaning without complicating the task." *Pressley*, 528 S.W.3d at 513.

When, however, the language of a statute is ambiguous, we resort to rules of statutory construction and external sources in order to ascertain and give effect to the legislative intent. *Lee Medical*, 312 S.W.3d at 527; *Ray*, 536 S.W.3d at 832. These external sources may include the broader statutory scheme, the history and purpose of the legislation, public policy, historical facts preceding or contemporaneous with the enactment of the statute, and legislative history. *Lee Medical*, 312 S.W.3d at 527-28; *Ray*, 536 S.W.3d at 831-32. The language of a statute is ambiguous when it is subject to differing interpretations which yield contrary results. *In re Hogue*, 286 S.W.3d 890, 894 (Tenn. 2009). "This proposition does not mean that an ambiguity exists merely because the parties proffer different interpretations of the statute. A party cannot create an ambiguity by presenting a nonsensical or clearly erroneous interpretation of a statute." *Powers v. State*, 343 S.W.3d 36, 50 n. 20 (Tenn. 2011).

Wallace v. Metro. Gov't of Nashville, 546 S.W.3d 47, 52-53 (Tenn. 2018) (footnotes omitted). "[T]his Court traditionally gives a liberal construction to remedial statutes, so long as the legislative intent is not disturbed and the result is not clearly contrary to the language of the statutes . . . ." *Lipscomb v. Doe*, 32 S.W.3d 840, 847 (Tenn. 2000).

We first address Manufacturer Defendants' issue of whether the District Attorney Plaintiffs lack standing. Manufacturer Defendants point out that in a statutory list of persons who may bring an action under the DDLA, district attorneys are conspicuously absent. The DDLA states:

(a) One (1) or more of the following persons may bring an action for damages caused by an individual's use of an illegal drug:

(1) A parent, legal guardian, child, spouse, or sibling of the individual drug user;

(2) An individual who was exposed to an illegal drug in utero;

(3) An employer of the individual drug user;

(4) A medical facility, insurer, governmental entity, employer, or other entity that funds a drug treatment program or employee assistance program for the individual drug user, or that otherwise expended money on behalf of the individual drug user; or

(5) A person injured as a result of the willful, reckless, or negligent actions of an individual drug user.

Tenn. Code Ann. § 29-38-106(a) (2012).

Indeed, district attorneys are not mentioned. Elsewhere in the DDLA, however, there is a provision that Plaintiffs cite in support of their contention that district attorneys have standing to bring DDLA claims on behalf of the political subdivisions in their respective judicial districts. This provision provides that "[a] prosecuting attorney may represent the state or a political subdivision of the state in an action brought under this chapter." Tenn. Code Ann. § 29-38-116(a) (2012). There is no dispute that the District Attorney Plaintiffs qualify as prosecuting attorneys, but their standing to sue is disputed sharply. Manufacturer Defendants argue that Tenn. Code Ann. § 29-38-116(a) means that the state or political subdivisions of the state may retain prosecuting attorneys to represent them as counsel in a DDLA lawsuit, not that prosecuting attorneys may file DDLA lawsuits on behalf of the state or political subdivisions on their own initiative. According to Manufacturer Defendants, the District Attorney Plaintiffs lack the necessary approval from their localities to bring this lawsuit, and, therefore, lack standing.

Related to this issue, Manufacturer Defendants have filed on appeal their "Motion to Consider Post-Judgment Facts" and "Motion for Leave to File Reply Brief in Support of Motion to Consider Post-Judgment Facts" in which they bring to our attention the separate case of *Staubus v. Purdue Pharma L.P.*, Case No. C-41916, a case brought by another group of district attorneys. Manufacturer Defendants argue that a position taken by plaintiffs in that case, that the district attorneys sue in their own right, sheds further light on the wrongness of Plaintiffs' position with respect to the District Attorney Plaintiffs' standing. In their response, Plaintiffs point out, among other things, that these cases involve different plaintiffs and different local governments.

We agree with Plaintiffs that they are not bound by positions allegedly adopted by different parties in another case. That information is immaterial to our consideration of the issues and parties currently before us. Moreover, we do not even discern a real contradiction in the positions taken. Finally, this is a matter of statutory construction. It does not hinge on the positions of counsel. These filings by Manufacturer Defendants do

not aid in resolving the issue of the District Attorney Plaintiffs' standing or lack thereof. We therefore deny Manufacturer Defendants' "Motion to Consider Post-Judgment Facts" and "Motion for Leave to File Reply Brief in Support of Motion to Consider Post-Judgment Facts."

Returning to standing, we observe that Tenn. Code Ann. § 29-38-116(a), which enables prosecuting attorneys to "represent the state or a political subdivision of the state in an action" brought under the DDLA, is amenable to competing interpretations. It could mean, as Manufacturer Defendants insist, that prosecuting attorneys—such as the District Attorney Plaintiffs—simply may be called upon to serve as counsel for "the state or a political subdivision of the state . . . ." Under that interpretation, the District Attorney Plaintiffs were not at liberty to exercise their own, independent discretion to file this DDLA lawsuit on behalf of political subdivisions, and thus lack standing.

Plaintiffs' interpretation also is viable, however. In Plaintiffs' interpretation, to "represent" means what it does when a district attorney represents the State in a criminal matter. District attorneys do not obtain permission from other governmental officials before initiating a criminal prosecution, for instance. They instead act on their own discretion.

Both Plaintiffs and Manufacturer Defendants advance reasonable interpretations of the statute. This being so, we must look to the broader purposes of the DDLA to resolve the question. The legislative purpose of the DDLA is articulated as follows:

> The purpose of this chapter is to provide a civil remedy for damages to persons in a community injured as a result of illegal drug use. These persons include parents, employers, insurers, governmental entities, and others who pay for drug treatment or employee assistance programs, as well as infants injured as a result of exposure to drugs in utero, referred to in this chapter as "drug babies." The chapter will enable injured persons to recover damages from those persons in the community who have joined the illegal drug market. A further purpose of the chapter is to shift, to the extent possible, the cost of the damage caused by the existence of the illegal drug market in a community to those who illegally profit from that market. The further purpose of the chapter is to establish the prospect of substantial monetary loss as a deterrent to those who have not yet entered into the illegal drug distribution market. The further purpose is to establish an incentive for drug users to identify and seek payment for their own drug treatment from those dealers who have sold drugs to the user in the past.

Tenn. Code Ann. § 29-38-102 (2012).

In construing a statute, we attempt to effectuate, rather than frustrate, its purpose where possible. Construing Tenn. Code Ann. § 29-38-116(a) to mean merely that district attorneys may be lawyers for the state or its political subdivisions would inhibit the undisputed remedial aims of the DDLA. In this scenario, district attorneys would be mere standby counsel for localities as opposed to independent parties fully empowered to utilize the DDLA to deter entry into the illegal drug market and shift costs to the beneficiaries of the illegal drug market. As Plaintiffs point out, district attorneys regularly exercise their discretion to initiate criminal prosecutions without first obtaining permission from any political leader.

We are unpersuaded by Manufacturer Defendants' contention that the General Assembly specially included this provision in the DDLA merely to let prosecuting attorneys serve as lawyers to localities. The better interpretation to effectuate the legislative intent of this remedial statute, which we adopt, is that district attorneys may file DDLA claims on behalf of the political subdivisions within their respective judicial districts. While both sides present reasonable interpretations of Tenn. Code Ann. § 29-38-116(a), Plaintiffs' interpretation is, in our judgment, far and away much more likely to give effect to the legislative intent of the remedial purpose of the DDLA and "the legislative intent is not disturbed and the result is not clearly contrary to the language of the statutes . . . ." *Lipscomb*, 32 S.W.3d at 847. We hold that the District Attorney Plaintiffs have standing.

The next and final issue we address is Plaintiffs' issue of whether the Trial Court erred by granting Manufacturer Defendants' motion to dismiss. As our Supreme Court has instructed:

> Our review of a dismissal for failure to state a claim under Rule 12.02 of the Tennessee Rules of Civil Procedure requires us to take the allegations in the complaint as true. *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002). This is because a motion filed under Rule 12.02(6) tests "the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). By filing their motion to dismiss, the defendants effectively " 'admit[ted] the truth of all of the relevant and material allegations contained in the complaint, but ... assert[ed] that the allegations fail to establish a cause of action.' " *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 516 (Tenn. 2005) (quoting *Leach v. Taylor*, 124 S.W.3d 87, 90 (Tenn. 2004)). As such, courts "should grant a motion to dismiss only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Crews*, 78 S.W.3d at 857. On appeal, we review the "trial court's decision

> to dismiss a petition for failure to state a claim . . . de novo with no presumption of correctness." *Metro. Gov't of Nashville v. Bd. of Zoning Appeals of Nashville*, 477 S.W.3d 750, 754 (Tenn. 2015) (citing *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999)).

Nelson v. Myres, 545 S.W.3d 428, 430-31 (Tenn. 2018).

Manufacturer Defendants contend that the DDLA was intended to establish liability for "street dealers," not legal participants in a regulated marketplace such as themselves. In response, Plaintiffs assert that the DDLA makes no distinction between "street dealers" and drug manufacturers. For resolution, we look to the DDLA and other pertinent law.

An illegal drug is defined in the DDLA as "a drug, the distribution of which is a violation of state law." Tenn. Code Ann. § 29-38-104(1) (2012). The DDLA includes a category of "specified illegal drug" meaning "cocaine, heroin, or methamphetamine, or any other drug the distribution of which is a violation of state law." Tenn. Code Ann. § 29-38-104(14) (2012). The illegal drug market is defined as "the support system of illegal drug related operations, from production to retail sales, through which an illegal drug reaches the user." Tenn. Code Ann. § 29-38-104(2) (2012). "A person who knowingly participates in the illegal drug market within this state is liable for civil damages as provided in this chapter . . . ." Tenn. Code Ann. § 29-38-105(a) (2012). The DDLA defines a "person" as "individual, governmental entity, corporation, firm, trust, partnership, or incorporated or unincorporated association, existing under or authorized by the laws of this state, another state, or foreign country." Tenn. Code Ann. § 29-38-104(11) (2012). Participation in the illegal drug market means "to distribute, possess with an intent to distribute, commit an act intended to facilitate the marketing or distribution of, or agree to distribute, possess with an intent to distribute, or commit an act intended to facilitate the marketing or distribution of an illegal drug . . . ." Tenn. Code Ann. § 29-38-104(9) (2012). The drugs at issue in this case are classified by Tennessee as Schedule II and include hydrocodone, hydromorphone, oxycodone, and oxymorphone. *See* Tenn. Code Ann. § 39-17-408(b)(1)(F), (G), (M), & (N) (2018). Schedule II drugs require, except when administered directly to a patient by a doctor, a prescription from a healthcare provider in order to be dispensed lawfully. *See* Tenn. Code Ann. § 53-11-308(a) (Supp. 2018).

No Tennessee case provides guidance on whether drug manufacturers may be liable under the DDLA. Manufacturer Defendants point to three principal cases from other jurisdictions in support of their position. In *Schafer v. Shopko Stores, Inc.*, 741 N.W.2d 758, 762 (S.D. 2007), the South Dakota Supreme Court affirmed the grant of summary judgment in favor of a pharmacy, finding that "[t]here is no evidence that the

Legislature adopted the DDLA for any purpose other than to impose civil liability on illegal drug dealers." In *Whittemore v. Owens Healthcare-Retail Pharmacy, Inc.*, 111 Cal. Rptr. 3d 227, 232 (3d Dist. 2010), a California appellate court affirming the dismissal of a lawsuit held that, although a pharmacy's employee could be liable, the defendant pharmacies could not be liable because "they did not 'knowingly' participate in the marketing of the drugs . . . ." Finally, in *Cooper v. Purdue Frederick Company, Inc.*, No. 08-3757, 2008 WL 11355004, at *3 (E.D. La. Nov. 5, 2008), a federal court flat out stated that "[t]he Louisiana Drug Dealer Act establishes 'a cause of action against drug dealers,' not pharmaceutical companies."

With respect to these cases from other jurisdictions, they are not binding on this Court. The DDLA does not confine itself to "street drugs" or "street dealers." What matters under the DDLA is that a person, as defined in the Act, knowingly participates in the illegal drug market. A "person" may be a corporate entity, and a drug's legality depends on the context—that is, whether it is prescribed, whether its sale or distribution conforms to state law, etc. Manufacturer Defendants posit that, by definition, they cannot be drug dealers under the DDLA. They point out that the drugs they produce are FDA-approved and DEA-regulated. That, however, begs the question. Drug manufacturers cannot, as is alleged here, knowingly seek out suspect doctors and pharmacies, oversupply them with opioids for the purpose of diversion, benefit from the process, and then cynically invoke their status as otherwise lawful companies to avoid civil liability. The common perception of a drug dealer may be that of the street dealer, but the DDLA does not make that distinction.

We acknowledge that, in conformity with state and federal law, the manufacture of opioids is a legitimate endeavor. There are perfectly sound medical applications for these drugs. Our interpretation of the DDLA is not that drug manufacturers are liable every time one of their products is misused by a third party. We do, however, reject the view that a drug manufacturer can never be liable under the DDLA even when it *knowingly* exceeds the boundaries of its regulated framework, as is alleged here. We find no support in the DDLA for Manufacturer Defendants' contention that they are exempt from the Act.

Having determined that drug manufacturers may be liable under the DDLA, we now need determine whether Plaintiffs' complaint is sufficient to survive Manufacturer Defendants' motion to dismiss. We are required to accept Plaintiffs' allegations as true at this stage. Plaintiffs' 100-plus page Third Amended Complaint contains a litany of allegations, some highly specific, as to Manufacturer Defendants' activities with regard to the diversion of opioids in Tennessee, as well as the destruction in communities caused by this diversion. If Plaintiffs' allegations are correct, as, again, we must presume them to be at this motion to dismiss stage, Manufacturer Defendants knowingly flooded the

affected areas with drugs they *knew* were to be diverted. Plaintiffs do not allege that these events occurred simply as a result of neglect. For example, Plaintiffs allege that Manufacturer Defendants actively identified suspect pharmacies to provide with opioids. According to Plaintiffs, Manufacturer Defendants *knew* about the whole sequence and actively enabled it from the top down for the sake of profit. Manufacturer Defendants are alleged to have knowingly participated in the illegal drug market in Tennessee. That is the basis for civil liability under the DDLA whether one's headquarters is an office building or a back alley.

Whether Plaintiffs can prove their allegations against Manufacturer Defendants is another matter entirely. We take no position on that. We hold only that Plaintiffs alleged enough in their Third Amended Complaint to survive Manufacturer Defendants' motion to dismiss for failure to state a claim. Manufacturer Defendants did not meet their burden at this motion to dismiss stage of showing " 'that the plaintiff[s] can prove no set of facts in support of the claim that would entitle the plaintiff[s] to relief.' " *Nelson,* 545 S.W.3d at 431 (quoting *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002)). We reverse the judgment of the Trial Court, and remand for this case to proceed.

Conclusion

The judgment of the Trial Court is reversed, and this cause is remanded to the Trial Court for collection of the costs below and for further proceedings consistent with this Opinion. The costs on appeal are assessed against the Appellees, Endo Health Solutions, Inc., Endo Pharmaceuticals, Inc., Purdue Pharma, L.P., Purdue Pharma, Inc., The Purdue Frederick Company, Inc., Mallinckrodt LLC, and Teva Pharmaceuticals USA, Inc.

D. MICHAEL SWINEY, CHIEF JUDGE