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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

THE STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. CV-2019-901174
	)	
ENDO HEALTH SOLUTIONS, INC., *et al*.,	)	ORAL ARGUMENT REQUESTED
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF
McKESSON CORP.'S MOTION FOR SUMMARY JUDGMENT

The State of Alabama cannot satisfy its burden of presenting substantial evidence of the essential elements of its claims against Defendant McKesson Corp. ("McKesson"). As explained below, because of this failure of proof, summary judgment in favor of McKesson is appropriate on all of the State's claims for damages.[1] *See* Ala. Code § 12-21-12(a) (proof by substantial evidence is required to test the sufficiency of evidence on motion for summary judgment).[2]

First, the State cannot present substantial evidence of proximate cause, which is an element of the State's negligence, wantonness and nuisance claims. Despite repeated requests, the State can offer no evidence that links anything McKesson did or did not do to the enormous damages the State alleges it has incurred. The State cannot avoid this element of its claims and its lack of proof on this element is fatal to those claims.

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[1] Although the State asserts a claim under the Alabama Uniform Controlled Substances Act ("ACSA"), it seeks only "a declaration that [McKesson] violated" the ACSA. *See* Compl., ¶ 446. The State does not seek damages for any alleged ACSA violations. *See* Doc. No. 77, at 52 ("In its Prayer for Relief, the State only requested, insofar as Count III is concerned, "a declaration that all Defendants have violated the Alabama Uniform Controlled Substances Act."). The ACSA does not authorize any claims for damages. Moreover, as demonstrated in the text, the State's own records confirm that McKesson's Alabama Distribution Center has been in compliance with the ACSA at all times.

[2] "Substantial evidence" is evidence of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions as to the existence of the fact sought to be proven." Ala. Code § 12-21-12(d). *See also West v. Founders Life Assur. Co. of Fla.*, 547 So. 2d 870, 871 (Ala. 1989) (stating substantial evidence standard).

Second, the State's public nuisance claim also fails because the State cannot establish that McKesson "controlled the instrumentality" that caused the alleged public nuisance. To the contrary, it is undisputed that, once McKesson delivered any ordered medication to a pharmacy, it had no further control over the further distribution or use of the medication.

Third, the State's public nuisance claim fails for the additional reason that Alabama law has never recognized a public nuisance claim in circumstances like those in this case. In Alabama, nuisance law historically has been confined to cases involving the misuse of, or interference with, public property or resources. Alabama law has never recognized a public nuisance claim based on harm allegedly caused by a product.[3]

Fourth, the State has not identified any specific conduct by McKesson that constitutes an unlawful trade practice under the Alabama Deceptive Trade Practices Act ("ADTPA"), Ala. Code § 8-19-1, *et seq*. In the absence of such evidence, the ADTPA claim fails.

NARRATIVE SUMMARY OF UNDISPUTED FACTS

The State filed its complaint on June 20, 2019, alleging that Endo and McKesson "deceptively and illegally" marketed prescription opioid medications and failed to prevent the medications from being diverted illegally. *See generally* Complaint (Doc. 1). The State further contends that Endo and McKesson are jointly and severally liable for *all* consequences, regardless of their source, allegedly flowing from the so-called "opioid crisis" in Alabama. *Id*.

[3] The State's assertion of negligence and public nuisance claims prohibits it from simultaneously asserting an equitable claim for unjust enrichment. *See, e.g.*, *Univalor Tr., SA v. Columbia Petroleum, LLC*, 315 F.R.D. 374, 382 (S.D. Ala. 2016). In any event, the State does not have any evidence of any benefit conferred upon McKesson by the State, let alone one for which the State would have a reasonable expectation of compensation. *See, e.g.*, *Avis Rent A Car Sys., Inc. v. Heilman*, 876 So. 2d 1111, 1123 (Ala. 2003); *Southern v. Pfizer, Inc.*, 471 F. Supp. 2d 1207, 1219 (N.D. Ala. 2006).

The State seeks in excess of $20 billion in damages, including huge expenditures attributable to illicit drugs such as heroin and illicit fentanyl, which have never been distributed by McKesson.[4] The State seeks damages for alleged injuries across various state agencies, including Medicaid costs, loss of tax revenues, increased incarceration and law enforcement costs, and increased social services spending.

McKesson is a wholesale distributor of a wide range of pharmaceutical products, including FDA-approved, prescription opioid medicines. Its role in the pharmaceutical distribution chain is limited to delivering orders placed by DEA-registered and state-licensed pharmacies. McKesson does not market to or "detail" doctors. Doctors—not McKesson—prescribe drugs to patients. And pharmacies—not McKesson—provide these medications to patients. At all times, McKesson has been registered by the DEA and licensed by the State of Alabama to act as a wholesale distributor.[5] The Alabama Board of Pharmacy has repeatedly inspected McKesson's McCalla distribution center and found that McKesson meets all requirements to be a wholesale distributor, including maintenance of effective controls against diversion.[6]

McKesson's pharmacy customers order medications to fill prescriptions written by doctors. From the mid-1990s through at least the mid-2010s, the number of prescriptions written by Alabama doctors for opioid-containing, FDA-approved medications increased substantially. [7] As

[4] *See* Ex. A, State_Alabama_000005669503.

[5] *See* Ex. B, MCK-ALAG-0000131–0000141.

[6] *See* Ex. C, MCK-ALAG-00021562 at -71, -70, -69, -68, -67, -65, -62 (reports by the Alabama Board of Pharmacy of its inspections of McKesson's McCalla Distribution Center in 2005, 2007, 2008, 2009, 2011, 2014, and 2018, each finding that McKesson was in compliance with all applicable BOP regulations).

[7] *See* Ex. D, (Curt Harper Tr.) at 112:14–114:22, 230:4–233:23; Ex. E, (Ex. 41 to Harper Dep.); Ex. F (Ex. 599 to BJ Harrison Dep.) ("A group of us from the Medical Association met with some DEA officials and sheriffs who told us that Alabama was number one for hydrocodone until 2001,' said Association President Jerry Harrison. 'We fell out of the top slot for a few years, but we got it back.'"); Ex. G, *Alabama ranks #1 as highest painkiller prescribing state* ("Alabama Board of Medical Examiners Chair Dr. Jerry Harrison said Alabama led the country in the number of prescription pain killers from 1987 until 2001, and stayed in the top five from 2002 through 2006."); Ex. H (BJ Harrison Dep. Tr.) at 81:5–7 (Alabama doctors prescribed opioids at a rate over double the national average).

a result, the volume of such medications that McKesson shipped to licensed pharmacies in Alabama also increased.

There is no record evidence that McKesson ever shipped more opioids to Alabama than were needed to fill prescriptions written by Alabama doctors.[8] Nor is there any evidence that McKesson played any role in bringing about the change to the standard of care regarding the use of prescription opioids or the increased good-faith prescribing that flowed from it.

While the State alleged that McKesson failed to maintain effective controls against diversion,[9] the State is unable to identify *any* prescription opioid distributed by McKesson that was diverted due to something that McKesson allegedly did or did not do.[10] The State also has not identified any instance of addiction or overdose for which McKesson is allegedly responsible.[11]

ARGUMENT

I. The State Cannot Present Substantial Evidence That McKesson's Conduct Was The Proximate Cause Of The State's Claimed Damages.

"Proximate cause is an essential element of both negligence claims and wantonness claims." *Martin v. Arnold*, 643 So. 2d 564, 567 (Ala. 1994). Similarly, to prevail on a public nuisance claim under Ala. Code § 6-5-120, a plaintiff is "required to prove against the defendant the elements of legal duty and causal relation between the conduct or activity complained of and the hurt, inconvenience, or damage sued for." *Tipler v. McKenzie Tank Lines*, 547 So. 2d 438, 440

[8] *See* Ex. I (Clay Morris Tr.) at 176:1–11, 216:6-17; Ex. J (S. Harris Tr.) at 105:16–106:1, 116:6–9, 222:12–223:4, 263:12–264:13, 276:2–12; Ex. H (B.J. Harrison Tr.) at 80:16–21.

[9] "Diversion" is defined as transfer of any legally prescribed controlled substance from the person for whom it was prescribed to another person for any illicit use. *See* U.S. Dep't of Health & Human Servs., Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health, glossary at 2 (2016), https://addiction.surgeongeneral.gov/sites/default/files/surgeon-generals-report.pdf.

[10] *See* Ex. K (State's Supp. Resp. to McKesson Rog. Nos. 1–2); Ex. H (B.J. Harrison Tr.) at 84:21–84:14; Ex. G (S. Harris Tr.) at 100:1–8; Ex. L (E. Braden Tr.) at 54:3–8, 145:4–10, 223:16–22, 287:15–21, 300:19–23; Ex. I (C. Morris Tr.) at 31:22–32:21.

[11] *See e.g.*, Ex. J (S. Harris Tr.) at. 253:14–254:15.

(Ala. 1989). *See also Hilliard v. City of Huntsville Elec. Util. Bd.*, 599 So. 2d 1108, 1113 (Ala. 1992) ("Thus, for an action in nuisance under § 6-5-120, Ala. Code, 1975, the plaintiff must show conduct, be it intentional, unintentional, or negligent, on the defendant's part, which was the breach of a legal duty, and which factually and proximately caused the complained-of hurt, inconvenience, or damage"). Or, put differently, the State's proof "must comport with the classical tort concepts of duty and causation" to recover on a claim for nuisance. *Tipler*, 547 So. 2d at 440.

"A well-established principle of Alabama law is that, to recover in tort, a plaintiff must establish that the defendant's misconduct was the 'proximate cause'—and not just the 'remote cause'—of the plaintiff's injuries." *United Food & Com. Workers Unions, Emp'rs Health & Welfare Fund v. Philip Morris, Inc.*, 223 F.3d 1271, 1273 (11th Cir. 2000). "Proximate cause is an act or omission that in a natural and continuous sequence, unbroken by any new independent causes, produces the injury and without which the injury would not have occurred." *Martin*, 643 So. 2d at 567. The State cannot present substantial evidence of this essential element of its claims.[12]

The State cannot present any competent evidence that McKesson—as opposed to other actors—caused Alabama's opioid-abuse crisis. The State cannot direct the Court to a single opioid medication shipment from McKesson that caused the harm of which the State complains. In fact, the State has been unable to identify a single opioid order from any Alabama pharmacy that McKesson should not have filled.

The Complaint alleges that McKesson had a duty to "report" and "halt" "suspicious orders" placed by its pharmacy customers. The State, however, is unable to point to any specific order that

[12] McKesson has carried its burden on this summary judgment motion. "'When the basis of a summary-judgment motion is a failure of the nonmovant's evidence, the movant's burden, however, is limited to informing the court of the basis of its motion—that is, the moving party must indicate where the nonmoving party's case suffers an evidentiary failure.'" *Tanksley v. ProSoft Automation, Inc.*, 982 So. 2d 1046, 1049 (Ala. 2007) (quoting *Rector v. Better Houses, Inc.*, 820 So. 2d 75, 79–80 (Ala. 2001)).

McKesson should have identified as suspicious but did not. Indeed, multiple Alabama Board of Pharmacy witnesses confirmed that the BOP has *never* taken *any* actions related to suspicious order reports; indeed, the BOP did not start even looking at suspicious order reports until *after* this litigation was filed.[13]

Nor has the State shown that, had McKesson halted or reported any particular order, that it would have reduced the total quantity of opioids available to Alabamians—let alone that it would have reduced the State's opioid-related expenditures. There is also no evidence that a retail pharmacy would not have obtained opioids from some other source. McKesson is only one of many wholesale distributors that ships opioids to Alabama. Roughly two out of every three prescription opioid pills delivered to Alabama pharmacies came from a distributor *other than* McKesson.[14]

There is no record evidence that McKesson ever shipped an opioid medicine to a licensed pharmacy in Alabama that was improperly dispensed by that pharmacy or used for any purpose other than to fill a prescription written by a licensed Alabama doctor. The State seeks to blame McKesson for "medicine cabinet diversion"—the diversion of pills after they are properly dispensed by a pharmacy to a patient pursuant to a legitimate prescription, such as when a patient sells or gives away his medicine to a friend or family member. But there is no record evidence that McKesson has the ability (or the obligation) to prevent that form of diversion.

[13] *See, e.g.*, Ex. L (Eddie Braden Tr.) at 273:1–3; 285:12–292:1. The record further confirms that, consistent with DEA guidance, McKesson blocked and did not ship "suspicious orders" beginning in 2008. *See, e.g.*, Ex. M (G. Boggs MDL Tr.) 72:1–11; Ex. N (Gary Davis Tr.) 133:4–9. Thus, any order that the State now contends should have been reported *never* was sent to the State of Alabama.

[14] It is undisputed that when McKesson terminated sales of controlled substances to pharmacy customers, other distributors began supplying those pharmacies. *See, e.g.*, Ex. O, MCK-ALAG-00021555; Ex. P (Keith Ex K Tr.) at 186:2–187:13.

After McKesson delivers a medicine to a pharmacy, it relinquishes control, and the medicine remains with the pharmacy until (1) a doctor writes a prescription and (2) a pharmacist fills it. From that point, the diversion of the pills can cause harm only if the patient or a third party transfers the pills to illicit use (e.g., by selling them or stealing them from the medicine cabinet) and a fourth party illicitly ingests the pills in the absence of a prescription.[15] At that point, the State's alleged injury resulting from diversion is many steps removed from McKesson's conduct. Moreover, the fact that these intervening steps inherently involve criminal activity (*i.e.*, criminal diversion and illicit use), further demonstrates the attenuated nature of the causal chain between McKesson's actions and the harms underlying the State's claims.

In short, it is not enough for the State to demonstrate that the opioid medicines McKesson delivered to State-licensed pharmacies were eventually diverted to illicit use by the patients to whom they were prescribed. Rather, the State is required to establish by substantial evidence that its claimed damages were caused by a specific wrongful act that McKesson committed. *Martin*, 643 So. 2d at 647. *See also* Ala. Code § 6-5-530(a) ("In any civil action for personal injury, death, or property damage caused by a product, regardless of the type of claims alleged or the theory of liability asserted, the plaintiff must prove … that the defendant designed, manufactured, sold, or leased the particular product the use of which is alleged to have caused the injury on which the claim is based, and not a similar or equivalent product."). Because the State cannot carry this burden, McKesson is entitled to summary judgment on all of the State's claims.

[15] To be sure, a patient may also become addicted himself after using or abusing an opioid medicine prescribed to him in good faith by his doctor. But the State could not credibly argue that McKesson was a legal cause of that injury.

II. McKesson Lacked Control Of The Instrumentality Causing The Nuisance.

The State cannot establish that McKesson maintained control of the instrumentality giving rise to the alleged nuisance, which is an element of the tort of public nuisance under Alabama law. *Tipler*, 547 So. 2d at 441 (no liability for public nuisance "either for maintaining, or for failing to prevent, a chain of events and circumstances over which [defendant] had no reasonable means of control.").[16] *See also Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 633–34 (D.R.I. 1990) ("The paramount question is whether the defendant was in control of the instrumentality alleged to have created the nuisance when the damage occurred."); *Corp. of Mercer Univ. v. Nat'l Gypsum Co.*, No. 85-126-3-MAC, 1986 WL 12447, at *6 (M.D. Ga. Mar. 9, 1986) ("[A] nuisance claim may only be alleged against one who is in control of the nuisance creating instrumentality.").

"[C]ontrol at the time the damage occurs is critical in public nuisance cases, especially because the principal remedy for the harm caused by the nuisance is abatement." *State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 449 (R.I. 2008). It is undisputed that McKesson relinquishes all control over opioid medications once delivered to the licensed Alabama pharmacy that ordered the medication. McKesson does not prescribe opioids to a patient or fill any such prescription. And it certainly does not control what the patient does with the medications after the pharmacist dispenses

[16] This aspect of Alabama's nuisance doctrine is consistent with other jurisdictions. *See also, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1026 (10th Cir. 2007) (under Oklahoma law, an "individual[] may be held liable to the extent he was responsible for the maintenance of a nuisance that was under his possession or control"); *Tioga Pub. Sch. Dist. No. 15 of Williams Cnty. v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) ("[N]uisance [liability] turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance."); *Lead Indus.*, 951 A.2d at 449 ("[A] defendant must have control over the instrumentality causing the alleged nuisance at the time the damage occurs."); *Traube v. Freund*, 775 N.E.2d 212, 216 (Ill. App. Ct. 2002) ("[A]bsence of a manufacturer's control over a product at the time the nuisance is created generally is fatal to any nuisance … claim."); *Cofield v. Lead Indus. Ass'n, Inc.*, 2000 WL 34292681, at *7 (D. Md. Aug. 17, 2000) (distributor cannot be liable for nuisance because it lacks control over products after sale); *Gelman Scis., Inc. v. Dow Chem. Co.*, 508 N.W.2d 142, 144 (Mich. Ct. App. 1993) (per curiam) ("If a commercial transaction is involved, control of the nuisance at the time of injury is required."); *Clark v. Greenville Cnty.*, 437 S.E.2d 117, 119 (S.C. 1993) ("[O]ne who has no control over property at the time of the alleged nuisance cannot be held liable therefor."); *Patton v. Simone*, 1992 WL 183064, at *13 (Del. Super. Ct. June 25, 1992) (describing control as "predicate element" of public nuisance claim).

them—use them as instructed, misuse them, give them away, or sell them. McKesson also does not ever have control over illicit opioids, like heroin or fentanyl. The State, therefore, cannot satisfy the control element of its claim.

The Alabama Supreme Court's holding in *Tipler* is dispositive:

> While [Plaintiff's] argument has a certain logical "but for" appeal, the facts do not supply the requisite nexus between [Defendant's] activities and the ultimate events and circumstances of the accident in question. [Defendant] cannot be charged and held liable either for maintaining, or for failing to prevent, a chain of events and circumstances over which it had no reasonable means of control.

Tipler, 547 So. 2d at 441. Even if opioids were considered to be a nuisance, the nuisance creating property was in the possession and control of others at the time the nuisance was created. McKesson had "no reasonable means of control" over the "chain of events and circumstances" giving rise to the alleged nuisance. Under established Alabama law, McKesson's lack of control over the opioid medicines at the time the nuisance is created requires dismissal of the nuisance claim.

III. Alabama's Public Nuisance Law Does Not Encompass The State's Product-Based Claims.

The State asks the Court to entertain a public nuisance claim based on the distribution and subsequent misuse of a product, which the Alabama Supreme Court has never recognized, and thereby dramatically to expand the definition of public nuisance under Alabama law.

While the application of the public nuisance doctrine may be flexible and applicable to a variety of factual situations, Alabama has never recognized a public nuisance claim in circumstances like those in this case. *See Lauderdale Cnty. Bd. of Educ. v. Alexander*, 269 Ala. 79, 110 So. 2d 911 (1959) (holding that the statutory definition of nuisance is declaratory of the common law and does not supersede the common law as to the other conditions and circumstances constituting a nuisance). Traditionally, nuisance claims in Alabama have flowed from the

defendant's use of property in a manner that gives rise to the complained of nuisance. *Acker v. Protective Life Ins. Co.*, 353 So. 2d 1150, 1152 (Ala. 1977) ("The law of nuisance rests upon the principle that every man must so use his property as not to injure that of his neighbor").[17]

Alabama, like many other states, has not recognized products-based public nuisance claims. *See State v. Purdue Pharma, L.P.*, 2019 WL 446382 at *12 (Del. Sup. Ct. Feb. 4, 2019) ("There is a clear national trend to limit public nuisance to land use."); *Lead Indus. Ass'n,* 951 A.2d at 456 ("The law of public nuisance never before has been applied to products, however harmful."); *In re Lead Paint Litig.*, 924 A.2d 484, 505 (N.J. 2007) ("[W]ere we to permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations to the tort of public nuisance".); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *People v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003); *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) ("Nuisance thus would become a monster that would devour in one gulp the entire law of tort.").

Although some courts in other states, often in reliance on the Restatement (Second) of Torts § 821B, have extended nuisance liability to claims involving the use or misuse of products, the Alabama Supreme Court has never cited § 821B for that proposition.[18] And the Restatement (Third) of Torts: Liability for Economic Harm, section 8, clarifies that, whatever its scope, public nuisance does not encompass claims for injury caused by products and that the Restatement

[17] Other statutorily defined nuisances in Alabama are based upon activities that occur in connection with the use of land. *See*, *e.g.*, Ala. Code § 6-5-140 (lewdness); § 6-5-155 (drug use); § 6-5-160 (distribution of obscene material to minors).

[18] Alabama's appellate courts have cited § 821B only three times and have done so exclusively in cases involving use of or damage to property. *See State v. Epic Tech, LLC*, (Ala. 2020) (operation of slot machines); *Antoine v. Oxmoor Preservation/One, LLC*, 130 So. 3d 1204 (Ala. Civ. App. 2012) (yard flooding from neighboring lots); *Tipler*, 547 So. 2d at 438 (control of highway traffic).

(Second) should not be read to say that it does.[19] Section 8 explains that while "problems caused by dangerous products might once have seemed to be matters for the law of public nuisance because the term 'public nuisance' has sometimes been defined in broad language that appears to encompass anything injurious to public health and safety," the "traditional office of the tort … has been narrower." *Id*. § 8, cmt. g. Liability for public nuisance based on products "has been rejected by most courts, and is excluded by [the Restatement], because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue." *Id.* cmt. g.[20]

The State's attempt to unreasonably expand public nuisance doctrine to regulate the licensed distribution of federally authorized products should be rejected. Under the long-standing bounds of Alabama's public nuisance doctrine, McKesson is entitled to summary judgment on that claim.

IV. The State Has No Substantial Evidence That McKesson Violated The ADTPA.

The ADTPA, a consumer protection statute, declares unlawful certain specifically described acts or practices in the conduct of trade or commerce. Ala. Code § 8-19-5. A private right of action for damages is available only where the defendant has committed one of the several unlawful trade practices enumerated in the ADTPA. *See* Ala. Code § 8-19-10. The State cannot present substantial evidence that McKesson has committed any such unlawful trade practice.

[19] Section 8 is explicit that "[t]his Section does not seek to restate the substantive law of public nuisance except as necessary to explain those cases that produce liability in tort for economic loss. … Many public nuisances are not of that character …, as when a defendant's pollution causes damage to property that the plaintiff owns." Comment a.

[20] *See id*. ("Mass harms caused by dangerous products are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake. … Claims for reimbursement of expenses made necessary by defendant's products might also be addressed by the law of … restitution"); *Lead Indus., Ass'n,* 951 A.2d at 456 ("[P]ublic nuisance and products liability are two distinct causes of action, each with rational boundaries that are not intended to overlap."); *In re Lead Paint Litig.*, 924 A.2d at 505 (rejecting public nuisance claim because it would "supplant an ordinary products liability claim with a separate cause of action as to which there are apparently no bounds").

Despite requests to the State to identify McKesson's conduct that could constitute an unlawful trade practice, the State has been unable to do so. Nor can the State offer *evidence* that McKesson has engaged in any "unconscionable, false, misleading, or deceptive act or practice," Ala. Code § 8-19-5(27).[21] While the State contends that manufacturers overstated the benefits of opioid use and omitted or mischaracterized data about opioid abuse and addiction, the State cannot present any evidence, much less substantial evidence, that McKesson made any representations at all related to the benefits or risks of prescription opioids.

At this stage, the State may not "rest upon the mere allegations" of its sweeping complaint. Ala. R. Civ. P. 56(e). To avoid summary judgment, it must "set forth specific facts showing that there is a genuine issue for trial." *Id*. It cannot do so. This evidentiary failure is fatal to the State's ADTPA claim. *Jackson v. CIT Group/Sales Fin., Inc.*, 630 So. 2d 368, 373 (Ala. 1993) (defendant entitled to summary judgment when plaintiff failed to present substantial evidence of conduct actionable under the ADTPA).[22]

[21] The State argued that McKesson failed to report suspicious orders to the Alabama Board of Pharmacy. But the BOP's own inspections found that McKesson was in compliance with its suspicious order reporting obligations. *See* n.6, *supra.* The State also said that its experts would identify the specific orders that the State faults McKesson for not reporting. But no expert provided any such opinion. Moreover, there is no evidence that McKesson ever shipped a suspicious order to Alabama. *See* n.13, *supra*.

[22] Given the State's inability to produce substantial evidence of any act McKesson committed in violation of the ADTPA, it cannot satisfy the ADTPA's requirement of "knowledge of false or deceptive conduct on the part of the wrongdoer." *Sam v. Beaird*, 685 So. 2d 742, 744 (Ala. Ct. Civ. App. 1996). *See also Strickland v. Kafko Mfg., Inc.*, 512 So. 2d 714 (Ala. 1987) (ADTPA claim failed when plaintiff lacked proof that defendant knew it engaged in prohibited conduct).

CONCLUSION

The State cannot present substantial evidence of the essential elements of its claims. Because of this failure of proof, McKesson is entitled to summary judgment on all claims.

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