

IN THE CIRCUIT COURT FOR SULLIVAN COUNTY
AT KINGSPORT, TENNESSEE

BARRY STAUBUS, in his official capacity as the District Attorney General for the Second Judicial District and on behalf of all political subdivisions therein, including SULLIVAN COUNTY, CITY OF BLUFF, CITY OF BRISTOL, CITY OF KINGSPORT; STATE OF TENNESSEE *ex rel.* BARRY STAUBUS; TONY CLARK, in his official capacity as the District Attorney General for the First Judicial District and on behalf of all political subdivision therein, including CARTER COUNTY, CITY OF ELIZABETHTON, CITY OF WATAUGA, JOHNSON COUNTY, CITY OF MOUNTAIN CITY, UNICOI COUNTY, TOWN OF UNICOI, TOWN OF ERWIN, WASHINGTON COUNTY, CITY OF JOHNSON CITY, TOWN OF JONESBOROUGH; STATE OF TENNESSEE *ex rel.* TONY CLARK; DAN ARMSTRONG, in his official capacity as the District Attorney General for the Third Judicial District and on behalf of all political subdivisions therein, including GREENE COUNTY, CITY OF TUSCULUM, TOWN OF BAILEYTON, TOWN OF GREENEVILLE, TOWN OF MOSHEIM, HAMLEN COUNTY, CITY OF MORRISTOWN, HANCOCK COUNTY, TOWN OF SNEEDVILLE; HAWKINS COUNTY, CITY OF CHURCH HILL, TOWN OF BULLS GAP, TOWN OF MOUNT CARMEL, TOWN OF ROGERSVILLE, TOWN OF SURGOINSVILLE; STATE OF TENNESSEE *ex rel.* DAN ARMSTRONG; and BABY DOE, by and through his Guardian Ad Litem;

Plaintiffs,

v.

PURDUE PHARMA, L.P.; PURDUE PHARMA, INC.; THE PURDUE FREDERICK COMPANY; MALLINCKRODT LLC; ENDO HEALTH SOLUTIONS, INC.; ENDO PHARMACEUTICALS, INC.; ELIZABETH ANN BOWERS CAMPBELL; PAMELA MOORE; and ABDELRAHMAN HASSABU MOHAMED;

Defendants.

JURY DEMAND
Case No. C-41916
Chancellor E. G. Moody

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO INTERVENE AS OF RIGHT ON BEHALF OF
THE STATE OF TENNESSEE *EX REL.* HERBERT H. SLATERY III,
ATTORNEY GENERAL AND REPORTER

Pursuant to Rule 24.01(2) of the Tennessee Rules of Civil Procedure, the Attorney General and Reporter, Herbert H. Slatery III, upon relation of the State, respectfully moves to intervene as of right on behalf of the State of Tennessee in this action for the following reasons:

First, the district attorneys general, in their official capacities, have brought this case on behalf of the State of Tennessee. (2nd Amd. Compl. at ¶¶ 15–17.) The Attorney General’s duties include the “trial and direction of all civil litigated matters . . . in which the state or any officer . . . or instrumentality of the state may be interested.” Tenn. Code Ann. § 8-6-109(b)(1). The Attorney General moves to intervene in order to fulfill his statutory duty to direct the opioid litigation in the state.

Second, the Attorney General has broad authority to participate in suits when they bear on the interest of the general public. *State v. Heath*, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1990). A lawsuit brought in the name of the State that seeks to address the opioid epidemic constitutes such a suit.

Third, the Plaintiff district attorneys general have alleged a violation of the public nuisance statute, Tenn. Code Ann. § 29-3-101, *et seq.* The Attorney General has statutory authority to bring a claim on behalf of the State under this statute. Tenn. Code Ann. § 29-3-102. He also has the right to intervene when the district attorneys general bring a claim under the statute. *State ex rel. Shriver v. Fraternal Order of Eagles*, 671 S.W.2d 859 (Tenn. Crim. App. 1984). In *Shriver*, the court considered a dispute concerning the authority of a district attorney general and the Attorney General to bring a civil suit under the gambling device forfeiture statute. The district attorney general brought the action, and the Attorney General later moved to intervene. Observing that the Attorney General has the statutory duty under Tennessee Code Annotated § 8-6-109(b)(1) to try and direct all civil litigated matters in which the State may be interested, the court found that the

State clearly had an interest in the action because the gambling device forfeiture statute provided that the seizing authority *and the general fund* were to share equally in the proceeds from the forfeiture of property. *Shriver*, 671 S.W.2d at 862 (citing Tenn. Code Ann. § 8-6-109(b)(1)). Thus, the court found that the Attorney General had an unconditional right to intervene. *Id.* The public nuisance statute is similar to the gambling device forfeiture statute at issue in *Shriver* in that Tennessee Code Annotated § 29-3-101(d) states that proceeds realized from the enforcement of the statute are to be “paid equally into the general funds of the state and the general funds of the political subdivision or other public agency, if any.” As the State has an interest in the statutory public nuisance claim, under the reasoning of *Shriver*, the Attorney General has an unconditional right to intervene in this case to represent the interests of the State under the public nuisance statute.

Fourth, the district attorneys general retained outside counsel to represent the State in this matter without the authorization required under state law:

In all cases where the interest of the state requires, in the judgment of the governor and attorney general and reporter, additional counsel to the attorney general and reporter *or district attorney general*, the governor shall employ such counsel, who shall be paid such compensation for services as the governor, secretary of state, and attorney general and reporter may deem just

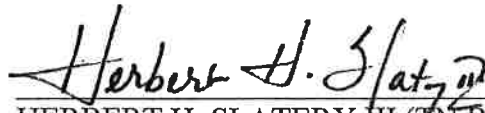
Tenn. Code Ann. § 8-6-106(a) (emphasis added). The statute leaves no doubt that district attorneys general may not retain outside counsel without approval from the Attorney General and the Governor. *See State v. Culbreath*, 30 S.W.3d 309, 314–15 (Tenn. 2000). As neither the Attorney General nor the Governor approved the retention of outside counsel, the representation agreement with the firm retained to represent the district attorney general in this case is “plainly void *ab initio* because it was without legal authority.” *State ex rel. Comm’r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 776 (Tenn. Ct. App. 2001). The attorneys who have entered an appearance on behalf of the State have no legal authority to represent the State in this action.

As a result, undersigned counsel are contemporaneously filing a notice of appearance on behalf of the State of Tennessee in this action.

Fifth, the district attorneys general also have challenged, in the name of the State, the constitutionality of a state statute—namely the state tort damages caps—which they have no authority to do. (2nd Amd. Compl. at ¶¶ 410-416.) In fact, “the district attorneys general are under an affirmative duty to defend the constitutionality of statutes of statewide application . . .” *State v. Chastain*, 871 S.W.2d 661, 667 (Tenn. 1994). This constitutional challenge places the Attorney General’s Office in the untenable position of defending the constitutionality of a statute that the district attorneys general have challenged in the name of the State.

As the Attorney General has determined that it is necessary to appear in this matter to represent the State’s interests, he respectfully requests to intervene as of right in this action.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the Memorandum has been served by U.S. mail on this the 16th day of March, 2018, to the following:

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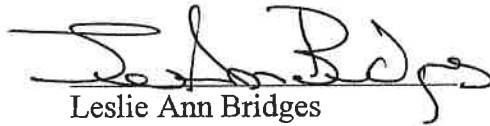
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