

STATE OF MICHIGAN
IN THE SUPREME COURT

**(On Appeal from the Michigan Court of Appeals
and Wayne County Circuit Court)**

JUDITH KUZNAR and JOSEPH
KUZNAR, her husband,

Plaintiffs/Appellees,

v

RAKSHA CORPORATION d/b/a
CROWN PHARMACY and VALERIE
RANDALL, Jointly and Severally,

Defendants/Appellants.

Supreme Court No. 132203
Court of Appeals No. 259501
Lower Court No. 03-333448-NO

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APPELLANTS' REPLY BRIEF ON APPEAL

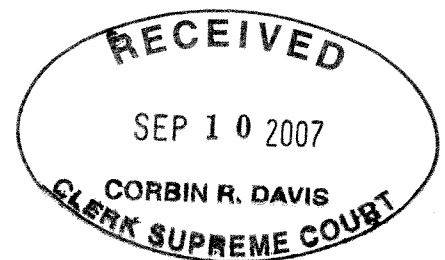


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LAW AND ARGUMENT

I. A PHARMACY CONSTITUTES A “HEALTH CARE PROFESSIONAL” UNDER THE LANGUAGE OF THE MEDICAL MALPRACTICE LIMITATION STATUTE.

Resolution of the issue in this case is simple: MCL § 600.5838a applies the medical malpractice statute of limitations to licensed health care professionals and licensed health facilities as defined by articles 15 and 17 of the Public Health Code. Pharmacies are licensed under Article 15 of the code. MCL 333.17741. Therefore, the Court of Appeals erred in determining that this action was not barred by the two-year medical malpractice statute of limitations.

A licensed health care professional means “an individual licensed or registered under article 15 of the public health code.” MCL 600.5838a(1). A pharmacist *and* a pharmacy are specifically licensed under Article 15. With regard to a pharmacy, Section 17741 provides that a pharmacy cannot operate unless licensed under Article 15. MCL 333.17741. Section 16333 provides a fee schedule for “persons” licensed or seeking licensure to engage in the practice of pharmacy, and applies to pharmacists *and* pharmacies. MCL 333.16333.

Plaintiff disputes Defendants’ position that a pharmacy is a “health care professional” by relying on the West Virginia case of *Phillips v Larry’s Drive-In Pharmacy, Inc.*, 647 S.E.2d 920 (2007). However, such reliance on *Phillips* is completely misplaced. In that case, the Court determined that a pharmacy was not a “health care provider” under West Virginia Code § 55-7B-2(c) because a pharmacy was not included in the specific list of health care providers in the statute. Therefore, the court presumed that the legislature

intended to omit pharmacies from the statute.¹

However, in the present case, a pharmacy *is* a health care professional because it is specifically listed as being “licensed or registered under Article 15 of the public health code.”

Therefore, the intent of the Legislature to include pharmacies as being capable of being sued for medical malpractice is clear.² Accordingly, the Phillips case is distinguishable from the case at bar, and should be disregarded by this Court.

II. THE TRIAL COURT AND COURT OF APPEALS CLEARLY ERRED IN DETERMINING THAT PLAINTIFF’S CLAIMS AGAINST DEFENDANT RANDALL, WHO ALLEGEDLY HELD HERSELF OUT AS A PHARMACIST, SOUND IN ORDINARY NEGLIGENCE.

Plaintiff has alleged separate claims against the pharmacy and Valerie Randall, the pharmacy technician who allegedly filled the prescription. In Plaintiff’s Brief on Appeal, Plaintiff does not dispute that Defendant Randall was allegedly holding herself out as a

¹ Defendants contend that *Phillips* is not only inapplicable to the present case, but was also wrongly decided. The statute at issue in that case states that a “health care provider” means “a person, partnership, corporation, facility or institution licensed by, or certified in, this state or another state, to provide health care or professional health services, including, *but not limited to*, a physician, osteopathic physician, hospital dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, or psychologist, or an officer, employee or agent thereof acting in the course and scope of such officer’s, employee’s or agent’s employment.” W. Va. Code, 55-7B-2(c). While it is true that a pharmacy is not mentioned in the list, the court completely ignored the phrase “including, but not limited to,” which would indicate that the list was not intended by the legislature to be all-inclusive. Although such an error is irrelevant to a determination in the present case, it indicates the unreliability of the court’s decision and its inapplicability to the case at bar.

² If the Legislature had intended to exclude pharmacies as “health care professionals,” it could have expressly excluded pharmacies as it did with veterinarians and sanitarians. See MCL 600.5838a(1)(b).

pharmacist when the prescription was filled.³

Michigan Compiled Laws § 600.5838a provides the time frames for pursuing medical malpractice actions against “a person or entity who is *or who holds himself or herself out to be a licensed health care professional*, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment” (emphasis added). It is undisputed that a pharmacist is licensed under Article 15 and therefore qualifies as a “licensed health professional.” Therefore, MCL § 600.5838a applies to a pharmacist, *or* a person who holds himself or herself out to be a pharmacist.

In the present case, Plaintiff specifically alleges that Defendant Randall was holding herself out as a pharmacist because she allegedly filled Plaintiff’s prescription, had a duty “to exercise reasonable care in the dispensing of medications,” and had a duty “to adhere to a standard of care to which she is held to avoid foreseeable injury in dispensing medications.” (Complaint, pg. 5, Apx. pg. 11a). Plaintiff further alleges that Ms. Randall breached these duties by failing to dispense the appropriate medication and failing to recognize the error she allegedly made in dispensing medication. (Complaint, pg. 6, Apx.

³ In fact, Plaintiff has alleged that there was not a pharmacist on duty and present at the pharmacy when the prescription was filled. Defendants dispute this allegation; however, accepting this allegation as true for purposes of this appeal, such a fact would support a finding that Ms. Randall was holding herself out as a pharmacist. This is especially true since a pharmacy open for business must be under the personal charge of a pharmacist. MCL § 333.17741.

pg. 12a). All of these allegations are associated with the practice of pharmacy and specifically relate to the professional functions of a pharmacist. *See* MCL 333.17707(5). Accordingly, Plaintiff's claims against Valerie Randall sound in medical malpractice against a person or entity that "holds himself or herself out to be a licensed health care professional"

III. CLAIMS BASED UPON THE WRONGFUL DISPENSATION OF PRESCRIPTION MEDICATIONS INVOLVE MEDICAL JUDGMENT AND ARE THEREFORE MEDICAL MALPRACTICE CLAIMS.

Plaintiff argues that this case is based in ordinary negligence rather than medical malpractice because Plaintiff's claims "do not raise questions of medical judgment beyond the realm of common knowledge and experience." (Appellee's Brief on Appeal, p 8). However, claims arising out of the wrongful dispensation of prescription medication clearly raise questions involving medical judgment and are therefore medical malpractice claims. *See Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 46; 594 NW2d 455 (1999).

Several Michigan Court of Appeals decisions have held that allegations related to dispensing prescription medication raise questions involving medical judgment and therefore constitute malpractice claims. In *Simmons v Apex Drug Stores*, 201 Mich App 250; 506 NW2d 562 (1993), leave to appeal denied, 445 Mich 860; 519 NW2d 157 (1994), a pharmacist incorrectly filled a prescription for a patient, causing an adverse reaction and hospitalization. The plaintiff filed a negligence action against the pharmacist, but the defense argued that pharmacists have a professional relationship with their customers and therefore

the action was properly a malpractice claim and barred by the statute of limitations. The Court dismissed the negligence action, stating that pharmacists are health care providers for malpractice standards. Accordingly, the action was properly a malpractice claim. *Id.* at 253.

Likewise, in *Becker v Meyer Rexall Drug Co.*, 141 Mich App 481; 367 NW2d 424 (1985), leave to appeal denied, 423 Mich 852 (1985), the plaintiff alleged that a pharmacist negligently filled decedent's prescription by dispensing the wrong medication, resulting in the death of the decedent. The trial court ruled that the alleged negligence was not malpractice and therefore not barred by the medical malpractice statute of limitation. However, the Court of Appeals reversed, determining that the complaint was clearly one of malpractice and not of ordinary negligence. As such, the plaintiff's claim was barred by the two-year statute of limitations. The court noted:

The complaint alleges a breach of duty which arose out of the professional relationship between Defendant, a pharmacist and the decedent, his client. Plaintiff has attempted to couch the complaint, in terms of negligence; however, the complaint is clearly one for malpractice. *Id.* at 483.

Therefore, in both *Simmons* and *Becker, supra*, the Court of Appeals determined that a complaint alleging injury caused by the negligent dispensation of the wrong medication was governed by the malpractice statutory requirements as opposed to the ordinary negligence requirements. Likewise, in the present case, Plaintiff alleges that the Defendants failed to dispense the prescribed medication, and instead gave Plaintiff the wrong medication. Defendants' alleged negligence in dispensing the wrong medication occurred within the course of their professional relationship with Plaintiff. Therefore, because the issues in this

case involve dispensing prescriptions, the case raise questions involving medical judgment and is therefore a medical malpractice case. *Dorris*, supra at 46.

Furthermore, the Public Health Code defines the practice of pharmacy as “a health service, the clinical application of which includes the encouragement of safety and efficacy in the prescribing, dispensing, administering, and use of drugs” MCL 333.17707(5). The professional functions associated with the practice of pharmacy include: prescription interpretation and evaluation, selecting, dispensing, storing and distributing drug products, and advising prescribers and patients regarding drug reactions and interactions. *Id.* All of these duties raise questions that require medical judgment. Every day, millions of Americans walk into drug stores and depend on pharmacists for assistance and advice for their health care needs. Most doctors and nurses, as well as patients, trust and depend on pharmacists for information and advice about medications and drug interactions.

Pharmacists talk to people when they are healthy, when they are sick, when they are concerned with an emergency, when they have specific needs, and when they are seeking advice or information. Pharmacies serve patients and the community by providing information and advice on health, providing medications and associated services, and by referring patients to other sources of help and care, such as physicians, when necessary. As a result, patients have come to depend on pharmacies as a health care and information resource.

Pharmacists are also specialists in the science and clinical use of medications. They must be knowledgeable about the composition of drugs, their chemical and physical

properties, and their manufacture and uses, as well as how products are tested for purity and strength. Additionally, a pharmacist needs to understand the activity of a drug and how it will work within the body. Physicians and nurses routinely rely on the knowledge and skills of pharmacists for information about various drugs, their availability, and their activity. Clearly, the ordinary layman lacks such knowledge about the proper formula and method of dispensing prescription medication. Therefore, allegations of negligence in dispensing prescription medication constitute a medical malpractice claim.

CONCLUSION

For the foregoing reasons and for the reasons stated in Defendants/Appellants' Brief on Appeal, Defendants respectfully request that this Honorable Court reverse the Court of Appeals' decision, and hold that Plaintiff's claims against the Pharmacy and Defendant Randall are barred by the two-year medical malpractice statute of limitation.

Respectfully submitted,

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