

STATE OF MICHIGAN  
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

(On Appeal from Wayne County Circuit Court)  
Judge Louis F. Simmons, Jr.

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JUDITH KUZNAR and JOSEPH KUZNAR, her  
husband,

Plaintiffs/Appellees,

Supreme Court No. 132203  
Court of Appeals No. 259501  
Wayne County Circuit Court  
Case No. 03-333448 NO

-vs-

RAKSHA CORPORATION d/b/a CROWN  
PHARMACY and VALERIE RANDALL, jointly  
and severally,

Defendants/Appellants,

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**KANTER & KNAPP, P.L.L.C.**

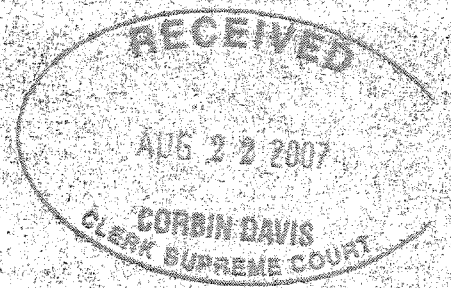
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**PLAINTIFFS/APPELLEES' BRIEF ON APPEAL**

**\*\* ORAL ARGUMENT REQUESTED \*\***

**TABLE OF CONTENTS**

Counter-Statement of Questions Involved..... ii

Index of Authorities..... iii

Statement of Facts and Material Proceedings..... 1

Law and Argument..... 2

I. THE MEDICAL MALPRACTICE LIMITATIONS STATUTE, MCL 600.5838a, DOES NOT APPLY TO A PHARMACY AND ITS NON-PHARMACIST EMPLOYEES..... 3

A. The medical malpractice limitations statute is not applicable to a pharmacy, since a pharmacy should not be deemed a “licensed health care provider” under MCL. 600.5838a..... 3

II. A NON-PHARMACIST EMPLOYEE OF A PHARMACY, WHO REFILLED A PRESCRIPTION AND DISPENSED THE WRONG MEDICATION, IS SUBJECT TO A CLAIM FOR ORDINARY NEGLIGENCE; A PHARMACIST IS NOT A NECESSARY PARTY TO SUCH CLAIM..... 4

II. THE TRIAL COURT AND COURT OF APPEALS PROPERLY DENIED DEFENDANTS’ MOTION FOR SUMMARY DISPOSITION BY DETERMINING THAT THE PLAINTIFFS’ CLAIMS SOUNDED IN ORDINARY NEGLIGENCE, RATHER THAN MEDICAL MALPRACTICE, AND THUS WERE NOT BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE CLAIMS ..... 5

Relief Requested..... 9

**COUNTER-STATEMENT OF QUESTIONS INVOLVED**

- I. DOES THE MEDICAL MALPRACTICE LIMITATIONS STATUTE, MCL 600.5838a, APPLY TO A PHARMACY AND ITS NON-PHARMACIST EMPLOYEES?**

Plaintiffs/Appellees say "No."

Defendants/Appellants say "Yes."

Court of Appeals said "No."

- II. CAN A NON-PHARMACIST EMPLOYEE OF A PHARMACY BE SUBJECT TO A CLAIM OF ORDINARY NEGLIGENCE FOR HER ACTIONS OF REFILLING A PRESCRIPTION AND DISPENSING THE WRONG MEDICATION?**

Plaintiffs/Appellees say: "Yes."

Defendants/Appellants say "No."

Court of Appeals said "Yes".

- III. DID THE TRIAL COURT AND COURT OF APPEALS PROPERLY DENY DEFENDANTS' MOTION FOR SUMMARY DISPOSITION BY DETERMINING THAT THE PLAINTIFFS' CLAIMS SOUND IN ORDINARY NEGLIGENCE, RATHER THAN MEDICAL MALPRACTICE, AND THUS ARE NOT BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE CLAIMS ?**

Plaintiffs/Appellees say: "Yes".

Defendants/Appellants say "No".

Court of Appeals said "Yes".

## INDEX OF AUTHORITIES

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
<i>Becker v Meyer Rexall Drug Co</i> , 141 Mich App 481; 367 NW2d 424 (1985).....	7
<i>Bryant v Oakpointe Villa Nursing Centre, Inc.</i> 471 Mich 481; 684 NW2d 864 (2004) .....	7
<i>Cameron v Auto Club Ins Ass'n</i> , 476 Mich 55, 63; 718 NW2d 784 (2006).....	4
<i>Fraser Twp v Linwood-Bay Sportsman's Club</i> , 270 Mich App 289, 297; 715 NW2d 89 (2006).....	4
<i>Kroger Co. v Estate of Hinders</i> , 733 N.E.2 d 303, 306-307 (Ind. Ct..App 2002) .....	3
<i>Kuznar v Raksha Corp</i> , 272 Mich App 130;724 NW2d 493 (2006).....	2
<i>People v Cleveland Williams</i> , 475 Mich 245, 250; 716 NW2d208 (2006).....	4
<i>Phillips v Larry's Drive-In Pharmacy, Inc.</i> __ W.Va. ____ (2007) January 2007 Term, No. 33194, filed June 28, 2007.....	3,4
<i>Simmons v Apex Drug Stores, Inc.</i> , 201 Mich App 250; 506 NW2d 562 (1993)....	7
<i>Sun Valley Foods Co v Ward</i> , 460 Mich 230, 237; 596 NW2d 119 (1999).....	4
<i>Walter v Wal-Mart</i> , 2000 Me 63, 748 A.2d 961 (2000) .....	8
<i>46<sup>th</sup> Circuit Court v Crawford Co</i> , 476 Mich 131, 157; 719 NW2d 553(2006).....	4
 <b><u>COURT RULES</u></b>	
MCR 2.205 .....	6
 <b><u>STATUTES</u></b>	
MCL 333.17707(2).....	5
MCL 333.17707(4).....	3
MCL 333.17707(5).....	3
MCL 333.17711.....	7

MCL 333.17741.....	6
MCL 333.17763.....	6
MCL 333.17763 (c) and (d).....	7
MCL 333.20106 .....	4
MCL 600.5838a (1) (b).....	2
<b><u>MISCELLANEOUS</u></b>	
<i>Michigan Board of Pharmacy, <a href="http://www.michigan.gov/mdch">http://www.michigan.gov/mdch</a>.....</i>	5

## **COUNTER-STATEMENT OF FACTS AND MATERIAL PROCEEDINGS**

The Plaintiffs filed their Complaint on October 7, 2003, not October 27, 2003. (Defendants/Appellants' Appendix, page 7a). The Plaintiffs dispute the characterization of Defendant, Valerie Randall, as a "pharmacy technician", as there is no such profession licensed in the State of Michigan.

The Plaintiffs/Appellants further dispute the assertion that, "it was undisputed by the parties in the trial court and in the Court of Appeals that Defendant Crown Pharmacy is a licensed health care facility under a contractual duty to render health care services to its customers." First, the issue as to whether a pharmacy constitutes a licensed health care facility was not addressed in the trial court. The question as to whether a pharmacy is a licensed health care facility did not arise in this case until the time of oral argument in the Court of Appeals, when the Court asked respective counsel their opinion on that issue. The issue had not been briefed or researched at that time, and Plaintiffs/Appellees' counsel's answer to the question was on first impression and a preliminary opinion, certainly not conclusive of the issue.

## **LAW AND ARGUMENT**

### **Introduction**

The Plaintiffs brought suit against Defendant pharmacy and its non-pharmacist employee for the negligent refilling of a prescription. Defendants filed a Motion for Summary Disposition, alleging that suit was not filed within the two-year medical malpractice statute of limitations period, MCL 600.5838a. The trial court denied Defendants' motion. The Court of Appeals affirmed, and held that the Defendant pharmacy was not a "licensed health care facility or agency," and that the Defendant non-pharmacist

employee was not a “licensed health care professional” giving rise to a professional relationship between Plaintiffs and Defendants. The Court of Appeals held, therefore, that the Plaintiffs’ claims are excluded from the realm of medical malpractice and not governed by MCL 600.5838a.

The Court of Appeals was careful in its analysis to distinguish between a pharmacist (defined by statute as a licensed health care professional) and a pharmacy (not defined by statute as a licensed health facility or agency). Furthermore, just as all causes of action for negligence against hospitals or physicians do not necessarily fall under the medical malpractice umbrella, but under the particular circumstances may fall under an ordinary negligence scenario, all causes of action for negligence against a pharmacy, even if the legislature chose to designate it a licensed health facility, which to date it has not, should not be summarily designated as medical malpractice claims. The Plaintiffs/Appellees respectfully request that this Court affirm the decision of the Court of Appeals.

**I. THE MEDICAL MALPRACTICE LIMITATIONS STATUTE, MCL 600.5838a, DOES NOT APPLY TO A PHARMACY AND ITS NON-PHARMACIST EMPLOYEES**

The Court of Appeals in this case held that “a pharmacy is not a licensed health facility subject to malpractice actions” and the unlicensed pharmacy technician (is) “not a licensed health care professional subject to malpractice suits under MCL 600.5838a (1)(b).” *Kuznar v Raksha Corp*, 272 Mich App 130; 724 NW2d 493 (2006).

The Court of Appeals decision is based on the fact that Article 17 of the Michigan Public Health Code, MCL 333.20106, does not include pharmacies under the definition of “health facility or agency”, subject to malpractice suits under MCL 600.5838a(1)(a), and

that the non-pharmacist employee, Defendant Randall, was not a “licensed health care professional” subject to malpractice suits under MCL 600.5838a(1)(b).

The legislature has not defined a pharmacy as a “health facility.” MCL 333.17707(4) defines a pharmacy as “a building or part of a building in which the practice of pharmacy is conducted.” MCL 333.17707(5) defines the “practice of pharmacy” as “a health service.”

The issue of whether pharmacies should qualify as “health care providers,” although not specifically named as such in the statute, and whether they should be subject to a medical malpractice statute of limitations, was recently decided by the West Virginia Supreme Court in the case of *Phillips v Larry’s Drive-In Pharmacy, Inc.*, \_\_\_ W. Va. \_\_\_\_ (2007), January 2007 Term, No. 33194, filed June 28, 2007. (Appellees ‘Appendix, Page 1b). The West Virginia Supreme Court reached the same conclusion as did the Court of Appeals in the instant case regarding this issue:

A patient’s relationship with a pharmacy is not equivalent of a doctor-patient relationship. A patient goes to a drug store only after the patient visits a physician and receives a prescription, and then largely to purchase a product. As one court stated,

In every relationship between a patient and one of the listed health care providers under Indiana Code section 34-18-2-14, independent medical treatment is an important component of the health care provided. This characteristic is lacking in the relationship between a pharmacist and a customer simply requesting that a prescription be dispensed.

*Kroger Co. v Estate of Hinders*, 733 N.E.2d 303, 306-307 (Ind. Ct.App 2002)

*Phillips v Larry’s Drive-In Pharmacy, Inc*, supra. (Appellees’ Appendix, Page 16 b).

In *Kroger Company v Estate of Hinders*, 773 N.E.2d 303 (Ind.App 2002), the Indiana Court of Appeals, in deciding whether that state’s Medical Malpractice Act applied to pharmacies for the purpose of determining the applicable statute of limitations, held that since pharmacies had not been specifically added to the exclusive list of health care

providers afforded the protections of its Medical Malpractice statute of limitations, pharmacies and pharmacists were not “health care providers.”

The West Virginia Supreme Court, in *Phillips, supra*, noted the fact that pharmacies were not included under the state code’s definition of “health care providers” and discussed statutory interpretation.

“The list does not include pharmacies, and this Court has previously recognized that in the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies. ... The *expressio unius* maxim is premised upon an assumption that certain omissions from a statute by the Legislature are intentional.” *Phillips, supra* (Appellees’ Appendix , page 18b)

Michigan courts also have recognized and utilized the *expressio unius* maxim in determining legislative intent. *Fraser Twp v Linwood-Bay Sportsman’s Club*, 270 Mich App 289, 297; 715 NW2d 89 (2006).

In determining the legislative intent of a statute, a court must first look to the plain language of the statute itself. In *Cameron v Auto Club Ins Ass’n*, 476 Mich 55, 63; 718 NW2d 784 (2006), this Court wrote that, “we must assume that the thing the Legislature wants is best understood by reading what is said.” “If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written.” 46<sup>th</sup> *Circuit Court v Crawford Co*, 476 Mich 131, 157; 719 NW2d 553(2006), quoting *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). Because the language of the Public Health Code is unambiguous in excluding a pharmacy from its definition of health facilities, this court must presume that the intent is what has been clearly expressed and “no further judicial construction is... permitted.” *People v Cleveland Williams*, 475 Mich 245, 250; 716 NW2d208 (2006).

Applying the rules of statutory construction, it is clear that the Michigan

legislature, by not including pharmacies under the definition of “licensed health facility or agency” in MCL 333.20106, and yet including the occupation of pharmacist as a “licensed health care professional,” was aware of what it was doing and intended the law to be as written.

**II. A NON-PHARMACIST EMPLOYEE OF A PHARMACY MAY BE SUBJECT TO A CLAIM OF ORDINARY NEGLIGENCE FOR REFILLING A PRESCRIPTION AND DISPENSING THE WRONG MEDICATION; A PHARMACIST IS NOT A NECESSARY PARTY TO SUCH CLAIM**

The Defendants/Appellants in their brief have referred to Defendant, Valerie Randall, as a “pharmacy technician.” Such a job classification is not specified by statute or by the Michigan Administrative Code Rules relating to pharmacies. (See *Michigan Board of Pharmacy*, <http://www.michigan.gov/mdch>). MCL 333.17707(2) defines the profession of “pharmacist” as “an individual licensed under this article to engage in the practice of pharmacy.” It also defines the job of “pharmacist intern” or “intern” as “an individual who satisfactorily completes the requirements set forth in rules promulgated by the board and is licensed by the board for the purpose of obtaining instruction in the practice of pharmacy from a preceptor approved by the board.”

Plaintiffs/Appellees alleged in their complaint that Defendant, Valerie Randall, who was not a pharmacist or an intern, dispensed the prescription at issue. Contrary to Defendants/Appellants’ assertions, the Plaintiffs/Appellees have throughout this litigation disputed that a “professional relationship” existed between the parties. The Plaintiffs/Appellees’ complaint alleges that an unlicensed individual, acting without supervision from a licensed pharmacist, dispensed the wrong amount of medication. Despite the Defendant/Appellants’ characterization of Valerie Randall as a “pharmacy

technician”, there is no such licensed profession in Michigan. Ms. Randall was an unlicensed individual filling prescriptions and dispensing medications, when she was completely unqualified under the law to do so.

MCL 333.17741 indicates that a pharmacy shall not be operated unless licensed by this part. Although MCL 333.17741 requires that “a pharmacy open for business shall be under the personal charge of a pharmacist and the person to whom a pharmacy license is issued” and that the “pharmacists on duty are responsible for compliance with federal and state laws regulating the distribution of drugs and the practice of pharmacy”, the statute does not mandate making the pharmacist a party to a civil lawsuit for damages incurred as a result of a violation of these provisions.

In the instant case, the Plaintiffs/Appellees have alleged that no pharmacist was on duty and present at the premises when the subject prescription was refilled. Plaintiffs/Appellees assert that, in light of the factual circumstances, the pharmacist that should have been present and in charge of the pharmacy when the prescription was dispensed is not a necessary party under MCR 2. 205.

MCR 2.205 states :

(A) Necessary Joinder. Subject to the provisions of subrule (B) and MCR 3.501, persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests

The Court is able to render complete relief to the parties without the pharmacist being made a party to this civil lawsuit. MCL 333.17763 provides for disciplinary procedures against pharmacists who violate the provisions of the health code, such as, “permitting the dispensing of prescriptions by an individual who is not a pharmacist, pharmacist intern, or dispensing prescriber” or “permitting the dispensing of prescriptions

by a pharmacist intern”, who is not in the presence of the pharmacist. MCL 333.17763 (c) and (d). The Public Health Code does not mandate the naming of the pharmacist as a party to a civil lawsuit for violations of the above sections.

**III. THE TRIAL COURT AND COURT OF APPEALS PROPERLY DENIED DEFENDANTS/APPELLANTS’ MOTION FOR SUMMARY DISPOSITION BY DETERMINING THAT THE PLAINTIFFS/APPELLEES’ CLAIMS SOUND IN ORDINARY NEGLIGENCE RATHER THAN MEDICAL MALPRACTICE, AND THUS ARE NOT BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE CLAIMS**

MCL 333.17711 specifically proscribes an unlicensed individual from engaging in the practice of pharmacy. MCL 333.17741 further provides that a pharmacy open for business shall be under the personal charge (defined in MCL 333.17707 as “the immediate physical presence”) of a licensed pharmacist. Plaintiffs/Appellees’ complaint alleges that the Defendants/Appellants’ negligent acts were performed while they were in violation of these requirements. As Defendants/Appellants’ presented no evidence to rebut these allegations, they must be taken as true for the purposes of summary disposition. Plaintiffs/Appellees’ claims do not arise out of the course of a professional relationship, and the Court of Appeals in the instant case was correct in its analysis and in distinguishing *Becker v Meyer Rexall Drug Co*, 141 Mich App 481; 367 NW2d 424 (1985), and *Simmons v Apex Drug Stores, Inc.*, 201 Mich App 250; 506 NW2d 562 (1993), as those cases involved allegations against the pharmacist.

In *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411, 684 NW2d 864 (2004), this Court ruled that a claim for ordinary negligence arising out of the care rendered to plaintiff’s decedent in a nursing home was not a claim for medical malpractice and therefore not barred by the medical malpractice statute of limitations. The court used a

two-pronged test to determine that the claim was one of ordinary negligence rather than one of medical malpractice:

“[A] court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises the questions of medical judgment beyond the realm of common knowledge and experience.” *Bryant, supra at 422.*

The court further explained further explained that, “[i]f the reasonableness of the health care professional’s actions can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence.” *Bryant, supra at 423.*

Plaintiffs/Appellees’ claims do not raise questions of medical judgment beyond the realm of common knowledge and experience. Plaintiffs/Appellees assert that no expert testimony concerning a medical standard of care is necessary for a jury to properly evaluate the allegations and determine that the Defendants/Appellants breached their duty of ordinary care when allowing a customer’s prescription to be dispensed with eight times the amount of medication prescribed.

At least one state supreme court has addressed this issue and concluded that such a scenario presents a case of ordinary negligence. In *Walter v Wal-Mart*, 2000 Me 63, 748 A.2d 961 (2000), a case in which the wrong drug was given to a customer getting a prescription filled, the Maine Supreme Court stated that “the negligence of the pharmacist and the harmful results were sufficiently obvious to be within the common knowledge of a lay person. It does not take an expert to know that *filling a prescription with the wrong drug* and failing to take steps in place in that pharmacy to check for the wrong drug is negligence.” *Walter, supra* (Appellees’ Appendix at page 36b) (Emphasis added).

**RELIEF REQUESTED**

The Plaintiffs/Appellees have filed ordinary negligence claims against the Defendants/Appellants. For the reasons stated above, it is respectfully requested that this Honorable Court affirm the decision of the Court of Appeals.

Respectfully submitted,

**KANTER & KNAPP, P.L.L.C.**

Dated: August 17, 2007

  
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