

**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,

v

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

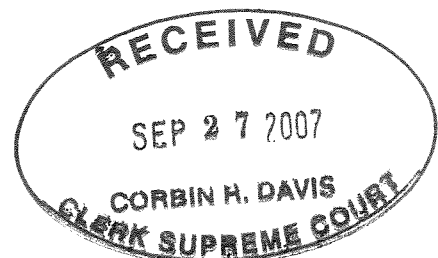
Defendants/Appellants.

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Docket No. 132203  
COA No: 259501  
L.C. No: 03-333448-NO

**BRIEF AMICUS CURIAE, MICHIGAN PHARMACISTS ASSOCIATION**  
**IN SUPPORT OF DEFENDANT/APPELLANT'S APPEAL**

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## INTRODUCTION

The Plaintiff-Appellee's position in this case is essentially that by artful crafting of a complaint, a Plaintiff can avoid the two-year statute of limitations which has been consistently applied to pharmacy malpractice actions in the State of Michigan. It is your Amicus' position that this Court should refuse to allow a Plaintiff to enlarge the applicable statute of limitations by simply not naming a pharmacist as a Defendant and, instead, naming only a pharmacy technician and a pharmacy in an action alleging that a prescription was misfilled at the defendant pharmacy. In addition, it is the MPA's position that a pharmacist is not a necessary party in a malpractice action alleging that a prescription was misfilled.

## ARGUMENT

**I. MICHIGAN'S TWO-YEAR STATUTE OF LIMITATIONS PERTAINING TO MALPRACTICE ACTIONS APPLIES IN SITUATIONS WHERE THE PLAINTIFF IS ALLEGING THAT A PRESCRIPTION HAS BEEN MISFILLED AT A PHARMACY.**

It has long been the law in the State of Michigan that actions alleging malpractice on the part of a pharmacist or pharmacy must be filed within two years. *Simmons v Apex Drug Store, Inc.*, 201 Mich App 250; 506 NW2d 562 (1993); *Becker v Meyer Rexall Drug Co.*, 141 Mich App 481; 367 NW2d 424 (1985). MCL 600.5838(a) provides that limitation. It applies to pharmacists, who are undisputedly licensed health care professionals, as well as anyone "who holds himself or herself out to be a licensed health care professional," and to pharmacies.

**A. THE TWO-YEAR STATUTE OF LIMITATIONS APPLIES TO ACTIONS AGAINST PHARMACISTS AS WELL AS THOSE WHO HOLD THEMSELVES OUT TO BE PHARMACISTS.**

Under Michigan law, only a pharmacist can fill a prescription or dispense medication. MCL

333.17711. In addition, all pharmacy services must be conducted under the personal control of a pharmacist. MCL 333.17741. If the prescription involved in this case, as Plaintiff alleges but Defendant disputes, was filled by somebody other than a licensed pharmacist, that person was, by necessity, holding himself or herself out to be somebody who could legally fill a prescription. The only person who can legally fill a prescription is a pharmacist and, therefore, an action alleging that an inappropriate medication was provided is a malpractice action subject to the two-year statute of limitations.

The position of the Michigan Pharmacists Association is very clear. The MPA does not, in any way, approve or condone the filling of prescription medications by any one other than a licensed pharmacist. There is no excuse or justification for a pharmacy technician to work at a pharmacy who is not under the control and personal charge of a pharmacist as required by Michigan law. Such activity could easily be considered practicing pharmacy without a license.

It is also the position of the MPA, however, that a Plaintiff should not be allowed to avoid the two-year statute of limitations in an action for pharmacy malpractice by artfully naming only the pharmacy and a non-pharmacist as defendants. The MPA can envision that if this Court upholds the opinions of the lower courts, the two-year statute of limitations will be expanded by the careful crafting of complaints to become a three-year statute of limitations for a cause of action alleging professional malpractice. That was clearly not the intent of the Legislature.

**B. A PHARMACY IS A LICENSED HEALTH CARE PROFESSIONAL AND THE TWO-YEAR STATUTE OF LIMITATIONS APPLIES.**

In addition, it has long been the law in Michigan that actions against pharmacies involving the filling of prescriptions is subject to the two-year limitations period provided in MCL

600.5838(a). The two-year limitations applies to actions against a “licensed health care professional.” Under MCL 600.5838(a)(1)(b) “Licensed Health Care Professional” means “an individual licensed or registered under Article 15 of Public Health Code” (MCL 333.16101 to 333.18838). Under Article 15 of the Public Health Code, “Pharmacies” are included as a “licensed health care professional.” Both a pharmacist and a pharmacy must be licensed by the State. Both are considered licensed health care professionals because of the stringent requirement that pharmacies be operated under the control and personal charge of a pharmacist. The Court of Appeals opinion that suggests that the two-year statute of limitations does not apply to an action against a pharmacy because it is not a “licensed health facility or agency” ignores the fact that the Legislature included pharmacies as licensed health care professionals protected by the two-year statute of limitations. Because a pharmacy is a “licensed health care professional,” actions alleging a misfilled prescription are subject to the two-year statute of limitations.

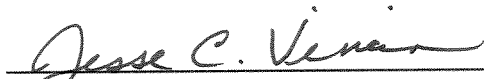
## **II. A PHARMACIST IS NOT A NECESSARY PARTY IN AN ACTION ALLEGING THE INAPPROPRIATE FILLING OF A PRESCRIPTION.**

This Court asked the parties to address whether the naming of a pharmacist is necessary in an action against a pharmacy for malpractice. It is the position of the Michigan Pharmacists Association that a pharmacist is not a necessary party in such an action any more than the naming of a physician is necessary in any action against a professional corporation which employs the physician. Clearly, a pharmacy can be sued for the misconduct of its employees. It is not essential to the cause of action to name the individual employee as a defendant for the Plaintiff to have a cause of action against a pharmacy.

**CONCLUSION**

For these reasons, the Michigan Pharmacists Association request that this Court reverse the holding of the Court of Appeals and confirm the requirements established by statute and case law that actions against a pharmacy for misfilling prescriptions is subject to the two-year statute of limitations irrespective of whether or not a pharmacist is named as a defendant.

Respectfully submitted,



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Dated: September 26, 2007

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