

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KATHLEEN GAY HOOPER, Personal  
Representative of the Estate of  
RONALD CHARLES HOOPER, Deceased,

Plaintiff-Appellee,

v

PERRY DRUG STORES, INC.,

Defendant-Appellant,

and

DR. VENITA PRABHAKAR, HENRY FORD  
HEALTH SYSTEM, d/b/a HENRY FORD  
MEDICAL CENTER, and JOHN DOE,  
Pharmacist,

Defendants.

UNPUBLISHED  
September 20, 1996

No. 178665  
LC No. 93-327645

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Before: White, P.J., and Smolenski, and R.R. Lamb,\* JJ.

PER CURIAM.

In this medical malpractice and pharmacist negligence case, defendant Perry Drug Stores, Inc., appeals by leave granted from a September 1994 order denying its motion for summary disposition. We reverse.

On May 30, 1992, Ronald Hooper, visited Dr. Venita Prabhaker, a physician at Henry Ford Medical Center, for treatment. Dr. Prabhaker examined Hooper and gave him prescriptions for Seldane and Erythromycin. Hooper presented the prescriptions to a pharmacist at one of defendant's stores the same day. The pharmacist filled the prescriptions as written and dispensed the prescribed

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\* Circuit judge, sitting on the Court of Appeals by assignment.

medications to Hooper, who thereafter ingested them. On July 7, 1992, Hooper died of a myocardial infarct, secondary to coronary thrombosis.

Seldane is “terfenadine”. Erythromycin is a “macrolide” antibiotic. Almost two years before the death of plaintiff’s decedent in this case an August 6, 1990 letter entitled “IMPORTANT DRUG WARNING” was issued by Marion Merrill Dow, Inc., the manufacturer of Seldane, to physicians and pharmacies, including Dr. Prabhaker and defendant’s store. This letter provided in relevant part as follows:

### PRECAUTIONS

General: Terfenadine undergoes extensive metabolism in the liver. Patients with impaired hepatic function (alcoholic cirrhosis, hepatitis) or on ketoconazole or troleandomycin therapy, or having conditions leading to QT prolongation (e.g., hypokalemia, congenital QT syndrome) may experience QT prolongation and/or ventricular tachycardia at the recommended dose. The effect of terfenadine in patients who are receiving agents which alter the QT interval is not known. These events have also occurred in patients on macrolide antibiotics, including erythromycin, but causality is unclear. The events may be related to altered metabolism of the drug, to electrolyte imbalance, or both.

Drug Interactions: Preliminary evidence exists that concurrent ketoconazole or macrolide administration significantly alters the metabolism of terfenadine. Concurrent use of Seldane with ketoconazole or troleandomycin is not recommended. Concurrent use of other macrolides should be approached with caution.

On July 7, 1992, approximately five weeks after plaintiff’s decedent had filled his prescription at defendant’s store, a Department of Health and Human Services news release stated that Marion Merrill Dow, Inc., had issued pursuant to a request by the Food and Drug Administration warnings to physicians and pharmacists that patients using Seldane may be in danger of developing life-threatening cardiac arrhythmias, and that the concurrent use of Seldane and Erythromycin was contraindicated and must be avoided.

In September 1993, plaintiff Kathleen Gay Hooper, as personal representative of the decedent’s estate, filed suit against Dr. Prabhaker, Henry Ford Health System, doing business as Henry Ford Medical Center, an unknown pharmacist and defendant Perry, claiming medical malpractice and pharmacist negligence. As relevant to this appeal, plaintiff claimed that defendant’s acts of dispensing Seldane and Erythromycin for concurrent use were negligent acts that proximately caused the decedent’s death.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), claiming that dismissal of plaintiff’s claim was in order because it had no actionable duty to plaintiff’s decedent except to correctly fill his valid prescription. In response, plaintiff claimed defendant’s duty to plaintiff’s decedent arose by virtue of the August 6, 1990 letter and that defendant had breached its duty by failing

to contact Prabhaker before dispensing Seldane and Erythromycin to plaintiff's decedent for concurrent use.

The trial court denied defendant's motion, noting that the issue before it was whether defendant had a duty to warn the physician, or anyone else, if the prescription was accurately filled. The court reasoned that although duty was an issue for the court to decide a relationship existed that required defendant to operate with ordinary care, and that whether it did so was for the jury to decide.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law. *American Community Mutual Ins Co v Comm'r of Ins*, 195 Mich App 351, 362; 491 NW2d 597 (1992). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Radtke, supra*. All inferences are to be drawn in favor of the nonmovant. *Dagen v Hastings Mut Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987).

The moving party must specifically identify the matters which have no disputed factual issues, and has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 134; 463 NW2d 442 (1990). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). The disputed factual issues must be material to the dispositive legal claims. *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1991). The nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

A pharmacist owes a customer a duty to properly fill lawful prescriptions and may be held liable in tort for any breach of that duty. *Adkins v Mong*, 168 Mich App 726, 729; 425 NW2d 151 (1988). Generally, however, a pharmacist will not be held liable for correctly filling a prescription issued by a licensed physician. *Id.* Thus, this Court has held that a pharmacist owes no legal duty to warn a customer of the possible side effects of a prescribed medication where the prescription is proper on its face and neither the physician nor the manufacturer has required that any warning be given to the patient by the pharmacist. *Stebbins v Concord Wrigley Drugs, Inc*, 164 Mich App 204, 218; 416 NW2d 381 (1987). This Court has also held that a pharmacist owes no legal duty to monitor and intervene with a customer's reliance on drugs prescribed by a licensed physician. *Adkins, supra* at 732. The rationale for these rules is, in part, that "pharmacists should not be placed in the position of having to second guess every prescription in an attempt to avoid tort liability." *Adkins, supra* at 730; *Stebbins, supra* at 216-217. In addition, this Court has held that a pharmacist owes no legal duty either to discover a customer's addicted status or, failing such knowledge, to refuse to sell a nonprescription product to him." *Kintigh v Abbott Pharmacy*, 200 Mich App 92, 94; 503 NW2d 657 (1993).

However, in *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 205-206; 544 NW2d 727 (1996), this Court found that a pharmacy voluntarily assumed a duty of care to a customer where it had implemented a computer system and then advertised that this system would detect harmful drug interactions for its customers. Moreover, this Court has specifically reserved consideration of the scope of a pharmacist's liability where the pharmacist either knows of a particular patient's unique problems or where the pharmacist fills two incompatible prescriptions. *Baker, supra* at 205; *Stebbins, supra* at 218.

In this case, the August 6, 1990 letter did not state that Seldane and Erythromycin were incompatible or that their concurrent use was contraindicated. Rather, the letter contemplated their concurrent use, albeit with "caution," thereby leaving the ultimate determination concerning their concurrent use with the physician. Rather, the first determination that Seldane and Erythromycin were incompatible or their concurrent use contraindicated was the July 7, 1992 Department of Health and Human Services news release. Thus, assuming without deciding that a pharmacy has a duty not to fill two incompatible prescriptions, *Baker, supra*, we conclude that no such duty arose in this case where Seldane and Erythromycin were not incompatible or their concurrent use was not contraindicated at the time plaintiff's decedent fill his prescription at defendant's store. Rather, we believe this case falls within the rule that "a pharmacist has no duty to warn the patient of *possible* side effects of a prescribed medication where the prescription is proper on its face and neither the physician nor the manufacturer has required any warning be given the patient by the pharmacist." *Stebbins, supra* at 218 (emphasis supplied). To hold otherwise would require pharmacists to second-guess every prescription ordered by a doctor. *Id.* At 216-217.

Finally, plaintiff argues that when the determination of duty depends upon factual findings, the issue is for the finder of fact. See, e.g., *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 528-529; 538 NW2d 424 (1995). We hold, however, that even giving the benefit of every reasonable inference to plaintiff, there were no factual issues remaining for trial concerning the issue of duty where the concurrent use of Seldane and Erythromycin did not become contraindicated until after plaintiff's decedent had filled his prescriptions at defendant's store.

Reversed.

/s/ Michael R. Smolenski

/s/ Richard R. Lamb