

STATE OF MICHIGAN
COURT OF APPEALS

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

UNPUBLISHED

Plaintiff- Appellee,

v

No. 178665
LC No. 93-327645

DR. VENITA PRABHAKAR, HENRY FORD
HEALTH SYSTEM d/b/a HENRY FORD
MEDICAL CENTER, PERRY DRUG STORES,
INC., JOHN DOE, Pharmacist, jointly and severally,

Defendants,

and

PERRY DRUG STORES, INC.,

Defendant-Appellant.

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

WHITE, P.J., (dissenting)

I respectfully dissent. I conclude that the circuit court properly determined that there is a genuine issue whether defendant's duty of ordinary professional care extended beyond accurately filling the prescriptions under the circumstances presented in the instant case.

Plaintiff's complaint in pertinent part alleged gross negligence, negligence and malpractice as to defendant Perry Drug Stores, Inc., (Perry) and John Doe, a pharmacist and employee of Perry. Defendant's motion for summary disposition argued that defendant had no actionable duty such as alleged in plaintiff's complaint. Defendant argued that because it had no legal duty to second-guess plaintiff's doctor with respect to the medication, plaintiff's negligence claims were unenforceable as a matter of law. Defendant argued that if there did come a time when defendant might have been

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

negligent in dispensing the two prescriptions concurrently, that time was, at the earliest, July 1992. Defendant argued that until July 1992, the combination of Seldane and Erythromycin was “not contraindicated, and the matter [was] left to the medical judgment of Mr. Hooper’s physician.” Defendant further argued that “Unless the prescription confronting the pharmacist represents an obviously lethal dosage, or is absolutely contra-indicated (such as became the case after these prescriptions were filled), the pharmacist has no duty and no liability.”

Plaintiff attached to her response to defendant’s motion for summary disposition excerpts of deposition testimony of the pharmacist who dispensed the two prescriptions for plaintiff’s decedent on May 30, 1992.¹ The pharmacist, Kay Pfeifle, testified that she had never seen the August 6, 1990, warning letter from Marion Merrell Dow before, and that had she seen that letter she “absolutely” would have made some inquiries before she filled the prescription. She testified that her first reaction would have been to call the doctor to see if the doctor was aware of the warnings stated in the letter.² Pfeifle further testified that had she so contacted the doctor, and had the doctor indicated to her that she wanted the prescription filled, Pfeifle believed that she would not have filled the prescription. Pfeifle also testified that in 1992 Perry had a computer network set up whereby the pharmacist or the pharmacist’s assistant filling a prescription would interface with the computer.³

Plaintiff submitted the affidavit of Leeann Stember, president and executive director of the National Council for Prescription Drug Program, which averred that the August, 1990 “Important Drug Warning” letter was mailed to the drugstore. Pfeifle, the pharmacist, testified that the information contained in the letter was not contained in the Perry computer and was not made known to her.

Plaintiff’s brief below also attached the affidavit of its expert witness, a licensed pharmacist with a Ph.D. in Pharmacy, who averred that:

10. It is my expert opinion that in May 1992, Perry Drugs had a duty to inform its pharmacists of this potentially adverse interaction, and that pharmacists once aware of this interaction, had a duty to contact the prescribing physician and/or warn the patient of the potential health risks before dispensing Seldane with Erythromycin to be used concurrently. Once the pharmacist was made aware of this potential adverse interaction, to act inconsistent with the above would be in violation of the standard of care; and

11. It is my expert opinion that in May 1992, Perry Drugs violated pharmacy and pharmaceutical industry standards by failing to properly inform, advise, and/or instruct its pharmacists employed and/or acting as agents of Perry Drugs about the potential health risks associated with the concurrent use of Seldane and Erythromycin. It was the duty of Perry Drug Stores to disseminate information regarding the potential interaction to its pharmacy employees or agents. Perry Drug Stores violated this duty.

After hearing argument from counsel, the circuit court stated:

Okay, summary judgment is sought essentially on the basis that as a matter of law there was no duty to warn the physician or anyone else once—if the prescription was accurately filled. **And it is true that duty is for the court, not some expert. But the duty that is for the court is whether there is a relationship that requires the exercise of ordinary care. And of course there is.**

You don't—but that doesn't solve the question. This is in the end a negligence case, and negligence in the end is determined by what all mankind does. The people in the middle, what they do, and that's the standard. And in the usual case we tell the jury that they're supposed to decide that.

In this kind of a case it's not a matter of ordinary experience in the affairs of life and so what ordinary people do is determined by people who have knowledge about those things. And that is expert witnesses. People who work in the business. And so in that sense it is for an expert to tell the court what negligence is. This is the way it's done.

He's [plaintiff] got an expert who says that the ordinarily careful pharmacist at this point in time would have done something, and the rest of it, which apparently neither of you are overly concerned about, is a matter of causation which—and if you're not concerned about, I won't either—**so it remains for evidence to determine what the ordinarily careful pharmacist would have done or, if you will, what the standard of care was for the pharmacist.**

There is obviously a relationship between one who dispenses drugs and the person standing in front of them who's going to take it. The duty of ordinary care. And the only question is whether it extends this far. The only other thing is that if there is for reasons of policy some common law decision that says well regardless of what the practice is or might be, we're going to arbitrarily for policy reasons end the duty right here as the courts have done in other situations.

But they have not yet done that in this circumstance. The motion is denied.

Baker v Arbor Drugs, 215 Mich App 198, 205; 544 NW2d 727 (1996), was decided during the pendency of this appeal and appears to be the only Michigan pharmaceutical negligence case involving the dispensing of several incompatible prescriptions. As stated in the majority opinion, this Court in *Baker* expressly stated that in *Stebbins v Concord Wrigley Drugs, Inc*, 164 Mich App 204, 218; 416 NW2d 381 (1987) “this Court . . . specifically reserved consideration of a pharmacist's liability in situations where the pharmacist knows of a particular patient's unique problems or where a pharmacist fills two incompatible prescriptions.” *Baker*, 215 Mich App at 204.

The majority reverses the circuit court on the basis of its conclusion that Marion Merrill Dow's letter of August 6, 1990, “did not state that Seldane and Erythromycin were incompatible or that their

concurrent use was contraindicated.” I disagree, and conclude that when the facts are viewed in a light most favorable to plaintiff, the letter, which was disseminated to pharmacies as well as physicians, expressed sufficient concern regarding the interaction of the two drugs, and was apparently so understood by the pharmacist involved when eventually called to her attention and by plaintiff’s expert, to constitute a manufacturer’s warning of incompatibility.

The letter’s prominent title, which is in bold and boxed all-capital letters is “IMPORTANT DRUG WARNING.” The letter alerts pharmacies and doctors that the labeling of Seldane has been revised and while the events noted are extremely rare, “we feel the changes are of sufficient importance that we should inform you.” The letter goes on to state:

PRECAUTIONS

General

Terfenadine [Seldane] undergoes extensive metabolism in the liver. Patients with impaired hepatic function . . . or on ketoconazole or troleandomycin therapy , or having conditions leading to QT prolongation . . . may experience QT prolongation and/or ventricular tachycardia at the recommended dose. . . **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. [Emphasis added.]

Drug Interactions

Preliminary evidence exists that concurrent ketoconazole **or macrolide administration significantly alters the metabolism of terfenadine [Seldane].** Concurrent use of Seldane with ketoconazole or troleandomycin is not recommended. **Concurrent use of other macrolides should be approached with caution.** [Emphasis added.]

ADVERSE REACTIONS

The information concerning cardiovascular adverse effects is being supplemented with the underlined:

Rare reports of severe cardiovascular adverse effects have been received which include arrhythmias (ventricular tachyarrhythmia, torsades de pointes, ventricular fibrillation), hypotension, palpitations, and syncope. . . .

* * *

The full text of the newly revised prescribing information for Seldane, which also includes an update of the information under CLINICAL PHARMACOLOGY and rewording of the DOSAGE AND ADMINISTRATION statement, accompanies this letter.

I conclude that reversal is not required by *Baker, supra*, *Stebbins, supra*, *Adkins v Mong*, 168 Mich App 726; 425 NW2d 151 (1988) or *Kintigh v Abbott Pharmacy*, 200 Mich App 91; 503 NW2d 657 (1993). While in *Baker* this Court based its decision on the plaintiff's claim that the defendant had undertaken a duty to warn of drug interactions, the court recognized that *Stebbins* specifically reserved consideration of a pharmacist's liability concerning incompatible prescriptions and did not state how the case would have been decided had the plaintiff not asserted the special undertaking. Further, in *Baker*, the drugs were not dispensed simultaneously, as they were here. *Stebbins* expressly distinguished a circumstance involving "two incompatible prescriptions." In *Adkins*, the panel that decided *Stebbins* applied *Stebbins* and concluded that a pharmacy has no duty to maintain and monitor customer records to identify addicted customers and their over-prescribing physicians. Relying on *Adkins*, the *Kintigh* Court concluded that "the pharmacists owed no duty to plaintiff to discover his addicted status; failing knowledge of that, they had no duty to refuse to sell to him."

The simultaneous filling of two prescriptions, the compatibility of which has been the subject of warnings from the manufacturer directly to the pharmacy, presents a significantly different factual circumstance than presented in *Stebbins, Adkins and Kintigh*. Under these circumstances, I conclude that the trial court properly denied defendant's motion.

/s/ Helene N. White

¹ From the excerpts of the pharmacist's deposition before us, we gather that she was employed as a licensed pharmacist by Perry beginning in 1985, and that at some point she left Perry, but returned there in March of 1991.

² Apparently, the doctor testified that she was thought she had prescribed Naldecon and not Seldane.

³ In *Baker, supra*, which also involved drug interactions, one of the plaintiff's claims was that the pharmacy voluntarily assumed a duty of care to plaintiff's decedent by implementing and using its ArborTech Plus system, which Arbor Drugs advertised as providing "your Arbor pharmacist with your complete medication history, so we're aware of any possible medication interactions." *Baker*, 215 Mich App at 205, n 1.