

IN THE FLORIDA SUPREME COURT

B.A.L. PHARMACY d/b/a
THE MEDICINE SHOPPE,

Petitioner,

v.

CASE NO: SC05-1192

LOWER COURTS

District Case No: 4D04-2061

Circuit Case No. 03-17380(12)

ROBERT POWERS, as Personal
Representative of the Estate of
Gail Powers,

Respondent.

REPLY BRIEF OF PETITIONER, THE MEDICINE SHOPPE

On Appeal from an Opinion of the Fourth District Court of Appeal Which
Certifies Direct Conflict with Opinions from the First and Fifth District
Courts of Appeal

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SCOPE OF THE REPLY BRIEF

In order to avoid unnecessary duplication, the Petitioner pharmacies have attempted to coordinate their replies to Powers' Answer Brief. Accordingly, Medicine Shoppe adopts the arguments contained in Your Druggists' Reply Brief as if fully contained herein.

ARGUMENT

I.

THE FOURTH DISTRICT COURT OF APPEALS' OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH OPINIONS FROM THE FIRST AND FIFTH DISTRICT COURTS OF APPEAL THUS VESTING THIS COURT WITH JURISDICTION TO RESOLVE THE CONFLICT.

Powers' overly narrow interpretation of the Fourth District's holding and the holdings in *Johnson v. Walgreen*, 675 So. 2d 1036 (Fla. 1st DCA 1996), and *Estate of Sharp v. Omnicare, Inc.*, 879 So. 2d 34 (Fla. 5th DCA 2004), is not an accurate portrayal of the line of Florida cases governing the duty of a pharmacist; a line of cases which is controlled by this Court's opinion in *McLeod v. W.S. Merrell Co.*, 174 So. 2d 736 (Fla. 1965). As is fully discussed in Medicine Shoppe's Initial Brief, under *McLeod*, a pharmacy's duty to its customers is limited to accurately filling a valid prescription. Both the First and Fifth District Courts agree. Contrary to *McLeod*, *Johnson*, and *Estate of Sharp*, the Fourth District held in this case that a pharmacy has a general duty to warn a customer of the risks associated

with taking a drug dispensed pursuant to a lawful and valid prescription. That holding wrongly interjects a pharmacist into the doctor-patient relationship.

In the Answer Brief, Powers attempts to distinguish *Johnson* on the grounds that *Johnson* “. . . did not even involve a claim of negligence, but held that the definition of dispense in the Florida Pharmacy Act did not create a private right of action.” (Answer Brief at 12). Power’s assertion makes no sense in light of the First District’s framing of the issue and holding in *Johnson*. The very first paragraph of the opinion in *Johnson* states as follows:

Johnson’s lawsuit against Walgreen was dismissed with prejudice by the trial court **on the grounds that her complaint failed to state a breach of a valid legal duty**. She challenges the trial court’s findings as to the **scope of a pharmacist’s duties under Florida law**. The question presented is whether Walgreen fulfilled its duties when it accurately filled her late husband’s lawful prescriptions, but failed to warn him or his doctors of the potential adverse drug interactions such a combination of prescriptions might cause. **We determine that no such duty to warn exists in Florida, and affirm the trial court’s ruling.**

Johnson, 675 So. 2d at 1037 (emphasis added).

Although the First District concluded in the *Johnson* opinion that the Florida Pharmacy Act did not provide the basis for a private cause of action, the decision in *Johnson* clearly held that the Defendant pharmacy did not have a duty to warn the decedent of potential drug interaction and that dismissal with prejudice was required.

Powers similarly mischaracterizes the holding in *The Estate of Sharp*. (Answer Brief at 13). In the first paragraph of the *Estate of Sharp* opinion, the Court states “[t]he trial court in dismissing the complaint with prejudice concluded that the Estate sought to establish a cause of action that went beyond that authorized by the Florida Supreme Court in *McLeod*. We agree with the trial court in this regard . . .”¹ *Estate of Sharp*, 879 So. 2d at 35. In *Estate of Sharp*, the Fifth District held that the Defendant pharmacy had breached no duty to the Plaintiff in connection with the prescribed drug regimen and thus dismissal of the claim against the pharmacy was required.

The conflict between the holdings in *Johnson* and *Estate of Sharp* and the Fourth District’s opinion in the instant case could not be more plain or more obvious. The Courts in *Johnson* and *Estate of Sharpe* held that, under this Court’s ruling in *McLeod*, a plaintiff can not state a cause of action against a pharmacy for failing to warn a customer of the risks associated with taking a drug dispensed pursuant to a lawful and valid prescription. In the instant case, the Fourth District held that a plaintiff who alleges a pharmacy’s breach of that same general duty to warn has stated a valid cause of action; one which may, under unarticulated circumstances, survive a summary judgment motion by the pharmacy.

¹ The *Estate of Sharp* Court then reversed and remanded, based on Plaintiff’s counsel’s representation that grounds existed for a claim based on the alternative theory of a voluntary undertaking by the pharmacy. There is no assertion by Powers that there is a basis for a voluntary undertaking claim in the instant case.

The true measure of whether the Fourth District's opinion creates a conflict in Florida case law is whether trial court rulings as to the duty of a pharmacist will differ based on the appellate district in which the trial court is located. Clearly, if this Court does not exercise its jurisdiction to review this case, a lawsuit with allegations identical to those in this case would not survive a motion to dismiss in circuit court in the First and Fifth Districts, but would survive a motion to dismiss in circuit court in the Fourth District. Moreover, there is no guidance, and only uncertainty as to when or if a circuit court judge governed by the Fourth District should grant summary judgment for a pharmacy. Clearly, there is no merit to Powers' argument that the Fourth District's opinion does not create conflict among the districts regarding the duty of a pharmacist.

Power's incorrect and unsubstantiated assertion that *Johnson* has likely been overruled by *Dee v. Wal-Mart Stores, Inc.*, 878 So. 2d 426 (Fla. 1st DCA 2004) is also incorrect and illustrates the fallacy to Power's argument that the Fourth District's opinion does not conflict with *Johnson* and *Estate of Sharp*. Prior to the Fourth District's opinion in this case, no Florida Court had ever held that a pharmacy had a general duty to warn its customers of the risks associated with the ingestion of a drug dispensed pursuant to a valid and lawful prescription from a medical doctor. The holding in *Johnson* followed this reasoning, and the holding

in *Dee*, although resulting in the finding of a limited duty, is consistent with *McLeod* and its progeny.

In *Dee*, the prescription was invalid on its face because, based on the nature of the drug prescribed, the prescription required an expiration date and there was no expiration date on the prescription. The prescription was over four months old, thus calling the validity of the prescription into question. The expiration date was required because the drug was only to be prescribed to individuals who had developed a tolerance to other drugs and therefore only should have been prescribed and dispensed if the individual had recently completed a regimen and developed a tolerance to weaker pain medication.

The facts and resulting issue before the Court in *Dee* was entirely different from that which was before the Court in *Johnson*. As discussed above, *Johnson* stands for the proposition that a pharmacist has no **general** duty to warn while *Dee* stands for the proposition that a pharmacist has a duty to warn or consult with the prescribing physician where the prescription submitted by the customer is defective on its face. Accordingly, Power's argument that *Johnson* was overruled by *Dee* is entirely baseless.

There is no allegation by Powers that there was any defect on the face of any of the prescriptions filled by Mrs. Powers at either of the pharmacies in this case. As such, the Fourth District, at Power's urging has created a general duty on the

part of a pharmacist to warn the customer and/or challenge the prescribing physician as to the strength and frequency of the dosage of prescribed pain medication, even where the prescription is valid on its face. The Fourth District's holding is thus directly contrary to the holdings in *McLeod*, *Johnson*, and *Estate of Sharpe* and is not supported by the holding in *Dee*.

Unlike the allegations in *Dee*, the crux of Power's argument is that the Petitioner drug stores should have recognized that Mrs. Powers was filling prescriptions for pain medications too frequently. In *Happel v. Wal-Mart Stores, Inc.*, 766 N.E. 2d 1118 (Ill. 2002), a case relied on by Powers in their Answer Brief, the Illinois Supreme Court very succinctly explained why there is a duty under circumstances like those found in *Dee* but not under the circumstances found in the instant case.

In *Happel*, the Court found a duty on the part of the pharmacy because the Plaintiff's husband verbally advised the pharmacy of his wife's drug allergies when he appeared at the pharmacy to pick up the medication and it should have been readily apparent to the pharmacist that the prescribed drug was in the class of drugs to which the Plaintiff was allergic. *Happel* is like *Dee* in that both cases involved circumstances where the pharmacist should have known from the information contained on or missing from the prescription that the drug should not

be dispensed. The *Happel* Court distinguished its opinion from the circumstances found in the instant case when it stated:

The situation here differs from . . . [cases] where **imposing the duty that the plaintiff sought would have required the pharmacist to warn that drugs were being prescribed in excessive quantities . . . a prescription which is excessive for one patient may be entirely reasonable for the treatment of another. Hence, imposing upon a pharmacist a duty to warn in such a situation might arguably require him to make a medical judgment.** Here, the pharmacist was faced not with a prescription for a quantity in excess of normal use, but rather with a simple contraindication which, as noted, means that the drug should not be given. It requires no medical judgment simply to notify a physician or a patient of such a contraindication.

Id. at 1128 (emphasis added) (citations omitted).

The Fourth District clearly erred in holding that Powers can state a valid cause of action against the pharmacies in this case where the pharmacies did nothing more than fill prescriptions that were lawful and valid on their face.

II.

THERE IS NO SUPPORT FOR POWER'S ASSERTION THAT THE NATIONAL TREND IN CASE LAW SUPPORTS CREATION OF A NEW GENERAL DUTY FOR PHARMACIES OR PHARMACISTS.

As discussed more fully in the Medicine Shoppe's Initial Brief, none of the out of state cases cited by Powers in their brief or by the Fourth District in the opinion below address the creation of a common law general duty of a Pharmacist to question a lawful and valid prescription from a customer's treating physician.

Instead, both Powers and the Fourth District cited to cases either (1) like *Dee* where the prescription was defective on its face or (2) from states that have enacted statutes authorizing private causes of action against the pharmacist under that state's pharmacist licensing statutes. Neither type of case provides valid support for imposing on pharmacists the broad new general duty to warn created by the Fourth District in its opinion below.

As conclusively demonstrated by the chart prepared and filed by *Amici*, the National Association of Chain Drug Stores (“NACDS”) and the Florida Retail Federation (“FRF”), in conjunction with their Amicus Brief, the overwhelming majority of states and the current trend in the common law from those states demonstrates that Power's assertion regarding the trend is simply wrong. In fact, shortly after NACDS and FRF filed their Amicus Brief, the Indiana Court of Appeals issued its opinion in *Alberry v. Parkmor Drug, Inc.*, 834 N.E. 2d 199 (Ind. Ct. App. 2005), holding that the defendant pharmacy had no duty to warn the customer of the potential side effects of a drug dispensed pursuant to a valid prescription because such warnings were the responsibility of the prescribing physician. *Id.* at 203. In reaching this conclusion, the *Alberry* Court considered many of the same out of state cases relied on by Powers and the Fourth District in the instant case, found the cases to be in the minority, and rejected their application to the *Alberry* case. *Id.* at 202-203. The *Alberry* Court stated:

By contrast, a few jurisdictions have imposed a duty on pharmacies that goes beyond merely filling prescriptions accurately. *See, e.g. Horner v. Spallito*, 1 S.W. 3d 519, 523-24 (Mo. Ct. App. 1999) (holding that a pharmacy could be found negligent for filling a prescription for what the pharmacist knew to be a lethal dose) reh'g denied, trans. Denied; *Lasley v. Shrake's County Club Pharmacy, Inc.*, 880 P. 2d 1129, 1132-34 (Ariz. Ct. App. 1994) (imposing a duty for failing to warn the customer when filling two prescriptions that adversely interacted with one another). . . . Because we find the majority view to be more persuasive, today, we reaffirm our holding in *Ingram v. Hook's Drugs, Inc.*, 476 N.E. 3d 881 (Ind. Ct. App. 1985).

Id. The *Alberry* Court concluded by noting that “. . . if the Indiana Legislature wanted to require pharmacists to warn customers of the side effects associated with prescription drugs, it would have done so by statute. We will not impose such a duty absent clear legislative intent.” *Id.* at 203. Similarly, as fully discussed in *Medicine Shoppe's* Initial Brief and the Long Term Care Pharmacy Alliance's Amicus Brief, Florida only requires pharmacists to offer to consult with customers; pharmacists are not required to second guess doctors' treatment of those customers. Accordingly, this Court should reject the small minority of cases relied on by the Fourth District and Powers because those cases do not serve as valid support for the Fourth District's creation of a new broad general duty to warn on the part of a pharmacy or pharmacist where the prescription is valid on its face.

III.

APPLICATION OF THE LEARNED INTERMEDIARY DOCTRINE IS APPROPRIATE

Contrary to the assertion in Power's Answer Brief, application of the learned intermediary doctrine has neither been considered nor rejected by either Federal or Florida statutes. As was discussed in the Medicine Shoppe's Initial Brief, Florida courts, including this Court in *McLeod*, have laid the ground work for application of the doctrine, thus rendering Power's examination of two cases from other states, which contain the minority view on the issue, to be unnecessary and irrelevant.

This case illustrates why application of the doctrine to pharmacies is particularly appropriate. In this case, Mrs. Powers' treating and prescribing physician, Dr. Thobhani,² was in the best position to determine whether the frequency, dosage and combination of the prescribed drugs was appropriate for Mrs. Powers given her medical diagnosis by Dr. Thobhani. Only Dr. Thobhani had the benefit of examining Mrs. Powers and her medical records. Most importantly, only Dr. Thobhani knew all of the medications that had been prescribed to Mrs. Powers. There was simply no way for one pharmacy to know which medications Mrs. Powers had obtained from other pharmacies; nor is there any allegation that one pharmacy knew or even could have known what Mrs.

² In addition to filing suit against Medicine Shoppe and Your Druggist, Powers also filed a medical malpractice action against Dr. Thobhani.

Powers had obtained through other pharmacies. As the sole treating and prescribing physician, only Dr. Thobhani was privy to this information and only Dr. Thobhani could assess or evaluate the appropriate prescription regimen for Mrs. Powers. In the Fourth District's own words from an earlier decision: "It is the physician who has the duty to know the drug he is prescribing and to properly monitor the patient." *Pysz v. Henry's Drug Store*, 457 So. 2d 561, 562 (Fla. 4th DCA 1984). *See also Estate of Sharp*, 879 So. 2d at 36; *McLeod*, 174 So. 2d at 739.

The burden should not be placed on the pharmacist to second guess the prescribing physician's treatment of the patient. The broad new general duty to warn sought by Powers and created by the Fourth District fosters such second guessing. While the pharmacist may be in a good position to observe and question obvious defects or mistakes on the face of a prescription, requiring the pharmacist to second guess whether treatment is appropriate goes far beyond the purview of a dispensing pharmacist and clearly requires the pharmacist to infringe on the relationship between physician and patient. Such determinations are more appropriately left to the treating physician and this Court should therefore apply the learned intermediary doctrine to pharmacies and pharmacists under such circumstances.

CONCLUSION

For the foregoing reasons, The Medicine Shoppe respectfully requests that this Court accept jurisdiction to review this case, quash the decision of the Fourth District in *Powers*, and approve the decisions in *Johnson* and *Estate of Sharpe*, holding that pharmacies and pharmacists do not have a duty to warn their customers of the risks involved with the ingestion of medication dispensed pursuant to a valid and lawful prescription.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of The Medicine Shoppe's Reply Brief was provided by mail to all counsel listed on the attached mailing list on this 7th day of February, 2006

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IN THE FLORIDA SUPREME COURT
CASE NO: SC05-1192

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the font of this brief is Times New Roman-14 point, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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