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Newsletters

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To Fill, or Not to Fill, That is the Question

Florida Court of Appeals for the Fifth District reversed trial court's order granting a Motion to Dismiss, filed by the Defendant Pharmacy, in a Pharmacy Negligence Case, that was granted with prejudice.

Facts and Procedural History

In May 2009, Steven Porter, deceased, was diagnosed with "stress syndrome" by his doctor and prescribed Xanax (Alprazolam) and Hydrocodone/ Acetaminophen or Oxycodone/Acetaminophen to treat it. Steven Porter continued this treatment regimen for two years until he died, in March 2011, due to combined drug intoxication. It was alleged that the doctor prescribed, and the pharmacy filled, Mr. Porter's prescriptions before Mr. Porter should have depleted the previous prescription refill, without question.

Plaintiff, the personal representative of the Estate of Steven Porter, filed a negligence claim against the Pharmacy and the doctor (who previously settled). In response, the Defendants filed a Motion to Dismiss arguing that the pharmacy had no additional duty to Mr. Porter, aside from filling his legal prescription. The trial court agreed and dismissed the case, with prejudice. This appeal followed.

Defendants argued, believing that there was a conflict among the districts, that the present case was similar to *Estate of Sharp*, and therefore the Motion to Dismiss should be granted. Plaintiff, argued that the present case was more related to *Powers* and that *Powers* should control the court's decision.

Analysis

The Fifth District Court of Appeals ruled on the issue: Whether Pharmacy owed a legal duty to Mr. Porter, which would support a negligence claim?

In reversing the trial court's ruling, the Fifth District explained:

Service Areas

Complex Tort & General Casualty

1. A pharmacy owes a customer a duty of reasonable care that an ordinarily prudent pharmacist would under the same or similar circumstances.
2. Although a pharmacy will not be held strictly liable for failing to warn customers of possible dangers associated with the drug they fill, a pharmacy can be held liable under a negligence standard for failing to warn of the dangers based on the Florida Supreme Court's Opinion in *McLeod*.
3. If a pharmacy fills a prescription that is unreasonable on its face, then the pharmacy may breach its duty of care, even if the prescription is lawfully written (citing to *Dee* a First District Court of Appeal Opinion).
4. Therefore, a pharmacy's duty to use due and proper goes beyond merely following the Doctor's orders (citing to the Fourth District's Opinion in *Powers*).
5. There is no conflict among the districts regarding this issue.

The Court explained that the case Defendant relied upon, *Estate of Sharp*, involved a different issue: Whether plaintiff sufficiently alleged a negligence claim against Defendant who was providing a **consulting** service. Reasoning that a consulting service is more of an administrative role, the Defendant in *Estate of Sharp* could not be held to the same standard of care as a pharmacist. That is different from the role Defendant had in the present case, where he had direct contact with Plaintiff by dispensing the drugs.

As a result, the First, Fourth and Fifth District Court of Appeals all agree that a cause of action in negligence is available if it is properly alleged that the pharmacy repeatedly filled medication but failed to provide warning of the dangers associated with taking them together or more frequently, despite the fact that the prescriptions were legal and valid.

Oleckna v. Daytona Discount Pharmacy, Etc. Et. Al., No. 5D13-3057 (Fla. 5d DCA Feb. 6 2015).

For more information, please contact Paul J. Gamm.

Gotcha! You Lose: Florida's Second District Court of Appeals Reverses Ruling Based on Defense Counsel's "Gotcha" Tactics

Florida Court of Appeals for the Second District reversed a jury verdict in favor of the Defense in a premise liability, slip and fall, case.

Facts and Procedural History

Plaintiff, Maria Andreaus, an elderly woman, age 71, slipped and fell on sprayed pesticide, upon exiting an elevator in a condominium, resulting in injuries. She received medical treatment and subsequently sued the Condominium Association and the Pest Management Company alleging that the sprayed pesticide caused her to slip.

Although the Trial Court previously granted Plaintiff's motion in limine to exclude mention of a "spill" and "water" contained in Plaintiff's medical records, during the Defendant's Closing Argument, the Judge permitted Defense Counsel to argue to the jury that there was another possible cause for Plaintiff's fall, since Plaintiff's Counsel mistakenly did not redact all the medical records. Basically, the Trial Court told Plaintiff's counsel to "live with it," and Defense Counsel made Plaintiff's look like liars. Plaintiffs appealed the verdict, returned against them.

Analysis

The Second Court of Appeals Reversed for various reasons:

1. Statements regarding the cause of a fall are inadmissible hearsay.
2. The timing of when the additional information was admitted was so prejudicial, to the point where it substantially outweighed its probative value because Defense Counsel insinuated to the jury that Plaintiffs were liars, and because the admission of those comments also inappropriately raised another possible cause of Plaintiff's injuries, unrelated to actions by Defendants – water, at a time when Plaintiff was no longer able to present evidence to dispute Defense Counsel's argument.
3. Trial Court could have easily cured Plaintiff's Counsel clerical error, since the records had not yet been published to the jury, at the time Defense Counsel requested the Court's permission to discuss the spill and water, and therefore

avoided a tainted jury.

Do not use "Gotcha!" Tactics or the Court will get you…

The Second District made clear that it did not find Defense Counsel's actions acceptable. They were so displeased that they specifically named Defense Counsel (a rarity) and said that Defense Counsel's actions were not only disliked by the Courts, but also improper under the rules governing conduct for attorneys.

Andreaus v. Regatta Beach Club Condominium Association, *Inc.*, No. 2D14-1688 (Fla. 2d DCA Feb. 6 2015).

For more information, please contact Paul J. Gamm.

Fashion Forward Department Store Backtracks and Settles Transgender Case

Large department store has settled a transgender discrimination case in Texas that garnered the company much unwanted attention.

The department store's former sales employee, Leyth Jamal, claimed she was discriminated against for being transgender and constantly harassed by co-workers and managers (Jamal's a man who identifies as a woman). The employer originally argued in a motion to dismiss that transgender individuals and gender identity are not covered by Title VII of the Civil Rights Act. The motion set off a backlash from various civil rights groups and the US Equal Employment Opportunity Commission that argued the store's position was untenable given US Supreme Court precedent, decisions of many federal appellate courts, and the EEOC's recent guidance on Title VII. Thereafter, the employer withdrew its motion and this settlement quickly followed undoubtedly due to the myriad negative publicity it faced when its motion became national news. Jamal's attorney commented only that the parties "amicably settled the lawsuit" while the employer had no public statement about the settlement.

Retailers and other businesses alike should take note of this issue and review anti-discrimination policies to ensure that the needs of the transgender employees are met. Managers should be trained on how to address difficult questions from transgender employees and their colleagues concerning bathroom use, dress and behavior.

Jamal v. Saks & Company case number 4:14-cv-02782, in the U.S. District Court for the Southern District of Texas

For more information, please contact your Hinshaw Attorney

Past Issues:

National Retail Newsletter - January 2015

National Retail Newsletter - October 2014

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