

# DON'T FORGET TO SUE THE PHARMACIST



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The Michigan Court of Appeals recently released an unpublished<sup>1</sup> opinion potentially impacting pharmacy. The case can be found at Estate of Kevin Carl Gottshalk v. Plumbrook Pharm., 2020 Mich. App. LEXUS 6183.

The Estate filed a complaint in Macomb County Circuit Court, claiming that a physician and the pharmacy committed malpractice related to the prescribing of Flexeril with Methadone 10 milligrams, seven times a day, and Valium 10 milligrams at HS (“hora somni,” or at bedtime) to a 49-year-old male. An autopsy was performed, and the pathologist’s diagnosis was “intoxication by the combined effects of Methadone and Diazepam associated with acute pneumonia.”<sup>2</sup> The key point for this audience is that the pharmacy was able to be dismissed from the case, because plaintiffs failed to name individual pharmacists. This most certainly suggests that the plaintiff’s bar will be more careful in the future and make sure that individual pharmacists, as well as the pharmacy, are named in pharmacy malpractice cases in Michigan.

Procedurally, the pharmacy filed a Motion for Summary Disposition under Michigan Court Rules (MCR) 2.116(C) (8), arguing that since pharmacists were not named individually, the pharmacy could not be held liable based on Michigan statutes and prior case law. The trial court granted the Motion for Summary Disposition, and this appeal followed. The primary argument by the pharmacy was that the pharmacy itself was not a licensed healthcare professional subject to medical malpractice claims and that the pharmacy was not sued under ordinary negligence theories. The Michigan Court of Appeals agreed with the trial court and upheld their dismissal of the pharmacy. The claims against the pharmacy were basically that the pharmacy should have known about the potential serious side effects and potentiation with the combination that was prescribed, and not raising issues with either the prescriber and/or the patient was below the standard of care. The patient had been on the combination of Methadone and Valium for a number of years, so the pharmacy/pharmacist likely had standard of care defenses.

The case turned on the statutory definition of licensed

healthcare professional or a licensed health facility or agency, neither of which prior caselaw supported a pharmacy would fit within.<sup>3</sup> In the appeal, the plaintiff argued that they did not need to name the individual pharmacists, because the pharmacists were employees of the pharmacy, and that should still be within the



definition of a licensed healthcare professional, since the pharmacy was licensed as well. In the alternative, they claimed that they did not need to name the pharmacists individually, because they were agents of the pharmacy defendant that was sued, under vicarious liability theories.

It does not appear that the plaintiff is filing an Application for Leave to File an Appeal with the Michigan Supreme Court, likely in light of the fact that it would not be successful.

## ANALYSIS

While this case will likely not increase the number of pharmacy malpractice cases being filed, it certainly will ensure that individual pharmacists are named defendants, along with the pharmacy, when cases are brought.

## REFERENCES:

1. Technically, unpublished appellate opinions do not have stare decisis (binding precedent) affect, but most trial courts will take them into consideration when ruling on the parties’ motions.
2. The post-mortem toxicology found 130 ng/ml of Diazepam, 86 ng/ml of Nordiazepam, and 860 ng/ml of Methadone. The reported range of blood concentration in Methadone-related fatalities was noted to be 400 to 1800 ng/ml.
3. See MCL 600.5838A.

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