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**Your Druggist, Inc. v. Robert Powers etc., et al. &
B.A.L. Pharmacy etc. v Robert Powers etc., et al.
SC05-1191 & SC05-1192**

NEXT CASE ON THE COURT'S DOCKET IS YOUR DRUGGIST VERSUS POWERS , B.A.L. PHARMACY VERSUS POWERS. ARE YOU READY TO PROCEED?

THANK YOU , YOUR HONOR . GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. JONATHAN MATZNER ON BEHALF OF THE PETITIONER THE MEDICINE SHOP. MY CO-PETITIONER IS REPRESENTED BY MARK PALMER AT THE COUNSEL TABLE AND SCOTT COLE. GOOD MORNING. WE HAVE SET ASIDE A MOMENT FOR MR . PALMER TO ADDRESS THE COURT WITHIN OUR ALLOTTED TIME. THE PETITIONER S URGE THIS COURT TO QUASH THE OPINION BELOW BECAUSE THE FOURTH DISTRICT COURT OF APPEAL HELD FOR THE FIRST TIME IN THE STATE OF FLORIDA, THAT A PHARMACIST HAS BROAD NEW DUTY TO WARN CUSTOMERS OF THE RISKS ASSOCIATED WITH TAKING DRUGS, DISPENSED PURSUANT TO A LAWFUL --

JUSTICE: WOULD YOU SHARPEN OUR MEMORY AT THE OUTSET AS TO WHAT CONFLICT THERE EXISTS HERE BETWEEN DECISIONS OF THE DISTRICT COURTS.

YES , YOUR HONOR. IN BELOW, THE FOURTH DISTRICT, CREATED THESE BROAD NEW DUTIES FOR A PHARMACIST INSERTED CONFLICT , BUT MOST IMPORTANTLY , THE -- IN CERTIFIED CONFLICT, BUT MOST IMPORTANTLY THE FOURTH DCA'S DECISION DEPARTS FROM THIS COURT'S LONG STANDING PRECEDENT IN THE McCLOUD CASE.

JUSTICE: LET'S LOOK AT McCLOUD. WHAT ASPECT OF McCLOUD DEALT WITH THE DUTY OF CARE IN A NEGLIGENCE CASE.

IN THE McCLOUD CASE, THIS COURT SET OUT A BRIGHT-LINE TEST . IF , THERE WAS UNDER McCLOUD , THERE WAS A DUTY FOR A PHARMACIST -- A DUTY FOR A PHARMACIES FOR -- PHARMACIES TO THE PROPERLY FILL A PRESCRIPTION.

JUSTICE: BUT IS IT TRUE THAT THEY SAID IN THAT CASE IT MAY BE WELL TO NOTE ALSO THAT WE ARE NOT HERE DEALING WITH COMPLAINT GROUNDED IN MEMBERS OF THE JURY -- IN NEGLIGENCE, AND THEN THEY END THE DECISION BY SAYING THE CONCEPT WITH STRICT LIABILITY WITHOUT FAULT SHOULD NOT BE APPLIED TO THE PRESCRIPTION DRUGGIST IN THE INSTANT SITUATION. IT IS UNNECESSARY TO REACH THAT THE RESPONDENTS FAILED TO SPLIT DRUGS OF A COMMODITY. SO THE WHOLE COMPLAINT IS WE DON'T WANT TO MAKE A PHARMACIST STRICTLY LIABLE UNDER A PRODUCT LIABILITY LAW.

I WOULD POINT OUT TWO THINGS IN THE COURT. FIRST OF ALL IN THE CASE WHICH ALSO CAME OUT OF THE FOURTH DCA AND UPON WHICH JUDGE ANSTEAD PARTICIPATED IN, THE COURT ADDRESSED THAT ISSUE , THE FOURTH DID, AND FOUND -- THE COURT ADDRESSED THAT ISSUE, THE FOURTH DID AND FOUND NO DISTINCTION ON THE ONE HAND AND NO CLAIM FOR PRODUCTS LIABILITY.

JUSTICE: SO WHY DID THAT CONCLUDE BY SAYING HOWEVER REVERT OUR FACTS TO THE SITUATION OF THIS CASE BY SAYING A FACTUAL SITUATION COULD EXIST AGAINST A DRUGS WHO HAS LAWFULLY FILLED A -- A DRUGGIST WHO HAS LAWFULLY FILLED A PRESCRIPTION WHICH WAS PROPERLY WRITTEN.

McCLOUD DEALT WITH WHETHER OR NOT THERE WAS A DUTY TO WARN OF SIDE EFFECTS FROM THE PRESCRIBED DRUG.

JUSTICE: IN A PRODUCTS LIABILITY CASE.

IN A PRODUCTS LIABILITY CASE. THERE WAS NO DUTY TO WARN UNDER THOSE CIRCUMSTANCES. IT DIDN'T FIT INTO THE SECOND CATEGORY OF DUTIES THAT YOU HAVE REFERRED TO. THERE WAS NO DUTY TO WARN IN THAT CASE AND THEREFORE THE INSTANT CASE DOES NOT FIT INTO THAT EXCEPTION OR THAT HOLE LEFT OPEN IN McCLOUD.

JUSTICE: SO WHAT IS THE ACTUAL HOLDING, HOWEVER, IN THIS CASE? DIDN'T THE COURT REALLY SAY HERE THAT, ON THESE, UNDER THESE CIRCUMSTANCES, A MOTION TO DISMISS, THEY REALLY WERE DEALING WITH A MOTION TO DISMISS ISSUE AS OPPOSED TO BECAUSE ARE NOW ARGUING FROM THE FOURTH AS TO WHETHER A PHARMACIST COULD EVER BE HELD NEGLIGENT UNDER THESE KINDS OF --

YOU ARE CORRECT, JUSTICE QUINCE AND THAT REALLY GOES TO THE HEART OF THE CONFLICT, BECAUSE WHAT YOU HAVE HERE BASED ON THE OPINION IN POWERS IS YOU NOW HAVE A CIRCUMSTANCE WHERE, IN THE TRIAL COURTS THAT ARE GOVERNED BY THE FOURTH DCA, YOU CAN ALLEGE A CAUSE OF ACTION BY SIMPLY ASSERTING A FAILURE OF, ON THE PART OF THE PHARMACIST TO WARN THE CUSTOMER, WHEREAS IN THE FIRST AND THE FIFTH UNDER JOHNSON AND OMNI CARE, YOU CAN'T STATE THAT CAUSE OF ACTION, AND THAT GOES TO THE VERY HEART OF THE CONFLICT IN THIS CASE, WHICH IS WHY IT IS SO IMPORTANT FOR THIS COURT TO RESOLVE THAT CONFLICT, SO THAT THERE IS UNIFORMITY, BECAUSE YOU ARE DEALING WITH ARRIVE PRESCRIPTION IN THE STATE OF FLORIDA, EVERY TIME A PHARMACIST DEALS WITH A PRESCRIPTION IN THE STATE OF FLORIDA.

JUSTICE: LET ME GO BACK TO A QUESTION I ASKED IN THE PRECEDING CASE, AND THAT IS DID YOU MOVE FOR THIS CASE TO GO EN BANC IN THE FOURTH DISTRICT?

WELL, WE HAD, THE GROUNDS EXISTED, BECAUSE IT IS OUR FIRM BELIEF THAT THE POWERS CASE OVERRULES THE PIZZ CASE, BECAUSE THERE IS NO TRUE CONCEPTUAL DIFFERENCE BETWEEN THE TWO. WE DID NOT MOVE FOR A REHEARING EN BANC SIMPLY BECAUSE THE FOURTH RECOGNIZED THERE WAS CONFLICT. THEY CERTIFIED CONFLICT WITH JOHNSON AND THE STATE OF SHARP.

JUSTICE: DO YOU REALIZE THAT THERE ARE DIFFERENT FACTUAL ALLEGATIONS IN THIS CASE, IN THE POWERS CASE THAN THERE WERE IN THE PRECEDING FOURTH DISTRICT CASE?

IT IS NOT PRECISELY THE SAME FACTS, BUT I THINK INTELLECTUALLY THAT THERE IS REALLY NO, IT IS WHETHER OR NOT THERE WAS A DUTY TO WARN, AND CLEARLY UNDER McCLOUD THERE IS NOT A DUTY TO WARN. AND UNDER PIZZ THERE WASN'T A DUTY TO WARN.

JUSTICE: SO IF WE ACCEPT YOUR ARGUMENT, LET'S SAY THERE IS A PHARMACIST AND ONE PHYSICIAN AND THAT YOU HAVE GOT A SCHEDULE TWO DRUG OXYCONTIN 80 MILLIGRAMS, WHICH IS A CONTROLLED SUBSTANCE NOT ABLE TO BE REFILLED. YOU HAVE TO HAVE A NEW PRESCRIPTION EVERY TIME AND YOU HAVE A PATIENT COME INTO A PHARMACIES ON THE MONDAY AND GET A PRESCRIPTION -- INTO A PHARMACIST ON MONDAY AND GET A PRESCRIPTION FOR A WEEK. COMES IN ON TUESDAY, COMES IN ON WEDNESDAY, THURSDAY, AND FIVE DAYS STRAIGHT GETS THE PRESCRIPTION UNDER YOUR THEORY, THE PHARMACIST WOULD HAVE NO RESPONSIBILITY OR LIABILITY TO THAT PERSON.

THE PHARMACIST HAS AN OBLIGATION TO MAKE SURE THAT A PRESCRIPTION IS FILLED IN CONFORMITY WITH THE PRESCRIPTION ISSUED BY THE PRESCRIBING PHARMACIST, AND THAT IS BECAUSE THE, BY THE PRESCRIBING DOCTOR, RATHER, , AND THAT --

JUSTICE: SO IF YOU HAVE A LEGAL PRESCRIPTION FILLED OUT BY A DOCTOR, WE ARE NOT TALKING MULTIPLE PHYSICIANS , ET CETERA , YOU HAVE GOT ONE DOCTOR, ONE PHARMACY, MONDAY, TUESDAY, WEDNESDAY , THURSDAY AND FRIDAY, SOMEBODY COMES IN BECAUSE YOU HAVE GOT A DOCTOR THAT IS BASICALLY NOT COMPLYING WITH THE CONTROLLED SUBSTANCE ACT AND IS JUST GIVING THE PRESCRIPTIONS OUT. YOUR POSITION WOULD BE THAT , IN THE STATE OF FLORIDA THE PHARMACIST HAS NO RESPONSIBILITY TO THAT , NO GATE KEEPING RESPONSIBILITY AT ALL TO THAT CLIENT OR TO SOCIETY.

THE PHYSICIAN , AND PRESUMPTIVELY YOU ARE GOING TO HAVE A PHYSICIAN WHO CARES FOR THEIR PATIENT AND WHO WORKS OUT A PRESCRIPTION PLAN TO TREAT THE PATIENT. IN THIS CIRCUMSTANCE , YOU HAD MRS. POWERS, WHO HAD SEEN DR . TABANI 39 TIMES.

JUSTICE: BEFORE YOU GO BACK TO THIS IN ANSWER TO HIS QUESTION -- IN ANSWER TO HIS QUESTION, WHAT IS THE ANSWER TO JUSTICE BELL 'S QUESTION ABOUT THERE BEING NO GATE KEEPING. IT SEEMS TO ME THAT THAT IS CERTAINLY SIMILAR TO THE CASE THAT WAS DECIDED WHERE THERE WAS NO EXPIRATION DATE ON THE PRESCRIPTION , AND WE FOUND THAT , THE COURT FOUND THAT THERE WAS A PROBLEM WITH THE PHARMACIST FILLING THAT PRESCRIPTION JUST ON THE FACE OF IT. IT WAS NOT A PROPER PRESCRIPTION. ON THE FACE OF THESE , IF YOU HAVE FIVE PRESCRIPTIONS IN A ROW , EACH DAY , THAT REALLY IS KIND OF ANALOGOUS HERE.

WELL , THERE IS NO ALLEGATION IN THIS CASE THAT THERE WAS ANYTHING WRONG ON THE FACE OF THE PRESCRIPTION.

JUSTICE: WE UNDERSTAND THAT BUT THAT IS A HYPOTHETICAL. WE ARE TRYING TO DETERMINE THE LIMIT OF DOES A PHARMACIST HAVE ABSOLUTELY NO GATE KEEPING RESPONSIBILITY HERE.

IT WOULD BE OUR POSITION THAT THE PHARMACIST DOES NOT HAVE ANY GATE KEEPING RESPONSIBILITY HERE , BECAUSE YOU HAVE TO RELY 'THE DOCTOR WHO HAS FREQUENT VISITS WITH THE PATIENT, WHO HAS RECORDS ON THE PATIENT, WHO FOLLOWS UP ON THE PATIENT TO CREATE THE PROPER DRUG REGIMEN FOR THE PATIENT .

JUSTICE: WHAT DOES THE PHARMACIST DO, REALLY, IF THEY GET IN THEIR VIEW CONFLICTING PRESCRIPTIONS? THEY KNOW THAT, IF THE PATIENT TAKES THE TWO CONFLICTING PRESCRIPTIONS, THAT THERE IS A HIGH-RISK OF DEATH THAT THEY KNOW , BECAUSE THEY ARE PHARMACISTS AND THEY ARE -- THEY ARE GOOD PHARMACISTS AND THEY ARE VERY KNOWLEDGEABLE , AND THEY KNOW THAT IF THE PATIENT WHO IS FILLING THESE TWO PRESCRIPTIONS BUYS TWO SEPARATE PHYSICIANS THAT MAY NOT KNOW ANYTHING ABOUT WHAT THE PATIENT IS DOING WITH THE OTHER DOCTOR OR WHATEVER , WHAT IS THE ANSWER , JUST DILEMMA OF THE PHARMACIST, NOW, WHAT DOES THE PHARMACIST DO IN A SITUATION LIKE THAT ? THEY ARE GOING TO TECHNICALLY FILL EACH PRESCRIPTION. THE PRESCRIPTIONS ARE PERFECTLY LEGAL. BUT THE PHARMACIST KNOWS THAT, A VERY GOOD PHARMACIST AND VERY WELL EDUCATED AND KNOWS THAT, IF THEY FILL THOSE TWO PRESCRIPTIONS AND THE PATIENT TAKES THOSE , THAT THERE IS A VERY HIGH PROBABILITY THAT THE PATIENT WILL DIE. WHAT DOES THE PHARMACIST DO? IN OTHER WORDS JUST IN A COMMON SENSE WAY , TELL ME WHAT THE PHARMACIST DOES .

WELL , THAT DILEMMA HAS BEEN THE SAME ALL THE WAY , GOING ALL THE WAY BACK TO McCLOUD.

JUSTICE: DON'T TELL ME THE DILEMMA HAS BEEN THE SAME GOING BACK TO McCLOUD. TELL ME WHAT IN YOUR VIEW, THE PHARMACIST DOES IN THAT SITUATION.

UNDER THE STATUTES AND UNDER THE ADMINISTRATIVE CODE, THE PHARMACIST HAS AN OBLIGATION TO OFFER TO COUNSEL THE CUSTOMER .

JUSTICE: SO THE PHARMACIST DOES DO SOMETHING IN THAT SITUATION.

YES, SIR.

JUSTICE: THEY SAY SOMETHING TO THE PATIENT. YOU SHOULD KNOW THAT, IF YOU TAKE TWO MEDICATIONS TOGETHER, THERE IS -- THOSE TWO MEDICATIONS TOGETHER THERE, IS A HIGH-RISK OF YOUR DEATH. IS THAT WHAT YOU WOULD SAY, YOU WOULD ADVISE THE PHARMACIST TO TELL THAT PATIENT?

YES AND NOT ONLY WOULD I ADVISE THE PHARMACIST BUT UNDER THE ADMINISTRATIVE CODE AND UNDER THE STATUTES, THE PHARMACIST HAS AN OBLIGATION TO OFFER TO COUNSEL THE PATIENT, THE CUSTOMER.

JUSTICE: AT HIS DISCRETION AT THE PHARMACIST'S DISCRETION.

YES. THAT'S CORRECT. AT THE PHARMACIST'S DISCRETION.

JUSTICE: SO IF THE PHARMACIST IN THIS CASE DOESN'T TAKE YOUR ADVICE AND DOESN'T, JUST FILLS THOSE TWO PRESCRIPTIONS ANSWER THE PATIENT GOES HOME AND TAKES THE -- THOSE TWO PRESCRIPTIONS, AND THE PATIENT GOES HOME AND TAKES THE MEDICATION AND DIES, THERE ANY LIABILITY ON THE PART OF THE PHARMACIST TO THE PATIENT THAT DIED AND BY THE PHARMACIST THAT DIDN'T TAKE YOUR ADVICE?

NO. I AM SORRY I REPEAT YOUR QUESTION. -- I AM SORRY. REPEAT YOUR QUESTION.

YOU SAID THAT THE PHARMACIES IN THAT INSTANCE, O KAY, SHOULD COUNSEL THE PATIENT AND TELL THE PATIENT THAT THERE IS THIS PROBLEM AND THIS ISSUE. O KAY. I AM SAYING IF THE PHARMACIST DOESN'T TAKE YOUR ADVICE, JUST FILLS THOSE TWO PRESCRIPTIONS, AND THE PATIENT GOES HOME AND TAKES THEM AND DIES. IS THERE A CAUSE OF ACTION ON BEHALF OF THAT PATIENT'S ESTATE AGAINST THAT PHARMACIST THAT DIDN'T TAKE YOUR ADVICE?

NO. NO. THE CAUSE OF ACTION SHOULD BE AGAINST THE DOCTOR, BECAUSE THE PHARMACIST HAS THE OBLIGATION TO OFFER TO COUNSEL. IF, ONCE THE PHARMACIST COUNSELS --

JUSTICE: I AM SAYING THE PHARMACIST DIDN'T DO THAT IN THIS INSTANCE. IN OTHER WORDS YOU ARE ADVISING THE PHARMACIST THAT IF THEY GET IN A SITUATION LIKE THAT BUT THEY DIDN'T DO IT, SO IS THERE ANY LIABILITY, THEN, ON THE PART OF THE PHARMACIST?

WELL, THERE IS NO, AS JUSTICE QUINCE POINTED OUT THERE IS NO REQUIREMENT THAT THE PHARMACIST COUNSEL. THEY SHOULD OFFER TO COUNSEL. BUT THE PHARMACIST CAN ONLY GO SO FAR. THE PHARMACIST HAS AN OBLIGATION TO OFFER TO COUNSEL, BUT ANYTHING BEYOND THAT WOULD BE SECOND-GUESSING THE DOCTOR. IT HAS TO BE UP TO THE DOCTOR IN THE END TO DECIDE WHAT IS APPROPRIATE. PAIN MEDICATIONS ARE DIFFICULT TO REGULATE. AND YOU CAN'T HAVE THE PHARMACIST SECOND-GUESSING THE DOCTOR. THE PHARMACIST IS NOT IN A POSITION TO DO THAT. THE PHARMACIST, THE DOCTOR IS IN A UNIQUE POSITION WHERE THE DOCTOR GETS TO EXAMINE THE PATIENT. THE DOCTOR GETS TO REVIEW THE RECORDS THAT THAT PATIENT HAS SEEN ANY OTHER PHYSICIANS AND TO DESIGN THE APPROPRIATE DRUG THERAPY FOR THAT PATIENT.

JUSTICE: BUT DOCTORS ARE ALSO HUMAN AND THEY MAKE MISTAKES. IS THERE NO DUTY OR RESPONSIBILITY RECOGNIZED UNDER STANDARDS OF PROFESSION IN THE PHARMACY, THAT IF THE PHARMACIST HAS A CONCERN ABOUT THE PRESCRIPTION, IF NOT TO COUNSEL THE PATIENT, TO CONTACT THE PHYSICIAN?

WELL --

JUSTICE: ISN'T IT RECOGNIZED AMONG PHARMACISTS THAT IF THEY HAVE A CONCERN ABOUT ANY PRESCRIPTION, THAT THEY SHOULD CONSULT THE PHYSICIAN?

WELL, THAT IS WHAT, THAT IS SIMILAR TO WHAT I AM SUGGESTING IS THAT THE PHARMACIST SHOULD COUNSEL THE CUSTOMER AND THEN IF THE CUSTOMER STILL HAS ANY CONCERNS, THEY CAN GO BACK TO THEIR DOCTOR AND SAY WHAT IS APPROPRIATE HERE? THE PHARMACIST IS RAISING THESE CONCERNS. WHAT IS APPROPRIATE? IT SHOULDN'T BE FOR THE PHARMACIES TO MAKE DECISIONS AND TO SECOND-GUESS THE DOCTOR.

JUSTICE: WOULD IT NOT REQUIRE THAT THE PHARMACIST AT LEAST ALERT THE PATIENT TO GO BACK TO THE DOCTOR? WOULD THAT NOT BE A PROPER FUNCTION?

YES. THE, YOU KNOW, THE PHARMACIST SHOULD COUNSEL THE PERSON TO GO BACK AND CONFER WITH THEIR DOCTOR.

JUSTICE: GOING BACK TO JUSTICE WELLS'S QUESTION, IT SEEMS TO ME AND YOU CORRECT ME IF I HAVE MISINTERPRETED THESE CASES, BUT IN THE OMNI CARE CASE, IT LOOKED TO ME LIKE IT WAS TRYING TO SET UP CONSULTING KIND OF PHARMACIST THROUGH A NURSING HOME, A LITTLE BIT DIFFERENT. IS THAT WHAT OMNI CARE WAS ABOUT?

LOOKING ON A MORE GLOBAL BASIS, I DON'T THINK IT IS DIFFERENT.

JUSTICE: I AM ASKING YOU AM I CORRECT? THAT WAS MY READING. IT WAS NOT GOING INTO YOUR LOCAL PHARMACIST, AND AS I READ THE OTHER CASE, THE JOHNSON CASE IT IS PRESCRIPTIONS FOR MULTIPLE PHYSICIANS THAT WERE COMING INTO PLAY, AND MAYBE, HE MAY COME IN MONDAY WITH ONE AND THEN WEDNESDAY WITH SOMEBODY ELSE AND FRIDAY. A LITTLE DIFFERENT THAN WE ONLY HAVE ONE PHYSICIAN HERE, CORRECT?

YOU HAVE ONE PHYSICIAN HERE.

JUSTICE: BUT ARE THERE MULTIPLE PRESCRIPTIONS, DRUGS, ON EACH PRESCRIPTION FORM? OR WHAT IS THE GOVERNMENT OF THIS?

WHAT YOU HAVE HERE IS MULTIPLE PHARMACIES WHO AREN'T COMMUNICATING WITH ONE ANOTHER.

JUSTICE: CAN YOU ANSWER MY QUESTION OR EXPLAIN, ARE THERE MULTIPLE PRESCRIPTIONS ON THE FORM THAT WE ARE DEALING WITH OR ARE WE DEALING WITH OXYCONTIN ONE DAY AND THEN --

I AM NOT SURE WHERE THE RECORD REFLECTS THAT.

JUSTICE: THAT IS CONTEMPLATIVE I HAVE. IT MAY BE DIFFERENT CONTEMPLATIVE I HAVE. IT MAY BE -- IT IS CONTEMPLATIVE. ISN'T THAT WHAT THE FOURTH DISTRICT WAS SAYING THAT WE NEED TO FLUSH OUT SOME OF THESE THINGS TO SEE WHAT IS HAPPENING. THOSE ARE FAR DIFFERENT CIRCUMSTANCES.

THE FOURTH DISTRICT'S OPINION RAISES PROBLEMS, THOUGH, BECAUSE UNDER McCLOUD YOU HAD A BRIGHT-LINE TEST.

JUSTICE: WELL, I THINK YOU ARE GOING TO RUN INTO SOME PROBLEMS THAT, ASSUMING THAT McCLOUD HAS A BRIGHT LINE PROBLEMS. ISN'T McCLOUD AN EARLY '60s OPINION? AND WEST WASN'T EVEN THE LAW UNTIL THE SEVENTIES SOMETIMES. I WOULD LIKE YOU TO ANSWER

WITHOUT REFERENCE TO McCLOUD , BECAUSE I THINK THAT IS A PRODUCT CASE, STRICT LIABILITY CASE AND DOESN'T DEAL, IT TALKS ABOUT THE PRODUCT BEING DEFECTIVE. THIS IS VERY DIFFERENT. SO COULD YOU ANSWER WITHOUT REFERENCE TO McCLOUD.

I AM NOT SURE I UNDERSTAND.

JUSTICE: YOU ARE TRYING TO ANSWER ALL THESE QUESTIONS IN REFERENCE TO McCLOUD AND SAYING THERE ARE BRIGHT LINE RULES TO EVERYTHING AND THEY ARE IMMUNE IS WHAT I AM SAYING , SO I AM ASKING YOU TO ANSWER IN REFERENCE TO ASSUMING McCLOUD DOES NOT GIVE IMMUNITY TODAY IN 2006 IS HOW YOU ARE READING IT , HOW DO ALL THESE CASES FIT TOGETHER? ISN'T IT DIFFERENT IF YOU HAVE ONE PHYSICIAN PROVIDING ONE PRESCRIPTION WITH FOUR DIFFERENT DRUGS THAN FOR TEN PHYSICIANS EACH GIVING HIM ONE AND THEY COME IN OVER A PERIOD AFTER MONTH, AREN'T THOSE DIFFERENT? WOULDN'T THEY BE ANALYZED DIFFERENTLY?

I AM NOT SURE THAT THEY WOULD BE ANALYZED DIFFERENTLY. I THINK YOU HAVE TO LOOK TO THE RELATIVE POSITIONS OF THE PHARMACIST ON THE ONE HAND AND THE PRESCRIBING DOCTOR ON THE OTHER HAND .

JUSTICE: RIGHT.

AND THE PHARMACIST IS IN THE BEST POSITION TO EVALUATE WHETHER OR NOT THE PRESCRIPTION IS APPROPRIATE , WHETHER OR NOT THE DRUGS ARE DISPENSED CORRECTLY , PURSUANT TO THAT PRESCRIPTION, AND ON THE OTHER HAND YOU HAVE GOT THE PHYSICIAN WHOSE IN THE BEST POSITION TO EVALUATE WHETHER OR NOT, FOR INSTANCE, THERE ARE CONFLICTS BETWEEN THE DRUGS , WHETHER OR NOT THE STRENGTH OF THE DRUG --

CHIEF JUSTICE: YOU ARE WELL INTO YOUR REBUTTAL TIME.

OKAY , THEN I AM GOING TO HOLD MY TIME FOR REBUTTAL. THANK YOU , YOUR HONOR .

CHIEF JUSTICE: ARE YOU GOING TO DO IT NOW? I THOUGHT --

THERE WAS A RESERVATION OF TIME FOR ME . CHIEF CHOF FOR REBUTTAL?

TO --

CHIEF JUSTICE: FOR REBUTTAL? ONE MINUTE?

PLEASE .

CHIEF JUSTICE: OKAY .

ART POMERANTZ FOR YOUR DRUGGIST AND BESIDES BEING AN ATTORNEY, I AM ALSO A FLORIDA - REYNOLD PHARMACIST. WHAT IS IMPORTANT TO -- FLORIDA REGISTERED PHARMACIST. WHAT IS IMPORTANT TO NOTE IS ONCE A PATIENT GETS TO THE PHARMACY , THEY HAVE ALREADY GONE TO THE DOCTOR , TO THE HOSPITAL , THROUGH MRI'S , 20 DIFFERENT BLOOD TESTS , A PHYSICAL. BY THE TIME THEY GET TO A PHARMACIST, ALL THAT COMES OUT FROM A MEDICAL FILE IS A CHART THAT IS THIS SIZE , SOMETHING THE SIZE OF A POSTCARD. THAT IS WHAT A PHARMACIST , EVEN THE BEST PHARMACIST , JUSTICE ANSTEAD.

JUSTICE: BUT IF YOU SEE A PRESCRIPTION ON MONDAY AS A PHARMACIST ON MONDAY FOR OXYCONTIN AND ON WEDNESDAY THE SAME AMOUNT OF OXYCONTIN 80 THAT THE FIRST PRESCRIPTION COULD NOT HAVE BEEN USED , UNDER THE OMBUDSMAN ACT , UNDER 893 IN THE FLORIDA STATUTE AND YOUR UNDERSTANDING OF THE ABUSE THAT HAS BEEN HAPPENING

THROUGHOUT THIS COUNTRY OF OXYCONTIN AND PHYSICIANS OVER PRESCRIBING IT , IS IT YOUR POSITION AS A PHARMACIST THAT YOU HAVE NO DUTY TO CONTACT THE PHYSICIAN AND SAY DO YOU REALIZE THAT YOU JUST PRESCRIBED THIS PERSON THIS ON MONDAY? AND THEY HAVE GOT TEN ANOTHER PRESCRIPTION FROM THE SAME PHYSICIAN , OR DO YOU HAVE A DUTY TO TELL THE CLIENT, LOOK, WHAT HAPPENED TO THEONES FROM MONDAY ? FOR A DRUG THAT IS PRIMARILY USED FOR VERY CHRONIC PAIN , AND YOU HAVE THE PATIENT WALKING IN AMBULATORY TO YOUR PHARMACY.

I UNDERSTAND , JUSTICE BELL. AND TODAY'S DRUG , THE DRUG YOU WERE BEFORE WAS QUAAALUDES , AND THAT WAS ALSO VIEWED AS OXYCONTIN IS. THE DIFFERENCE IS THAT , WHEN YOU HAVE SOMEONE COMING IN WITH JUST THAT PRESCRIPTION FOR 80 TODAY, YOU CAN TAKE IT AND BY THE WAY THE PRESCRIPTIONS ARE FOR 30. IF YOU LOOK AT ALL OF THE PRESCRIPTION THAT IS ARE LISTED THERE, THEY ARE IN THE NORMAL RANGE.

CHIEF JUSTICE: I AM SORRY . YOUR TIME IS UP . THANK YOU.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS STEPHANIE ALEXANDER AND I AM HERE WITH MY PARTNER PETER HERMAN ON BEHALF OF THE RESPONDENT GAIL POWERS. I THINK THE COURT HAS REALLY HIT IT ON THE HEAD IN THE SENSE THAT THE WAY THIS CASE IS POSTURED IS IT IS A DUTY CASE IN THE SENSE THAT THE TRIAL COURT BELOW HELD THAT THERE WAS NO LAW THAT HELD THERE WAS A DUTY ' ON THE PART OF PHARMACISTS , AND ALL THE COURT DID WAS SAY THERE WAS A REASONABLE DUTY UNDER THE STANDARD OF CARE AND THERE WAS NEGLIGENCE AND ALLOWED THESE CASES TO PROCEED. NOW, THE SCOPE OF THE DUTY --

JUSTICE: NOW , IF WE START EXPANDING INTO THIS , AREN'T WE ENDING UP WITH PEOPLE ENTIRELY DIFFERENT DISCIPLINES , OKAY, BEING CHARGED REALLY WITH VIRTUALLY THE SAME RESPONSIBILITIES THAT IS THAT THERE IS REALLY A LONG HISTORY HERE OF THE PHYSICIANS REALLY BEING THE ONES THAT ARE RESPONSIBLE FOR COUNSELING WITH PATIENTS AND DECIDING WHAT THE BEST COURSE OF TREATMENT IS , AND PHARMACISTS ARE FITTING INTO THE CATEGORY WHERE THEY ARE REALLY TECHNICAL , TRAINED TECHNICALLY , IN TERMS OF MIXING COMPOUNDS AND THIS KIND OF THING , AND IN FACT , IN MOST MAJOR PHARMACIES , THERE IS PROBABLY MORE THAN ONE PHARMACIST , AND THERE IS A LIMITED ABILITY , REALLY , TO KNOW EVEN ABOUT THESE PAST PRESCRIPTIONS, WHETHER THEY WERE FILLED SOME PLACE ELSE OR WHATEVER , SO MY QUESTION TO YOU IS , ONCE WE TAKE A STEP , OKAY , SORT OF OVER A LINE AND SAY, NO , NOW WE ARE GOING TO PUT RESPONSIBILITY ON PHARMACISTS , TOO , THAT REALLY EXTEND TO THE PATIENT , AND IN A MORE DIRECT RELATIONSHIP , AREN'T WE REALLY OPENING UP SOMETHING THAT WE HAVE DECLINED TO OPEN UP BEFORE, AND AS FAR AS IN THE LEGAL FIELD AT LEAST , THAT THERE REALLY WOULD BE NO JUSTIFICATION FOR THAT?

WELL , I DON'T THINK THAT WE ARE SUGGESTING THAT WE OPEN A BIG PANDORA'S BOX. I DO TO TALLY AGREE -- PANDORA 'S BOX. I DO TOTALLY AGREE THAT IN NORMAL CIRCUMSTANCES A DOCTOR SHOULD BE RELIED UPON BECAUSE THE DOCTOR KNOWS THE PATIENT AND THE TREATMENT RIDGE I AM , BUT THE TYPE OF -- REGIME , BUT THE TYPE OF CIRCUMSTANCES THAT WE HAVE POSTED HERE TODAY -- POSITED HERE TODAY ARE FOR EXAMPLE THE PHARMACIST MAY KNOW THAT THE PATIENT HAS AN ALLERGY THAT THE DOCTOR DIDN'T KNOW ABOUT AND THE PHARMACIST MAY KNOW THAT THE PATIENT IS GETTING A CONTRAINDICATED DRUG BECAUSE THERE IS ANOTHER DOCTOR

JUSTICE: YOU ARE ADDING THESE THINGS IN , AND AREN'T YOU TURNING THE PHARMACIST INTO SOMETHING THAT THE PHARMACIST IS NOT . I LIKEN IT TO TAKING A PERFECTLY VALID CHECK TO THE BANK AND YOU HAVE GOT MONEY IN YOUR ACCOUNT AND YOU SAY PLEASE CASH THIS CHECK FOR ME, OKAY , AND THE DUTY OF THE BANK IS TO CASH THE CHECK, RIGHT ? NOT TO TALK ABOUT WHAT YOU YOU ARE GOING TO USE THE MONEY FOR OR WHETHER IT IS TO DE

COMPLETE YOUR ACCOUNT OR ALL KINDS OF OTHER THINGS, AND THE WAY THAT YOU TALKED ABOUT THE PHARMACIST BEING IN THIS POSITION, THAT MAY ALL BE TRUE, BUT WHERE DOES THE PHARMACIST GET THESE DUTIES TO DO ALL THESE OTHER THINGS?

RIGHT. I THINK, WELL, THERE IS A STANDARD DUTY OF ANY PROFESSIONAL TO USE DUE AND REASONABLE CARE, BUT I THINK A PART FROM THAT IF YOU LOOK IN THE RISE IN THE LAW FROM THE OVER 90 STANDARDS AND THE DUTY OF COUNSELING AND SCREENING, FOR EXAMPLE CODE 64 B 16-2718, REQUIRES A PHARMACIST WITH RESPECT TO EACH PRESCRIPTION TO SCREEN EVERY SINGLE ONE FOR OVER UTILIZATION AND UNDER YOUTH, THEY WERE -- UNDER UTILIZATION, THERAPEUTIC CONTRAINDICATIONS --

JUSTICE: BUT IF YOU LOOK AT THOSE DUTIES, THEY ARISE FROM 465, CORRECT?

CORRECT.

JUSTICE: AND 465 SAYS SPECIFICALLY THE SOLE LEGISLATIVE PURPOSE FOR ENACTING THIS CHAPTER IS TO MAKE SURE THAT EVERY PHARMACIST THAT PRACTICES IN THIS STATE MEETS CERTAIN REQUIREMENTS. IT IS A LICENSING STATUTE.

RIGHT.

JUSTICE: SO HOW DO WE APPLY THOSE STANDARDS IN A LICENSING STATUTE WHERE THE LEGISLATURE SAYS THIS IS OUR ONLY PURPOSE IS TO MAKE SURE THAT WE HAVE PROPERLY LICENSED PHARMACISTS, HOW DO WE APPLY THAT FOR NEGLIGENCE?

I THINK THAT THERE ALSO IS PROVISIONS IN THE STATUTE WHICH SAYS THAT IT IS A LEARNED PROFESSION. FOR EXAMPLE THERE IS ALSO THE PROVISION IN ONE OF THE 465S THAT SAYS THAT THE REFILLING OF EXIST I HAVE PRESCRIPTIONS IS OUTSIDE THE STANDARD OF CARE, REGARDLESS OF WHETHER OR NOT IT HARMS PATIENTS. NOW, I DON'T KNOW IF THOSE STATUTES RISE TO THE LEVEL OF NEGLIGENCE PER SE IN TERMS OF DECIDING WHETHER OR NOT THERE IS ULTIMATE LIABILITY, BUT I DO THINK THAT THEY INFORM THE STANDARD IN WHAT THE REASONABLE STANDARD IS, AND I THINK THAT THE QUESTIONS FROM THE BENCH ARE CORRECT. WHAT WE URGED BELOW WAS A VERY, I THOUGHT, SENSIBLE RATIONALE, WHICH IS THE PHARMACIST IS DESIGNED NOW, AFTER OVER 90 AND WITH THESE GATE KEEPING FUNCTIONS WHICH THEY ACKNOWLEDGE -- FUNCTIONS WHICH THEY ACKNOWLEDGE THAT THEY HAVE. THEY ACKNOWLEDGE TODAY THAT THEY HAVE A DUTY.

JUSTICE: LET ME ASK YOU A QUESTION ALONG THAT LINE, WHICH YOU ACKNOWLEDGE, YOUR OPPONENT, SAID THAT THE FOURTH DISTRICT IN THEIR EARLIER CASE HAD MADE A DECISION THAT THERE WAS NO DUTY FOR ADDICTION AND THE THING THAT IS -- DUTY FOR ADDICTION AND THE THINGS THAT ARE SET FORTH IN THAT CASE. WHAT IS HAVE YOU ALLEGED DIFFERENTLY THAT WOULD DISTINGUISH YOUR CASE, POWERS CASE FROM THE EARLIER CASE?

WELL, I THINK IN THE PIZZ CASE, THAT WAS THE QUAY LEWD CASE IF I REMEMBER AND -- THE QUAALUDES CASE AND IF I REMEMBER THAT WE NT ON FOR OVER NINE YEARS, SO THERE WASN'T ANY SENSE OF IMMEDIATE HARM OR GATE KEEPING FUNS. I THINK THAT IS THE DISTINCTION. I THINK THAT THE PIZZ CASE IS FROM THE 1980s, WHICH IS WELL BEFORE THE GATE KEEPING FUNCTIONS THAT CAME IN IN THE STATUTES AND THE ADMINISTRATIVE CODE, TO THE EXTENT THAT THEY WOULD NOT HAVE HAD A DUTY ANY THE 1980s.

JUSTICE: IF THIS COURT AFFIRMED, HOW ARE TRIAL JUDGES GOING TO KNOW WHAT DOESN'T STATE A CAUSE OF ACTION UNDER THE EARLIER FOURTH DISTRICT CASE AND WHAT DOES STATE A CAUSE OF ACTION NOW, UNDER THE LATER CASE?

I AGREE. I THINK UNDER NOTICE PLEADING, YOU SIMPLY ALLEGE FACTS THAT GO TO

THE ELEMENTS. REACH OF CAUSATION AND DUTY DAMAGES, BUT I THINK IF YOU ARE LOOKING FOR A TEST HERE IS WHAT I THINK MAKES SENSE. WE KNOW THAT THEY HAVE A GATE KEEPING FUNDS AND AN ACTIVE DUTY -- KEEPING FUNDS AND AN ACTIVE DUTY TO COUNSEL A PATIENT AND IF THERE IS A PROBLEM TO RESOLVE IT, AND WHAT WE HEARD WAS IF A PHARMACIST GETS A PRESCRIPTION AND LOOKS AT IT AND LOOKS UP AT THE PATIENT AND SAYS TO THEMSELVES THAT THIS PATIENT IS GOING TO BE DEAD TO NIGHT IF I FILL THIS PRESCRIPTION OR THEY ARE GOING TO BE SERIOUSLY INJURED SHORTLY, THEN THEY HAVE A DUTY TO DO SOMETHING RIGHT THEN.

JUSTICE: I THINK THAT IS WHAT JUSTICE WELLS IS ASKING ABOUT IS WHAT HAS BEEN ALLEGED HERE, BECAUSE CERTAINLY THAT IS NOT THE CIRCUMSTANCE IF YOU FILL ONE FROM TEN DIFFERENT PHYSICIANS AND YOU GO TO 15 DIFFERENT WALKERENS, SO IT IS A DIFFERENT SCENARIO AND WHAT THEY HAVE ALLEGED HERE IS A DIFFERENT SCENARIO, A TRIAL JUDGE MAY HAVE NOTICED THE PLEADING BUT YOU STILL HAVE TO FIND THE ULTIMATE FACTS BEYOND WHAT IS BREACHED. YOU CAN'T JUST SAY YOU HAD A DUTY AND YOU BREACHED IT. LET'S GET IT TO A JURY. YOU HAVE TO EXPLAIN THE FACTS. EXPLAIN WHAT THE DUTY IS HERE AND LIMITED, IS IT WIDE OPEN?

I THINK THE DIET OF CARE NEEDS TO BE FLUSHED OUT AS EACH FACTUAL SITUATION DEFENDANTS BY THE CASE LAW, SO I DON'T THINK THAT YOU CAN NECESSARILY STATE WHERE THE LINES ARE BUT I THINK THE FACTS THAT ARE PRESENTED HERE ARE THAT THE WOMAN WAS GETTING MULTIPLE PRESCRIPTIONS FOR, PRESCRIPTIONS FOR MULTIPLE NARCOTICS WHICH WERE CONTRAINDICATED. YOU ARE NOT SUPPOSED TO GET OXYCONTIN AT THE SAME TIME YOU ARE GETTING PERCOSET.

JUSTICE: ON THE SAME FORM?

SHE WAS GETTING THEM AT THE SAME TIME AND HANDING THEM IN. EACH PRESCRIPTION HAS TO BE ON A DIFFERENT PIECE OF PAPER.

JUSTICE: FILLED ON THE SAME DAY.

FILLED AT THE SAME TIME ON THE SAME DAY AND ALSO FOR NARCOTICS AND DIAZEPAM, WHICH ALSO WERE CONTRAINDICATED AND ALSO GETTING THEM IN A QUANTITY THAT CLEARLY INDICATED ABUSE, AND IF YOU WANT TO GO BACK TO HOW CASE LAW IS EVOLVING, I THINK IT IS CLEAR THAT IF IT IS SOMETHING THAT IS DRUG-SPECIFIC, IN THE SENSE THAT YOU DON'T NEED TO KNOW MORE ABOUT THE PATIENT THAN YOU ALREADY DO, YOU DON'T NEED TO KNOW MORE ABOUT THE HISTORY THAN WHAT YOU ALREADY DO AND WHAT THE TREATMENT REGIME IS BUT YOU KNOW THAT THAT DOSE IS GOING TO BE HARMFUL, TOXIC, AND --

JUSTICE: TALKING ABOUT OXYCONTIN SO THAT YOU GET CONTINUES RELIEF AND DON'T HAVE TO SHOOT IT UP INSIDE THE ARM. IS THERE ANY DIFFERENCE IN WHAT YOU PLEAD THERE? FOR EXAMPLE WHAT IF YOUR CLIENT OR THE DECEDENT HAD CRUSHED THE DRUG AND USED IT ADVERSE TO WHAT IT IS PRESCRIBED FOR IN THAT MANNER? IS THE PHARMACIST STILL RESPONSIBLE IF THEY HAVE SOME QUESTION ABOUT WHETHER YOUR CLIENT WAS A DRUG ABUSER?

WELL, I THINK THAT WHEN THE LEVELS ARE SO EXTREME AND GIVEN THE DRUG THAT IT IS, I THINK THEY HAVE A DUTY TO CONTACT THE PATIENT AND CONTACT THE PRESCRIBER. NOW, ULTIMATELY THE DUTY MAY NOT BE VERY EXTENSIVE, IN THE SENSE THAT THEY MAY HAVE TO QUESTION THE PERSON WHO IS GETTING THE PRESCRIPTION. IF THAT ALLAY THEIR CONCERNS, THEN -- IF THAT ALLAYS THEIR CONCERNS, THEN --

JUSTICE: WHERE DOES THE DUTY COME FROM?

I THINK THE DUTY OF THE PROFESSIONAL TO USE REASONABLE CARE , AND I THINK THAT IF YOUR PROFESSION PUTS SOMEONE IN A ZONE OF RISK, THEN YOU HAVE TO RESPOND TO THAT ZONE OF RISK BY MITIGATING THE HARM AS BEST THAT YOU CAN , AND I THINK THAT THAT DUTY IS CONFIRMED WITH THE ADMINISTRATIVE CODE SAYS THAT YOU SHALL AS A PHARMACIST, IF YOU SUSPECT CONTRAINDICATIONS OR MISUSE , YOU SHALL TAKE STEPS TO AVOID IT. THAT IS VERY ACTIVE. YOU SHALL AND ALSO IF YOU CAN'T AVOID IT ANY OTHER WAY , YOU WILL CONTACT THE PRESCRIBER.

JUSTICE: I WANT TO COME BACK TO MY POINT WHICH BOTHERS ME, WHICH IS ADMITTEDLY A PROCEDURAL POINT , BUT I AM CONCERNED THAT THE , THAT IN THE EARLIER FOURTH DISTRICT CASE , THEY SAY THAT THE ALLEGATION THERE WAS BECAUSE APPELLEE KNEW OR SHOULD HAVE KNOWN THAT THE USE OF THIS DRUG OVER AN EXTENDED PERIOD OF TIME WOULD SUBJECT APPELLANT TO PHYSICAL AND PSYCHOLOGICAL DEPENDENCE AND ADDICTION. THEY HELD THAT THAT DID NOT STATE THE CAUSE OF ACTION .

RIGHT.

JUSTICE: NOW , ARE YOU SAYING THAT THAT IS STILL THE LAW , THAT THAT DOESN'T STATE A CAUSE OF ACTION , BUT THAT YOUR CASE ALLEGES SOMETHING DIFFERENT, OR ARE YOU SAYING WE SHOULD COME IN AND QUASH THE FOURTH DISTRICT'S , THIS PRESENT CASE AND THEIR EARLIER CASE?

WELL , I THINK THAT I WOULD GO BACK TO THE IMMEDIACY OF THE HARM. I SORT OF PASSED THE QUALITIES THERE. I NEVER ACTUALLY KNEW THAT YOU COULD GET QUALITIES BY PRESCRIPTION. I DON'T KNOW WHAT THEY COULD BE PRESCRIBED FOR BUT EVIDENTLY THEY WERE ABUSED AND PRESCRIPTIONS WERE OVER A NINE-YEAR PERIOD THAT CAUSED THE HARM, AND I DO THINK THAT , I DON'T KNOW EXACTLY WHAT DOSAGE THE PERSON WAS GETTING, IF IT WAS EXCESSIVE. OBVIOUSLY IT WASN'T IMMEDIATELY TOXIC AND HARMFUL BECAUSE THE PERSON GOT THE PRESCRIPTIONS FOR NINE YEARS, SO IN A SENSE THEREFORE , LOOKING AT A TEST OF A GATE KEEPING FUNCTION , WHETHER THE PRESCRIPTION IN QUESTION WOULD ACTUALLY ALERT A REASONABLE PHARMACIST TO INQUIRE FURTHER , I AM NOT REALLY SURE OF THE FACTS , BUT I DO THINK THAT , SINCE PIZZ IS FROM THE 1980s AND THOSE OVER SCREENING FUNCTIONS HAVE CHANGED OVER TIME AND IN FACT THE DUTIES OF THE PHARMACISTS HAVE INCREASED, I THINK IT IS IMPORTANT TO RESPECT THE CHANGE IN PHARMACY. IF YOU LOOK AT McCLOUD, IT TALKS ABOUT COMPOUNDING FROM THE 1960s , AND IF YOU REMEMBER IT'S A WONDERFUL LIFE WHERE THE MAN PUTS TOGETHER THE BILLS AND HARRY BAILLY TRIES TO STOP HIM BECAUSE HE PUTS TOGETHER THE WRONG ONE. THE PHARMACIST PUTS THE LITTLE PILLS TOGETHER AND THEN WITH THE RISE OF BIG PHARMACEUTICAL COMPANIES , THE PHARMACIST'S ROLE REALLY ERODED BECAUSE THE DRUGS WERE BEING PUT TOGETHER BY THESE BIG MANUFACTURING COMPANIES , AND THE REASON THAT WE GOT THE OVER 90s SCREENING REQUIREMENTS AND THINGS LIKE THAT WERE BECAUSE THE PHARMACISTS THEMSELVES IN THEIR PROFESSIONAL DUTIES , WANTED A MORE ACTIVE ROLE IN SCREENING PRESCRIPTIONS.

JUSTICE: LET ME ASK YOU A COUPLE OF QUESTIONS ON THE SCOPE OF THE DUTY. ARE YOU CLAIMING THAT THIS DUTY SHOULD APPLY ONLY TO A SCHEDULE TWO CONTROLLED SUBSTANCE OR TO ANY KIND OF PRESCRIPTION?

I THINK IT APPLIES TO ANY PRESCRIPTION WHERE THE PHARMACIST KNOWS OR SHOULD HAVE REASON TO KNOW THAT IT IS GOING TO CAUSE A SERIOUS ADVERSE SIDE EFFECT LIKE AN ENERGY , CONTRAINDICATED DRUGS .

JUSTICE: BUT IN THIS CASE IF THE DRUGS WERE TAKEN AS PRESCRIBED, THIS LADY WOULD NOT HAVE DIED THERE. IS NO ALLEGATION THAT THESE DRUGS AS PRESCRIBED AND GIVEN TO HER

CAUSED HER DEATH.

NO , I THINK THAT THERE IS ACT UALLY, AND THE CAUSE OF DEATH --

JUSTICE: IF SHE HAD TAKENTHE 80 MILLIGRAM OXYCONTIN , IT WAS THE NONTHERAPEUTIC DOSE IN YOUR COMPLAINT. YOU ALLEGE IT WAS A NONTHERAPEUTIC DOSE , ANDWHAT WAS THE CAUSE OF THE NONTHERAPEUTIC DOSE?

WHAT WAS THE CAUSE OF THE NONTHERAPEUTIC DOSE?

JUSTICE: IF SHE HAD TAKENTHE MEDICINE AS PRESCRIBED B Y THE DOCTOR .

I THINK YOU ARE GETTINGTO WHAT RESPONSIBILITY SHEMAY HAVE HAD I N OVERALL APPORTIONMENT OF RESPONSIBILITY, AND I THINKTHAT IF I UNDERSTAND YOUR QUESTION, IS AN IS SU E FORTHE FACT FINDER I N TE RMS OF PROPORTIONING RESPONSIBILITY. IS THAT WHAT YOU ARE SAYING?I A M SAYING ALSO NOT ONLY THE NONTHERAPEUTIC DOSE BUT ALSO THE COMBINATION OF NARCOTICS AND THE COMBINATION OF THE NARCOTICS WITH THE DIAZEPAM , AND SINCE THERE IS SO MUCH GOING ON , IT IS UP TO THE DEFENDANTS TO SORT OUT AMONGST THEM IF IT CAN BE ASSORTED OUT , BEARS THE ULTIMATE RESPONSIBILITY, AND I THINKTHAT IS WHAT THE FACT F INDERS ARE FOR I N THE SENSE THAT --

JUSTICE: I AM ASKING IF THE PHARMACIST A S A LEGALPRESCRIPTION, FILLS IT LEGALLY AND ASSUMES THAT THE PATIENT IS GOING TO USE IT AS PRESCRIBED , IS I T YOUR POSITION THAT THIS PL EADING IS BEYOND THAT ?

YES.

JUSTICE: BECAUSE THERE IS NO A D VERSE REA CTION , AS FAR AS THE CAUSE OF THE DE ATH. YOU GO BACK TO WAY BACK WHEN SHE STARTED TAKING MEDICATIONS BUT YOU G O BACK TO THE CAUSE OF THE DEATH.

I THINK THE ISSUE MAYBE YOU ARE GETTING TO IS ONETHAT THE PHARMACIST SHOULD HAVE INTERSEDED OR SCREENED , AND I THINK THAT AT ANY P OINT I N TIME THE LEVEL OF SUSPICION WAS THAT THEYSHOULD HAVE BEEN AL ERTED AND NOW AT THIS PO INT I N TIME IT IS HARD TO GO BACK AND SAY, WELL, IF THEY HAD INTERCEDED THEN THIS WOULD HAVE HAPPENED OR THAT WOULD HAVE HAPPENED AND WE ARE LEFT WITH THE FACTS AS WE FIND THEM. AM I ANSWERING YOUR QUESTION?

JUSTICE: I GUESS YOU ARE NOT MA KING A DISTINCTION BETWEEN THE PHARMACIST SHOULD HAVE KNOWN EARLY ON THAT THIS LADY HAD A DRUG USE PROBLEM. THEY SHOULD HAVE INTERVENED EARLIER , WHICH WOULD HAVE CAUSED HER NOT TO BE ADDICTED AND ULTIMATELY LED TO HER DEATH B Y MISUSE OF THE DRUG.

WELL , I THINK THAT , SURE .

JUSTICE: I A M T RYING TO GET THE COUNT - -

I UNDERSTAND. ULTIMATELY WE PLED THAT THE COMBINATION OF DRUGS WAS TOXICS I CAN AND I THINK THAT THE -- TOXIC, AND I THINK THAT THE CAUSE OF DEATH WAS FROM B OTH OXYCONTIN AND HYDRO CODOANE AND A MULTIDRUG TOXI CITY.

JUSTICE: ISN'T THIS A CASE WITH A MEDICAL MALPRACTICE CLA IM? WHY DOESN'T THE PHARMACIST NOW BECOME A HEALTH CARE PROFESSIONAL UNDER THE STATUTE , WHERE YOU HAVE TO HAVE NOTICE AND EX PERTS , ALLOF THOSE PRE-SUIT SCRE ENING REQUIREMENTS ?

I AM SOR RY. I ASKED HIM BECAUSE I DIDN'T HANDLE IT AT THE TRIAL COURTLEVEL , BUT THE INFORMATION THAT I HAVE IS THAT PHARMACIST S HAVE BEEN EXCLUDED FROM THE NOTICE PROVISIONS OF THAT STATUTE FOR A LARGE PERIOD OF TIME. AND I THINK THAT THERE IS AN OVERLAP IN THE MEDICAL ISSUES, BUT KEEP IN MIND THAT THEY HAVE A VERY SPECIFIC PROFESSION, WHICH IS TO UNDERSTAND DRUGS AND HOW THEY INTERACT .

JUSTICE: BUT IT SEEMS TO ME LIKE YOU ARE NOW ASKING US TO IMPOSE A DUTY THAT MAY GO AT LEAST IN SOME CASES , BEYOND THEIR EXPERTISE, WHICH IS TO DETERMINE , BASED ON THE PARTICULAR CIRCUMSTANCES OF THE PATIENT , AND THE DRUGS PRESCRIBED , WHETHER THOSE DRUGS ARE APPROPRIATE , EITHER AT ALL OR IN COMBINATION WITH OTHER DRUGS FOR THAT PARTICULAR PATIENT, AND THOSE PARTICULAR CIRCUMSTANCES .

I DON'T THINK WE ARE HONESTLY ASKING THEM TO BE MEDICAL EXPERTS. I DO THINK THAT THAT IS THE PROVINCE OF THE DOCTOR. IF YOU LOOK AT THE SCREENING DUTIES AND THE DUTY TO INTERCEDE AND CONTACT THE PRESCRIBER, ACTUALLY WHEN YOU WEIGH AGAINST THE POTENTIAL HARM , THE DUTY IS PRETTY MINIMAL. WE ARE NOT ASKING THEM TO OPINE, THIS IS DEFINITELY WRONG OR THIS IS MEDICALLY CONTRAINDICATED. WHAT WE KNOW IS THAT FROM THEIR EXPERTISE , THEY HAVE KNOWLEDGE ABOUT DRUGS THAT IS ACTUALLY SUPERIOR TO DOCTORS , AND IF A QUESTION IS RAISED ON CONTRAINDICATIONS OR MISUSE , THAT THEY HAVE A DUTY TO CONTACT THE PRESCRIBER, AND I THINK ONCE THEY DO. THAT

JUSTICE: WHAT HAPPENS IF THEY TRY TO CONTACT THE DOCTOR AND THE DOCTOR IS NOT AVAILABLE , THE DOCTOR IS IN SURGERY. GOING TO BE IN SURGERY ALL DAY. NOW IS IT THE DUTY TO WITHHOLD THAT MEDICATION WHICH MAY CAUSE OTHER PROBLEMS TO THE PATIENT, OR HAS SHE COMPLIED WITH THE DUTY AND NOW ATTEMPTED CONTACT , COULDN'T CONTACT THE PHYSICIAN , GO AHEAD AND GIVE THE MEDICATION?

I THINK IT DEPENDS ON THE CIRCUMSTANCES.

JUSTICE: THAT IS THE PROBLEM IT DEPENDS ON THE CIRCUMSTANCES , BECAUSE NOW YOU ARE PUTTING THE PHARMACIST BETWEEN A ROCK AND A HARD PLACE, AND WHATEVER THE PHARMACIST DOES MAY RESULT IN A LAWSUIT AND, ALSO, HARM TO THE PATIENT.

I UNDERSTAND.

JUSTICE: SO IF THERE IS A DUTY IT HAS GOT TO BE VERY CLEAR WHAT THE DUTY IS THE.

I UNDERSTAND JUSTICE CANTERO AND I THINK THEY ACTUALLY HAVE THAT DUTY NOW. IF SOMEONE IS TRYING TO REFILL A PRESCRIPTION FOR EXAMPLE AND THEY SAY I REALLY NEED THIS MEDICINE , IT IS MY UNDERSTANDING THAT THEY HAVE AUTHORITY TO ISSUE A SEVERAL DAYS' SUPPLY WHILE THEY ARE WAITING TO GET A RESPONSE FROM THE PHYSICIAN , SO IT MIGHT BE A CIRCUMSTANCE LIKE THAT WHERE THEY CAN IN FACT ISSUE AN EMERGENCY COUPLE OF DAYS , BUT I DO SAY WHILE IT DEPENDS ON THE FACTS, IF THEY THINK IT IS GOING TO BE LETHAL , THEN I DO THINK THAT UNDER THE CIRCUMSTANCES THEY HAVE TO USE THEIR PROFESSIONAL JUDGMENT OF REASONABLE CARE TO SAY THAT I THINK IF I FILL THIS IT IS GOING TO BE LETHAL AND IF IT TAKES ME ANOTHER HOUR TO CONTACT THE DOCTOR OR TO GET ANOTHER DOCTOR FROM THAT OFFICE ON THE PHONE, THAT THAT IS WHAT I HAVE TO WAIT TO DO AND IF I CAN GIVE THEM A SMALLER DOSAGE IN THE MEAN TIME AND THAT MIGHT HELP SOLVE THE SITUATION, BUT I THINK PROFESSIONALS DEAL WITH THESE KINDS OF ISSUES ALL THE TIME AND IN FACT I THINK THAT IS WHAT THEY DO NOT NECESSARILY FROM A DUTY PERSPECTIVE BUT FROM A PRACTICAL PERSPECTIVE. THEY ARE ALWAYS TRYING TO GET DOCTORS TO REFILL PRESCRIPTIONS, CALL INTO THE OFFICES AND WAIT FOR THE DOCTOR TO FAX BACK AND GIVING PEOPLE A COUPLE OF DAYS' SUPPLY UNTIL THEY CAN GET THE PRESCRIPTION FINALIZED , SO I DON'T THINK IT IS DIFFERENT FROM WHAT THEY ACTUALLY DO. I THINK WE ARE JUST CONFIRMING THE SCREENING AND INTERVENTION DUTY THAT THEY HAVE ALREADY HAVE

AND GIVEN THE FACT THAT THE DUTY TO CALL OR THE DUTY TO TRY TO INTERCEDE IS SO MINIMAL BASED UPON THE POTENTIAL HARM.

JUSTICE: LET'S GO BACK, SHE DIED OF A COMBINED OVERDOSE. OVERDOSE MEANS THAT SHE TOOK MORE OF THE DRUGS THAN AS PRESCRIBED AND FILLED BY THE PHARMACIST, CORRECT?

CORRECT.

JUSTICE: SO YOUR POSITION IS THAT THE PHARMACIST HAS THE DUTY TO PROTECT HER FROM HER OVERDOSE OF THE DRUG?

WELL, I THINK -- FROM HER OVERDOSING OF THE DRUG?

WELL, I THINK THAT ONE OF THE SCREENING DUTY CYSTS TO USE FOR ABUSE AND MISUSE AND ALSO THE DEFINITION OF OFFENSE SAYS THEY ARE SUPPOSED TO SCREEN FOR FOR THAT, I AM SORRY, ALSO THE LICENSING STATUTE SAYS THAT TO FILL THE PRESCRIPTION IN EXCESSIVE QUANTITIES IS PRESUMED TO BE HARMFUL TO THE PATIENT AND IS OUTSIDE OF THE STANDARD OF CARE, SO I THINK THAT THEY ARE NOT FREE TO JUST SAY THAT THAT PERSON HAS FREE WILL IN A SENSE. I THINK THAT, IF THEY THINK THAT THERE IS A CONTRAINDICATION OR THERE IS TOXIC LEVELS AT ISSUE, THEY HAVE TO COUNSEL THE PATIENT OR THEY HAVE TO GO TO THE DR. NOW, IT MAY BE THAT THEY COUNSEL THE PATIENT AND THE PATIENT SAYS I AM WILLING TO TAKE THAT RISK OR WHATEVER, THEY NOTE IT IN THE COMPUTER AND THAT IS ISSUE ULTIMATELY FOR APPORTIONING.

JUSTICE: CAN WE BE CLEAR HERE WHAT WE ARE TALKING ABOUT IS OVERDOSING. OVERDOSING AT THE LEVELS.

SHE HAD TOXIC DRUGS IN HER SYSTEM, YES.

CHIEF JUSTICE: I THINK YOUR TIME IS UP IF YOU WANT TO CONCLUDE. YOUR TIME IS UP, ALSO, ON THE PETITIONER'S SIDE. I AM GOING TO GIVE YOU ONE MINUTE, WHOEVER WANT TO USE IT BUT I AM AFRAID WE HAVE GOT TO MOVE ON.

CERTAINLY. CERTAINLY. YOUR QUESTION, YOUR HONOR, WAS THE FOURTH DCA CERTAINLY WOULD ADVOCATE FOR QUASHING THE RECENT OPINION. HOWEVER, THE LAW IS STILL GOOD. THERE IS STILL COMPOUNDING GOING ON IN THE STATE. SOME OTHER JURISDICTIONS ARE CRYSTAL CITING TO McCLOUD FROM AROUND THE COUNTRY -- ARE CITING TO McCLOUD FROM AROUND THE COUNTRY, SO WE ARE NOT ASKING THAT THAT OR THE PIZZ DE CISION BE QUASHED, CERTAINLY THE MOST RECENT ONE. WE ARE LOOKING AT THE DEE CASE AS REALLY THE SHINING EXAMPLE. IT SAYS THAT WHAT IS ON THE FACE OF THE PRESCRIPTION, THAT IS WHAT --

JUSTICE: LET ME ASK YOU WHY, IN A NARROW CASE WHERE TWO DRUGS ARE CONTRAINDICATED, THAT MEANS THEY SHOULD NEVER BE PRESCRIBED TOGETHER, REGARDLESS OF THE PATIENT'S CIRCUMSTANCES, WHY SHOULDN'T THERE BE A DUTY IN THOSE CASES FOR THE PATIENT, FOR THE PHARMACIST TO IDENTIFY THAT PROBLEM, EITHER TO THE PATIENT OR TO THE DOCTOR? THAT HE IS PRESCRIBING CONTRAINDICATED DRUGS?

THAT MIGHT BE THE CASE IF IT IS RIGHT ON THE FACE OF THE TWO PRESCRIPTION THAT IS COME IN, BUT THAT IS NOT THE CASE HERE. THE CAUSE OF DEATH BY THE MEDICAL EXAMINER THAT YOU HAVE BEFORE YOU, ONE OF THE MEDICAL --

JUSTICE: YOU SEEM TO HAVE ALLEGED THAT THERE WAS CONTRAINDICATION.

IT IS DIAZAPAM, IT IS NOT ON THE LIST OF ANYTHING, ON THE LIST, VALIUM, AND IT IS NOT ON THE LIST IT IS THERE. AND YOU AS A PHARMACIST HAVE TO MEET WHAT PRESCRIPTIONS

BROUGHT IN AND FILLED, IF THE PRESCRIPTION ON ITS FACE , ALL WE GET IS A POSTCARD SIZE , IF ON THAT SPACE THERE IS SOMETHING WRONG OR INHERENTLY DANGEROUS THAT , IS THE DISTINCTION.

JUSTICE: BUT YOU AGREE THAT, IF THERE ARE TWO PRESCRIPTIONS THAT COME IN THAT ARE CONTRAINDICATED THAT THE PHARMACIST HAS THE DUTY TO IDENTIFY THE PROBLEM AT THAT POINT.

TO COUNSEL. TO COUNSEL AND THAT MEANS BOTH TO THE PATIENT OR TO THE PHYSICIAN. THAT IS DIFFERENT FROM THE OTHER DUTY , BECAUSE THEN IT WOULD GO UNDER THE MEDICAL STATUTE. THAT IS WHY IT IS LENT WHERE PHARMACISTS ARE EXCLUDED BUT WHEN YOU START TO MAKE THOSE ADDITIONS , THE LEGISLATURE NEEDS TO CHANGE THE ENTIRE ROLE OF MEDICINE , THE PHARMACY AND THE STATE.

CHIEF JUSTICE: THANK YOU VERY MUCH. THE COURT WILL TAKE THAT , THIS CASE UNDER ADVISEMENT AND THE COURT WILL BE, TAKE ITS MORNING RECESS AND BE IN RECESS FOR 15 MINUTES .

ONE YOUNG LADY DIDN'T HAVE A CHANCE TO BE INTRODUCED ON THE RECORD . IF I MAY PLEASE . MARIAM -- MARIAM CLEMENS IS WITH US THIS MORNING. THANK YOU VERY MUCH.

CHIEF JUSTICE: THANK YOU.

CHIEF JUSTICE: GOOD MORNING AGAIN OR GOOD MORNING THE FIRST TIME.

JUSTICE: WE DID TAKE JUDICIAL NOTICE OF THE CARPET IN YOUR ABSENCE .

CHIEF JUSTICE: LOOKS YOU WONDERFUL. NOW WE ARE GOING TO BE GIVING BENCHES AND CUSHIONS SO WE ARE IN A TRANSITION PERIOD.