

MEMORANDUM FROM THE OFFICE OF THE GENERAL COUNSEL

To: The Nevada Board of Pharmacy

From: Carolyn J. Cramer, General Counsel



Subject: Klasch v. Walgreens

Date: January 4, 2011

Last month, the Nevada Retail Association came before the Nevada Board of Pharmacy for a discussion on Sanchez v. Wal-Mart. It is the position of the Nevada Retail Association that the Nevada Board of Pharmacy must amend NAC 639.753 so that pharmacists and pharmacies may avoid civil liability to unknown third parties. In the course of that discussion, a pending case was brought up, Klasch v. Walgreens, that was scheduled for oral argument on December 6, 2010. In order to be able to report to the Board about the *Klasch* case, I obtained copies of the parties' brief and I attended the oral argument, via the internet, on December 6, 2010 to observe the argument. Here is what we can glean from the two cases (*Sanchez* and *Klasch*).

Sanchez v. Wal-Mart

The facts of Sanchez are as follows: on June 4, 2004 Patricia Copening was driving her vehicle under the influence of a controlled substance. Gregory Sanchez, Jr., had experienced a flat tire and had pulled over to the side of the road, while he and his friend, Robert Martinez were transferring items from Sanchez's vehicle to his, Ms. Copening crashed into them killing Mr. Sanchez and seriously injuring Mr. Martinez. Ms. Copening was arrested for driving under the influence of controlled substances. Mr. Martinez and the family of Mr. Sanchez sued. In the process of discovery it was revealed that the Nevada Substance Abuse Task Force had sent an unsolicited report in June 2003 to the pharmacies who had dispensed and the physicians who had prescribed to Ms. Copening. In 2003 the Task Force sent out 520 unsolicited reports regarding Nevada patients. The letter regarding Ms. Copening's controlled substance use went to 13 different pharmacies. Based on the discovery of the Task Force's unsolicited report, the plaintiffs filed a second amended complaint to add Wal-Mart, Longs Drugs, Walgreens, CVS Pharmacy, Rite-Aid, Albertson's, Sav-On, and Lam's Pharmacy as defendants, alleging liability because these pharmacies had received an unsolicited report from the Task Force in June of 2003 and the pharmacies continued dispensing controlled substances pursuant to lawful prescriptions. It was never alleged that the prescriptions were fraudulent, forged, or were for excessive dosages that would be harmful to Ms, Copening. The pharmacies moved to dismiss in district court for failure to state a claim on the basis that the defendant pharmacies owed no duty of care to Mr. Martinez or Mr. Sanchez. The district court granted the motion to dismiss, finding that the Legislature had not created a duty under

the facts of this case and reasoning that this case analogous to Nevada dram-shop case (cases against bars over serving customers).

The issue before the Nevada Supreme Court was whether the pharmacies owed a duty to Mr. Martinez and Mr. Sanchez not to harm them by filling Ms. Copening's prescriptions after they had received the unsolicited report from the Task Force and whether there should be a public policy duty imposed on pharmacies to protect the general public, like Mr. Martinez and Mr. Sanchez. The Nevada Supreme Court reviewed NRS 453.1545 and held that there was no duty imposed on the pharmacies for third-parties to the pharmacist/patient relationship like Mr. Martinez and Mr. Sanchez, nor was there any special relationship that existed to justify imposing a duty on pharmacies in favor of unknown third-parties. The Nevada Supreme Court declined to rule on the district court's dram shop liability issues stating that the reliance on Nevada's dram shop cases was not necessary.

Footnote 3 in Sanchez

In Footnote 3 of *Sanchez*, the Supreme Court did give a warning for Nevada pharmacies. The Supreme Court noted that although they held that in 2004 Nevada pharmacies had no special duty imposed on them to keep unknown third parties safe from persons like Ms. Copening, they might have a different opinion for cases brought after 2006 (after the promulgation of NAC 639.753) reasoning that the promulgation of NAC 639.753 could justify the creation of a special relationship in favor of third parties. Footnote 3 provides:

"3. We note that, at the time that the underlying accident occurred, the pharmacies had no obligation to do anything after receiving the Task Force letter and only limited authority to refuse to fill any prescriptions. In 2006, however, the Board of Pharmacy amended its regulations, which may have created a special relationship that could justify imposing a duty in favor of third parties. NAC 639.753 provides that if a pharmacist declines to fill a prescription, because in his professional judgment the prescription is (1) fraudulent, (2) potentially harmful to the customer's health, (3) not for a legitimate medical purpose, or (4) filling the prescription would be unlawful, the pharmacist must in a timely manner contact the prescribing physician to resolve the pharmacist's concerns. The amendment further provides that after speaking with the physician, the pharmacist may fill the prescription if "the pharmacist reasonably believes, in his professional judgment, that the prescription is" not fraudulent or harmful to the patient's health or is lawful or for a legitimate medical purpose. NAC 639.753(3)(a)-(d). If one of these conditions is not met, after discussing the prescription with the physician, the pharmacist is mandated not to fill the prescription and must retain the prescription. NAC 639.753(4). We make no determination as to whether this regulation imposes a duty on pharmacies or creates a special relationship with their customers. "

Klasch v. Walgreens

On December 6, 2010, the Nevada Supreme Court held oral arguments in *Klasch v. Walgreens*. As of the drafting of this memorandum, the ruling in the *Klasch* case is still pending. The briefs were also obtained and reviewed. The facts of *Klasch* are as follows: 86 year-old Helen Klasch had been a

customer of Walgreens for approximately five years. In her patient profile it is reflected that she had an allergy to sulfa-based drugs. On July 27, 2006, Helen went to Dr. Tanenggee for a UTI and he prescribed Bactrim, a sulfa-based drug. Dr. Tanenggee saw a sticker on Helen's file alerting him to the possible allergy and after speaking with Helen he decided to prescribe the Bactrim. Helen's caregiver took the prescription to Walgreens to be filled. Helen's patient profile included the sulfa-drug allergy warning. The Bactrim prescription was filled by the pharmacist, but before the pharmacist dispensed the Bactrim she called Helen and asked her about the possible sulfa allergy. Helen assured her that she had taken the medication before with no problems. The pharmacist did nothing else to ascertain if Helen's allergy was serious, including not calling her doctor. The pharmacist took Helen's representation that she had the drug before and that was the end of the conversation. The pharmacist dispensed the Bactrim to Helen's caregiver. Helen took the medication, which triggered an allergic reaction that caused Stevens-Johnson Syndrome. Helen died as a result of her injuries having burns over 40-50 % of her body from the reaction she had to taking Bactrim.

The District Court granted summary judgment in favor of Walgreens holding that it only had a limited duty to its patients, stating that a pharmacist was not liable if he filled the prescription as it was written, and would only be liable if the prescription was clearly wrong or obviously fatal. The district court upheld the "learned intermediary doctrine" that was established in Nevada in 1972 in *Nevada Board of Pharmacy v. Garrigus*, 88 Nev. 277, 496 P.2d 748 (1972).

Based upon my reading of the parties' briefs and my observation of the oral argument before the Supreme Court on December 6, I posit the following observations (Note: caution must always be exercised in assuming that the Court will rule in a particular way based upon its questions at oral argument):

- The Court spent a considerable amount of time talking about *Sanchez* and NAC 639.753, focusing on whether the pharmacist should have called the doctor. Left unexplored up to this point in time is what the two professionals involved in Mrs. Klasch's treatment (the doctor and the pharmacist) should have done in their professional capacities to determine the seriousness of Mrs. Klasch's allergy beyond merely asking her what she thought about her allergy.
- The parties to the litigation and the Nevada Supreme Court were focused on the "learned intermediary doctrine" and NAC 639.753. Left unexplored throughout the briefing and the oral argument was the role that Nevada's mandatory patient counseling law (NRS 639.266 and its implementing regulations) could or should have in the case. It appeared from the questioning by several Justices and from the briefing that the parties are attempting to derive a duty of care from NAC 639.753 (the delineation-to-fill regulation) rather than from the NRS 639.266 (the patient-counseling law). Perhaps if the case is sent back to the district court the patient counseling aspect of the case will be explored.
- The Nevada Supreme Court appears to be concerned with protection of the public but it did not appear that they understood how this Board's statutes and regulations work. It appears this is why the parties and the Court kept trying to apply NAC 639.753 not realizing that there is an affirmative and statutorily defined standard of care to provide patient counseling established by NRS 639.266 and NAC 639.707.

- The Court's discussion of footnote 3 of *Sanchez* in this case may indicate that *Sanchez* does not appear to be at issue because Helen was Walgreens' patient and was known to them. It is possible that the Court will isolate the effect of its footnote 3 in *Sanchez* only to cases where a pharmacy's act results in injury to an unknown third party.
- Based upon the Supreme Court's obvious concern with the injury Mrs. Klasch incurred resultant from the prescription, if the case is sent back to the district court it can be hoped that the parties will explore NAC 639.707. While this Board has indicated in the past that it believes that NAC 639.707 speaks to the quality of the conversation and what the pharmacist needs to discuss with the patient and the patient's physician, no reported case has yet engaged in a similar review. While this Board has always held that only by completing the counseling process as is required by NRS 639.266, does the pharmacist discharge her duty to her patient, the courts have yet to look at the issue this way.