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November 8, 2011

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**VIA HAND DELIVERY**

Beth Foster  
President  
c/o Larry Pinson  
Executive Secretary  
Nevada State Board of Pharmacy  
431 West Plumb Lane  
Reno, Nevada 89509

Dear President Foster:

I represent the Retail Association of Nevada ("RAN"). Pursuant to NRS 233B.100(1), RAN hereby petitions the Nevada State Board of Pharmacy ("Board") to amend NAC 639.735. Specifically, RAN requests that NAC 639.753 be amended in order to avoid the creation of a new special relationship between a pharmacy and a customer which could create significant and unanticipated liability for Nevada pharmacies. The historical context and recommended amendment to the regulation is described in more detail below.

In May of 2006, NAC 639.753 was enacted by the Board. The regulation allows a pharmacist discretion to deny a prescription if "the pharmacist reasonably believes, in his professional judgment, that the prescription is" unlawful, fraudulent, not for a legitimate medical purpose, or potentially harmful to the medical health of the patient. NAC 639.753.

In December of 2009, in an en banc and published opinion, the Nevada Supreme Court decided *Sanchez v. Wal-Mart Stores, Inc., et al.*, 125 Nev. Advance Opinion 60, 221 P.3d 1276 (Nev. 2009). In the *Sanchez* case, a pharmacy customer, while abusing prescription medication in June of 2004, killed and seriously injured another person in a vehicle accident in Las Vegas. The victims sued not only the customer, but the pharmacies patronized by the customer as well. A central issue in that case was whether a special relationship existed between a pharmacy and a customer that could give rise to a legal duty by a pharmacy to aid third parties who could be impacted by the customers misuse of a prescription. Five of the seven Justices of the Nevada Supreme Court found that no special relationship existed between the pharmacies and the customer to justify such a duty, under the facts of the case and under the law as it existed at the time of the accident in June of 2004. Two of the seven Justices dissented, finding that a special relationship did in fact exist.

The *Sanchez* opinion also included, as part of the majority opinion, an important footnote. Footnote 3 of the opinion cited to the 2006 enactment of NAC 639.753 and suggested that the regulation, at least as of May 2006, could have created a special relationship between a pharmacy and a customer. Clearly, with two Justices finding a special relationship between a pharmacy and a customer and with the other five Justices authoring a footnote stating that there may well be a special relationship as of April 2006, the Board should be aware of this potentially significant impact to Nevada pharmacies.

We do not believe that the 2006 enactment of NAC 639.753 was intended to increase the litigation exposure to Nevada pharmacies, particularly when litigation is spawned by a customer abusing prescription medication, yet that has been an inadvertent result of the amendments. For example, Section 1(5)(A) of the Informational Statement prepared along with NAC 639.735, which addresses "adverse and beneficial effects" expressly notes that "[t]his regulation should have no economic impact on affected businesses or on the public." Section 1(5)(B) similarly notes that "[t]his regulation will have no immediate or long-term economic effects on business or the public." As the *Sanchez* case notes, clearly the regulation has created a significant and unanticipated potential economic impact on both pharmacies and on the public. At the very least, the rule making process should be reopened to explore the impacts of the regulation in light of the *Sanchez* case, and to consider whether the regulation should be amended to address the economic impact on businesses and the public. One potential example of an amendment to the regulation is found in the enclosed section of the New Jersey Pharmacy Practice Act, which we believe covers many of the same concerns that NAC 639.753 was intended to address, while at the same time addressing the discretion of a pharmacist in a way that weighs against the creation of a special legal duty between a pharmacy and unforeseen third parties.

For the above reasons, RAN requests that the Board institute the administrative rulemaking process to consider and enact amendments to NAC 639.753 to address this inadvertent new legal duty created by regulation and the significant economic impacts that have resulted therefrom.

We hereby enclose, for the Board's reference, copies of the following documents for consideration with the request:

1. NAC 639.753
2. NAC 639.753 Informational Statement
3. *Sanchez v. Wal-Mart Stores, Inc. et. al.* 125 Nev. Advance Opinion 60, 225 P.3d 1276 (Nev. 2009)
4. New Jersey Pharmacy Practice Act §45:14-67.1

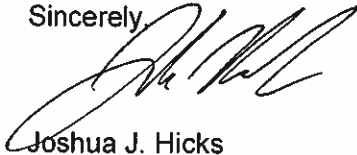
In light of the Executive Order signed by Governor Sandoval on January 3, 2011 addressing the implementation of administrative regulations, we submit that it is appropriate for the Board to implement the rule making process as of January 1, 2012. In the meantime, we also submit it is appropriate, within the provisions of Paragraph 2 of the Executive Order,

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to notify the Office of the Governor with respect to the potential economic impact of the current regulation in light of the *Sanchez* opinion.

We thank the Board for its consideration of this request and look forward to an ongoing discussion of this important issue.

Sincerely,



Joshua J. Hicks

Enclosures

cc: Keith W. Macdonald, Treasurer  
Cheryl Blomstrom, Member  
Kam Gandhi, Member  
Jody Lewis, Member  
Russell Smith, Member  
Kirk Wentworth, Member  
Carolyn J. Cramer, General Counsel

**NAC 639.753 Declination of pharmacist to fill prescription. (NRS 639.070)**

1. A pharmacist may decline to fill a prescription that satisfies the requirements of this chapter and chapter 639 of NRS only if the pharmacist reasonably believes, in his professional judgment, that:

- (a) The filling of the prescription would be unlawful;
- (b) The filling of the prescription would be potentially harmful to the medical health of the patient;
- (c) The prescription is fraudulent; or
- (d) The prescription is not for a legitimate medical purpose.

2. If a pharmacist declines to fill a prescription pursuant to this section, the pharmacist shall speak with the prescribing practitioner in a timely manner to discuss and resolve the concerns of the pharmacist regarding the prescription. Before the pharmacist speaks with the prescribing practitioner, the pharmacist may, based on his professional judgment:

- (a) Retain the prescription and not return the prescription to the patient;
- (b) Return the prescription to the patient;
- (c) Make a photocopy of the prescription and return the prescription to the patient; and
- (d) Unless the prescription is for a controlled substance that is listed in schedule II, dispense a quantity of the drug prescribed, not to exceed a 3 days' supply, to allow a reasonable period for the pharmacist to speak with the prescribing practitioner about the concerns of the pharmacist regarding the prescription.

3. If, after speaking with the prescribing practitioner, the pharmacist reasonably believes, in his professional judgment, that the prescription is:

- (a) Lawful;
  - (b) Not potentially harmful to the medical health of the patient;
  - (c) Not fraudulent; and
  - (d) For a legitimate medical purpose,
- ↪ the pharmacist may fill the prescription.

4. If, after speaking with the prescribing practitioner, the pharmacist reasonably believes, in his professional judgment, that the prescription is:

- (a) Unlawful;
  - (b) Fraudulent; or
  - (c) Not for a legitimate medical purpose,
- ↪ the pharmacist shall retain the prescription and may not return the prescription to the patient.

(Added to NAC by Bd. of Pharmacy by R036-06, eff. 5-4-2006)

**NOTICE OF ADOPTION OF PROPOSED REGULATION  
LCB File No. R036-06**

The State Board of Pharmacy adopted regulations pertaining to Chapter 639 of the Nevada Administrative Code on April 20, 2006.

**Notice date:** 3/15/2006  
**Hearing date:** 4/20/2006

**Date of adoption by agency:** 4/10/2006  
**Filing date:** 5/4/2006

**INFORMATIONAL STATEMENT**

**1. A DESCRIPTION OF HOW PUBLIC COMMENT WAS SOLICITED, A SUMMARY OF PUBLIC RESPONSE, AND AN EXPLANATION HOW OTHER INTERESTED PERSONS MAY OBTAIN A COPY OF THE SUMMARY.**

Public comment was solicited through public notices posted in county courthouses and through mailings to interested parties.

There were six persons that were sworn and gave testimony. One person approved the language as written, one person wanted stronger language to include the issue of conscience, and four persons opposed the language as being too broad. They made suggestions that the Board agreed to and these suggestions were incorporated into the language submitted to LCB

All interested parties may obtain a summary of public response by written or verbal request to: Nevada State Board of Pharmacy, 555 Double Eagle Court, Suite 1100, Reno, Nevada, 89521.

**2. THE NUMBER OF PERSONS WHO: (A) ATTENDED EACH HEARING; (B) TESTIFIED AT EACH HEARING; AND (C) SUBMITTED TO THE AGENCY WRITTEN STATEMENTS.**

The number of persons who attended the hearing was 6.  
The number of persons who testified at the hearing was 6.  
The number of agency submitted statements was 0.

**3. A DESCRIPTION OF HOW COMMENT WAS SOLICITED FROM AFFECTED BUSINESSES, A SUMMARY OF THEIR RESPONSE, AND AN EXPLANATION HOW OTHER INTERESTED PERSONS MAY OBTAIN A COPY OF THE SUMMARY.**

Comments were solicited from affected businesses through posting of public notices in the county courthouses, by direct mailings to all interested persons who have requested notices of board of pharmacy meeting agendas and by direct mailings to professional and trade associations.

There was no response from affected businesses relative to this proposed regulation.

4. IF THE REGULATION WAS ADOPTED WITHOUT CHANGING ANY PART OF THE PROPOSED REGULATION, A SUMMARY OF THE REASONS FOR ADOPTING THE REGULATION WITHOUT CHANGE.

The proposed regulation was adopted with minor changes.

5. THE ESTIMATED ECONOMIC EFFECT OF THE REGULATION ON THE BUSINESS WHICH IT IS TO REGULATE AND ON THE PUBLIC. THESE MUST BE STATED SEPARATELY, AND IN EACH CASE MUST INCLUDE:

A) BOTH ADVERSE AND BENEFICIAL EFFECTS.

This regulation should have no economic impact on affected businesses or on the public.

B) BOTH IMMEDIATE AND LONG-TERM EFFECTS.

This regulation will have no immediate or long-term economic effects on business or the public.

6. THE ESTIMATED COST TO THE AGENCY FOR ENFORCEMENT OF THE PROPOSED REGULATION.

There will be no additional or special costs incurred by the board for enforcement of this regulation.

7. A DESCRIPTION OF ANY REGULATIONS OF OTHER STATE OR GOVERNMENT AGENCIES WHICH THE PROPOSED REGULATION OVERLAPS OR DUPLICATES AND A STATEMENT EXPLAINING WHY THE DUPLICATION OR OVERLAPPING IS NECESSARY. IF THE REGULATION OVERLAPS OR DUPLICATES A FEDERAL REGULATION, THE NAME OF THE REGULATING FEDERAL AGENCY.

The Board of Pharmacy is not aware of any similar regulations of other state or government agencies that the proposed regulation overlaps or duplicates.

8. IF THE REGULATION INCLUDES PROVISIONS WHICH ARE MORE STRINGENT THAN A FEDERAL REGULATION WHICH REGULATES THE SAME ACTIVITY, A SUMMARY OF SUCH PROVISIONS.

The Board of Pharmacy is not aware of any similar regulations of the same activity in which the federal regulation is more stringent.

9. IF THE REGULATION PROVIDES A NEW FEE OR INCREASES AN EXISTING FEE, THE TOTAL ANNUAL AMOUNT THE AGENCY EXPECTS TO COLLECT AND THE MANNER IN WHICH THE MONEY WILL BE USED.

This regulation does not provide a new or increase of fees.

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**H**

Supreme Court of Nevada.

Leila-Jade G. SANCHEZ and Taylor N. Sanchez, Minors, by and through Josette SANCHEZ, their Guardian; Josette Sanchez, an Individual; Therese Cruz-Blas and Delbert M. Blas, as Co-Special Administrators of the Estate of Gregory Sanchez, Jr., Deceased; Robert Martinez, an Individual; and Michelle Martinez, an Individual, Appellants,

v.

WAL-MART STORES, INC., a Foreign Corporation; Longs Drug Stores Co., a Foreign Corporation; Walgreen Co., a Foreign Corporation; CVS Pharmacy, Inc., a Foreign Corporation; Rite-Aid, a Foreign Corporation; Albertson's, Inc., d/b/a Sav-On Pharmacy, a Foreign Corporation; and Lam's Pharmacy, Inc., a Nevada Corporation, Respondents.

No. 47851.  
Dec. 24, 2009.

**Background:** Widow and minor children of deceased motorist and others filed suit against pharmacies and others, asserting claims for personal injury and wrongful death, arising out of automobile accident that occurred when pharmacy customer struck and killed motorist while driving under the influence of controlled substances. Pharmacies filed motions to dismiss for failure to state a claim upon which relief can be granted. The District Court, Clark County, Douglas W. Herndon, J., granted motions. Plaintiffs appealed.

**Holdings:** The Supreme Court, Hardesty, C.J., held that:

- (1) in a matter of first impression, pharmacies' actions of dispensing prescription drugs to their customer did not create a legal duty on part of pharmacies in favor of third parties;
- (2) public policy of statute requiring Board of Pharmacy and Investigation Division of Department of Public Safety to create computerized program to

track controlled substance prescriptions filled by pharmacies did not create duty of care on part of pharmacies to protect third parties; and (3) statutes and regulations concerning prescription drug dispensation and customer recordkeeping maintenance were not intended to protect general public, as necessary to establish negligence per se claim against pharmacies.

Affirmed.

Cherry, J., dissented, with opinion, in which Saita, J., concurred.

West Headnotes

[1] Appeal and Error 30 ↪863

30 Appeal and Error  
30XVI Review  
30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In general. Most Cited Cases

A district court order granting a motion to dismiss for failure to state a claim upon which relief can be granted is subject to rigorous appellate review. Rules Civ.Proc., Rule 12(b)(5).

[2] Appeal and Error 30 ↪919

30 Appeal and Error  
30XVI Review  
30XVI(G) Presumptions  
30k915 Pleading  
30k919 k. Striking out or dismissal.

Most Cited Cases

Supreme Court, in reviewing order of dismissal for failure to state a claim upon which relief can be granted, accepts plaintiff's factual allegations as true, but the allegations must be legally sufficient to constitute the elements of the claim asserted. Rules

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Civ.Proc., Rule 12(b)(5).

**[3] Appeal and Error 30 ↪919**

30 Appeal and Error  
30XVI Review  
30XVI(G) Presumptions  
30k915 Pleading  
30k919 k. Striking out or dismissal.

**Most Cited Cases**

Supreme Court, in reviewing order of dismissal for failure to state a claim upon which relief can be granted, draws every reasonable inference in plaintiff's favor. Rules Civ.Proc., Rule 12(b)(5).

**[4] Appeal and Error 30 ↪893(1)**

30 Appeal and Error  
30XVI Review  
30XVI(F) Trial De Novo  
30k892 Trial De Novo  
30k893 Cases Triable in Appellate

**Court**

30k893(1) k. In general. Most Cited

**Cases**

Whether duty of care was owed by defendant to plaintiff which is a question of law that Supreme Court reviews de novo.

**[5] Health 198H ↪752**

198H Health  
198HV Malpractice, Negligence, or Breach of Duty

198HV(D) Duties and Liabilities to Non-Patients

198Hk752 k. Acts of patients in general.

**Most Cited Cases**

**Products Liability 313A ↪114**

313A Products Liability  
313AII Elements and Concepts  
313Ak114 k. Negligence or fault. Most Cited Cases

**Products Liability 313A ↪225**

**313A Products Liability**

**313AIII Particular Products**

313Ak223 Health Care and Medical Products

313Ak225 k. Drugs in general. Most

**Cited Cases**

Pharmacies' actions of dispensing prescription drugs to their customer did not create a legal duty on part of pharmacies to protect victims of automobile accident that occurred when pharmacy customer struck them with her vehicle while driving under the influence of controlled substances, resulting in death of one victim and severe injuries to other victim, victim's survivors, or co-administrators of victim's estate, as pharmacies had no direct relationship with these unidentifiable members of general public, who were unknown to pharmacies.

**[6] Negligence 272 ↪202**

**272 Negligence**

**272I In General**

272k202 k. Elements in general. Most Cited

**Cases**

To prevail on a negligence claim, plaintiff must establish four elements: (1) the existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages.

**[7] Negligence 272 ↪220**

**272 Negligence**

**272II Necessity and Existence of Duty**

272k220 k. Protection against acts of third persons. Most Cited Cases

**Negligence 272 ↪221**

**272 Negligence**

**272II Necessity and Existence of Duty**

272k221 k. Duty to warn. Most Cited Cases

With regard to the duty element of a negligence claim, under common law principles, no duty is owed to control the dangerous conduct of another or to warn others of the dangerous conduct.

**[8] Negligence 272 ↪220**

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272 Negligence

272II Necessity and Existence of Duty

272k220 k. Protection against acts of third persons. Most Cited Cases

**Negligence 272 ↔221**

272 Negligence

272II Necessity and Existence of Duty

272k221 k. Duty to warn. Most Cited Cases

An exception to the general rule that no duty is owed to control the dangerous conduct of another or to warn others of the dangerous conduct arises, and an affirmative duty to aid others is recognized when (1) a special relationship exists between the parties or between the defendant and the identifiable victim, and (2) the harm created by the defendant's conduct is foreseeable.

**[9] Health 198H ↔752**

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(D) Duties and Liabilities to Non-Patients

198Hk752 k. Acts of patients in general. Most Cited Cases

**Products Liability 313A ↔114**

313A Products Liability

313AII Elements and Concepts

313Ak114 k. Negligence or fault. Most Cited Cases

**Products Liability 313A ↔225**

313A Products Liability

313AIII Particular Products

313Ak223 Health Care and Medical Products

313Ak225 k. Drugs in general. Most Cited Cases

Public policy of statute requiring Board of Pharmacy and Investigation Division of Department of Public Safety to create computerized program to track controlled substance prescriptions

filled by registered pharmacies did not create duty of care on part of pharmacies to protect victims of automobile accident that occurred when pharmacies' customer struck them with her vehicle while driving under the influence of controlled substances, resulting in death of one victim and severe injuries to other victim, victim's survivors, or co-administrators of victim's estate, as statute's underlying purpose was to computerize a manual tracking system for tracking prescription drug use, i.e., a recordkeeping system, not to create public policy duty for pharmacies to protect third parties. West's NRSA 453.1545(1)(a)(1), (5).

**[10] Health 198H ↔752**

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(D) Duties and Liabilities to Non-Patients

198Hk752 k. Acts of patients in general. Most Cited Cases

**Products Liability 313A ↔114**

313A Products Liability

313AII Elements and Concepts

313Ak114 k. Negligence or fault. Most Cited Cases

**Products Liability 313A ↔225**

313A Products Liability

313AIII Particular Products

313Ak223 Health Care and Medical Products

313Ak225 k. Drugs in general. Most Cited Cases

Statutes and regulations concerning prescription drug dispensation and customer recordkeeping maintenance were not intended to protect general public, or to protect against any injury sustained by victims of automobile accident that occurred when pharmacies' customer struck them with her vehicle while driving under the influence of controlled substances, resulting in death of one victim and severe

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injuries to other victim, victim's survivors, or co-administrators of victim's estate, as necessary for them to establish negligence per se claim against pharmacies; duty owed under statutes and regulations was to person for whom prescription was written, i.e., the pharmacies' customers, if anyone. West's NRSA 453.1545, 453.256, 453.257, 639.2392, 639.2393; NAC 639.685, 639.726, 639.742, 639.745.

[11] Negligence 272 ↪ 222

272 Negligence

272II Necessity and Existence of Duty

272k222 k. Duty based upon statute or other regulation. Most Cited Cases

A negligence per se claim arises when a duty is created by statute.

[12] Negligence 272 ↪ 222

272 Negligence

272II Necessity and Existence of Duty

272k222 k. Duty based upon statute or other regulation. Most Cited Cases

Negligence 272 ↪ 259

272 Negligence

272IV Breach of Duty

272k259 k. Violations of statutes and other regulations. Most Cited Cases

A civil statute's violation establishes the duty and breach elements of negligence claim under doctrine of negligence per se when the injured party is in the class of persons whom the statute is intended to protect and the injury is of the type against which the statute is intended to protect.

[13] Appeal and Error 30 ↪ 763

30 Appeal and Error

30XII Briefs

30k763 k. Additional or supplemental briefs. Most Cited Cases

Supreme Court would not consider arguments raised in appellants' supplemental brief that were

not raised in their opening or reply briefs, as these arguments exceeded scope of briefing rule. Rules App.Proc., Rule 31.

\*1278 Marquis & Aurbach and Phillip S. Aurbach and Micah S. Echols, Las Vegas; Patti, Sgro & Lewis and Stephen K. Lewis, Las Vegas; Beckley Singleton, Chtd., and Daniel F. Polsenberg, Las Vegas, for Appellants.

Phillips, Spallas & Angststadt, LLC, and John W. Kirk, Las Vegas; Shook, Hardy & Bacon, LLP, and Frank C. Rothrock, Irvine, CA, for Respondent Wal-Mart Stores, Inc.

Hutchison & Steffen, LLC, and Michael K. Wall and L. Kristopher Rath, Las Vegas, for Respondent Longs Drug Stores.

Backus Carranza and Leland Eugene Backus and Edgar Carranza, Las Vegas, for Respondent Walgreen Company.

Pyatt Silvestri & Hanlon and Carrie McCrea Hanlon, Las Vegas, for Respondent CVS Pharmacy, Inc.

Laxalt & Nomura and Lon A. Burke, Las Vegas; Kelly, Herlihy & Klein LLP and Jonathan Allan Klein, San Francisco, CA, for Respondent Rite-Aid Corporation.

Thorndal, Armstrong, Delk, Balkenbush & Eisinger and Brian K. Terry and Christopher J. Curtis, Las Vegas, for Respondents Albertson's, Inc., and Lam's Pharmacy, Inc.

Before the Court En Banc.

*OPINION*

By the Court, HARDESTY, C.J.

This appeal raises issues concerning whether a pharmacy owes a duty of care to unidentified third parties who were injured by a pharmacy customer who was driving while under the influence of controlled prescription drugs. In addressing this appeal,

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we consider two main arguments: (1) whether, under common-law principles, pharmacies have a duty to act to prevent a pharmacy customer from injuring members of the general public; and (2) whether Nevada's pharmacy statutory and regulatory laws allow third parties to maintain a negligence per se claim for alleged violations concerning dispensation of prescription drugs and maintenance of customers' records.

The underlying matter arose after a pharmacy customer, while driving under the influence of prescription drugs, allegedly caused an automobile accident resulting in one person's death and severe injuries to another. Appellants filed a wrongful death and personal injury complaint against, among others, respondent pharmacies that filled multiple prescriptions for the woman driving the car. The appellants claimed that because the pharmacies had knowledge of the woman's prescription-filling activities, the pharmacies \*1279 owed appellants a duty of care to not fill the woman's prescriptions. The pharmacies filed a motion to dismiss the action, which the district court granted after finding that the pharmacies did not owe appellants a statutory duty of care, and thus, that appellants' claims failed to state a valid cause of action.

We conclude that pharmacies do not owe a duty of care to unidentifiable third parties. Moreover, Nevada's pharmacy statutes and regulations concerning prescription drug dispensation and customer recordkeeping maintenance are not intended to protect the general public from the type of injury sustained in this case, and thus, do not support the appellants' negligence per se claim. We therefore affirm.

#### *RELEVANT FACTS AND PROCEDURAL HISTORY*

On June 4, 2004, while driving on U.S. Highway 95 in Las Vegas, Gregory Sanchez, Jr., stopped on the side of the road to fix a flat tire. Appellant Robert Martinez, Sanchez's co-worker, arrived at the scene to assist Sanchez. While Martinez and Sanchez were transferring items from Sanchez's

vehicle into Martinez's vehicle, they were struck by defendant Patricia Copening's vehicle. <sup>FN1</sup> As a result of the collision, Sanchez died and Martinez was seriously injured. Copening was arrested for driving under the influence of controlled substances.

FN1. Copening is not a party to this appeal. Appellants' claims against her remain pending in the district court, and we make no observations regarding the substantive legal issues pending in the underlying action.

Appellants, Sanchez's minor daughters, his widow, and the personal representatives of his estate, and Martinez and his wife, filed a wrongful death and personal injury complaint against Copening, two medical doctors, and a medical association. Through discovery, appellants learned that in June 2003, the Prescription Controlled Substance Abuse Prevention Task Force sent a letter to the pharmacies that had dispensed to, and physicians who had written prescriptions for, Copening, concerning Copening's prescription-filling activities. The letter informed the pharmacies and physicians that from May 2002 to May 2003, Copening had obtained approximately 4,500 hydrocodone pills at 13 different pharmacies. Based on the Task Force letter, appellants moved the district court and were granted leave to file a second amended complaint to add the following defendants to the action: Wal-Mart Stores, Inc.; Longs Drug Stores Co.; Walgreen Co.; CVS Pharmacy, Inc.; Rite-Aid; Albertson's Inc., d/b/a Sav-on Pharmacy; and Lam's Pharmacy, Inc.

As to the pharmacies, the second amended complaint alleged that Copening was under the influence of controlled substances when the accident occurred and that the pharmacies had filled Copening's prescriptions after they had received a Task Force letter informing them of her prescription-drug activities. The complaint further asserted that after receiving the Task Force letter, the pharmacies continued providing Copening with the controlled

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substances that she used before the accident. The complaint did not allege any irregularities on the face of the prescriptions themselves. Nor did the complaint allege that the prescriptions presented by Copening to the pharmacies were filled by the pharmacies in violation of the prescriptions' language, were fraudulent or forged, or involved dosages that, individually and if taken as directed, were potentially harmful to Copening's health.

The pharmacies answered the complaint and asserted, as an affirmative defense, that appellants' second amended complaint failed to state a claim upon which relief could be granted. Thereafter, the pharmacies moved the district court to dismiss the claims asserted against them in appellants' second amended complaint on the basis that no duty was owed to appellants. The pharmacies subsequently moved the district court for summary judgment. Appellants opposed the motions.

At the hearing on the pharmacies' motions, the district court stated that no statute imposed a duty on the pharmacies to take action after receiving the Task Force letter. The district court further stated that absent a legislative duty, the case was governed by \*1280 Nevada's dram-shop cases and that there appeared to be no material difference between a bartender providing a customer alcohol and a pharmacist filling a customer's prescription, and therefore, proximate cause did not exist.<sup>FN2</sup> Thereafter, the district court entered a summary order that granted the pharmacies' motions to dismiss under NRCP 12(b)(5) and denied as moot the pharmacies' summary judgment motions. The court subsequently certified its order as final under NRCP 54(b). This appeal followed.

FN2. We note that the district court's reliance on Nevada's dram-shop cases was unnecessary. In particular, it appears that after concluding that there was no legislative mandate imposing a legal duty, the district court next considered whether proximate cause existed. An analysis of proximate cause, however, was not required, as

the district court correctly noted the absence of a legal duty imposed on respondents in favor of appellants. Accordingly, we determine that we need not consider the proximate cause element in this matter. See *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) (noting that this court will affirm a district court's order if the district court reached the correct result, even for the wrong reason).

#### DISCUSSION

The issues presented in this appeal raise two long-standing negligence principles. First, we consider whether pharmacies owe a duty of care to unidentified third parties injured by a pharmacy customer or whether public policy creates a duty of care for pharmacies, which when breached, supports a common-law negligence claim. Second, we decide if Nevada's pharmacy statutes and regulations create a statutory duty to support appellants' negligence per se claim against the pharmacies.

#### Standard of review

[1][2][3][4] A district court order granting an NRCP 12(b)(5) motion to dismiss is subject to rigorous appellate review. *Lubin v. Kunin*, 117 Nev. 107, 110–11, 17 P.3d 422, 425 (2001). Similar to the trial court, this court accepts the plaintiffs' factual allegations as true, but the allegations must be legally sufficient to constitute the elements of the claim asserted. *Malfabon v. Garcia*, 111 Nev. 793, 796, 898 P.2d 107, 108 (1995). In reviewing the district court's dismissal order, every reasonable inference is drawn in the plaintiffs' favor. *Id.* Accordingly, to prevail in this appeal, the appellants must demonstrate that a duty of care was owed to them by the pharmacies, which is a question of law that we review de novo. *Turner v. Mandalay Sports Entm't*, 124 Nev. —, —, —, 180 P.3d 1172, 1175, 1177 (2008).

*Pharmacies do not have a duty to act to prevent a pharmacy customer from injuring an unidentified third party*

Appellants argue that the district court impropr-

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erly dismissed their common-law negligence claims for two reasons. First, appellants contend that the pharmacies had a duty to prevent harm to appellants because Copening was a customer to whom the pharmacies continuously dispensed drugs, and the pharmacies had notice from the Task Force letter that Copening was a potential drug abuser. Second, appellants assert that NRS 453.1545 establishes a public policy duty to protect the general public, including appellants. The pharmacies counter that no special relationship exists between the pharmacies and appellants, and that no public policy duty is created by NRS 453.1545's enactment. We agree with the pharmacies' position that the district court properly declined to impose a duty on the pharmacies for the appellants' benefit.

*No special relationship exists to justify imposing a duty on pharmacies in favor of third parties*

[5][6][7][8] It is well established that to prevail on a negligence claim, a plaintiff must establish four elements: (1) the existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages. *Turner*, 124 Nev. at —, 180 P.3d at 1175. With regard to the duty element, under common-law principles, no duty is owed to control the dangerous conduct of another or to warn others of the dangerous conduct. See *Mangeris v. Gordon*, 94 Nev. 400, 402, 580 P.2d 481, 483 (1978). An exception to this general rule arises, however, and an affirmative duty to aid others is recognized when (1) a special relationship exists between the parties or \*1281 between the defendant and the identifiable victim, and (2) the harm created by the defendant's conduct is foreseeable. *Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 212 (2001); *Elko Enterprises v. Broyles*, 105 Nev. 562, 565–66, 779 P.2d 961, 964 (1989); *Mangeris*, 94 Nev. at 402, 580 P.2d at 483.

As a threshold matter, to determine whether appellants can maintain a common-law negligence claim against the pharmacies for Copening's criminal act of driving while under the influence of controlled substances, we must consider the relation-

ship between the parties and if a legal obligation can be imposed upon the pharmacies for the third-party appellants' benefit. The issue of whether, under common-law principles, a special relationship exists between a pharmacy and a third party to justify imposing a duty of care for the third party's benefit is an issue of first impression. We find persuasive to our analysis a Florida District Court of Appeal opinion involving a pharmacy's potential liability to a third party. *Dent v. Dennis Pharmacy, Inc.*, 924 So.2d 927 (Fla. Dist. Ct. App. 2006).

In *Dent*, a motorist, Dent, was involved in a collision with a pharmacy patron who drove while under the influence of prescribed medication and fell asleep at the wheel, causing injuries to Dent. 924 So.2d at 928. Dent filed a negligence action against the pharmacy, alleging that because the pharmacy voluntarily undertook the duty of warning the patron about the prescription drug's effect on driving, the pharmacy owed a duty of care to Dent, the injured motorist. *Id.* at 929. The pharmacy moved the trial court to dismiss the action on the basis that it owed no duty to an unidentified third party. The trial court agreed and dismissed Dent's complaint. *Id.*

On appeal, the *Dent* court recognized that in the context of professional relationships, the duty element of negligence could be established in one of two ways: (1) a plaintiff having a direct relationship with the defendant, or (2) by establishing that the plaintiff is a known or identifiable third party to whom the defendant owes a legal duty. *Id.* The court determined that no duty of care was owed to Dent because she had no direct relationship with the pharmacy; the pharmacy merely filled its customer's prescription and warned the customer of the medication's side effects. *Id.* The court further concluded that Dent was an anonymous member of the driving public and was therefore not a known or identifiable third party. The pharmacy had no control over whether its customer would take the medication and then drive, or even take the medication at all. *Id.* Therefore, a finding that Dent was a

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known or identifiable third party to whom the pharmacy owed a legal duty “ ‘under those circumstances would create a zone of risk [that] would be impossible to define.’ ” *Id.* (quoting *Cheeks v. Dorsey*, 846 So.2d 1169, 1173 (Fla.Dist.Ct.App.2003)). Thus, the pharmacy's actions did not create a legal duty in favor of the motoring public.

Following the Florida court's reasoning, we conclude that in this matter the pharmacies did not owe a duty to the third-party appellants. The pharmacies have no direct relationship with the third-party appellants. In addition, as in *Dent*, the appellants in this matter are unidentifiable members of the general public who were unknown to the pharmacies.<sup>FN3</sup> Thus, the pharmacies' acts of \*1282 dispensing prescription drugs to Copening did not create a legal duty. We conclude that the district court did not err in dismissing appellants' negligence causes of action asserted against the pharmacies on this ground.<sup>FN4</sup>

FN3. 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.

FN4. Because we conclude that no direct relationship exists between the pharmacies and the third-party appellants, or that appellants are identifiable members of the general public, to impose a duty on pharmacists for the general public's protection, we need not consider whether the pharmacies' actions created foreseeable harm to appellants.

Appellants' additional argument—that a common-law negligence claim is established merely as a result of alleged violations of a professional standard of care—fails. Unlike *Mainor v. Nault*, 120 Nev. 750, 101 P.3d 308 (2004), where a special relationship existed between the plaintiff, the client, and the plaintiff's attorneys, here, no special relationship exists between appellants and the pharmacies.

*NRS 453.1545's public policy does not create a duty of care for pharmacies*

[9] Appellants allege that while NRS 453.1545's language does not expressly require pharmacies to take action to prevent prescription-drug abuse, the statute's language and legislative history implies that pharmacies are required to take action to fulfill the statute's purpose. The pharmacies assert that neither the statute's plain language nor its legislative history demonstrates that the Legislature inten-

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ded to impose any obligation on pharmacies in favor of third parties. We agree with the pharmacies.

NRS 453.1545(1) requires Nevada's State Board of Pharmacy and the Investigation Division of the Department of Public Safety to create a computerized program to track controlled substance prescriptions that are filled by registered pharmacies or that are dispensed by a registered practitioner. The tracking program is designed to provide information relating to a customer's inappropriate use of specific controlled substances filled by board-registered pharmacies and practitioners:

1. The Board and the Division shall cooperatively develop a computerized program to track each prescription for [specific] controlled substance[s] ... filled by a pharmacy that is registered with the Board or that is dispensed by a practitioner who is registered with the Board. The program must:

(a) Be designed to provide information regarding:

(1) The inappropriate use by a patient of [specific] controlled substances ... to pharmacies, practitioners and appropriate state agencies to prevent the improper or illegal use of those controlled substances.

NRS 453.1545(1)(a)(1). Although NRS 453.1545(1)(a)(1) states that the information will be provided to pharmacies, subsection 5 of the same statute explains that the "[i]nformation obtained from the program ... is confidential and, except as otherwise provided by this section ... must not be disclosed to any person." NRS 453.1545(5).

The Board or Division are required, however, to report any suspected fraud or illegal activity to law enforcement or the appropriate occupational licensing board. NRS 453.1545(4). Thus, while the statute's language states that gathering information related to prescription-drug use and disseminating it to pharmacies and practitioners is to prevent pre-

scription-drug abuse, only the Board or Division may share the information gathered from the pharmacies. Pharmacies and practitioners are expressly prohibited from disclosing any information. NRS 453.1545(5). Further, nothing in NRS 453.1545 requires pharmacies to take action to protect the general public after receiving a Task Force letter. Thus, based on the statute's plain language, it is evident that the Legislature did not intend to create a policy that requires pharmacies to protect third parties from a pharmacy customer's actions.

NRS 453.1545's legislative history further supports our conclusion. The statute's underlying purpose is to computerize a manual system for tracking prescription-drug use, *i.e.*, a recordkeeping system. *See* Hearings on S.B. 36 Before the Senate Comm. on Human Resources and Facilities and Before \*1283 the Assembly Comm. on Health and Human Services, 68th Leg. (Nev., January 25, February 1, June 7, 1995). When suggested to the legislators that another purpose of the computerized program was to identify drug abusers early on before they become "serious drug users, kill themselves or someone else," a legislator responded that the Legislature is not responsible for people's personal decisions and, ultimately, it is the Board's duty to prosecute regulatory violations. Hearing on S.B. 36 Before the Senate Comm. on Human Resources and Facilities, 68th Leg. (Nev., February 1, 1995) (testimony by lobbyist for the Nevada State Board of Pharmacy, and comment by state senator); Hearing on S.B. 36 Before the Assembly Comm. on Ways and Means, 68th Leg. (Nev., June 20, 1995) (comment by committee vice-chair). Subsequently, when it enacted NRS 453.1545, the Legislature declined to impose additional obligations on pharmacies. NRS 453.1545; Hearing on S.B. 36 Before the Senate Comm. on Human Resources and Facilities, 68th Leg. (Nev., February 1, 1995) (testimony by lobbyist for the Nevada State Board of Pharmacy).

Thus, the legislative history demonstrates that NRS 453.1545's enactment was intended to enhance recordkeeping by permitting more thorough

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and accurate information to be available to enforcement and regulatory authorities and for transmission by the Task Force to physicians, pharmacies, and others. We therefore reject appellants' contention that NRS 453.1545 creates a public policy duty for pharmacies to protect third parties.

*Nevada's pharmacy statutes and regulations do not support appellants' negligence per se claim against the pharmacies*

[10] Appellants assert that the district court erred in dismissing their negligence per se claim against the pharmacies because the pharmacies violated a number of Nevada statutes and regulations enacted to protect the general public, of whom the appellants are members, from the unlawful distribution of controlled substances.<sup>FN5</sup> The pharmacies counter that the statutes and regulations relied on by appellants do not mandate that a pharmacist must refuse to fill a valid prescription for the general public's protection.

FN5. Appellants cite to the following statutes and regulations to support their negligence per se claim: NRS 453.1545 (creating computerized program to track prescriptions for controlled substances); NRS 453.256 (outlining requirements for dispensing specific controlled substances); NRS 453.257 (prohibiting the filling of second or subsequent prescriptions for certain controlled substances "unless the frequency of prescriptions is in conformity with the directions for use" and the increased amount is verified by the practitioner personally by telephone or in writing); NRS 639.2392 (establishing requirements for maintaining patient records); NRS 639.2393 (establishing limitations on filling controlled substance prescriptions); NAC 639.485 (concerning the maintenance of records for controlled substances); NAC 639.742 (discussing the duties and authority of a dispensing practitioner to dispense controlled substances); NAC 639.745

(outlining duties concerning dispensing controlled substances); NAC 639.926 (regarding dispensing controlled substances to certain individuals and maintaining records).

[11][12] A negligence per se claim arises when a duty is created by statute. *Torrealba v. Kesmetis*, 124 Nev. 95, 178 P.3d 716 (2008). A civil statute's violation establishes the duty and breach elements of negligence when the injured party is in the class of persons whom the statute is intended to protect and the injury is of the type against which the statute is intended to protect. *Ashwood v. Clark County*, 113 Nev. 80, 86, 930 P.2d 740, 744 (1997); *Sagebrush Ltd. v. Carson City*, 99 Nev. 204, 208, 660 P.2d 1013, 1015 (1983). But a statute that regulates the communication of information regarding the administration of drugs does not impose a duty on a pharmacy that runs to an unidentifiable third party. *Crippens v. Sav On Drug Stores*, 114 Nev. 760, 763 n. 1, 961 P.2d 761, 763 n. 1 (1998).

The statutes and regulatory provisions the appellants rely on to assert a negligence per se claim against the pharmacies are not intended for the general public's protection or to protect against any injury that the third-party appellants may have sustained. The duty owed under these statutes or regulations is to the person for whom the prescription was written, the pharmacy's customer, if anyone, and not for the general public's protection. And although various statutory and regulatory provisions may express standards \*1284 of care for the practice of pharmacology, under the circumstances of this case, those standards of care do not extend to unidentified third parties. Therefore, we conclude that the district court properly dismissed appellants' negligence per se claims asserted against the pharmacies.<sup>FN6</sup>

FN6. The pharmacies contend that *Nevada State Board of Pharmacy v. Garrigus*, 88 Nev. 277, 496 P.2d 748 (1972), is dispositive of appellants' negligence per se claim. But *Garrigus* is inapposite to our consider-

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ation of whether the pharmacies owed a duty to appellants, as that case concerned whether the Nevada State Board of Pharmacy's decision to revoke several pharmacists' licenses was supported by substantial evidence. *Id.* at 278–79, 496 P.2d at 749.

#### CONCLUSION

[13] We affirm the district court's order dismissing appellants' action against the pharmacies for failure to state a claim upon which relief can be granted.<sup>FN7</sup>

FN7. After briefing in this appeal had concluded, appellants filed a supplemental brief. In that supplemental brief, appellants provided additional authority, which was available when their reply brief was filed, and appellants asserted a new argument that was not previously raised in their opening or reply briefs. We did not consider the arguments raised in appellants' supplemental brief because they exceeded the scope of NRAP 31. *See U.S. v. Vazquez-Rivera*, 407 F.3d 476, 487 (1st Cir.2005) (considering authority raised in a supplemental brief that was not raised in the opening brief because there was an intervening change in law); *U.S. v. Khorozian*, 333 F.3d 498, 506 n. 7 (3d Cir.2003) (providing that FRAP 28(j) cannot be used to raise supplemental arguments); *U.S. v. Kimler*, 335 F.3d 1132, 1138 n. 6 (10th Cir.2003) (refusing to consider an argument that should have been raised in the party's opening or reply brief).

We concur: PARRAGUIRRE, DOUGLAS, GIBBONS and PICKERING, JJ.

CHERRY, J., with whom SAITTA, J., agrees, dissenting:

I differ with my colleagues as to their resolution of this appeal. In particular, I conclude that the district court erred when it granted the pharmacies'

motions to dismiss because the appellants have sufficiently stated common-law negligence and negligence per se claims that preclude dismissal. I therefore dissent.

#### DISCUSSION

##### *Common-law negligence cause of action*

The majority concludes that no special relationship exists to extend a duty of care from the pharmacies to the third-party appellants. I disagree with this conclusion. This court has recognized a special relationship between an innkeeper-guest, teacher-student, and employer-employee. *See Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 212 (2001). The relationship between a pharmacy and pharmacy customer should also be considered a special relationship. Thus, in my opinion, appellants' allegations in their complaint are legally sufficient to constitute a common-law negligence cause of action.

Generally, a defendant does not have a duty to control another's dangerous conduct or to warn others when dangerous conduct arises. *Mangeris v. Gordon*, 94 Nev. 400, 402, 580 P.2d 481, 483 (1978). But an exception to this general rule occurs when a special relationship exists between the defendant and the actor who allegedly caused the injury. *Id.* If a special relationship exists, the defendant has a duty to take measures to protect foreseeable victims from foreseeable harm. *See Elko Enterprises v. Broyles*, 105 Nev. 562, 565–66, 779 P.2d 961, 964 (1989); *El Dorado Hotel v. Brown*, 100 Nev. 622, 627, 691 P.2d 436, 440 (1984), *overruled on other grounds by Vinci v. Las Vegas Sands*, 115 Nev. 243, 984 P.2d 750 (1999). Here, contrary to the majority's position, I determine that the pharmacies owed appellants a duty of care to, among other things, investigate the validity of Copening's prescriptions or to refuse to fill her prescriptions, if warranted, based on the special relationship that exists between a pharmacist and pharmacy customer, together with the information distributed by the Task Force. While I conclude that sufficient information exists to reverse the district

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court's dismissal of appellants' common-law negligence claim, because the underlying proceedings are at an early stage of the litigation, there also remain unanswered questions relating to \*1285 foreseeability that justify remanding this appeal to the district court for further proceedings.

*Special relationship element of common-law negligence cause of action*

A pharmacist's professional standards of care, considered with the notice contained in the Task Force letter, justifies extending the duty owed by the pharmacies under a common-law negligence cause of action to these appellants. Not only do pharmacists possess an expertise in the dispensation of prescription drugs, NRS 639.213; NRS 639.0124 (4), as recognized by the majority, but pharmacists must ensure that the drugs sought by a customer are "dispensed only for medically necessary purposes and according to prevailing standards of care for practitioners practicing in the specialty claimed or practiced by the dispensing practitioner." NAC 639.742(3)(h). Nevada's Legislature has recognized that pharmacists are trained to recognize potential drug abuse based on the frequency of a drug's refill and dosages. NRS 639.0124; NAC 639.707(4). Before filling a prescription, a pharmacist must review a customer's records to determine the prescription's therapeutic appropriateness by considering possible drug abuse, overuse of a particular drug, adverse side effects, or improper dosages or treatment durations. NAC 639.707(4). If a pharmacist reasonably believes that a prescription for a controlled substance was not issued in the normal course of a professional's practice, a pharmacist is prohibited from filling the prescription. NRS 453.381(4).

Based on a pharmacist's professional standards of care, the Legislature contemplated that pharmacists may be subject to civil liability for improperly dispensing prescription drugs when it enacted NRS 453.256(6). This statute provides that civil liability cannot be imposed upon a pharmacist if the pharmacist acts in "good faith in reliance on a reasonable belief that an order purporting to be a pre-

scription was issued by a practitioner in the usual course of professional treatment," implying that civil liability could arise if the good faith requirement is not met. *See also International Game Tech. v. Dist. Ct.*, 122 Nev. 132, 154, 127 P.3d 1088, 1103 (2006) (noting that this court presumes that when the Legislature enacts a statute it does so "with full knowledge of existing statutes relating to the same subject" (internal quotes and citation omitted) ). Consequently, the special relationship between a pharmacist and pharmacy customer, entails more than blindly filling prescriptions, and thus, a special relationship is created between a pharmacist and customer when a prescription is filled.

Generally, the relationship between a customer and pharmacist does not establish a duty in favor of third parties. This case, however, includes a component that the majority ignores—notice. The actual notice to the pharmacies contained in the Task Force letter (which, according to the complaint, was sent to and received by all the pharmacies in this action), together with a pharmacist's professional standard of care, noted above, clearly refutes the majority's conclusion that no special relationship exists to justify extending a duty of care owed by the pharmacies to the appellants.

Appellants' second amended complaint alleges that the pharmacies that received the Task Force letter outlining Copening's prescription-filling activities were informed that Copening had received 4,500 hydrocodone pills within a 12-month period by having numerous prescriptions filled at 13 different pharmacies.<sup>FN1</sup> The complaint also contends that despite receiving the Task Force letter the pharmacies continued to fill narcotic or SOMA prescriptions for Copening.<sup>FN2</sup> It is \*1286 unclear why Copening was filling prescriptions for this amount of narcotic medication within a year's time. But the pharmacies had, at a minimum, inquiry notice that continuing to fill Copening's prescriptions for hydrocodone or SOMA could result in harm to herself or others. *See Ogle v. Salamatof*

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*Native Ass'n, Inc.*, 906 F.Supp. 1321, 1326 (D.Alaska 1995) (explaining that inquiry notice exists when one has knowledge of facts that would lead a reasonable and prudent person using ordinary care to make further inquiries).

FN1. Hydrocodone is a narcotic pain reliever used for the relief of moderate to moderately severe pain and has a high potential for abuse. *Physicians' Desk Reference* 3143-44 (63d ed.2009); NRS 453.176 ; NAC 453.520. It may impair one's mental or physical abilities required for the performance of potentially hazardous tasks, such as driving a car. *Physicians' Desk Reference* 3143-44 (63d ed.2009).

FN2. SOMA, also known as carisoprodol, is used for the relief of acute pain. *Physicians' Desk Reference* 1931 (63d ed.2009). It is recommended that it only be used for "acute treatment periods up to two or three weeks," and it also may impair one's ability to operate a motor vehicle. *Id.* According to appellants' complaint, the combination of hydrocodone and SOMA is known as "The Vegas Cocktail."

Here, the pharmacists had a duty to review Copening's prescription records, including giving consideration to the Task Force letter, before filling her next prescription. In light of the Task Force letter identifying Copening's prescription history, the pharmacies were required to evaluate the prescription's therapeutic appropriateness (considering possible drug abuse, overuse of a particular drug, or improper dosages or treatment durations). NAC 639.707(4). In their professional analysis, if the pharmacists reasonably believed that Copening's prescriptions for hydrocodone were not issued in the normal course of her physician's practice, they were prohibited from filling the prescriptions. NAC 639.742(3)(h); NRS 453.381(4). Thus, the pharmacists owed appellants a duty to exercise that standard of care that is required of the pharmacy profession in the same or similar circumstances.

*See Dooley v. Everett*, 805 S.W.2d 380 (Tenn.Ct.App.1990); *see also Pittman v. Upjohn Co.*, 890 S.W.2d 425, 434 (Tenn.1994) (suggesting that because a pharmacy has a duty to do more than fill a customer's prescription correctly, a pharmacy may owe a duty to a noncustomer).

For these reasons, I conclude that the first element to the common-law exception for a duty of care has been established. The next issue presented is whether the harm created by the pharmacies' dispensation of the drugs to Copening was foreseeable.

*Foreseeability element of common-law negligence cause of action*

This court has held that "[a] negligent defendant is responsible for all foreseeable consequences proximately caused by his or her negligent act." *Taylor v. Silva*, 96 Nev. 738, 741, 615 P.2d 970, 971 (1980). A defendant's liability can be extinguished when an unforeseeable intervening cause occurs between a defendant's negligence and a plaintiff's injury. *El Dorado Hotel v. Brown*, 100 Nev. 622, 628-29, 691 P.2d 436, 441 (1984), *overruled on other grounds by Vinci v. Las Vegas Sands*, 115 Nev. 243, 984 P.2d 750 (1999). But when a "third party's intervening intentional act is reasonably foreseeable, a negligent defendant is not relieved of liability." *Id.* at 629, 691 P.2d at 441. The issue of foreseeability, thus, can be a mixed question of law and fact. *Elko Enterprises v. Broyles*, 105 Nev. 562, 566, 779 P.2d 961, 964 (1989). Because the majority concludes that no special relationship exists between the pharmacies and third-party appellants to establish a duty of care owed to appellants, they decline to reach the foreseeability issue. As noted above, however, I conclude that the relationship between the pharmacy and its customer is sufficient to establish the first duty element and that sufficient allegations were pleaded by appellants to address the foreseeability element that precluded the district court from dismissing the common-law negligence cause of action.

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According to appellants' second amended complaint, the Task Force notified the pharmacies that Copening was potentially abusing drugs. The Task Force informed each pharmacy that Copening went, during a 12-month period, to multiple pharmacies to fill her prescriptions. According to appellants, in the months before the accident, the pharmacies continued to fill Copening's prescriptions for hydrocodone and SOMA and that the amount of prescriptions filled for Copening provided her with at least 25 pills a day. Why Copening obtained this amount of a narcotic prescription in a 12-month period is not clear, but it may involve misuse of prescription drugs. In my view, these are reasonable inferences that could be drawn from the facts alleged in the appellants' complaint, and the district court was required to accept them as true. See *Malfabon v. Garcia*, 111 Nev. 793, 796, 898 P.2d 107, 108 (1995) (providing\*1287 that, in the context of a motion to dismiss under NRCP 12(b)(5), the plaintiff's allegations are taken as true and every reasonable inference is resolved in plaintiff's favor). Thus, it may have been reasonably foreseeable that Copening could not be expected to take the medication as prescribed and would drive while under the prescription drug's influence. A natural consequence of those combined actions was that Copening could cause harm to herself or others.

Although the appellants' allegations are not conclusive of the pharmacies' potential liability, appellants were not required to prove their claim against the pharmacies while defending a motion to dismiss. See *Malfabon*, 111 Nev. at 796, 898 P.2d at 108. At a minimum, questions of fact remain as to whether the pharmacies had actual or inquiry notice that Copening was potentially abusing drugs and that she was purportedly pharmacy shopping. Thus, I conclude that sufficient allegations, raised in appellants' pleadings, regarding foreseeability exist and coupled with my determination that a special relationship, together with the actual notice received by the pharmacies, exists to support imposing a duty on the pharmacies for appellants' benefit. I would reverse and remand this issue to the district

court for further proceedings.

*Negligence per se cause of action that precludes dismissal*

The majority concludes that a negligence per se claim is unavailable to appellants because the statutes and regulations relied on by appellants were not intended for the general public's protection or to protect against any injury that third parties may sustain. I disagree.

A negligence per se claim is available when a defendant violates a statute that is designed to protect others against the type of injury that was incurred. *Ashwood v. Clark County*, 113 Nev. 80, 86, 930 P.2d 740, 744 (1997). The Legislature has recognized that pharmacology affects public safety and welfare. NRS 639.213. Consequently, the Legislature regulates the profession, including in what manner and when controlled substances may be dispensed. See NRS 639.2171; NRS 639.0124; NRS 453.381. To that end, the Legislature directed the Board of Pharmacy to adopt regulations "as are necessary for the protection of the public, appertaining to the practice of pharmacy." NRS 639.070 (1)(a).

Nevada law requires pharmacists to review customers' records before filling prescriptions to determine prescriptions' therapeutic appropriateness. NAC 639.707(4). Pharmacists must ensure that the substance is being dispensed solely for medically necessary purposes and in accordance with prevailing professional standards of care. NAC 639.742(3)(h).

Based on the enactment of these statutory and regulatory provisions, it is apparent to me that the Legislature intended to prevent pharmacy shopping and the overfilling of certain controlled substances, and ultimately, to protect the general public from prescription-drug abuse and its effects. The abuse of either hydrocodone or SOMA can impair one's driving ability. In my opinion, motorists, like appellants, who are injured by an individual who is driving under the influence of prescription drugs are in

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the class of persons that the Legislature intended to protect and the injury is a type that the statutes and regulations intended to prevent. Having reached this conclusion, I would reverse the district court's dismissal of appellants' negligence per se claim and remand this matter to the district court for additional proceedings.

*CONCLUSION*

In my view, the appellants' complaint sufficiently states a common-law negligence cause of action because the special relationship and foreseeability elements to create an affirmative duty on the pharmacies to act for the appellants' benefit have been adequately pleaded. The appellants' negligence per se claim should similarly not have been dismissed under NRC 12(b)(5), as the elements of that claim have also been met. In light of the above, I would reverse the district court's order and remand this matter to the district court to allow appellants' claims to proceed against those pharmacies that had actual or inquiry notice of the driver's prescription-filling\*1288 activities. For these reasons, I dissent.

I concur: SAITTA, J.

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END OF DOCUMENT

## **New Jersey Permanent Statutes**

(UPDATED THROUGH P.L. 2011, ch. 136, and JR 8)

TITLE 45 PROFESSIONS AND OCCUPATIONS

45:14-67.1 Duty of pharmacy to fill certain prescriptions.

45:14-67.1 Duty of pharmacy to fill certain prescriptions.

1. a. A pharmacy practice site has a duty to properly fill lawful prescriptions for prescription drugs or devices that it carries for customers, without undue delay, despite any conflicts of employees to filling a prescription and dispensing a particular prescription drug or device due to sincerely held moral, philosophical or religious beliefs.

b. If a pharmacy practice site does not have in stock a prescription drug or device that it carries, and a patient presents a prescription for that drug or device, the pharmacy practice site shall offer:

(1) to obtain the drug or device under its standard expedited ordering procedures; or

(2) to locate a pharmacy that is reasonably accessible to the patient and has the drug or device in stock, and transfer the prescription there in accordance with the pharmacy practice site's standard procedures.

The pharmacy practice site shall perform the patient's chosen option without delay. If the patient so requests, the pharmacist shall return an unfilled prescription to the patient.

c. If a pharmacy practice site does not carry a prescription drug or device, and a patient presents a prescription for that drug or device, the pharmacy practice site shall offer to locate a pharmacy that is reasonably accessible to the patient and has the drug or device in stock.

d. A person who believes that a violation of this section has occurred may report the violation to the New Jersey State Board of Pharmacy.

L.2007, c.199, s.1.