2021 IL App (1st) 200558

FIRST DISTRICT
FIRST DIVISION
September 30, 2021

No. 1-20-0558

QUATANYA SEALS, as Administrator of the Estate of Kelli Danelle Brown, Deceased, Plaintiff-Appellant, v. RUSH UNIVERSITY MEDICAL CENTER; WALGREEN COMPANY; and SVETLANA MELAMED, M.D., Defendants (Walgreen Company, Defendant-Appellee).	)	Appeal from the Circuit Court of Cook County No. 17 L 2395 Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE COGHLAN delivered the judgment of the court, with opinion.
Presiding Justice Hyman and Justice Walker concurred in the judgment and opinion.

OPINION

¶ 1 In this wrongful death and survival action against defendant Walgreen Company (Walgreens),[1] plaintiff Quatanya Seals, as administrator of her infant daughter's estate (the Estate of Kelli Danelle Brown),[2] appeals the dismissal of the fourth amended complaint with prejudice for failure to state a claim under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)) and denial of her motion to reconsider. Seals argues that the "learned intermediary

[1]Walgreen Company asserts that it was improperly named in the complaint as "Walgreens Pharmacy, LLC." Because the parties refer to defendant as Walgreens in their briefs, we will do the same in this opinion.

[2]Brown was born on August 11, 2014, and died on April 30, 2015.

doctrine" did not shield Walgreens from liability for failing to properly fill a prescription.

¶ 2 The learned intermediary doctrine is frequently at issue in pharmaceutical cases. *Urbaniak v. American Drug Stores, LLC*, 2019 IL App (1st) 180248, ¶ 13. "The learned intermediary doctrine is a fundamental tenet of pharmacological and negligence law in America" and "helps courts to decide which participant in the chain of administering prescription drugs to consumers should be charged with the duty to warn patients about the potential adverse side effects." *Id.* ¶¶ 1, 13. "In its most basic form, the learned intermediary doctrine obligates drug manufacturers to warn only physicians about the potential risks of a drug, and then physicians are required to use medical judgment to determine which warnings to provide to patients to whom the drug is prescribed." *Id.* ¶ 13; *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507, 517 (1987). Illinois law does not impose a duty on a pharmacist "to monitor patients, make medical decisions, or to warn a physician or patient of 'excessive' prescribed doses." *Hernandez v. Walgreen Co.*, 2015 IL App (1st) 142990, ¶ 24; see *DiGiovanni v. Albertson's, Inc.*, 405 Ill. App. 3d 932, 935 (2010) (the doctrine exempts pharmacies from giving warnings to patients). "It is the doctor's duty to know what he is prescribing, and it is the pharmacy's duty to give the patient what the doctor orders." *Urbaniak*, 2019 IL App (1st) 180248, ¶ 25. However, even in a pharmaceutical context, a duty to warn "can be found where there is unequal knowledge of a dangerous condition and the defendant, possessed of that knowledge, knows or should know that harm might or could occur if no warning is given." *Id.* ¶ 14.

¶ 3 For the reasons that follow, we reverse and remand for further proceedings, finding that the learned intermediary doctrine was not implicated under the well-pleaded facts.

¶ 4 BACKGROUND

¶ 5 On March 2, 2015, Dr. Svetlana Melamed prescribed the following for Brown:

"enoxaparin (LOVENOX) 30 MG/0.3 mL SC injection

inject 0.125 mL beneath the skin every 12 hours.

Quantity: **90 (Ninety) Syringe** Refills: **0 (Zero)**

Dispense as Written: No"

On March 6, 2015, Walgreens filled the prescription by dispensing to Seals 90 "single-dose, spring-loaded" syringes, prefilled with 0.3 mL of Lovenox. The prefilled syringes "were made from clear transparent material and did not come with any demarcations, level, amount or numerical measurements." Using the dispensed syringes, Brown "was given multiple doses of Lovenox at the higher than the intended dosage (0.125 mL)." On March 11, 2015, Brown was taken to Rush University Medical Center because she had "at least two episodes of vomiting blood." Brown died on April 30, 2015, due to "bleeding from the brain, that was caused by complications from the uncontrolled bleeding caused by the administration of a higher dosage of Lovenox than prescribed."[3]

¶ 6 On March 7, 2017, Seals filed a wrongful death and survival action against Walgreens, and later named Melamed and Rush University Medical Center as defendants.[4] Seals amended the complaint several times, leading to the fourth and final amended complaint, which attached as exhibits the doctor's prescription and a photograph of the dispensed syringes. In the fourth amended complaint, Seals advanced a theory that Walgreens improperly filled the prescription. Seals alleged that Walgreens was negligent because "it should have been obvious to a competent pharmacist that Lovenox should not have been dispensed in single-use, spring-loaded syringes,

[3]"Reviewing health professional's" determination of the cause of death.

[4]The action against these defendants remained pending when the fourth amended complaint was dismissed with prejudice. The order dismissing Walgreens from the action included Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) language.

but instead it should have been dispensed in multi-use syringes with proper dosage demarcations, as the [script] called for doses of less than the entire 0.3mL to be administered to Brown." The complaint also alleged that Walgreens "failed to timely warn the Plaintiff and/or Melamed regarding the fact that the prescribed dosage could not be administered from the Wrong Syringes."

¶ 7 Walgreens moved to dismiss under section 2-615, arguing that the complaint failed to plead a duty because "[u]nder the learned intermediary doctrine, a pharmacy is not required to convey warnings to its customers about the adverse effects of a medication or its dosage." Walgreens characterized Seals's claims as "rely[ing] on criticism of the dosage and the packaging [the medicine] was dispensed in," which it argued fell within the purview of the learned intermediary doctrine. Walgreens further argued that the complaint "lack[ed] any patient-specific information which [it] had which would trigger a duty to warn under [*Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 187 (2002)], which represents the only exception to the learned intermediary doctrine in Illinois."

¶ 8 The trial court granted Walgreens' section 2-615 motion to dismiss with prejudice but later vacated that order and directed Walgreens to respond to outstanding written discovery. In doing so, Walgreens produced its "internal policy," "counseling pharmacists to contact the prescribing physicians if further clarification regarding prescriptions was necessary" and "requiring pharmacists to always exercise professional judgment as to when the prescriber should be consulted regarding a patient or a prescription." The trial court reinstated the dismissal, finding, as it did with each amended complaint, that the learned intermediary doctrine applied to shield Walgreens from any alleged negligence. Seals filed a motion to reconsider and requested leave to file a proposed fifth amended complaint, which raised new allegations that Walgreens was negligent in its voluntary undertaking to warn. The trial court denied Seals's motion.

¶ 9 ANALYSIS

¶ 10 Seals challenges the trial court's dismissal of her amended complaint pursuant to section 2-615, arguing that "this Case is about improperly filled medication, the learned intermediary doctrine does not even apply to this case and the trial court should not have even been burdened with considering whether the *Happel* exception to the Doctrine applies."

¶ 11 A section 2-615 motion to dismiss attacks the legal sufficiency of a complaint based on defects apparent on the face of the pleading. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 13. When reviewing a section 2-615 dismissal, all well-pleaded facts are accepted as true, as well as all reasonable inferences from those facts. *Id.* The relevant inquiry is whether the allegations, viewed in the light most favorable to the plaintiff, are sufficient to state a claim. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 61. "A plaintiff is not required to prove his case at the pleading stage; rather, he must merely allege sufficient facts to state all the elements which are necessary to constitute his cause of action ***." *Claire Associates v. Pontikes*, 151 Ill. App. 3d 116, 123 (1986). A dismissal is proper only "if it clearly appears that the plaintiff cannot prove any set of facts that will entitle it to relief." *Sheffler*, 2011 IL 110166, ¶ 61. To state a claim for negligence, Seals must allege and prove "a duty owed by the defendant, a breach of that duty, and that the breach was the proximate cause of the plaintiff's injuries." *Monson v. City of Danville*, 2018 IL 122486, ¶ 23. We review the dismissal of a complaint under 2-615 for failure to state a claim *de novo*. *Sheffler*, 2011 IL 110166, ¶ 61.

¶ 12 Based on our review of Seals's fourth amended complaint, we find that the allegations in the pleading were sufficient to withstand a section 2-615 motion to dismiss. Specifically, Seals pled that Walgreens had a duty "to conduct its affairs in accordance with Illinois law and standards applicable to pharmacies in Illinois, which include, but are not limited to properly filling

prescriptions and giving timely and proper warnings to doctors." Seals alleged that Walgreens dispensed syringes that were "made from clear transparent material and did not come with any demarcations, level, amount or numerical measurements that could allow the user to administer a dosage that is less than 0.3 mL with any degree of safety or accuracy." The complaint also alleged that Walgreens "[d]eviated from the Note and dispensed the medication to Seals, in a form that could not be administered in the prescribed amount to Seals' infant daughter," "[d]ispensed the medication in improper syringes (*i.e.*, single-use syringes as opposed to multi-use syringes) for the prescription, as written," and "failed to timely warn Plaintiff and/or Melamed regarding the fact that the prescribed dosage could not be administered from the Wrong Syringes." The complaint further alleged that Seals "was given the 90 pre-loaded Wrong Syringes of Lovenox by Walgreens, to be administered to the infant [ ] in a manner or device such that the entire pre-filled dosage was then given to the said infant child, contributing to and/or causing her death." Attached to the complaint was a copy of the prescription, directing an injection of "0.125 mL beneath the skin every 12 hours," without specifying whether single or multiuse syringes should be dispensed. Also attached was a photograph of the dispensed syringes, which supported the allegations that the syringes were spring-loaded with no demarcations and contained a clear liquid.

¶ 13 As stated, the issue before us is a pleading issue addressing the sufficiency of Seals's allegations in the complaint. Construing the pleading liberally in Seals's favor, we find that the complaint sufficiently pled that the dispensed single use, spring-loaded syringes pre-filled with 0.3 mL of Lovenox could not be used to safely administer the prescribed dose of 0.125 mL to the infant such that negligence was a reasonable *inference*. We must accept as true all well-pleaded facts and reasonable inferences arising from them. *In re Application for a Tax Deed*, 2021 IL 126150, ¶ 17; see *Landers-Scelfo v. Corporate Office Systems, Inc.*, 356 Ill. App. 3d 1060, 1065

(2005) (a fact is considered well pleaded if the plaintiff clearly set out the ultimate fact that she intends to prove). At this pleading stage, the complaint sufficiently stated a cause of action alleging that Walgreens improperly filled the prescription by dispensing syringes containing Lovenox that could not be used to safely administer the medication *as prescribed* and provided no warnings addressing administration of the dispensed medicine.

¶ 14 We must still address Walgreens' argument that a valid cause of action for negligence cannot be stated under Illinois law because the claims "fall within the learned intermediary doctrine." Walgreens claims that because Seals raised an "excessive dose allegation," it had no duty to warn "of the dangerous propensities of administering too much Lovenox" under the learned intermediary doctrine.

¶ 15 Walgreens relies on *Eldridge v. Eli Lily & Co.*, 138 Ill. App. 3d 124 (1985), arguing that the case "applies the learned intermediary doctrine to excessive dose cases" to shield pharmacies from any liability. We find such reliance misplaced.

¶ 16 In *Eldridge*, an individual died from an overdose of a prescribed drug. *Id.* at 125. A negligence claim was brought against the pharmacy, alleging it "had been negligent in filling prescriptions for quantities of [the drug] and other drugs beyond those normally prescribed and in failing to warn [the prescribing doctor] that the prescriptions were for an excessive quantity." *Id.* at 126. Recognizing that a "pharmacist owes a duty of ordinary care in practicing his profession, but such care requires the highest degree of prudence, thoughtfulness and diligence, and it is proportioned to the danger involved," the court held that the pharmacist had no duty to warn that a drug was being prescribed in an excessive quantity. *Id.* at 126-27. The court explained that imposing a duty to warn "would require the pharmacist to learn the customer's condition and monitor his drug usage" because a "prescription which is excessive for one patient may be entirely

reasonable for the treatment of another." *Id.* at 127. The court stated that to impose such a duty, "the pharmacist would have to interject himself into the doctor-patient relationship and practice medicine without a license." *Id.*

¶ 17 *Eldridge* is distinguishable because in that case, the plaintiff did "not allege that [the pharmacy] did anything other than fill the prescription as ordered by the physician." *Id.* at 126. In contrast, Seals alleges that Walgreens dispensed Lovenox "in a form that *could not* be administered in the prescribed amount." (Emphasis added.) Seals's allegation that Walgreens failed to properly fill the prescription, which we must accept as true, is not the same allegation that it filled a prescription as ordered for an *excessive dose* and had a duty to warn of the excessive dose. Although "[o]ur courts have already made clear that pharmacies do not have a duty to determine whether a prescription is 'excessive,' " that principle has no application here where the negligence claim against Walgreens was for failing to fill a prescription in a manner that could be safely administered *in the amount as prescribed*. *Urbaniak*, 2019 IL App (1st) 180248, ¶ 28; see *Leesley v. West*, 165 Ill. App. 3d 135, 141-42 (1988) (no duty imposed on the pharmacy to warn its customers of the potential hazards of a prescription drug); *Fakhouri v. Taylor*, 248 Ill. App. 3d 328, 330, 333 (1993) (pharmacist who properly fills a prescription has no duty to warn the doctor or customer of prescribed dosages exceeding the manufacturer's recommended limits). But see *Jones v. Walgreen Co.*, 265 Ill. App. 308, 321 (1932) ("[i]f a prescription is doubtful as to what drug is really intended," the pharmacist has a duty "to take all reasonable precaution to be certain that he does not sell one thing when another is called for"). Therefore, we disagree with Walgreens that Seals's "allegations are truly criticisms of the dosage of the medication as prescribed, which falls squarely within the doctrine."

¶ 18 Walgreens also argues that the exceptions to the protections afforded to pharmacies under

the learned intermediary doctrine recognized in *Happel* did not apply because there were no allegations that it had "patient specific" information. See *Happel*, 199 Ill. 2d 187, 194 (found a narrow duty to warn outside of the learned intermediary doctrine because pharmacy had patient specific information that the patient was allergic to aspirin and the prescribed drug was contraindicated for a person with that allergy).

¶ 19 Because Seals's allegations of negligence were based upon Walgreens improperly filling a prescription, the negligence claim falls outside the purview of the learned intermediary doctrine and any applicable exceptions would be irrelevant.

¶ 20 In sum, construing the well-pleaded facts liberally in the light most favorable to Seals, we find that the complaint "set out facts necessary for recovery under the theory asserted in the complaint." *Kirk,* 117 Ill. 2d at 516. Therefore, because "sufficient facts are contained in the pleadings which, if established, could entitle the plaintiff to relief," dismissal with prejudice was inappropriate. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 488 (1994). While we offer no opinion on whether Seals will or should ultimately prevail on the merits of her claims against the defendants, *at this stage* of the proceedings, the fourth amended complaint meets the threshold to survive a section 2-615 motion to dismiss. Because we reverse the dismissal of the fourth complaint, we need not address Seals's final claim that the trial court abused its discretion in denying the motion to reconsider the dismissal with prejudice and for leave to file a fifth amended complaint. See *Simon v. Wilson*, 291 Ill. App. 3d 495, 508 (1997) (whether the proposed amendment would cure the defective pleading is a factor to consider on a motion for leave to amend).

¶ 21 CONCLUSION

¶ 22 We reverse the dismissal of Seals's fourth amended and remand for further proceedings.

¶ 23 Reversed and remanded.

No. 1-20-0558

Cite as:	*Seals v. Rush University Medical Center*, 2021 IL App (1st) 200558
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 17-L-2395; the Hon. Kathy M. Flanagan, Judge, presiding.
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