

STATE OF MICHIGAN
COURT OF APPEALS

BIRCHWOOD MANOR, INC.,
Plaintiff-Appellant,

v

COMMISSIONER OF REVENUE,
Defendant-Appellee.

FOR PUBLICATION
September 23, 2003
9:25 a.m.

No. 236646
Michigan Tax Tribunal
LC No. 00-230501

HEALTH CARE AND RETIREMENT
CORPORATION,

Plaintiff-Appellant,

v

COMMISSIONER OF REVENUE,
Defendant-Appellee.

No. 236698
Michigan Tax Tribunal
LC No. 00-230502

KNOLLVIEW MANOR, INC.,

Plaintiff-Appellant,

v

COMMISSIONER OF REVENUE,
Defendant-Appellee.

No. 236699
Michigan Tax Tribunal
LC No. 00-230503

Before: Bandstra, P.J., and Gage and Schuette, JJ.

GAGE, J.

Plaintiffs Birchwood Manor, Inc., Health Care and Retirement Corp., and Knollview Manor, Inc., appeal as of right the order of the Michigan Tax Tribunal denying plaintiffs' motion

for summary disposition and granting summary disposition to defendant in these consolidated cases, which concern the use tax treatment of over-the-counter medications plaintiffs purchased for their nursing home residents. We find our analysis in this case is limited because we are bound by this Court's decision in *CompuPharm, LTC v Dep't of Treasury*, 225 Mich App 274; 570 NW2d 476 (1997), which held that non-legend drugs dispensed to nursing home residents by licensed pharmacists pursuant to physician's written prescriptions were not exempt from sales tax. MCR 7.215(J)(1). If we were not bound by *CompuPharm*, we would find that non-legend drugs dispensed to nursing home residents by licensed pharmacists pursuant to physician's written prescriptions are exempt from use tax. Therefore, were it not for *CompuPharm*, we would remand this case to the Tax Tribunal for further analysis regarding whether the drugs at issue were dispensed pursuant to written prescriptions. However, because we are bound by *CompuPharm*, we affirm the order of the Tax Tribunal granting defendant summary disposition.

I

A

Defendant assessed use tax against each plaintiff following separate audits. At least a portion of each assessment related to the company's purchase of non-legend,¹ or over-the-counter, drugs for use in its nursing homes. Each plaintiff protested the assessments, claiming some of the medications qualified for the use tax exemption for prescription drugs, MCL 205.94d, because they were dispensed by a licensed pharmacist pursuant to a prescription written by a physician for a designated resident.² After a commissioner upheld the tax assessment, plaintiffs appealed to the Tax Tribunal.

Plaintiffs thereafter filed a motion for summary disposition and defendant filed a cross-motion for summary disposition. In December 1997, the tribunal granted plaintiffs' motion to hold the case in abeyance pending the outcome of *CompuPharm, supra*. In May 1999, the current cases were removed from abeyance and the tribunal granted defendant's cross-motion for summary disposition. In granting defendant summary disposition, the tribunal followed *CompuPharm*, ruling that the non-legend drugs plaintiffs purchased were not exempt from use tax under MCL 205.94d.

B

¹ Federal law requires certain drugs to bear a legend indicating they may be dispensed only by prescription. 21 CFR 201.100(b). These drugs are referred to as "legend drugs." When the parties filed their briefs in this case, the labels of these drugs were required to state, "Caution: Federal law prohibits dispensing without prescription." Effective April 2, 2002, the labels must now state, "Rx only." 67 FR 4904, 4906. "Non-legend" drugs are those drugs that do not require this label.

² Plaintiffs acknowledge that some of the non-legend drugs were purchased to be used as "house supplies" and were not ordered by a physician for a particular resident. Plaintiffs do not dispute that these "house supplies" are subject to use tax.

This Court's review of Tax Tribunal decisions is very limited. *Michigan Milk Producers v Dep't of Treasury*, 242 Mich App 486, 490; 618 NW2d 917 (2000). On appeal, absent a claim of fraud, this Court can determine only whether the tribunal committed an error of law or adopted a wrong legal principle. *Id.*; *Michigan Bell Telephone Co v Dep't of Treasury*, 229 Mich App 200, 206; 581 NW2d 770 (1998). Further, the tribunal's factual findings will not be disturbed as long as they are supported by competent, material, and substantial evidence on the whole record. *Michigan Milk Producers, supra* at 490-491; *Canterbury Health Care, Inc v Dep't of Treasury*, 220 Mich App 23, 28; 558 NW2d 444 (1996).

II

This case requires us to analyze the use tax exemption for prescription drugs provided in MCL 205.94d. The precise question plaintiffs request be decided is whether non-legend drugs dispensed to nursing home residents by licensed pharmacists pursuant to a physician's written prescriptions are exempt from use tax. Plaintiffs assert that although the drugs at issue in this case could be purchased by the public over the counter, federal and state Medicaid and Medicare regulations require that nursing home residents receive drugs only pursuant to a written prescription. However, this issue, as it relates to the sales tax, was decided by a panel of this Court in *CompuPharm, supra*.

A

The Michigan Constitution exempts "prescription drugs for human use" from sales and use tax. Const 1963, art 9, § 8. This provision provides, "No sales or use tax shall be charged or collected from and after January 1, 1975 on the sale or use of prescription drugs for human use" *Id.* However, the Constitution does not define "prescription drugs for human use."

MCL 205.94d exempts prescription drugs from use tax. The statute defines "prescription drug for human use" as follows:

"Prescription drug for human use" means insulin or a drug dispensed by a licensed pharmacist pursuant to a written prescription prescribed by a licensed physician or other health professional as defined in section 21005 [MCL 333.21005] of the public health code . . . for the use of a designated person, or oxygen dispensed pursuant to a written prescription or order issued by a licensed physician or other health professional [MCL 205.94d(2).]

Plaintiffs assert the non-legend drugs it purchased qualified for exemption from use tax because they met the statutory definition of prescription drugs, despite their over-the-counter nature. Specifically, plaintiffs contend the items were (1), drugs, (2) dispensed by a licensed pharmacist, (3) pursuant to prescriptions written by licensed physicians or other health professionals for the use of designated persons. Therefore, plaintiffs urge that the tribunal committed an error of law by failing to apply the statutory definition of prescription drugs.

B

In *CompuPharm, supra* at 279-280, this Court ruled that non-legend drugs dispensed to nursing home residents do not qualify for tax exemption, even if a licensed pharmacist dispenses

them pursuant to a written prescription. *CompuPharm* presented facts similar to those in the instant case. CompuPharm, a pharmaceutical company, argued its sales of over-the-counter drugs to nursing home residents were exempt from sales tax because the drugs were dispensed by licensed pharmacists to fill prescriptions written by doctors. *Id.* at 275-276. In other words, CompuPharm argued for a transactional approach, under which a drug's distribution method is key to its status. The company premised its argument on federal Medicaid regulations that require all medication given to nursing home patients be dispensed only by physician's orders. *Id.* at 275-276.

The panel rejected CompuPharm's argument. In rejecting the argument, the panel relied on this Court's decision *Syntex Laboratories, Inc v Dep't of Treasury*, 188 Mich App 383; 270 NW2d 665 (1991), finding that this Court had rejected a transactional approach in *Syntex*. Relying on *Syntex*, the *CompuPharm* panel focused on the nature of the non-legend drugs distributed to nursing home residents rather than their means of distribution. *Id.* at 279-280. Because the drugs were available without a prescription, the panel found they were not exempt from tax. *Id.* The panel explained:

In the instant case, adopting petitioner's interpretation [a transactional approach] would potentially confer prescription drug (and sales tax-exempt) status on anything that could reasonably be characterized as a drug, rather than merely on "legend" drugs, because the only requirements would be that the substance be a drug and that it be prescribable. Such an interpretation does not comport with the commonly understood meaning of "prescription drug" as found in *Syntex*. It would also open the door to potential abuse by providing a method of avoiding the payment of sales tax on otherwise taxable items. [*Id.* at 279-280.]

The panel also rejected CompuPharm's argument that Medicaid regulations requiring the drugs to be dispensed pursuant to a written prescription conferred prescription drug status. *Id.* at 280. The panel concluded, "[T]he purpose of this requirement is 'to ensure that medical care is being provided in accordance with each recipient's individualized medical care plan.' Thus, the requirement exists for recordkeeping and oversight purposes that are unrelated to the intent of the constitutional exemption from taxation." *Id.*

Although the present case involves use tax rather than sales tax, this Court has noted the two acts define prescription drugs nearly identically. *CompuPharm, supra* at 278. We find that because the instant case presents facts and issues nearly identical to *CompuPharm*, *CompuPharm* applies to this case. Therefore, we are bound by *CompuPharm*'s holding that non-legend drugs dispensed to nursing home residents do not qualify for tax exemption, even if a licensed pharmacist dispenses them pursuant to a physician's written prescription.

Plaintiff's attempts to distinguish this case from *CompuPharm* are without merit. Plaintiff claims that *CompuPharm* concerned a tax on the company that sold drugs, while this case involves a tax on the ultimate user – namely elderly, indigent, and disabled nursing home residents. However, plaintiffs mischaracterize the facts of this case. Here, defendant assessed the use tax against the nursing home *operators*, not the *residents*. We note, however, that the consumer likely would bear the cost of any tax on drugs, regardless against whom the actual assessment is made. See *Syntex, supra* at 390-391. Thus, plaintiffs' arguments do not provide a basis for not applying *CompuPharm* in this case.

C

The Tax Tribunal is bound under the rule of stare decisis to follow this Court's published decisions. MCR 7.215(C). Plaintiffs have presented no persuasive reasons for distinguishing *CompuPharm* from the instant case. Therefore, we are bound to find that the tribunal did not err in relying on *CompuPharm* to conclude that the non-legend drugs at issue were not exempt from use tax, and we must affirm the decision of the Tax Tribunal.

III

Plaintiffs however next assert that this Court in *CompuPharm* misapplied *Syntex* and inappropriately usurped legislative authority by construing a clear, unambiguous statute; therefore, plaintiffs urge this Court to indicate its disagreement with *CompuPharm* pursuant to MCR 7.215(J)(2) and convene a special panel pursuant to MCR 7.215(J)(3). While we believe plaintiffs mischaracterize the *CompuPharm* and *Syntex* decisions in making its argument, we nonetheless agree that the *CompuPharm* panel erred in its application of the *Syntex* holding. Because *CompuPharm* was decided after November 1, 1990, we must follow its rule of law, MCR 7.215(J)(1); however, we stress our disagreement with the decision, MCR 7.215(J)(2).

A

In *Syntex*, the Department of Treasury attempted to impose use tax on samples of legend drugs that Syntex, a drug manufacturer, distributed to physicians. *Syntex, supra* at 384. The department argued the drugs were not "prescription drugs," and were therefore subject to use tax because they were not dispensed by a pharmacist pursuant to a prescription written for a designated consumer. *Id.* at 388-389. A panel of this Court agreed the drugs did not meet the statutory definition because they were not dispensed by a pharmacist to fill a physician's written prescription. *Id.* at 389. The panel then turned to the constitutional exemption, and determined that the commonly understood meaning of "prescription drugs" focused on whether a drug could be bought only with a physician's prescription, not on how the drug was distributed. *Id.* at 389-390. The panel also noted the Public Health Code defined "prescription drug" to include "[a] drug designated by the board as one which may only be dispensed pursuant to a prescription." *Id.* at 390, quoting MCL 333.17708(4)(c). The panel concluded, "These definitions focus on the nature of the drug, instead of on whether the drug has actually been dispensed pursuant to a prescription." *Id.* at 389. Therefore, the panel held the drug samples were "prescription drugs" and that imposing a use tax on them violated the Constitution. *Id.* at 391.

CompuPharm, however, presented the converse situation from *Syntex*. While in *Syntex, supra* at 388-389, the Department of Treasury asserted legend drugs were subject to taxation because they did not meet the statutory definition, this Court agreed the drugs were not exempt under MCL 205.94d, but found the drugs exempt under the constitutional provision. *Id.* at 391. By contrast, in *CompuPharm, supra* at 275-276, the taxpayer argued its non-legend drugs were exempt from taxation because they met the statutory definition. This Court, relying on *Syntex*, concluded the drugs were not tax-exempt. *CompuPharm, supra* at 279-280.

B

The plaintiff in *CompuPharm* based its argument on the statutory exemption as well as the constitutional exemption. *Id.* at 275. Apparently, the *CompuPharm* panel assumed the *Syntex* analysis applied to both: “The definition of ‘prescription drug’ set forth in the Use Tax Act *and construed in Syntex*” *Id.* at 278 (emphasis added). However, a closer reading of *Syntex* shows that the ruling applies only to the constitutional provision. *Syntex, supra* at 389-391. The *Syntex* panel addressed MCL 205.94d only to note that the drugs did not meet the statutory definition of “prescription drug.” Most notably, contrary to the *CompuPharm* panel’s rejection of the transactional approach, the *Syntex* panel adopted a transactional approach in making its determination: “The drug samples *do not* satisfy the Use Tax Act definition *because they were not dispensed by a pharmacist to fill a prescription prescribed by a physician.*” *Syntex, supra* at 389 (emphasis added). This implies the drugs would have been exempt had they satisfied these requirements, and underscores that the panel rejected the statute’s transactional approach only with respect to determining the meaning of “prescription drug” for the purpose of the constitutional provision.

C

The differing goals of statutory interpretation and constitutional interpretation indicate *Syntex*’s analysis cannot simply be transferred to the statutory definition. The goal of either type of interpretation is to ascertain and give effect to the provision’s purpose and intent. *Frankenmuth Mut Ins v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998); *White v Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979). However, when interpreting a statute, one aims to determine the intent of the Legislature that passed the provision, and the language’s plain and ordinary meaning governs. *Frankenmuth Mutual, supra* at 515; *Toth v AutoAlliance Int’l (On Remand)*, 246 Mich App 732, 737; 635 NW2d 62 (2001). By contrast, constitutional interpretation aims to determine the intent of the people who adopted the provision, and the rule of common understanding applies. *Straus v Governor*, 459 Mich 526, 533; 592 NW2d 53 (1999). Importantly, constitutional provisions are not subject to statutory construction rules. *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971); *Michigan United Conservation Club v Dep’t of Treasury*, 239 Mich App 70, 76; 608 NW2d 141 (1999).

The *Syntex* interpretation of “prescription drug” cannot trump the meaning the Legislature gave that term unless the statute is unconstitutional. Statutes, however, are presumed constitutional, and that presumption is especially strong regarding tax legislation. *Ammex, Inc v Dep’t of Treasury*, 237 Mich App 455, 468; 603 NW2d 308 (1999). This Court must construe a statute as constitutional unless its unconstitutionality is clearly apparent. *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999). If necessary, this Court must give a statute a narrowing construction to render it constitutional if such a construction is possible without harming the Legislature’s purpose. *Thompson v Merritt (Amended Opinion)*, 192 Mich App 412, 424; 481 NW2d 735 (1991).

In *Syntex, supra* at 389 n 4, citing OAG 1979-80, No 5601, p 486 (November 30, 1979), the Department of Treasury asserted that if the statutory definition of “prescription drug” restricted the constitutional use and sales tax exemption, it violated the constitution. By contrast, however, plaintiffs’ proposed interpretation of MCL 205.94d broadens the constitutional exemption. Under this Court’s interpretation of the constitutional provision, only legend drugs qualify for tax exemption. *Syntex, supra* at 389-390. However, plaintiffs’ interpretation would

exempt any drug dispensed by a pharmacist pursuant to a physician's prescription. See *CompuPharm, supra* at 279-280. The statute, therefore, broadens the constitutional right, and thus, is not unconstitutional.

Although the statutory definition can be harmonized with the constitutional provision, defendant argues the Legislature has indicated the *Syntex* analysis applies to the statutory definition – that is, that the drug's nature governs its tax status for purposes of the statutory definition. Before *Syntex*, MCL 205.94d(2) defined “prescription drug for human use” as “insulin or a drug dispensed by a licensed pharmacist to fill an individual prescription prescribed by a licensed physician or other licensed practitioner of the healing arts solely for the use of a designated person.” After this Court decided *Syntex*, the Legislature amended the statute to its current form, which is substantially similar, but expressly exempts “oxygen dispensed pursuant to a written prescription or order issued by a licensed physician or other health professional. 1992 PA 267; MCL 205.94d(2). Defendant asserts that the addition of oxygen signals the Legislature's approval of *Syntex* because the amended language exempts oxygen only if it is dispensed by prescription. According to defendant, if plaintiffs' interpretation of the statutory definition (a transactional approach) were correct, the language requiring distribution by prescription would be superfluous.

While defendant's argument represents one possible explanation for the Legislature's specific exemption of oxygen, another possibility exists – oxygen would require a specific exemption if it is not considered a drug. Plaintiffs' interpretation would exempt all drugs issued by prescription. If oxygen is not considered a drug, then it would not satisfy plaintiffs' interpretation of the statute, and the requirement that it be prescribed by a doctor would not be superfluous.

Although MCL 205.94d does not define “drug,” the Public Health Code, MCL 333.1011 *et seq.*, defines “drug” as “. . . a substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings or animals” MCL 333.7105(7). Oxygen arguably could be used to mitigate or treat disease; however, the statutory amendment's legislative history indicates oxygen's status as a drug has been questioned. House Legislative Analysis, HB 6087 and 6088, September 24, 1992. According to the analysis, the revenue commissioner questioned whether oxygen was a drug, despite an earlier Attorney General's opinion to the contrary. *Id.* Although legislative history is “a generally unpersuasive tool of statutory construction,” *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001), it suggests the prescription requirement language may have been necessary to exempt oxygen from use tax even under plaintiffs' interpretation.³

³ Defendant also notes that the Legislature did not amend the statute to exempt *any* drug prescribed by a physician, but instead limited the exemption to oxygen. However, the statutory definition already defines “prescription drug for human use” to include all drugs dispensed by a pharmacist pursuant to a physician's prescription. MCL 205.94d(2). Thus, this amendment was unnecessary.

The statute provides that a prescription drug is a drug prescribed by a physician and dispensed by a pharmacist for a designated person. MCL 205.94d. Arguably, the meaning of the term “drug” is ambiguous, but the parties do not dispute that the items plaintiffs seek to exempt from taxation are drugs. The remainder of the definition, concerning the distribution of the drug by prescription, does not lend itself to more than one interpretation.⁴ Importantly, it does not lend itself to the meaning of “prescription drug” derived in *Syntex*. The language states that prescription drugs are those dispensed by a pharmacist to fill a prescription. It cannot be fairly interpreted as including only those drugs that *must* be distributed by a pharmacist. If the Legislature had intended the latter meaning, it could have included language to that effect – for instance, “insulin or a drug *required to be* dispensed by a licensed pharmacist.” Accordingly, we conclude that judicial construction of this statute is neither necessary nor appropriate in this case; thus, the *Syntex* analysis is irrelevant to the statute’s application, and under a strict reading of the statute, a prescription drug is a drug dispensed by a licensed pharmacist to fill a prescription written by a physician, regardless whether the drug is required to be dispensed by a prescription.

D

We note that the *CompuPharm* panel addressed certain policy concerns that counsel raised against adopting this broader interpretation of “prescription drugs.” *CompuPharm, supra* at 279-280. First, the panel noted that plaintiffs’ interpretation would encompass a broad range of items in the tax exemption. *Id.* Second, the panel concluded that the federal and state regulations requiring that all medications be dispensed to nursing home residents by a doctor’s order served recordkeeping and oversight purposes unrelated to the intent of exempting prescription drugs from taxation. *Id.* at 280.

We do not dispute that these are valid concerns. However, they represent policy considerations for the Legislature, not this Court, to weigh. In interpreting a statute, this Court may not impose a construction based on a different policy decision than the Legislature has chosen. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 752; 641 NW2d 567 (2002); see also *City of Lansing v Lansing Twp*, 356 Mich 641, 648; 97 NW2d 804 (1959) (“The duty of the Court is to interpret the statute as we find it. The wisdom of the provision in question in the form in which it was enacted is a matter of legislative responsibility with which the court may not interfere”). In this case, the neediest population is forced to bear the cost of professional services (i.e., to obtain prescriptions) in order to receive what ordinary citizens can buy over the counter. While the ordinary person does not pay tax on a prescription drug, the nursing home residents, in effect, are forced to pay more, through the assessment of the tax on the operator of the nursing home, for drugs they can only obtain by prescription. Although we should not be concerned with policy considerations, perhaps this explains why the Legislature passed the statute containing the specific language that it did.

E

⁴ We note that the term “prescription” may be ambiguous and lend itself to more than one meaning. See *infra* IV. However, resolution of the ambiguity of this term at this point in the discussion is unnecessary.

In summary, the Tax Tribunal correctly applied binding precedent in deciding the drugs at issue were not exempt from use tax. Under the rule of stare decisis, this Court is bound to follow its published opinion in *CompuPharm*, *supra* at 274, and therefore, must affirm the tribunal's ruling regarding this issue. MCR 7.215(J)(1). However, our disagreement with the *CompuPharm* decision is apparent.

IV

Although we are bound by *CompuPharm*, we find it necessary to address whether the drugs at issue in this case would qualify for exemption under our analysis of the statute. In its decision, the Tax Tribunal found that “non-legend drugs are not obtained upon written prescription by a physician but instead are ordered by the physician dispensing the non-legend drug.” Plaintiffs argue that the tribunal erred in this finding and contend that the non-legend drugs at issue in this case were dispensed by prescription, and thus, meet the statutory definition.

To qualify as a “prescription drug for human use” under MCL 205.94d(2), an item must, among other things, be “dispensed by a licensed pharmacist pursuant to a written prescription prescribed by a licensed physician or other health professional.” Plaintiffs concede “the drugs were ordered by the physicians,” but assert the drugs could only be dispensed by a pharmacist pursuant to a written prescription under Michigan and federal law. Because plaintiffs complied with these regulations, they assert that the drugs were prescribed by licensed physicians and not merely ordered. Plaintiffs, however, mischaracterize the federal and state regulations governing Medicare and Medicaid reimbursements to nursing homes when they claim drugs must be dispensed to residents only pursuant to physicians' prescriptions. The term “prescription” does not appear in any of the regulations plaintiffs cite for this proposition. 42 CFR 483.40; 42 CFR 483.60; 2001 AC, R 325.20903. Instead, the regulations require that doctors sign and date all orders for nursing home residents, with limited exceptions. 42 CFR 483.40(b)(3). In addition, nursing homes must provide pharmaceutical services and employ or obtain the services of a licensed pharmacist. 42 CFR 483.60. Finally, state regulations mandate that nursing homes administer medications only in accordance with the attending physician's order. 2001 AC, R 325.20903(1). Further, the order can be either written or verbal. *Id.* Therefore, plaintiffs' assertion that they complied with these regulations does not necessarily support their claim that the drugs were dispensed pursuant to written prescriptions.

However, the difference in the terms order and prescription in this case appears to be a distinction without a difference. It does not appear that the tribunal actually analyzed the specific facts of this case to find whether the orders were the equivalent of prescriptions. The record here reflects that the physician's orders were either mailed or faxed to the pharmacy to be filled by a pharmacist. The drugs were then sent back to the nursing homes in boxes labeled for each resident. Therefore, it appears that specific written “orders” for particular drugs to be dispensed to particular residents were sent to the pharmacy and filled by a pharmacist. Importantly, plaintiffs contend that only the drugs for which a written “order” was filled are exempt from tax, plaintiffs acknowledge that those non-legend drugs that were purchased for “house supplies” were subject to use tax. We fail to see the distinction in this case between the

written order filled by the pharmacist and a written prescription.⁵ However, based on this record, we are unable to conclusively determine that the drugs at issue were prescribed by written prescriptions from a physician.

Because the Tax Tribunal failed to fully analyze this issue in its opinion and because we are unable to make a conclusive determination on this record with regard to this issue, were we not bound by *CompuPharm* to affirm the tribunal's decision, we would remand to the tribunal for a determination whether the non-legend drugs dispensed by the pharmacist to the particular residents were dispensed pursuant to a written order by a physician and whether the written order was the equivalent of a written prescription.

V

In summary, we find the Tax Tribunal was bound to follow *CompuPharm, supra*, and therefore properly granted summary disposition to defendant. We note our disagreement with *CompuPharm*, and were we not bound by *CompuPharm*, we would hold that under MCL 205.94d, a drug, whether legend or non-legend, dispensed by a pharmacist pursuant to a written prescription prescribed by a licensed physician is a prescription drug for purposes of exemption from use tax. Thus, as just explained, the outcome of this appeal would change – we would remand rather than affirm. Because of our disagreement with *CompuPharm*, we recommend that this case be submitted to a special conflict panel pursuant to MCR 7.215(J)(3).

Affirmed.

/s/ Hilda R. Gage
/s/ Richard A. Bandstra
/s/ Bill Schuette

⁵ The term prescription is defined as “a written direction by a physician for the preparation and use of a medicine or remedy. *Random House Webster's Dictionary* (1997) p 1029.