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Summary of Sanchez v. Wal-Mart, 125 Nev. Adv. Op. No. 60

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***Sanchez v. Wal-Mart*, 125 Nev. Adv. Op. No. 60 (Dec. 24, 2009)¹**

Tort – Negligence and Wrongful Death

Summary

Plaintiffs/Appellants appeal from a district court dismissal of their complaint against several pharmacies for wrongful death and personal injury in a common-law negligence and negligence per se action.

Disposition/Outcome

Affirmed. The Nevada Supreme Court held that pharmacies owe neither a special nor a statutory duty of care to unidentified third parties, and that Appellant's complaint was therefore properly dismissed by the district court for failing to state a claim for which relief could be granted.

Factual and Procedural History

On June 4, 2004, Defendant Patricia Copenig, not a party to this appeal, struck Gregory Sanchez, Jr. and Appellant Robert Martinez with her vehicle as they were attempting to fix a flat tire on US Highway 95, killing Sanchez and seriously injuring Martinez. Copenig was subsequently arrested for driving under the influence of drugs. Appellants, Sanchez's minor daughters and his widow, representing Sanchez's personal estate, and Martinez and his wife brought wrongful death and personal injury actions against Copenig, two medical doctors, and a medical association.

Discovery uncovered a June 2003 letter from the Prescription Controlled Substance Abuse Prevention Task Force to several pharmacies and prescribing physicians informing them that Copenig had obtained approximately 4,500 hydrocodone pills from 13 pharmacies between May 2002 and May 2003. Plaintiffs/Appellants amended their complaint to add the pharmacies as defendants, alleging that the pharmacies wrongfully continued to fill Copenig's prescriptions despite the Task Force letter informing them of Copenig's prescription drug activities.

The pharmacies moved to dismiss the complaint for failure to state a claim for which relief can be granted and for summary judgment. The district court noted that in the absence of legislative authority on the question of pharmacies' duty of care to unidentified third parties, the issue was governed by Nevada's cases regarding dram-shop liability, which indicate by analogy that there is no proximate cause between filling valid prescriptions and the subsequent injury. Therefore, the district court granted the pharmacies' motion to dismiss and denied the motion for summary judgment as moot, certifying its decision as final per NRCP 54(b). Plaintiffs/Appellants took this appeal.

¹ By Shana S. Brouwers.

Discussion

The Court grants rigorous appellate review to an order granting a motion to dismiss² and approached the question of law regarding what duty of care the pharmacies owed the Appellants de novo.³ The Court also declined to discuss the district court's analysis of dram shop liability, declaring it inapplicable to the present case.

Because potential pharmacy liability to third parties was an issue of first impression in Nevada, the Court relied on a Florida District Court of Appeal opinion regarding the same issue, *Dent v. Dennis Pharmacy, Inc.*⁴ In *Dent*, the plaintiff was injured when a pharmacy customer, under the influence of prescription drugs, fell asleep at the wheel of her vehicle and struck Dent.⁵ Florida's district court dismissed Dent's complaint because it did not sufficiently allege that the pharmacy owed the injured motorist a duty of care.⁶ On appeal, the court in *Dent* refused to recognize a duty of care between the pharmacy and Dent because the parties did not have a direct relationship to one another⁷ and Dent was not a known or identifiable third party,⁸ emphasizing that it would be overly inclusive to impose a duty of care on pharmacies on behalf of the motoring public as a rule.⁹

Analogizing the present case to *Dent*, the Court held that pharmacies do not owe a duty of care to unidentified third parties injured by a pharmacy customer because no special relationship exists between the pharmacy and the third party that would justify such a duty of care. Based on this assessment, the Court declined to discuss the question of whether the Appellants' injuries were foreseeable. The Court further concluded that nothing in the express language or the legislative history or intent of Nevada's public policy statement outlining a tracking program for controlled substance prescriptions¹⁰ implies that pharmacies have a duty to enforce that statute's provisions, and that therefore the policy statement does not impose any duty on pharmacies in favor of third parties. Finally, the Court concluded that the Appellants' negligence per se claims were properly dismissed because the statutes and regulatory provisions prohibiting the unlawful distribution of controlled substances are not intended for the general public's protection or to protect against the nature of injuries sustained by the Appellants, but rather are intended to protect the pharmacy's customer.

Dissenting Opinion

Justice Cherry, joined by Justice Saitta, wrote separately in dissent, arguing that Appellants had appropriately alleged a claim for common law negligence because a special relationship exists between pharmacies and their customers that extends to third parties and the injury to the Appellants was reasonably foreseeable. Cherry based these conclusions on Nevada

² *Lubin v. Kunin*, 117 Nev. 107, 110-111, 17 P.3d 422, 425 (2001).

³ *Turner v. Mandalay Sports Entertainment*, 124 Nev. ___, ___, ___, 180 P.3d 1172, 1175, 1177 (2008).

⁴ *Dent v. Dennis Pharmacy, Inc.*, 924 So.2d 927 (Fla. Dist. Ct. App. 2006).

⁵ *Id.* at 928.

⁶ *Id.* at 929.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*,

¹⁰ NEV. REV. STAT. § 453.1545 (2009).

law that implies that pharmacists may be liable for civil damages for improperly distributing prescription drugs with a lack of good faith,¹¹ combined with the Task Force letter notifying the pharmacies of Copening's potential drug abuse and the fact that the prescribed drugs, taken in such quantities in such a limited time frame, presented a reasonable likelihood that Copening might drive under the influence, risking injury to herself and others. Cherry further disagreed with the majority's assessment of Appellants' negligence per se claims, noting that the Legislature directed the Board of Pharmacy to adopt regulations to "protect[...] the public, appertaining to the practices of pharmacy,"¹² thereby indicating that regulations passed by the Board of Pharmacy are directly intended to protect the general public, of which Appellants are members. Therefore, Cherry and Siatta would have reversed the district court's decision to dismiss the Appellants' complaint for failure to state a claim.

Conclusion

Because no special relationship exists between the pharmacies and the Appellants, Appellants could not properly allege a claim of common-law negligence for their injuries. Moreover, Appellants' claim of negligence per se fails in the absence of evidence that regulations governing the distribution of controlled substances were intended to protect third parties from harm resulting from a pharmacy customer's prescription drug abuse. Therefore, the Court affirmed the judgment of the district court.

¹¹ *Id.* § 453.256 (6).

¹² *Id.* § 639.070 (1)(a).