

## **Misfilled Prescription Cases**

Recently, my dad, Jere Beasley, and I tried the case of Deal v. Rite Aid Corp. for the second time in the Circuit Court of Montgomery County, Alabama. The first trial ended in a mistrial after one juror refused to discuss the case and would not return a verdict in favor of the Plaintiffs under any circumstance. The case involved a misfilled prescription which Rite Aid gave to Mrs. Jewell Deal of Andalusia, Alabama. On January 4, 1999, the Rite Aid pharmacy incorrectly filled Mrs. Deal's Lopressor prescription, a medicine used to control her blood pressure. Although the label stated the correct dosage of 50 mg. to be taken three times a day, the bottle contained 100 mg. tablets Mrs. Deal took the medication over several weeks, experienced many classic symptoms of adverse reactions to the overdose, and developed congestive heart failure. She was getting a double dose of this medication 3 times a day which had a substantial effect on her heart. Rite Aid's own documents warn the customer not to double up on the 50 mg. tablet if a dose is missed.

Rite Aid admitted that it breached the standard of care, but disputed that the overdose caused Mrs. Deal's death. Plaintiff's expert was Dr. Joseph Burton, a forensic pathologist, who has investigated cause of death 50,000-60,000 times over his 20 year career as Chief Medical Examiner for the metro Atlanta area. Dr. Burton testified that the excessive dosage of Lopressor caused Mrs. Deal to develop congestive heart failure and caused her death. On July 26, 2002, after a week long trial, the jury awarded a verdict in favor of Plaintiffs in the amount of \$850,000.

The law in Alabama changed during the Deal case and prevented us from discovering and informing the jury of prior misfilled prescriptions at Rite Aid stores in

Alabama. Now, under Alabama law a party is prohibited from conducting discovery with regard to any other act or omission or from introducing evidence of any other act or omission at trial. ALA. CODE § 6-5-551 (Supp. 2000). The law applies to any case for injury or death against a “health care provider” for breach of standard of care, whether resulting from negligence in providing health care, or hiring, training, supervision or retention of the care giver.” ALA. CODE § 6-5-551 (Supp. 2000).

In 2000, the Supreme Court of Alabama held that a pharmacist is a “health care provider” under the Alabama Medical Liability Act and reconfirmed that ruling in the Deal case. See Cackowski v. Wal-Mart Stores, Inc., 767 So. 2d 319 (Ala. 2000); Ex parte Rite Aid of Alabama, Inc., 768 So. 2d 960 (Ala. 2000).<sup>1</sup> In cases against a pharmacist or pharmacy for negligent filling of prescriptions, Plaintiff is not allowed to discover or produce evidence of other previous misfilled prescriptions by the pharmacist who misfilled Plaintiff’s prescription or other errors that the drugstore’s pharmacists throughout the State of Alabama.

In a wrongful death action arising out of an incorrect prescription and cases of wanton supervision or training, evidence of other prior incidents is significant in relation to punitive damages. The purpose of the Wrongful Death Act is to deter or prevent future conduct. In these cases, the defense often argues that the pharmacist made a “simple human mistake,” inferring this is a one time event and attempting to invoke sympathy for the pharmacist who made the mistake. In Deal, the pharmacist who Rite Aid claims filled Mrs. Deal’s prescription (although the pharmacist had no memory of it and it is likely that a technician filled it) had 3 prior misfills of heart medications. The

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<sup>1</sup> In Florida, the pharmacy is not a “health care provider” under the Medical Malpractice Reform Act.” See Sova Drugs, Inc. v. Barnes, 661 So. 2d 393 (Fla. Dist. Ct. App. 1995).

jury never heard this information nor did they hear of several hundred more mistakes that Rite Aid has made with other customer's prescriptions.

Prior to the change in the law, Alabama courts allowed discovery of other errors and discussed its relevance in these type cases. In Harco Drugs, Inc. v. Holloway, 669 So. 2d 878 (Ala. 1995), the Supreme Court held that evidence of prior incident reports prescription errors, certain complaints filed with the Alabama Board of Pharmacy, and evidence of other lawsuits filed against the pharmacy who allegedly misfilled the prescription was admissible.<sup>2</sup> In Holloway, Harco incorrectly filled Plaintiff's prescription for her breast cancer medication. Holloway, 669 So. 2d at 879. Justice Houston in his special concurrence, stated that evidence of prior incident reports is relevant to Plaintiff's claim that Harco failed to monitor its pharmacies. Id. at 882. In Holloway, the Plaintiff was given a drug for heart problems instead of her cancer medication and the pharmacist continued to incorrectly refill it two other times over a 5 month period. Id. at 880. In that case, the jury was informed of 233 incident reports of prescription errors for the 3 previous years. Id. at 881. The jury awarded a verdict including both compensatory and punitive damages in favor of Plaintiff. Interestingly, Harco was later bought out by Rite Aid Corporation.

In Wal-Mart Stores, Inc. v. Robbins, 719 So. 2d 245, 246, (Ala. 1998), the Wal-Mart pharmacy misfilled Plaintiff's thyroid prescription and misfiled it 4 more times over a period of 14 months. The court held that the award of \$190,000 in punitive damages was not excessive. Robbins, 719 So. 2d at 247. In Robbins, Plaintiff was allowed to

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<sup>2</sup> In Georgia, Plaintiff is allowed discovery on prior similar lawsuits against the drugstore. See Mableton Parkway CVS, Inc. v. Salter, 561 S.E. 2d 478 (Ga. App. 2002); See Also Amiker v. Drugs for Less, Inc., 796 So. 2d 942 (Miss. 2000) (court allowed discovery of prior claims of negligence in filling prescriptions).

introduce evidence that Wal-Mart had misfilled 3 other persons' prescriptions during that 14 month period.<sup>3</sup> *Id.* at 246. In addition, the jury was informed that Wal-Mart had also misfilled 14 prescription of other customers during the same time period as Plaintiff's misfills. Robbins, 719 So. 2d at 246-247. The court concluded that "the degree of reprehensibility was high enough to support he punitive damages award. *Id.* at 247.

There have been recent studies and surveys which document the frequency and serious nature of misfilled prescriptions in our country today. According to one Associated Press report, the number of prescriptions in the United States has doubled since 1989; however, the number of pharmacists has remained the same.<sup>4</sup> This report noted that pharmacists dispense 3 billion prescriptions a year which breakdowns to approximately 10,600 prescriptions by each pharmacist, often with the assistance of a technician. The Associated Press found complaints on misfilled prescriptions in all states nationwide are on the rise, with some resulting in permanent injury or death.<sup>5</sup> According to a recent study, 45 million prescriptions are incorrectly filled each year.<sup>6</sup> Similar studies found the competitive nature of the large drugstore chains, emphasis on high volume and profitability, and overworked pharmacists as reasons for the increase in prescription errors.<sup>7</sup>

Recently, ABC's Primetime Live conducted a first time study.<sup>8</sup> With hidden cameras, they took 100 prescriptions (easily recognized drugs) to randomly selected

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<sup>3</sup> Sun One, The Gainesville Sun, Gainesville, Fla., Feb. 26, 2000.

<sup>4</sup> Sun One, The Gainesville Sun, Gainesville, Fla., Feb. 26, 2000. (In 8 year period in N.C., the number of reported prescription-related deaths increased from 14 to 36 – up 157%; In Florida, drugstore mistakes nearly doubled during 1995-1999).

<sup>5</sup> Anthony Gasha, University of Cincinnati.

<sup>6</sup> U.S. News and Georgetown University School of Medicine, 1996; Many pharmacists fill 300 prescriptions daily, Thomas J. Moore, George Washington University Medical Center.

<sup>7</sup> ABC, Inc., Primetime Live, Jan. 4, 2002.

drugstores (small and large stores) in New York, New Jersey, and Florida. The results were shocking – pharmacy mistakes which could be deadly, incorrect dosages, dangerous instructions and wrong pills. According to the Primetime survey, 5 out of 100 prescriptions were filled wrong, suggesting 274,000 misfilled prescriptions per day in our country. Dr. Kenneth Barker, an expert from Auburn University, designed and evaluated the study.

A few examples of the shocking mistakes which could have led to serious problems and death included: a double dose of Coumadin (a blood thinner); an underdose of an asthma medication; wrong labeling; wrong pills and double dose of an anti-seizure medication; and no warning of taking aspirin with Coumadin even though the pharmacist knew it was a deadly combination. Pharmacists who spoke to Primetime admitted that there are thousands more misfills for every one the public knows about. According to the Primetime survey 274,000 prescriptions are incorrectly filled each day.<sup>9</sup>

In October of 1996, a South Carolina jury awarded a verdict of \$16,100,000 for Plaintiffs and against Rite Aid for negligence, wantonness, retention of the pharmacist and understaffing the pharmacy. In the case of Hundley v. Rite Aid of South Carolina, Inc., 339 S.C. 285, 529 S.E.2d 45 (S.C. App. Ct. 2000), parents and guardian of a minor filed suit against the pharmacist and Rite Aid for brain damage the child suffered after a prescription was incorrectly filled. The jury awarded \$11,000,000 in punitive damages on the basis that Rite Aid negligently supervised and retained the pharmacist where the pharmacist had a history of misfilled prescriptions, the pharmacy had no policy designed

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<sup>8</sup> ABC, Inc., Primetime Live, Jan. 4, 2002.

to ensure competency of its pharmacists and no policy regarding storage or handling of medications or the filling and labeling of prescriptions. Hundley, 339 S.C. at 313.

In Hundley, the Plaintiff's attorney was allowed to inform the jury that Rite Aid stores in South Carolina had knowledge of 2,900 misfilled prescriptions in a one year period. At the time of the misfill, the pharmacist was at the end of his 12 hour shift. Id. at 313. He worked these shifts for 5 days without another pharmacist present to relieve him. In affirming the award of punitive damages, the South Carolina Supreme Court stated that "Rite Aid's indifference to the life, health, and safety of others at the center of its misconduct." Hundley, 339 at 314. "The conduct is repetitive in nature, as demonstrated by Rite Aid's internal documentations and reports to the Board of Pharmacy." Id. This South Carolina case and the surveys previously mentioned are examples of the rising problem of misfilled prescriptions which occur nationwide.

The jury should be allowed to know when a drugstore has a history of misfills and to know the degree of misconduct by the defendant drugstore. In misfilled prescription cases in Alabama, the exclusion of other prior misfills makes it difficult, if not impossible, for the jury to get a true picture of the extent of the misconduct of the pharmacist and/or pharmacy. If the defendant drugstore has a history of misfilled prescriptions, supervision and/or training problems, then the jury should be informed of such prior conduct in order to have all the relevant facts when determining liability and assessment of damages, especially punitive damages. It appears that the taking over of the retail drug business by the large chains has greatly increased the magnitude of the misfill problems.

It is apparent that the nursing home industry had much impact in changing the law in Alabama regarding exclusion of this crucial and relevant evidence. This law has affected large chain drug stores in cases involving misfilled prescriptions and protects the wrongdoer, rather than the public. The customer, who may receive the wrong prescription and is injured and damaged by taking a different medication than the one prescribed by the doctor, should be protected. It is hard to understand the rationale behind the current state of the law in Alabama.

The Deal verdict has raised much media attention and public awareness to the increasing problem of misfilled prescriptions. During and after the trial, our office received numerous phone calls including: a concerned citizen discussing her own experience from a misfill; a psychiatrist commended us for getting the story out because she treats many pharmacists who are required to work a 12 hour shift without a break; a family was offered \$5,000 by a drugstore if they would return the wrongly filled prescription bottle; and many other related calls concerning this misfill problem. We will see many more of these type cases and juries will continue to get the attention of the large drugstores that we won't tolerate incorrect prescriptions in our state. Plaintiff's attorneys, however, must continue to battle the large drugstores in these cases which now fall under the Alabama Medical Liability Act with all of the requirements, restrictions, and evidentiary exclusions of a medical malpractice case. We owe our clients the commitment to keep up this fight and the fight to change the law in the misfilled prescription cases.