

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BEATRICE BOYNTON,)
)
 Plaintiff)
)
 v.) Civil No. 97-0171-B
)
 BROOKS DRUG OF MAINE, INC.,)
)
 Defendant)

MEMORANDUM OF DECISION¹

This action arises out of Plaintiff's purchase, in April, 1994, of a prescription drug from Defendant. It is undisputed that the pharmacist who filled Plaintiff's prescription for Depakote incorrectly provided Plaintiff with chlorpropamide, a drug to which Plaintiff was allergic.

Plaintiff's Second Amended Complaint sets forth eight separate causes of action. As a preliminary matter, Plaintiff consents to dismissal of her claim for strict product liability in Count I, her claim of breach of an express warranty in Count II, and her claim for misbranding in Count V. Remaining for resolution on this Motion for Summary Judgment are Defendants arguments regarding Plaintiff's claim for breach of the implied warranty of merchantability in Count III, breach of the implied warranty of fitness for a particular purpose in Count IV, and negligence in Count VIII.

Discussion

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

¹ Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

Count III -- Implied Warranty of Merchantability.

Defendant argues that Plaintiff has failed to show that the "goods," in this case, chlorpropamide, were "merchantable" within the meaning of the Uniform Commercial Code, which provides:

- (2) Goods to be merchantable must at least be such as
 - (a) Pass without objection in the trade under the contract description; and
 - (b) In the case of fungible goods, are of fair average quality within the description; and
 - (c) Are fit for the ordinary purposes for which such goods are used; and
 - (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
 - (e) Are adequately contained, packaged and labeled as the agreement may require; and
 - (f) Conform to the promises or affirmations of fact made on the container or label if any.

11 M.R.S.A. § 2-314.

The Court agrees with Plaintiff that a factfinder could reasonably find the "contract" in this case was for the purchase and sale of Depakote, not chlorpropamide. Defendant's argument in its reply brief that the transaction at issue is not a contract, and is therefore governed by the law of negligence rather than the Uniform Commercial Code is belied by the argument it originally raised in support of the Motion for Summary Judgment. Defendant's Motion, insofar as it seeks judgment on Count III of Plaintiff's Complaint, is DENIED.

Count IV Implied Warranty of Fitness for a Particular Purpose.

Defendant argues that Plaintiff lacks evidence to prove her claim of breach of the implied warranty of fitness for a particular purpose because she cannot show that she intended to use the Depakote for a particular purpose *other than* the ordinary purpose for which Depakote is used. *Porter v. Pfizer Hosp. Prod. Group*, 783 F. Supp. 1466, 1473-74 (D. Me. 1992) (citing 11 M.R.S.A. § 2-315, comment 2; *Lorfano v. Dura Stone Steps*, 569 A.2d 195, 197 (Me. 1990); *Duford v. Sears, Roebuck & Co.*, 833 F.2d 407, 413 (1st Cir. 1987)). The Court agrees. Plaintiff's rebuttal that she need not have specifically told the pharmacist how she intended to use the drug, while true, does not address whether she intended to use the Depakote for a purpose other than the ordinary purpose for which it is used. Defendants Motion for Summary Judgment is GRANTED as to Count IV.

Count VIII -- Negligence.

Defendant argues that Plaintiff's claim for negligence must be dismissed for her failure to file within the statute of limitations applicable to actions for the professional negligence of health care practitioners. Maine Law defines some of the relevant terms as follows:

- 1-A. Health care practitioner. "Health care practitioner" means physicians and all others certified, registered or licensed in the healing arts, including, but not limited to, nurses, podiatrists, optometrists, chiropractors, physical therapists, dentists, psychologists and physicians' assistants.
- ...
6. Action for professional negligence. "Action for professional negligence" means any action for damages for injury or death against any health care provider, its agents or employees, or health care practitioner, his agents or employees, whether based upon tort or breach of contract or otherwise, arising out of the provision or failure to provide health care services.

24 M.R.S.A. § 2502. At issue in this case is whether Defendant's agent, the pharmacist who actually dispensed the medication, is a "health care practitioner" within the meaning of this section.² The Maine Law Court has not directly addressed the question, but this Court is nevertheless satisfied that a pharmacist is not included within the statutory definition.

Although it is true that the definition in question includes without limitation the various practitioners listed, the Court is satisfied that more notice is required before a potential plaintiff's right of action is terminated after two years when the usual statute of limitations in the state is six years. In effect, Defendant is asking prospective plaintiffs to undergo the interpretation presented in its two memoranda filed in support of this Motion for Summary Judgment. As reasonable as that interpretation might be, it can hardly be said that the statute provides pharmacy customers with sufficient notice of their rights and responsibilities under the law.

In other states, pharmacists are often specifically included in the statutory lists of "health care providers." *Eg.*, La. Rev. Stat. Ann. § 40:1299.41(A)(1); Mo. Ann. Stat. § 516.105; S.C. Code Ann. § 38-79-410; Wash. Rev. Code Ann. § 7.70.020(1). Even where pharmacists are not specifically mentioned in the statute, courts often have more authority upon which to include them than is offered by the statutory scheme in Maine. For example, in Michigan, a "licensed health care professional" within the meaning of the medical malpractice statute is defined as "'an individual licensed under [M.C.L. §§ 333.16101-333.18838; M.S.A. §§ 14.15(16101-14.15(18838)].'" *Simmons v. Apex Drug Stores*, 506 N.W.2d 562, 564 (quoting M.C.L. § 600.5838a; M.S.A. § 27A.5838(1)). Pharmacists in Michigan are required to be licensed by M.C.L. § 333.17711, rendering them "licensed health care

² The parties do not dispute that there is a two year limitations period on actions for professional negligence against health care practitioners. 24 M.R.S.A. § 2502.

professionals" within the meaning of the act. *Id.* The Court is unwilling to include pharmacists in the Maine statutory provision solely by virtue of the phrase "including, but not limited to." Defendant's Motion for Summary Judgment is appropriately DENIED as it relates to Plaintiff's claim for negligence in Count VIII of the Complaint.

Conclusion

For the foregoing reasons, Counts I, II, and V of Plaintiff's Second Amended Complaint are DISMISSED with prejudice. Defendant's Motion for Summary Judgment is hereby DENIED as to Counts III and VIII, and GRANTED as to Count IV.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated on February 12, 1998.