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Chelsea Austin v. Connecticut CVS Pharmacy, LLC et al.**CV136037871S****SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF
HARTFORD AT HARTFORD***2013 Conn. Super. LEXIS 1284***June 6, 2013, Decided****June 6, 2013, Filed**

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

JUDGES: [*1] Jane S. Scholl, J.

OPINION BY: Jane S. Scholl

OPINION

MEMORANDUM OF DECISION RE MOTION TO DISMISS (#103)

The defendants, Connecticut CVS Pharmacy, LLC and CVS Pharmacy, Inc., have moved to dismiss this action because the plaintiff, Chelsea Austin, has failed to comply with the provisions of *General Statutes §52-190a* because she has failed to attach to the complaint an opinion of a similar health care provider as required by the statute. The complaint alleges that the defendants conduct business in the pharmaceutical industry by, among other actions, receiving prescriptions from health providers and dispensing medications and controlled substances to customers pursuant to prescriptions. The plaintiff alleges that she was prescribed a certain

medication by her doctor and that her doctor instructed her and the defendants not to use generic substitutes. The plaintiff alleges that the defendants did in fact substitute a generic drug and that, as a result, she suffered certain injuries. The plaintiff alleges that the defendants were negligent, which negligence caused her injury, in that they failed to fill a prescription as prescribed, failed to warn her that the prescription filled was not as prescribed, failed [*2] to supervise its employees as to ensure that she received the prescription as prescribed, and failed to properly read the instructions for filling the prescription.

The plaintiff acknowledges that a pharmacist is a "health care provider" within the meaning of *General Statutes §52-190a*. *General Statutes §52-190a* requires that in order to pursue an action against a health care provider the complaint must have attached an opinion from a similar health care provider. The parties agree that the complaint does not. The failure to attach such a letter where one is required requires dismissal of the action. *Bennett v. New Milford Hospital, Inc.*, 300 Conn. 1, 29, 12 A.3d 865 (2011).

The plaintiff claims that her complaint alleges ordinary acts of negligence, where no medical judgment is required, and therefore the requirements of *General Statutes §52-190a* do not apply. As Judge Licari noted in *Burke v. CVS Pharmacy, Inc.*, *Superior Court, judicial*

district of New Haven at New Haven, Docket No. CV085024739S, 2009 Conn. Super. LEXIS 442 (2/9/09), there is a split of authority as to whether or not a pharmacist's misfilling of a prescription is medical malpractice or simple negligence.

"The classification of a negligence claim as either medical [*3] malpractice or ordinary negligence requires a court to review closely the circumstances under which the alleged negligence occurred. [P]rofessional negligence or malpractice . . . [is] defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services . . . Furthermore, malpractice presupposes some improper conduct in the treatment or operative skill [or] . . . the failure to exercise requisite medical skill . . . From those definitions, we conclude that the relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment." (Internal quotation marks and citations omitted.) *Trimel v Lawrence & Memorial Hosp. Rehab. Ctr.*, 61 Conn.App. 353, 357-8, 764 A.2d 203 (2001).

Applying [*4] the *Trimel* criteria to this case it is clear that the complaint alleges medical negligence, not ordinary negligence. First, the defendants are being sued in their role as pharmacists. Second, what is alleged to have occurred here arose out of their relationship with the plaintiff as her pharmacist. Third, the alleged negligence relates to the medical judgment exercised by a pharmacist. *General Statutes §20-571(17)* defines "pharmacist" as "an individual who is licensed to practice pharmacy under the provisions of *section 20-590, 20-591,*

20-592 or 20-593, and who is thereby recognized as a health care provider by the state of Connecticut." *General Statutes §20-571(21)* defines "practice of pharmacy" or "to practice pharmacy" as "the sum total of knowledge, understanding, judgments, procedures, securities, controls and ethics used by a pharmacist to assure optimal safety and accuracy in the distributing, dispensing and use of drugs and devices . . ." *General Statutes §20-571(7)* defines "dispense" to mean "those acts of processing a drug or device for delivery or for administration for a patient pursuant to a prescription consisting of: (A) Comparing the directions on the label with the [*5] directions on the prescription to determine accuracy; (B) the selection of the drug or device from stock to fill the prescription; (C) the counting, measuring, compounding or preparation of the drug or device; (D) the placing of the drug or device in the proper container; (E) the affixing of the label to the container; and (F) the addition to a written prescription of any required notations . . ."

The validity of the plaintiff's argument rests on the claim that the job of a pharmacist is to simply mechanically fill a prescription as exactly written, with no use of judgment. But a review of the foregoing statutes indicates that the filling of a prescription entails the use of judgment beyond simply reading it. But see, *Burke v. CVS Pharmacy, Inc.*, *Superior Court, judicial district of New Haven at New Haven, docket no. CV085024739, 2009 Conn. Super. LEXIS 442 (Licari, J., 2/9/09)*; *Shaw v. Caldor, Superior Court, judicial district of Stamford-Norwalk at Stamford, docket no. CV940135645 (Lewis, J., 2/23/95) [13 Conn. L. Rptr. 524, 1995 Conn. Super. LEXIS 567]*. That judgment involves the judgment of a pharmacist as a health care provider and therefor an action challenging the exercise of such judgment constitutes a claim of medical malpractice [*6] and not ordinary negligence.

For the foregoing reasons the motion to dismiss is granted.

Jane Scholl, J.