**IN THE COURT OF APPEALS**
**STATE OF GEORGIA**

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| TAMI CARTER, | : | |
| | : | |
| Appellant, | : | |
| | : | |
| v. | : | CASE NO: A19A1613 |
| | : | |
| WALGREEN CO. | : | |
| | : | |
| Appellee. | : | |

## I. Statement of Proceedings & Material Facts

Ms. Carter filed suit against Walgreens after a pharmacist at Walgreens negligently called the police resulting in her unlawful arrest. R Vol 3 Pages 615-624 The pharmacist called the police after Ms. Carter presented a prescription that had been altered by the prescribing physician in a manner that caused the pharmacist to believe that the prescription had been altered by Ms. Carter in an unlawful attempt to obtain narcotics. *Id*. Rather than take the prudent course of contacting the prescribing physician, the pharmacist, in concert with Dr. Christopher Greene, the on-call physician, decided to call the police to investigate Ms. Carter. *Id*. The pharmacist knew or should have known that it was likely that Ms. Carter would be arrested by the police. In fact, Walgreens asked Ms. Carter to pull around the store and wait for her prescription to be filled knowing the police had been called and that she was subject to being arrested. Dr. Greene, as Walgreens admits in the Court below, suggested to Walgreens that Carter be arrested, said suggestion was made

without investigating into the facts of how the prescription was filled. *Id*. The police arrived at the scene and proceeded to verbally berate Ms. Carter and arrested her at the scene. *Id*. Ms. Carter was forced to spend the night in jail and has since suffered disturbing psychiatric symptoms, diagnosed as Post-Traumatic Stress Disorder, as well as severe humiliation. R. Vol 2 Page 4-14

Walgreens filed a Motion for Summary Judgment and a second Motion (R. Vol 2 Pages 174-275, Vol 3 580-603) seeking dismissal of the claims filed against it. In its Motions, Walgreens asserts that the Carter complaint was required to be filed in accordance with Tennessee law and the procedures for filing claims as enumerated in Tennessee Code Annotated 29-26-115 et seq. *Id*. Walgreens asserted the failure to follow the provisions of the Tennessee Code warranted the grant of summary judgment. Walgreens also asserted that the provisions of Tennessee Code Annotated 53-10-112(c) and 29-26-101 applied to Walgreens, supporting the grant of summary judgment as it is a protected entity under Tennessee's Health Care liability laws. *Id*.

Carter responded to the Motion for Summary judgment alleging that the Tennessee Code is procedural in nature and inapplicable to the filing of the complaint where the substantial facts of the case occurred in Georgia and that Georgia does not require the prerequisites for filing as required in the State of Tennessee. R Vol. 4 Pages 924-931 Moreover, Carter asserted that the Tennessee Code, even if it did apply to the filing of a Georgia lawsuit, is inapplicable to the

defendant Walgreens. *Id*. Carter also filed a supplement to her Motion raising issues that the Tennessee Health Care Liability Act did not apply to her case under any circumstance because Walgreen's and the claims against Walgreen's do not come under the Tennessee statute. R Vol. 3 Pages 604-614

The Court heard arguments on Summary Judgment and entered an order granting summary judgment. R. Vol 5 Page 980 Carter appropriately filed her notice of appeal (R. Vol 2 Page 1) with this Court from the grant of summary judgment stating that "Defendant Walgreen's Motion, be GRANTED in total as to all claims. The Court further finds that there is no just cause for delay and this Order is to be consider final judgment in the matter." R. Vol 5 Page 980

## II. Enumeration of Errors

1. The trial court inappropriately granted summary judgment (R. Vol 5 Pages 980-982) as to the appellee Walgreens Motion for Summary Judgment and Second Motion for Summary Judgment. (R. Vol 2 Pages 174-275, Vol 3 580-603) The Trial Court inappropriately applied Tennessee law stating Tennessee Law (Tennessee Health Care Liability Act T.C.A. section 29-26-101 et. seq) requires certain prerequisites for the filing of the complaint even if that complaint is filed in the state of Georgia where the Tennessee procedure for filing such is inapplicable because it is procedural and not substantive. R. Vol 3 Pages 604-613, Vol 4 Pages 924-931.

2. The trial court inappropriately granted summary judgment by applying Tennessee Code Annotated 29-26-101, 53-10-112 (C), to the appellee Walgreens inappropriately granting summary judgment by finding that the substantive law of the Tennessee Code applies to Walgreens when the code provisions are not intended to be applied to an entity such as Walgreens under the allegations of the complaint. The Court's grant of summary judgment is, therefore, inappropriate as the Tennessee law does not apply. R. Vol 4 Pages 924-931, R Vol. 5 Page 980

As previously noted, Carter appropriately filed her notice of appeal R. Vol 2 Page 1 with this Court from the grant of summary judgment stating that "Defendant Walgreen's Motion, be GRANTED in total as to all claims. The Court further finds that there is no just cause for delay and this Order is to be consider final judgment in the matter." R. Vol 5 Page 980. An appeal from the grant of summary judgment, therefore, lies with this Court.

## III.Argument and Citation to Authority

### Standard of Review

This court should review this matter de novo. "On appeal this court reviews the denial of a motion to dismiss de novo. However, we construe the pleadings in the light most favorable to the plaintiff and resolve any doubts in her favor." *Jensen v. Engler*, 733 S.E. 2d 52 (Ga. App. 2012) (citing *Comprehensive Pain Management v. Blakeley*, 312 Ga. App. 721, 719 S.E. 2d 579 (2011).

## Carter's First Enumeration of Error

1. The trial court inappropriately granted summary judgment (R. Vol 5 Pages 980-982) as to the appellee Walgreens Motion for Summary Judgment and Second Motion for Summary Judgment. (R. Vol 2 Pages 174-275, Vol 3 580-603) The Trial Court inappropriately applied Tennessee law stating Tennessee Law (Tennessee Health Care Liability Act T.C.A. section 29-26-101 et. seq) requires certain prerequisites for the filing of the complaint even if that complaint is filed in the state of Georgia where the Tennessee procedure for filing such is inapplicable because it is procedural and not substantive. R. Vol 3 Pages 604-613, Vol 4 Pages 924-931.

### a. The Tennessee Health Care Liability Act Does Not Apply to The Filing of Carter's Complaint in The State of Georgia

Walgreens was not entitled to Summary Judgment because its contention that the Tennessee Health Care Liability Act (T.C.A. section 29-26-101 et. seq.) applies to the actions of Walgreens is legally wrong. Under the Doctrine of *lex loci delicti*, the substantive law of another state is controlling where the action is filed in Georgia, but the tortious act occurred in another state. However, as the complaint shows in this case, the tortious acts arise out of the negligence committed by Dr. Cornwell in the writing of a prescription. All other acts committed by the other parties arise from the series of events started by Dr. Cornwell. R. Vol 2 Page 4-14 The Tennessee Health Care Liability Act pertains to procedural requirements for filing an action

based on the tortious action of a health care provider in Tennessee, it does not apply to the procedure for filing such a claim in Georgia. Accordingly, the doctrine of *lex fori* applies and Georgia is permitted to apply its own procedural rules. Most importantly, Walgreens cannot meet its burden of showing, on a rational basis, that the conflicting interests of the foreign state are superior to those of the forum.

### b. Walgreen's Assertion that All Relevant Acts Occurred in Tennessee is Incorrect, and the Tennessee Health Care Liability Act is Not Controlling (R. Vol 2 Pages 174-275, 580-603)

While it is true that the choice of law doctrine followed by Georgia courts is determined under the principle of *lex loci delicti*, it is not a hard and fast rule. "It is true that Georgia generally adheres to the traditional choice of law system, under which tort actions are adjudicated according to the law of the place where the wrong occurred…However, " '[t]he laws of the states have no force in Georgia except on principles of comity and so long as their enforcement "is not contrary to the policy of the State."' "Prima facie every state is entitled to enforce in its own courts its own statutes lawfully enacted. One who challenges that right, because of the force given to a conflicting statute [or law] of another state by the full faith and credit clause [or for any other reason] assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. It follows that not every statute or law of another

state will override a conflicting statute of the forum…; that the statute of a state may sometimes override a conflicting statute [or law] of another, both at home and abroad…." *Security Ins. Group v. Plank*, 133 Ga. App.815, 817 (1975). *See also*, *Alexander v. General Motors Corp*., 478 S.E. 2d 123 (Ga. 1996). In the case at bar, imposition of *lex loci delicti* would rob Ms. Carter of an opportunity to recover damages. It does not serve Georgia public policy to impose a wholly inflexible rule, which is far harsher than similar Georgia law. Walgreens has advanced no argument (R. Vol 2 Pages 174-275, 580-603) that to show that the conflicting interests of the foreign state are superior to those of the forum. In fact, all the parties have significant ties to the forum. The plaintiff was a Georgia resident at the time the tortious act occurred, both doctors involved practice in Georgia, the prescription alteration by Dr. Cornwell also happened in Georgia. R. Vol. 2 Pages 4-14 Walgreens maintains a strong retail presence in Georgia. *Id*.

Moreover, under the circumstances of the present case, the Health Care Liability Act, under which Walgreens attempts to shield itself, is not applicable. First, it is not true that the tortious acts occurred only in Tennessee. *Id*. The Walgreens Pharmacist, Shannon Walraven, who negligently made the call to the police, claims that she did so because she was told to do so by Dr. Greene. R. Vol 2 Pages 4-14 It should be noted that Dr. Greene practices in Georgia, resides in Georgia and was present in the State of Georgia when he spoke with Ms. Walraven

about the possibility of Ms. Carter's prescription having been altered. R. Vol 2 Pages 450-500. The fact that Ms. Walraven asserts that she made the call on the advice of Dr. Greene, whose only connection is with the State of Georgia, cements the tort's most obvious connection to the State of Georgia. Ms. Walraven was calling about a prescription written in the State of Georgia by a physician practicing in the State of Georgia for the benefit of a patient who resided in Georgia. *Id*. The fact that the pharmacy happened to be in Tennessee is tangential to the commission of the tortious act. Ms. Walraven, who is not a party to this action, and Walgreens presence slightly over the Georgia State Line offers the only connection to the State of Tennessee. *Id.* Moreover, it is common knowledge that all Walgreens stores maintain a common database for all customers. Ms. Walraven was not isolated in Tennessee and could have checked the database and found that Dr. Cornwell had been prescribing this medication for Ms. Carter, which she normally filled at Walgreens located in Georgia, for a very long time without incident. Accordingly, the law of the State of Georgia should control not only on procedural issues but on substantive law as well.

If, however, this court were to determine that the substantive law of the State of Tennessee is controlling, Ms. Carter asserts that the provision of the Tennessee Health Care Liability Act set forth in *T.C.A. Section* 29-26-115 inapplicable to this case. As noted above, even if Georgia follows the Doctrine of *lex loci delicti* with

regard to the substantive law of another state, it follows its own laws as to procedural issues. Section 29-26-121 requires that the plaintiff must file a certificate of good faith "in any health care liability action in which expert testimony is required by 29-26-115." In this case, no expert testimony is required to show that when one negligently makes a police report without actual knowledge of the facts, it is foreseeable that an innocent person might be arrested and taken to jail. No issue regarding a standard of care exists. A jury can certainly make the determination that the pharmacist is liable without the aid of an expert. Moreover, the rule is one of procedure, not of law and should not control proceedings in Georgia, where no such requirement exists. Accordingly, neither section 29-26-115 or 29-26-121 applies.

Walgreens contented in its Motions (R. Vol 2 Pages 174-275, 580-603) that "courts" have determined that the Tennessee Health Care Liability Act is substantive, not procedural law. However, Walgreens can cite to only one case, so the use of the plural as applied to "court" is misleading. Moreover, the one case cited to by Walgreens, *Williams v. U.S.*, 754 F. Supp. 942 (W. D. Tenn. 2010), is a Federal Court case decided in the Western District of Tennessee in 2010, and has no applicability to the interpretation of the act by courts in Georgia. Moreover, the Historical and Statutory Notes to *T.C.A. Section* 29-26-101 et. seq. states in Section 21 "This act shall take effect October 1, 2011 … and shall apply to all liability

actions for injuries, deaths and losses covered by this act which shall accrue on or after such date." Since the Act did not go into effect until October 1, 2011, a case decided by a federal court in the Western District of Tennessee in 2010 can have no applicability as to whether the Act is substantive or procedural. And surely the Act need not be one or the other exclusively, as it is possible that certain parts of the act can be construed as substantive, while other provisions address procedural requirements, as is the case here.

Even if this court were to decide that the Act applies, it does not apply to drugstores such as Walgreens, which purveys a wide assortment of goods and services many of which are not in the least health related. While it is true that, if applicable, the Act includes pharmacists, the court should take note of the fact that the pharmacist is not a named party to this action. Walgreens is a party and Ms. Walraven is not. R. Vol. 2 Pages 4-14 The Act does not govern Walgreens. If it did, under the inflexible language of the Act, a person who slips and falls in a drugstore due to the negligent failure of the store to rectify a hazardous condition, would not be able to bring suit against Walgreens because, according to the act, no liability attaches "regardless of the theory of liability on which the action is based". *T.C.A. Section* 29-26-101 (a)(1). Clearly such an absurdity is not contemplated under the Act which applies to individuals and institutions which provide direct care services to patients, which are medical in nature. Here, there were no

professional services rendered by the pharmacist. As Walgreens states in its filings (R. Vol 2 Pages 174-275, 580-603), the pharmacist did not fill the prescription. Accordingly, she rendered no professional health related service of a pharmaceutical nature to Ms. Carter. The act of having a pharmacy tech take a prescription from a customer at the drive through window, and showing it to the pharmacist, is not related to the pharmacist's technical expertise in any way shape or form. *Id*. After she saw that the prescription appeared altered and began to investigate that possibility by calling the on-call number for Dr. Cornwell's practice, she was not engaged in an activity requiring her pharmaceutical expertise. As noted above, whether she acted prudently or negligently in calling the police on an innocent person is a question for a jury to determine and not a question of law to be decided on a Motion for Summary Judgment. What she intended when she called the police is known only to Ms. Walraven. It is for a jury to determine whether or not she told the truth about her intentions in her deposition, it is not a matter to be determined by the court at this juncture in the proceedings.

Moreover, Walgreens asked Ms. Carter to pull around and wait knowing it was calling the police department, knowing that Ms. Carter was going to be subject to arrest and following the suggestion of Dr. Greene to have her arrested. R. Vol 3 Pages 450-500 There was no investigation and no attempt to contact the

prescribing physician, who admits he did not follow the custom and practice of his own group when he altered the prescription. *Id*.

**c. Walgreens is not immune from Liability for tortious acts based on *Tenn. Code Ann*, 53-10-112(c-d) as alleged by Walgreens in Its Motions for Summary Judgment**.

The plain language of the Tennessee Code section relied upon by Walgreens does not apply to the case at bar. The law protects a pharmacist from fines and penalties when refusing to dispense a drug, which "lacks a therapeutic value for the patient or which is not for a legitimate medical purpose." Section (d) also states that a pharmacist shall not be subject to any penalty or fine when fulfilling the pharmacist's obligation to uphold the health and safety of a patient which results in the pharmacist declining to dispense any legend drug." This section deals with fines and penalties, not immunity from civil liability. In fact, *Tenn. Code Ann. Section* 53-10-107 specifically address the issue of fines and states, "…all fines and fees received in the regulation and enforcement of this part shall be paid to the secretary-general of the board of pharmacy." In fact, Section 53-10-110(e) which follows, states, "nothing in this section shall limit in any manner the civil liability of any person guilty of willful or wanton misconduct, gross negligence, reckless conduct or criminal conduct." Therefore, the statute cited by Walgreens does not protect a pharmacy or pharmacist from civil liability. This lawsuit does not ask for fines or penalties from the pharmacist as damages. If the pharmacist had simply

refused to dispense the medication to Ms. Carter, this action would not have been filed. Had she told Ms. Carter she could not fill the prescription as written, explained why and instructed her to obtain a new prescription from her doctor, Ms. Carter would not have been arrested and suffered damages. Accordingly, this code section is wholly inapplicable to this case. From the plain language of the statutes, no immunity attaches to Walgreens for the negligence of Ms. Walraven.

The Tennessee statute (in Walgreen's view) most applicable to this matter is found at *Tenn. Code Ann. Section* 53-11-308 (a) provides that any pharmacist "who has actual knowledge that a person has knowingly, willfully and with intent to deceive, obtained or attempted to obtain controlled substances in the manner prohibited by Section 53-11-402(a)(6) shall cause a report to be submitted regarding such activity within five (5) business days of obtaining such knowledge." The report is to be submitted to the local law enforcement agency where the health care provider is located or, where one exists, to a judicial district or multi-judicial district drug task force." *Id*. Had the pharmacist followed this procedure, rather than making an ill-advised and negligent phone call at the behest of an on-call physician, Ms. Carter would not have been arrested. Moreover, it is important to note that neither the pharmacist or Dr. Greene had "actual knowledge" that Ms. Carter was attempting to obtain narcotics illegally. Instead, based on supposition and conjecture, they rushed into a foolish and negligent decision to

contact the authorities, resulting in a horrifying experience for Ms. Carter who then spent the night in jail and suffered humiliation and emotional distress. Tennessee law does not require the pharmacist to make an instant decision to contact the law enforcement authorities whether or not the pharmacist has "actual knowledge." Even if she had had actual knowledge, she had 5 days within which to make the report to the appropriate authority. Making the phone call to the police as she did was completely unnecessary and was not required by law.

**Carter's Second Enumeration of Error**

2. The trial court inappropriately granted summary judgment by applying Tennessee Code Annotated 29-26-101, 53-10-112 (C), to the appellee Walgreens inappropriately dismissing Walgreens on summary judgment by finding that the substantive law of the Tennessee Code applies to Walgreens when the code provisions are not extended to be applied to an entity such as Walgreens under the allegations of the complaint. R. Vol 4 Pages 924-931, R Vol. 5 Page 980

If this Court rules Tennessee law applies, the statutes cited by Walgreens in its Motions for Summary Judgment (R. Vol 2 Pages 174-275, 580-603) apply to pharmacists, not Walgreens. Moreover, the pharmacist in this case is not a party to this law suit. Therefore, the applicability of the statutes as it applies to the pharmacist do not apply to Walgreens. Moreover, the statutes are for cases of

health care liability against a pharmacist, not for negligent training and supervision by Walgreens. Therefore:

The Court should consider the following allegations against Walgreens:

**COUNT THREE – NEGLIGENT TRAINING AND SUPERVISION**

29. Walgreens has a duty to train its pharmacy employees to treat customers respectfully and to handle issues regarding altered prescriptions appropriately.
30. Walgreens has a duty to supervise its pharmacy employees to treat customers respectfully and to handle issues regarding altered prescriptions appropriately.
31. Walgreens has failed to properly train its pharmacy employees in methods of handling an issue regarding an altered prescription so that it does not have innocent customers wrongfully arrested.
32. Walgreens has failed to properly train its pharmacy employees in appropriate methods of handling an issue regarding an altered prescription so that is does not have innocent customers wrongfully arrested.
33. But for Walgreens negligent training and supervision of its pharmacy employees, Ms. Carter would not have suffered the

> horrifying distress, humiliation and embarrassment of a wrongful arrest that has caused her to suffer extreme humiliation, embarrassment, clinical depression, panic attacks and nightmares. R. Vol 2 Pages 4-14, R. Vol 2 Pages 450-500

The allegations of negligent training and supervision are not allegations against the pharmacist but allegations against Walgreens. The following points should be considered:

First, Tennessee Code Annotated Section 29-26-101 requires a plaintiff to file a certificate of good faith in any health care liability action in which expert testimony is required. The claims against Walgreens for negligent training and supervision are not claims of health care liability thereby invoking the statutory provisions cited by Walgreen's. Moreover, Walgreens own legal positions in its pleadings shows the fallacy of its arguments. Walgreens takes the following position in the Trial Court:

> "Health care liability action means any civil action…alleging that a health care provider or providers have cause an injury related to the provision of, or failure to provide health care services to a person, regardless of the theory of liability on which the action is based…Tennessee statutory law defines health care services to include pharmacists,

> pharmacy interns or pharmacy technicians under the supervision of a pharmacist…" R Vol. 3 Pages 580-603, Vol. 4 Page 926.

The statute does not say "caused an injury related to the negligent hiring or supervision of a pharmacist or employee of an entity such as Walgreens which is a store selling many other items besides medicines. The statute does not say that health care services include "pharmacists, pharmacy interns or pharmacy technicians under the supervision of a pharmacist and stores selling goods, service and medicines" such as Walgreens.

There is no authority saying any of these provisions, or the similar provisions under Georgia law, apply to Walgreens and causes of action for negligent supervision and training.

Second, the pharmacist is not a named party to this action. Moreover, as Walgreens argues in the Trial Court:

> "plaintiff failed to file a certificate of good faith with her complaint. Tennessee law required that the Plaintiff consult with an expert…and then establish, by expert testimony, that Walgreen Co, deviated from the standard of care in providing health care services to plaintiff in the

community in which the wrongful action occurred." R. Vol. 4 Page 927

There are three things wrong with this analysis.

First, the cause of action is for negligent training and supervision, not the providing of health care services to the plaintiff by Walgreens. Moreover, Walgreens does not provide health care services and is not included as a health care provider as provided by the statute. Walgreens cannot cite to any authority where an expert witness is required before filing a negligent training and supervision claim.

Second, the cause of action is not against an entity as defined by the statute and as alleged in all three complaints, it is one for negligent hiring and supervision. There is no showing by Walgreens that a cause of action for negligent hiring and supervision requires expert testimony as is required for the failure to provide health

care services by Walgreens, an entity not covered by the statute by is plain meaning as cited herein.

Third, Walgreens' pleadings are its own worst enemy showing why summary judgment is inappropriate. Walgreen's also states to the Trial Court:

"Plaintiff was required to provide 60 days pre-suit notice of her potential health care liability claim against a pharmacist." *Id*. at 928.

This is not a suit against a pharmacist, it is a suit against Walgreens for negligent hiring and supervision. There is no authority requiring 60 days' notice for a suit against Walgreen's for negligent supervision and training.

Next, Tennessee Code Annotated 53-10-112(c) also applies only to pharmacists. There is nothing in the statute that applies to the theories against Walgreen's of negligent training and supervision as cited herein. Even if this section were to apply it deals with immunity from fines and penalties, not liability. There is no citation of authority saying there is immunity for Walgreen's for causes of action for negligent training and supervision.

Georgia law applies anyway to the theories of liability espoused against Walgreens. Count [Two] of the Complaint is "Negligence of Walgreens Drug Store" not negligence of the pharmacist Walraven. Count Three is Negligent Training and Supervision. R. Vol 2 Pages 7-10 Therefore, the claims are not for health care liability against a pharmacist but for negligence, negligent training by

Walgreens. Therefore, the statutes cited are not applicable because they do not apply to Walgreens.

Finally, there is a rational basis that the laws of Georgia should be applied to all aspects of this case as previously argued in the response to Walgreen's Motion for Summary Judgment. However, should this Court apply Tennessee law there is no legal authority to grant summary judgment for Walgreens for Walgreen's negligence and for Walgreen's negligent training and supervision. Therefore, this Court should reverse the Trial Court's grant of summary judgment as to Walgreens.

This submission does not exceed the word count limit imposed by Rule 24

Respectfully submitted,

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| WALGREEN CO. | : | |
| | : | |
| Appellee. | : | |

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## CERTIFICATE OF SERVICE

I, the undersigned attorney, on this the 2nd day of April 2019, do hereby certify that the foregoing document has been served upon all counsel of record for the parties at interest in this case by placing a true and exact copy of the same in the United States mail, postage prepaid, in a properly addressed envelope, by email, fax, or by hand delivering the same to such attorney as follows:

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