

Winter 2000

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Recommended Citation

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COMMENTS

Rx FOR LIABILITY: ADVOCATING THE ELIMINATION OF THE PHARMACIST'S NO DUTY TO WARN RULE

EDWARD CASMERE*

*In modern societies, prescription drugs pose one of the greatest human-created dangers outside of war.*¹

*Today's drugs may be likened to ballistic missiles with atomic warheads, while we prescribe, dispense, and administer them as if they were bows and arrows.*²

CAVEAT EMPTOR

Jack's pharmacy was crowded again. He had been a pharmacist in Illinois for twenty years, but the last five had been really hectic. Every day he filled an increasing number of prescriptions. His customers would wait patiently at the deli counter for fifteen minutes, but they would be irate if they had to wait ten minutes to get a prescription filled.

Jack started to fill a prescription for Johnny Smith when he remembered that he had filled a different prescription (from the same doctor) for Johnny three days earlier. Jack was going to call the doctor who wrote the prescription, but the last time he questioned this doctor, Jack was subjected to a lecture on who had the medical degree and who did not. Jack figured that the doctor had fully advised Johnny and his mother about the potential drug interaction.

That night Johnny took the two medications together. As a result of a drug interaction between the two medications, Johnny died. Johnny's doctor never warned against any possible drug interaction. The doctor did not know if the two medications would

1. THOMAS J. MOORE, PRESCRIPTION FOR DISASTER 46 (1998).

2. *The Role of the Pharmacist in Comprehensive Medication Use Management*, APhA White Paper, at 2 (Mar. 1992) (quoting Donald D. Francke, founder and editor of DRUG INTELLIGENCE 1967). This article was cited in the Supplemental Memorandum *Amicus Curiae* of The Illinois Pharmacists Association app. 1, *Frye v. Medicare-Glaser Corp.*, 605 N.E.2d 557 (Ill. 1992) (No. 72908).

interact, but he assumed that the pharmacist would have a "duty to warn"³ against any potential interaction between the medications. Unfortunately, the doctor's assumption was wrong because in Illinois, pharmacists have no such obligation.⁴

INTRODUCTION

On August 28, 1986, Stephen Frye underwent arthroscopic knee surgery and obtained a post-operation prescription for Fiorinal[®] from his physician.⁶ After the hospital released Stephen, his mother went to the Medicare-Glaser pharmacy to have the prescription filled.⁷ Evelyn Nightengale, Medicare-Glaser's pharmacist on duty, filled the prescription exactly as prescribed, with the proper dosage and number of capsules.⁸ The written prescription from Stephen's physician did not instruct that any warnings be given to the patient.⁹ However, Evelyn Nightengale placed two warning labels on the container. The labels contained a federally-required statement prohibiting the transfer of the drug to persons other than the patient, and a "drowsy eye" warning label stating that the drug "May Cause

3. See Nicholas J. Lynn & William Sander Callahan, *The Court's View of the Pharmacist's Duty to Warn*, J. PHARMACY PRAC., Aug. 1988, at 65 (stating that "[t]he debate continues as to whether pharmacists are merely retailers of drugs or professionals The relationship between the increasing benefits of professionalism and the corresponding duties of professionalism has been a subject of much concern, especially over the amorphous concept referred to as the 'duty to warn.'"). "[T]he term duty to warn means generally the duty of a pharmacist to warn a patient or physician of the known risks and dangerous propensities associated with the use of a particular drug." *Id.* at 65 n.1. For purposes of this Comment, the phrase "duty to warn" shall have the same general meaning as discussed above. See also 63A AM. JUR. 2D *Pharmacies* § 1133 (1984 & Supp. 1997) (discussing whether pharmacists should have a duty to warn in products liability cases under the general rule that sellers have a duty to warn of the risks associated with the use of the product sold).

4. Currently pharmacists have no duty to warn in Illinois. See *Jones v. Irvin*, 602 F. Supp. 399, 402 (S.D. Ill. 1985) (holding that a pharmacist had no duty to warn a patient or physician that the medication has been prescribed in dangerous amounts); *Fakhouri v. Taylor*, 618 N.E.2d 518, 522 (Ill. App. Ct. 1993) (holding that the pharmacist filling a prescription had no duty to warn the patient of excessive dosages); *Leesley v. West*, 518 N.E.2d 758, 763 (Ill. App. Ct. 1988) (holding that pharmacists are not required to give warnings that they were not directed to give by the patient's physician).

5. Fiorinal[®] is a registered trademark of the Sandoz Pharmaceuticals Corporation. "Fiorinal[®] is indicated for the relief of the symptom complex of tension (or muscle contraction) headache." PHYSICIANS' DESK REFERENCE 2052 (48th ed. 1994).

6. *Frye v. Medicare-Glaser*, 605 N.E.2d 557, 558 (Ill. 1992). See *infra* notes 59-72 and accompanying text for a detailed discussion of the *Frye* case.

7. *Id.*

8. *Id.*

9. *Id.*

Drowsiness.¹⁰ Evelyn Nightengale disregarded a computer software program that suggested she place a label on the prescription container warning against consumption of alcohol while taking Fiorinal.¹¹ Stephen's mother left the pharmacy with no warning against the concurrent use of Fiorinal[®] and alcohol.¹² A few days later, Stephen Frye was found dead.¹³ He apparently died from the concurrent consumption of alcohol and Fiorinal.¹⁴

If Evelyn Nightengale had provided a warning against concurrent use of Fiorinal[®] and alcohol, would Stephen Frye have lived?¹⁵ Should pharmacists ever be required to provide a warning? Should there be a standard that mandates a warning if the pharmacist believes a prescription may contain an excessively dangerous dosage, a drug interaction, or may otherwise be dangerous in certain circumstances (such as the combination of alcohol and Fiorinal[®])?¹⁶

Currently in Illinois, pharmacists have no duty to warn a patient or the patient's physician of the dangers associated with a prescribed drug ("no duty to warn rule").¹⁷ This Comment discusses the reasoning behind the no duty to warn rule, and whether it should be eliminated in Illinois.¹⁸ Part I of this

10. *Id.*

11. *Frye*, 605 N.E.2d. at 559. Pharmacist Nightengale testified that she did not place an alcohol warning label on Frye's prescription because in the past, similar labels had offended customers and she had been "chewed out" for placing alcohol warning labels on other prescriptions. *Id.* Medicare-Glaser had a computer software program that printed a document suggesting specific warning labels to be placed on corresponding prescription containers. *Id.* The PHYSICIANS' DESK REFERENCE, *supra* note 5, at 2052, warns that: concurrent use of Fiorinal[®] and alcohol should be avoided, Fiorinal[®] can impair the mental/physical abilities of the patient, and "[t]he abuse liability of Fiorinal[®] is similar to that of other barbiturate-containing drug combinations."

12. *Frye*, 605 N.E.2d at 558.

13. *Id.* Stephen Frye was found dead on September 3, 1986, and was estimated to have died on September 1, 1986. *Id.*

14. *Id.* at 558. Since the court granted Medicare-Glaser's and Evelyn Nightengale's motion for summary judgment, it was never determined at trial what caused Stephen Frye's death. *Id.* at 559. The Supreme Court of Illinois had to assume that the concurrent use of alcohol and Fiorinal[®] caused Stephen Frye's death. *Id.* "[W]e assume that Stephen Frye died from the combined use of alcohol and Fiorinal." *Id.* (emphasis added).

15. *Id.*

16. See *Advincula v. United Blood Serv.*, 678 N.E.2d 1009, 1020 (Ill. 1996) (holding that the professional standard of care in Illinois is that which an "ordinarily careful professional would exercise under similar circumstances"). See *infra* Part II (analyzing the no duty to warn rule) and Part III (proposing possible alterations to the rule).

17. See *infra* notes 28-105 and accompanying text for a discussion of the no duty to warn rule in Illinois.

18. This Comment focuses on the no duty to warn rule in Illinois, but the arguments made herein may apply to any state that continues to uphold a

Comment provides an overview of the current no duty to warn rule in Illinois, and introduces the arguments supporting the rule. Part II analyzes the no duty to warn rule. Finally, Part III argues that the no duty to warn rule should be eliminated.

I. SETTING THE STAGE FOR PHARMACIST LIABILITY: THE CURRENT NO DUTY TO WARN RULE IN ILLINOIS

To assert that a pharmacist has a duty to warn, a plaintiff must file an action against a pharmacist for negligence.¹⁹ In Illinois, a claim for negligence "must set forth the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting from that breach."²⁰ The practice of pharmacy is considered to be a professional practice in Illinois.²¹ Logically, a pharmacist should be required to act according to a professional standard.²² The *Restatement (Second) of Torts* states that a practitioner of a profession is required to "exercise the skill and knowledge normally possessed by members of that profession."²³ Therefore, if a pharmacist breaches the professional standard, by failing to exercise the skill and knowledge normally possessed by other pharmacists, that pharmacist should be liable for any injury that proximately results

pharmacist's no duty to warn rule. It should also be noted that this Comment will not focus on other tort actions that may result from the acts or omissions of the pharmacist or pharmacy (e.g., misreading a prescription, filling a prescription with the wrong drug, filling a prescription with a non-prescribed dosage, failing to check for a drug interaction after advertising that the store's computer will check for drug interaction, or errors in dispensing the proper medication to the proper patient). See e.g., *Baker v. Arbor Drugs, Inc.*, 544 N.W.2d 727, 731 (Mich. Ct. App. 1996) (holding that a pharmacist voluntarily assumed a duty to warn a patient when the pharmacy advertised a system that would detect drug interactions and warn customers). This Comment will focus only on the no duty to warn rule in malpractice/negligence suits against pharmacists or pharmacies.

19. See generally *Widlowski v. Durkee Foods*, 562 N.E.2d 967, 969 (Ill. 1990) (discussing the requirements for a negligence action in Illinois).

20. *Id.* at 968.

21. The Pharmacy Practice Act of 1987, 225 ILL. COMP. STAT. 85/1 (West 1996).

22. The Illinois Supreme Court has held that "[i]n Illinois, the established standard of care for all professionals is stated as the use of the same degree of knowledge, skill and ability as an ordinarily careful professional would exercise under similar circumstances." *Advincula v. United Blood Serv.*, 678 N.E.2d 1009, 1020 (Ill. 1996). See also W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 32, at 132 (5th ed. 1984) (stating pharmacists should not only exercise reasonable care, but also exercise care associated with the pharmacist's special knowledge).

23. RESTATEMENT (SECOND) OF TORTS § 299A (1965). For purposes of this Comment, the standard of care of a pharmacist will be referred to as that of a reasonable and prudent pharmacist in the same factual situation.

from the breach of care.²⁴ However, in Illinois, a pharmacist cannot be found negligent for failing to warn against the dangerous propensity of a prescription drug, regardless of what the professional pharmacist standard requires, because there is a blanket no duty to warn rule for pharmacists.²⁵

Although Illinois courts have held that pharmacists have no duty to warn the patient or the patient's physician of the dangerousness of prescription drugs, several other jurisdictions maintain that pharmacists may have a duty to warn.²⁶ Should Illinois follow the lead of these jurisdictions and eliminate the no

24. See *supra* notes 21-23 and accompanying text for a discussion of the professional standard of care. If the standard of care of a professional in Illinois is using the "skill and ability as an ordinarily careful professional would exercise under similar circumstances," then a professional not using such care acts below the standard of care of a professional. *Advincula*, 678 N.E.2d at 1020. See *infra* notes 168-77 and accompanying text for a discussion of the professional pharmacist standard of care.

25. *Eldridge v. Eli Lilly & Co.*, 485 N.E.2d 551, 554-55 (Ill. App. Ct. 1985). See *infra* notes 28-105 and accompanying text for a discussion of the no duty to warn rule in Illinois.

26. See *e.g.*, *Lasley v. Shrake's Country Club Pharmacy, Inc.*, 880 P.2d 1129, 1134 (Ariz. Ct. App. 1994) (holding that pharmacists have a duty to act within the applicable professional standard of care, and therefore, the question of whether the pharmacist breached that duty is a question for a jury); *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514, 519 (Ind. 1994) (holding that society has an interest in the proper use of prescription drugs, giving pharmacists a duty will help to further the societal interest in the proper use of prescription drugs, and "pharmacists must exercise that degree of care that an ordinarily prudent pharmacist would under the same or similar circumstances."); *Guillory v. Dr. X & ABC Pharmacy*, 679 So. 2d 1004, 1010 (La. Ct. App. 1996) (holding that pharmacists have a duty to correctly fill a prescription as written by a physician, and to warn the physician or the patient of an excessive dosage or obvious inadequacies that create a substantial risk of harm to the patient); *Hand v. Krakowski*, 453 N.Y.S.2d 121, 123 (N.Y. App. Div. 1982) (holding that a pharmacist having knowledge that a patient is an alcoholic may have a duty to warn that patient of the dangers involved in prescription drugs that should not be taken with alcohol); *Riff v. Morgan Pharmacy*, 508 A.2d 1247, 1252 (Pa. Super. Ct. 1986) (holding that a pharmacist had a duty to exercise due care in performance of professional duties and the pharmacist breached that duty by not warning the patient or notifying the patient's physician "of the obvious inadequacies appearing on the face of the prescription"); *Pittman v. UpJohn Co.*, 890 S.W.2d 425, 434 (Tenn. 1994) (holding that pharmacists have a duty to exercise the standard of care required by pharmacists in the same or similar communities in which the pharmacist practices, and that the learned intermediary rule is not a defense for a pharmacist who did not warn a customer of a possible drug interaction between two drugs prescribed by the same physician); *Dooley v. Everett*, 805 S.W.2d 380, 386 (Tenn. Ct. App. 1990) (holding that pharmacists are professionals that should exercise a standard of care that is required by the pharmacy profession within the community that the pharmacist practices, and the question of whether a pharmacist owes a duty to warn against potential drug interactions is a question of fact for a jury).

duty to warn rule?²⁷

A. Illinois Precedent

In 1932, the Illinois Appellate Court held in *Jones v. Walgreen Co.* that a pharmacist's duty requires use of the highest degree of prudence, thoughtfulness, and diligence, in proportion to the danger involved.²⁸ In *Walgreen*, the plaintiff suffered an injury when a pharmacist misinterpreted a physician's handwriting on the prescription and filled the prescription with the wrong drug.²⁹ As a result of ingesting the improper drug, the plaintiff suffered a coma-like state for several days.³⁰ The jury found in favor of the plaintiff, and the court of appeals affirmed the verdict.³¹ The *Walgreen* court stated that people entrust their lives to pharmacists, and that even a minimal deviation from the pharmacist's proper care could have fatal results.³² Although *Walgreen* involved an improperly-filled prescription and not a failure to warn against the dangerous propensities of a prescription drug, the appellate court notably held that the pharmacist's duty was properly determined by comparing the defendant pharmacist's conduct to that of a "competent and careful pharmacist."³³

27. See *supra* note 26 for a list of jurisdictions holding that a pharmacist may have a duty to warn.

28. 265 Ill. App. 308, 315 (Ill. App. Ct. 1932). In *Walgreen*, a pharmacist misread a prescription causing him to fill the prescription with a much stronger dose of medication. *Id.* at 317. The resulting strong dosage caused the patient to suffer severe nausea, pain, vomiting, a coma-like state that lasted two days, and other adverse reactions. *Id.* at 311-12.

29. *Id.* at 316-17. The prescription called for "Strontium Salicylate four ounces (Wyatt)." *Id.* at 311. Strontium salicylate "is a combination formed by combining strontium with salicylic acid It is used especially in the treatment of rheumatism." *Id.* at 312. The pharmacist assumed that Wyatt referred to a manufacturer. *Id.* at 311. The pharmacist was unable to locate a manufacturer named Wyatt and subsequently filled the prescription with a strontium salicylate manufactured by Parke-Davis & Company. *Id.* at 317. The prescription intended to indicate a much weaker effervescent strontium salicylate manufactured by Wyeth. *Id.*

30. *Id.* at 311-12.

31. *Id.* at 317. The appellate court held that the verdict should be affirmed for \$10,000 on remittitur because the court concluded that the jury's verdict for \$20,000 was excessive. *Id.*

32. *Id.* at 315. The trial court stated that "[p]eople trust not merely their health, but their lives, to the knowledge, care, and prudence of druggists, and in many cases a slight want of care is liable to prove fatal to some one [sic]." *Id.*

33. *Jones*. 265 Ill. App. at 320. During the trial, two pharmacists and the pharmacy manager testified that they would have either known what the name on the prescription meant, or they would have called the prescribing physician to clarify the prescription. *Id.* at 317-20. The court stated: "It would be sufficient . . . to say that the jury were [sic] fully warranted, under all the

Walgreen remained the exclusive interpretation of Illinois law on a pharmacist's duty until 1985 when the United States District Court for the Southern District of Illinois decided *Jones v. Irvin*.³⁴ In *Jones*, the court addressed the issue of whether a pharmacist was negligent for failing to warn a patient or the patient's physician about drugs prescribed in dangerous quantities.³⁵ The court held that *Walgreen* was not controlling because *Walgreen* addressed an improperly filled prescription, while the defendant pharmacist in *Jones* properly filled the prescription as prescribed by the physician.³⁶ The *Jones* court held that because Illinois law was silent on the issue before it, the court must "put on its soothsayer hat" and attempt to predict what the Illinois Supreme Court would hold in this situation.³⁷ Based on the decisions of several other jurisdictions, the *Jones* court assumed that the Illinois Supreme Court would hold that pharmacists have no duty to warn.³⁸ Using that assumption, the *Jones* court held that Illinois pharmacists have no duty to warn the patient or the

evidence in this case, in finding that a competent and careful pharmacist would have understood what was meant by [the name on the prescription]." *Id.* at 320.

34. 602 F. Supp. 399 (S.D. Ill. 1985).

35. *Id.* at 400. The court stated:

The precise issue before this Court is whether a pharmacist, who correctly fills a prescription, is negligent for failing to warn the customer or notify the physician that the drug is being prescribed in dangerous amounts, that the customer is being over medicated, or that the various drugs in their prescribed quantities could cause adverse reactions to the customer.

Id.

36. *Id.* The *Jones* court distinguished its situation from *Walgreen* by pointing out that the pharmacist in *Walgreen* actually misread the prescription at issue in that case, and the pharmacist in *Jones* filled the prescription exactly as written. *Id.* "Therefore, in as much as [*Walgreen*] was addressing a different factual situation, it is not controlling in this case." *Id.* at 401.

37. *Id.* The court stated that it must "put on its soothsayer hat" to predict how the Illinois Supreme Court would decide this issue because "[w]hen state law is unsettled, the federal court must attempt to predict how the state's highest court would rule if confronted with the issue." 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 124.22[2] (3d ed. 1998). The *Jones* court declined to apply the *Walgreen* reasoning that an Illinois pharmacist's duty and subsequent breach is properly determined by comparing the defendant pharmacist's conduct to the conduct of a "competent and careful pharmacist." *Id.*

38. *Jones*, 602 F. Supp. at 402. The court cited *Pysz v. Henry's Drug Store*, 457 So.2d 561 (Fla. Dist. Ct. App. 1984), which held that pharmacists have no duty to warn when they have properly filled prescriptions; *Lemire v. Garrard Drugs*, 291 N.W.2d 103 (Mich. App. Ct. 1980), which held that a pharmacist is not liable when properly filling a prescription; and *Batiste v. American Home Prod. Corp.*, 231 S.E.2d 269 (N.C. Ct. App. 1977), which held that pharmacists have no duty to warn of the dangers of prescription drugs.

patient's physician that the drug being prescribed could endanger the patient's life.³⁹

Shortly after *Jones*, an Illinois Appellate Court applied the pharmacist's no duty to warn rule in *Eldridge v. Eli Lilly & Co.*⁴⁰ In *Eldridge*, the plaintiff's wife died from an overdose of a prescribed drug, resulting in a wrongful death action which alleged that the pharmacy negligently failed to warn that the prescription contained abnormal dosages.⁴¹ The *Eldridge* court cited *Walgreen*, but held that no Illinois court has determined whether a pharmacist has a duty to warn.⁴² Based on *Jones*, the *Eldridge* court became the first Illinois Appellate Court to hold that pharmacists have no duty to warn a patient's physician that a drug is being prescribed in an abnormal quantity.⁴³ The *Eldridge* court determined that pharmacists should have no duty to warn because that duty belongs to the physician.⁴⁴ The court reasoned that if it imposed a duty to warn on pharmacists, then pharmacists "would have to interject [themselves] into the doctor-patient relationship and practice medicine without a license."⁴⁵

In 1987, the Illinois Supreme Court appeared to condone the *Eldridge* and *Jones* decisions by favorably mentioning them in *Kirk v. Michael Reese Hospital & Medical Center*.⁴⁶ Although the

39. *Jones*, 602 F. Supp. at 402. The court stated that "a pharmacist has no duty to warn the customer or notify the physician that the drug is being prescribed in dangerous amounts, that the customer is being over medicated, or that the various drugs in their prescribed quantities could cause adverse reactions to the customer." *Id.*

40. 485 N.E.2d 551 (Ill. App. Ct. 1985).

41. *Id.* at 552.

42. *Id.* at 552.

43. *See id.* at 553-55 ("We, therefore, hold a pharmacist has no common law or statutory duty to refuse to fill a prescription simply because it is for a quantity beyond that normally prescribed or to warn the patient's physician of that fact.").

44. *See id.* at 553 (reasoning that drug manufacturers have a duty to warn physicians and physicians have a duty to warn patients because the physicians act as learned intermediaries). *See infra* note 49 and accompanying text for a discussion of the learned intermediary rule. The court felt that it was the duty of the physician to assess and evaluate the patient's needs, know the characteristics of the drugs available for treatment, and prescribe a drug accordingly. *Eldridge*, 485 N.E.2d at 552-53.

45. *See Eldridge*, 485 N.E.2d at 553 (holding that the application of a prescription requires knowledge of the drug and the patient's condition and inquiry into the patient's condition would amount to the practice of medicine without a license). The plaintiff in *Eldridge* asserted that pharmacists may have greater knowledge concerning prescription drugs than the physicians that are prescribing them. *Id.* As a consequence of this greater knowledge, the plaintiff asserted that pharmacists should supervise the application of the physician's prescription. *Id.*

46. 513 N.E.2d 387 (Ill. 1987). In *Kirk*, a driver lost control of his automobile after an allegedly adverse drug reaction and injured the plaintiff.

Kirk court did not address the issue of a pharmacist's failure to warn, it did cite *Jones* and *Eldridge* as analogous support for the contention that the employees of a defendant hospital should not have a duty to provide warnings that were not given by the physician.⁴⁷ The *Kirk* court found that the prescribing physician had the discretion to determine which warnings a patient should receive regarding prescription drugs.⁴⁸ Significantly, the *Kirk* decision is important to Illinois common law because the court adopted the learned intermediary rule⁴⁹ which precludes drug manufacturers from having a duty to warn patients, and instead compels physicians to warn patients of the dangers of prescription drugs.⁵⁰

In 1988, the Illinois Appellate Court determined that pharmacists have no duty to provide their customers with a written copy of the known risks and side effects of prescription drugs in *Leesley v. West*.⁵¹ In *Leesley*, the plaintiff asserted that the pharmacy that filled a prescription should have warned the plaintiff of the known side effects of peptic ulcer and gastrointestinal bleeding.⁵² The appellate court held that no requirement mandated pharmacists to give warnings not requested by the prescribing physician.⁵³ The court concluded that pharmacists have no duty to warn because pharmacists could not be reasonably expected to foresee a customer's injury.⁵⁴

Id. at 390-91. The plaintiff brought suit against the driver's physicians and the hospital for negligently failing to warn the driver of possible adverse reactions to the prescription drugs. *Id.* at 391. The plaintiff also asserted that the drug manufacturers and the hospital were liable under a theory of strict liability for failing to adequately warn. *Id.*

47. *Id.* at 396.

48. *Id.* at 395.

49. *See id.* at 392 (discussing the learned intermediary rule). The learned intermediary rule provides that drug manufacturers have a duty to warn physicians of the dangers of prescription drugs, and physicians have the duty to inform their patients. *Id.* Drug manufacturers usually communicate warnings to physicians through various mediums, such as the PHYSICIANS DESK REFERENCE, drug package inserts, and letters. *Id.* at 392-93. The physician then functions as a learned intermediary between the drug manufacturer and the patient by choosing which drug and what warnings should be given to the patient. *Id.* at 393.

50. *See id.* at 393 (holding that since drug manufacturers have no duty to warn the user of the drug, the drug manufacturers certainly had no duty to third-party non-users, namely, the plaintiff in *Kirk*).

51. 518 N.E.2d 758 (Ill. App. Ct. 1988).

52. *Id.* at 759.

53. *See id.* at 763 ("We simply decline to subject pharmacists to liability for failure to give warnings which the physician has not requested. We believe that this position is most consistent with this State's legislative policy against expanding the liability risks of health professionals.").

54. *See id.* at 762 (finding that the foreseeability of a customer's injury requires knowledge of a customer's medical history and condition—to which

Additionally, the *Leesley* court held that providing warnings to customers would be "very burdensome" on pharmacists.⁵⁵ The court further reasoned that requiring pharmacists to warn patients was inconsistent with the learned intermediary rule.⁵⁶ The *Leesley* court noted that it would be inconsistent for a drug manufacturer and a pharmacist (who actually hands the drug to the customer) to have different duties.⁵⁷ The *Leesley* court, in dicta, maintained that warnings, aside from those required by the physician, are not harmful nor should they be discouraged.⁵⁸

In 1992, the Illinois Supreme Court declined to review the no duty to warn rule in *Frye v. Medicare-Glaser*.⁵⁹ The special administrator of Stephen Frye's estate filed a negligent undertaking action alleging that Stephen died from a concurrent use of Fiorinal[®] and alcohol.⁶⁰ Allegedly, Stephen's death resulted from the failure of his physician, the Medicare-Glaser pharmacy, and Evelyn Nightengale, the pharmacist, to warn of the danger of concurrent use of alcohol and Fiorinal.⁶¹ The estate claimed that although the pharmacy and the pharmacist had no duty to warn of the dangerous side effects of Fiorinal,[®] they undertook a duty to warn when they placed a "drowsy eye" label on the prescription container.⁶² The estate asserted that because they undertook the duty to warn, their failure to place an alcohol warning on the prescription container constituted negligence.⁶³ The trial court granted Medicare-Glaser and Evelyn Nightengale's motion for summary judgment, but the appellate court reversed.⁶⁴ The

pharmacists cannot be expected to be privy).

55. *Id.*

56. See *Leesley*, 518 N.E.2d at 763 (Ill. 1985) (reasoning that requiring drug manufacturers to provide the same information to customers that they provide to physicians and pharmacists would undermine the learned intermediary rule). The court stated that "[p]lacing [a duty to warn] on pharmacists is simply inconsistent with the exemption afforded manufacturers by the learned intermediary doctrine." *Id.* See *supra* note 49, and *infra* notes 93-102 and accompanying text for a discussion of the learned intermediary rule.

57. *Leesley*, 518 N.E.2d at 763.

58. *Id.*

59. 605 N.E.2d 557 (Ill. 1992).

60. *Id.* at 558. See also *supra* notes 6-15 and accompanying text for a discussion of the factual background of *Frye*.

61. *Frye*, 605 N.E.2d at 558. The special administrator of Stephen Frye's estate filed an action against the prescribing physician for failing to warn of the dangerous side effects of Fiorinal[®] and against the Medicare-Glaser Corporation and Evelyn Nightengale on the theory of negligent undertaking. *Id.*

62. *Id.*

63. *Id.* The plaintiff asserted the theory of negligent undertaking, specifically stating that the defendant voluntarily undertook a duty to warn. *Id.*

64. *Id.* The appellate court held that the voluntary undertaking theory was

Illinois Supreme Court granted Medicare-Glaser and Evelyn Nightengale's petition for leave to appeal.⁶⁵

The Illinois Pharmacists Association⁶⁶ and the National Association of Boards of Pharmacy⁶⁷ filed briefs as *amici curiae* requesting the Court to determine whether pharmacists have a duty to warn customers of the dangerous propensities of prescription drugs.⁶⁸ However, the Illinois Supreme Court decided not to consider the issue because the parties to the action did not raise it.⁶⁹ The Court then proceeded to affirm the grant of summary judgment for Evelyn Nightengale and Medicare-Glaser.⁷⁰ The Court held that the extent of the pharmacist's duty was to perform the voluntary undertaking (placing the "drowsy eye label") without negligence and found that the pharmacist/pharmacy did not negligently perform this undertaking.⁷¹ The *Frye* court did not state that the sole source of warnings should be the prescribing physician; rather, patients should "principally look to their prescribing physician" for warnings relating to prescription drugs.⁷²

In 1993, the Illinois Appellate Court again upheld the no duty

the proper theory of recovery, and that: "[d]efendants can, therefore, be liable for injuries or death to the consumer if they undertook to warn the consumer of the dangerous side effects of a prescription drug and did so negligently." *Id.* at 560 (citing *Frye v. Medicare-Glaser Corp.*, 579 N.E.2d 1255 (Ill. App. Ct. 1991)).

65. *Id.* at 558.

66. The Illinois Pharmacists Association requested that the Illinois Supreme Court "recognize pharmacists as professionals, and impose upon the pharmacy profession the same duty as that owed by other professionals practicing their professions." Memorandum *Amicus Curiae* of The Illinois Pharmacists Association at 9, *Frye v. Medicare-Glaser Corp.*, 605 N.E.2d 557 (Ill. 1992) (No. 72908).

67. The National Association of Boards of Pharmacy "are charged with the responsibility of licensing pharmacists and pharmacies and regulating the profession of pharmacy." Brief *Amicus Curiae* for The National Association of Boards of Pharmacy at 2, *Frye v. Medicare-Glaser Corp.*, 605 N.E.2d 557 (Ill. 1992) (No. 72908). The National Association of Boards of Pharmacy requested that the Illinois Supreme Court impose a duty on pharmacists to counsel patients on potential adverse reactions to pharmaceuticals. *Id.* at 34.

68. *Frye*, 605 N.E.2d at 559. The Illinois Pharmacists Association, the National Association of Boards of Pharmacy, and the Illinois Trial Lawyers Association filed *amicus curiae* briefs with the Illinois Supreme Court. *Id.* at 558. The Illinois Supreme Court granted Evelyn Nightengale and Medicare-Glaser's petition for leave to appeal after the trial court granted Medicare-Glaser's motion for summary judgment and the appellate court reversed. *Id.*

69. *Id.*

70. *Id.* at 561.

71. *Id.* See also *supra* notes 63-64 and accompanying text for a discussion of the voluntarily undertaking rule.

72. *Frye*, 605 N.E.2d at 561.

to warn rule in *Fakhouri v. Taylor*.⁷³ In *Fakhouri*, the plaintiff brought an action for wrongful death caused by an overdose of Imipramine⁷⁴ against the pharmacists that filled the prescription, the pharmacy, and the prescribing physician.⁷⁵ The *Fakhouri* court relied on *Leesley*, *Eldridge*, and *Kirk*, holding that pharmacists should not have a duty to warn patients that a prescription exceeds the recommended dosage.⁷⁶ The *Fakhouri* court also relied on the learned intermediary rule to further support the pharmacists no duty to warn rule.⁷⁷

In 1996, the Illinois Appellate Court found in *Suarez v. Pierard* that pharmacists often advise and counsel patients.⁷⁸ In *Suarez*, the plaintiff sued a pharmacist for allegedly disclosing confidential information about the plaintiff.⁷⁹ The *Suarez* court held that a pharmacist should not be considered a therapist under the Confidentiality Act,⁸⁰ and therefore could not disclose

73. 618 N.E.2d 518, 521 (Ill. App. Ct. 1993).

74. See generally PHYSICIANS' DESK REFERENCE, *supra* note 5, at 992-94 (discussing Imipramine Hydrochloride). Physicians prescribe Imipramine Hydrochloride for the relief of depression symptoms. *Id.* "Lower dosages are also recommended for outpatients as compared to hospitalized patients who will be under close supervision. Dosage should be initiated at a low level and increased gradually, noting carefully the clinical response and any evidence of intolerance." *Id.* at 994. The PHYSICIANS' DESK REFERENCE also states:

It should be kept in mind that the possibility of suicide in seriously depressed patients is inherent in the illness and may persist until significant remission occurs. Such patients should be carefully supervised during the early phase of treatment with imipramine hydrochloride, and may require hospitalization. *Prescriptions should be written for the smallest amount feasible.*

Id. at 992 (emphasis added).

75. *Fakhouri*, 618 N.E.2d at 519.

76. *Id.* at 519-21. The court stated that "[t]o impose a duty to warn on the pharmacist would be to place the pharmacist in the middle of the doctor-patient relationship, without the physician's knowledge of the patient." *Id.* at 521. See *Eldridge v. Eli Lilly & Co.*, 485 N.E.2d 551, 563 (Ill. 1985) (stating that a pharmacist's duty might interfere with the physician-patient relationship).

77. *Fakhouri*, 618 N.E.2d at 521. The court stated that "it is illogical and unreasonable to impose a greater duty on the pharmacist who properly fills a prescription than is imposed in the drug's manufacturer." *Id.* See *Leesley v. West*, 518 N.E.2d 758, 763 (Ill. App. Ct. 1988) (stating that a pharmacist's duty would be inconsistent with the learned intermediary rule).

78. 663 N.E.2d 1039, 1042 (Ill. App. Ct. 1996).

79. *Id.* at 1041. The pharmacist counseled the plaintiff concerning the use of her medication for the treatment of mental health disorders at the pharmacy. *Id.* Later, the pharmacist discussed the plaintiff's treatment with the plaintiff during a chance meeting at a tavern. *Id.* The pharmacist's discussion with the plaintiff was said to be overheard by several people, which allegedly humiliated the plaintiff. *Id.*

80. 740 ILL. COMP. STAT. 110/1 et seq. (West 1992) (commonly known as the Confidentiality Act).

confidential information in violation of that act.⁸¹ Although *Suarez* did not address the issue of whether pharmacists have a duty to warn, this decision is important to the discussion of the no duty to warn rule because the court acknowledged that pharmacists advise and counsel patients by giving warnings of potential side effects.⁸² Specifically, the special concurrence stated that pharmacists “do much more” than simply fill prescriptions; they “counsel patients on drug interactions.”⁸³

Although Illinois case law contains only a limited discussion of the pharmacist's no duty to warn, the courts that have discussed this issue have held that pharmacists should have no duty to warn.⁸⁴ Generally, three theories have been cited as support for the no duty to warn rule in Illinois:

- (1) imposing a duty to warn on pharmacists would interfere with the physician-patient relationship,
- (2) imposing a duty to warn on pharmacists would violate the learned intermediary rule, and

81. See *Suarez*, 663 N.E.2d at 1042 (holding that a pharmacist was not defined as a therapist in section nine of the Confidentiality Act). The Confidentiality Act defines a therapist as

a psychiatrist, psychologist, social worker, or nurse providing mental health services or developmental disabilities services or any other person not prohibited by law from providing such services or from holding himself out as a therapist if the recipient reasonably believes that such person is permitted to do so. Therapist includes any successor of the therapist.

Id.

740 ILL. COMP. STAT. 110/2(9) (West 1992).

82. See *Suarez*, 663 N.E.2d at 1042-43 (discussing warnings about potential side effects). The court stated:

We do not believe that merely advising a person about the use of drugs or providing information about the drugs establishes a therapeutic relationship with that person. Warning about potential side effects is not therapy, nor does it change the nature of the relationship between a pharmacist and his customer to that of therapist and patient.

83. *Id.* at 1044. The special concurring opinion stated, “I disagree with the assertion that a pharmacist's function is merely that of a supplier of a product. Pharmacists do much more. They maintain extensive patient records and counsel patients on drug interactions. In doing so, they can literally reconstruct a patient's medical history.” *Id.* (Breslin, J., specially concurring).

84. See *Jones v. Irvin*, 602 F. Supp. 399, 402 (S.D. Ill. 1985) (holding that a pharmacist has no duty to warn a customer or a physician that a drug has been prescribed in dangerous amounts, or that the drug could cause adverse reactions to the customer). See also *Fakhouri v. Taylor*, 618 N.E.2d 518, 521 (Ill. App. Ct. 1993) (holding that pharmacists should not have a greater responsibility to warn than the manufacturer of the prescribed drug); *Leesley v. West*, 518 N.E.2d 758, 763 (Ill. App. Ct. 1988) (holding that pharmacists should not be liable for failing to give warnings that the prescribing physician has not requested); *Eldridge v. Eli Lilly & Co.*, 485 N.E.2d 551, 554-55 (Ill. 1985) (holding that pharmacists have no common law duty to warn a customer or a physician that a drug is being prescribed in excessive amounts).

(3) imposing a duty to warn on pharmacists would contradict "public policy."⁸⁵

B. Arguments in Support of the No Duty to Warn Rule

1. Interfering with the Physician-Patient Relationship

Advocates of the no duty to warn rule in Illinois frequently argue that imposing a duty on pharmacists would interfere with the physician-patient relationship.⁸⁶ In *Eldridge*, the court held that knowledge of how a drug will affect a patient requires knowledge of the patient's medical condition.⁸⁷ The court determined that a pharmacist would have to learn the patient's medical condition before the pharmacist could properly warn the patient of the effects of a prescription drug.⁸⁸ The court reasoned that such an intrusion into the physician-patient relationship would amount to the practice of medicine without a license.⁸⁹

The *Jones* court held that placing a duty to warn on pharmacists would cause each physician's prescription to be second-guessed by pharmacists attempting to avoid liability and would result in a disruption of the physician-patient relationship.⁹⁰

85. See *Jones*, 602 F. Supp. at 402 (discussing how the imposition of a duty to warn on pharmacists would adversely affect the physician-patient relationship); *Leesley*, 518 N.E.2d at 763 (holding that the learned intermediary rule would be violated by imposing a duty to warn on pharmacists, and that expanding the liability of health care professionals is contrary to Illinois legislative policy).

86. See *Jones*, 602 F. Supp. at 402 (holding that a pharmacist's duty may cause each physician's prescription to be second-guessed); *Fakhouri*, 618 N.E.2d at 521 (holding that a pharmacist's duty may interfere with the physician-patient relationship); *Eldridge*, 485 N.E.2d at 553 (holding that a pharmacist's duty would cause pharmacists to interject themselves into the physician-patient relationship).

87. *Eldridge*, 485 N.E.2d at 553.

88. *Id.*

89. *Id.* The *Eldridge* court reasoned that the patient's condition may determine whether a specific dosage is excessive or not. *Id.* The court stated that "[a] prescription which is excessive for one patient may be entirely reasonable for the treatment of another." *Id.* The court determined that a pharmacist cannot accumulate the knowledge necessary to determine whether a specific dosage is excessive without learning the patient's condition. *Id.* Finally, the *Eldridge* court held that pharmacists could only obtain such information by interjecting themselves into the physician-patient relationship. *Id.*

90. *Jones*, 602 F. Supp. at 402. The *Jones* court discussed the duties of physicians including the duty to know the characteristics of the drug being prescribed, the duty to know the proper amount of the drug that should be prescribed, the duty to properly prescribe combinations of drugs, the duty to warn the patient of the dangers of the drugs being prescribed, and the duty to inform the patient of how, when, and why to take the drug. *Id.* The *Jones* court also discussed the duty of patients to inform the physician of other drug

In *Fakhouri*, the court found that physicians, not pharmacists, have the knowledge of a patient's complete medical history.⁹¹ The *Fakhouri* court reasoned that requiring pharmacists to warn would place the pharmacist in the middle of the physician-patient relationship without the benefit of the physician's knowledge of the patient's complete medical history.⁹²

2. Violating the Learned Intermediary Rule

Additionally, proponents of the no duty to warn rule in Illinois argue that imposing a duty on pharmacists would violate the learned intermediary rule.⁹³ The learned intermediary rule holds that drug manufacturers have a duty to inform physicians of the dangers of prescription drugs, and physicians have a duty to warn patients of those dangers.⁹⁴ The learned intermediary rule shifts the manufacturer's duty to warn the patient to the prescribing physician, making the physician a learned intermediary between the patient and the drug manufacturer.⁹⁵ Illinois adopted the learned intermediary rule in 1987 in *Kirk*.⁹⁶

The *Eldridge* court used the learned intermediary rule to explain why pharmacists should not have a duty to warn.⁹⁷ The *Eldridge* court reasoned that because the physician is the learned intermediary between the drug manufacturer and the patient, the

prescriptions. *Id.* Finally, the *Jones* court discussed the drug manufacturers' duty to warn physicians of the adverse effects and other precautions associated with the drugs. *Id.*

91. *Fakhouri*, 618 N.E.2d at 521.

92. *Id.*

93. See *Leesley v. West*, 518 N.E.2d 758, 763 (Ill. App. Ct. 1988) (holding that the learned intermediary rule would be abrogated if pharmacists had a duty to warn); *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 513 N.E.2d 387, 392 (Ill. 1987) (defining the learned intermediary rule); *Eldridge*, 485 N.E.2d at 553 (holding that it is the physician that acts as a learned intermediary between the drug manufacturer and the patient).

94. *Kirk*, 513 N.E.2d at 392. "[M]anufacturers of prescription drugs have a duty to warn prescribing physicians of the drug's known dangerous propensities, and the physicians, in turn, using their medical judgment, have a duty to convey the warnings to their patients." *Id.* See generally Diane Schmauder Kane, Annotation, *Construction and Application of Learned-Intermediary Doctrine*, 57 A.L.R.5th 1 (1998) (examining the principles underlying the learned intermediary rule); Nancy K. Plant, *The Learned Intermediary Doctrine: Some New Medicine For An Old Ailment*, 81 IOWA L. REV. 1007 (1996) (discussing the learned intermediary rule).

95. *Kirk*, 513 N.E.2d at 393.

96. *Id.* The *Kirk* court held that since the learned intermediary rule precluded a drug manufacturer from having a duty to warn a patient, it necessarily followed that the drug manufacturer owed no duty to a third party who was allegedly injured as a result of the patient's adverse reaction to the prescription drug. *Id.*

97. 498 N.E.2d at 553.

physician, not the pharmacist, has the knowledge and duty to effectively warn a patient.⁹⁸ Similarly, the *Leesley* court invoked the learned intermediary rule as support to uphold the no duty to warn rule.⁹⁹ The *Leesley* court held that drug manufacturers must supply warnings to physicians, not consumers, and requiring pharmacists to supply warnings to consumers may impose a costly burden on pharmacists.¹⁰⁰ The *Leesley* court further held that requiring pharmacists to warn would be inconsistent with the learned intermediary rule.¹⁰¹ In *Fakhouri*, the court used the learned intermediary rule to deny imposing a duty to warn on pharmacists stating that it would be “illogical and unreasonable to impose a greater duty on the pharmacist who properly fills a prescription than is imposed on the drug’s manufacturer.”¹⁰²

3. “Public Policy” Justifications for the No Duty to Warn Rule

Supporters of the no duty to warn rule also justify the rule based on “public policy” reasons.¹⁰³ In *Jones*, the court stated that a general policy concern that pharmacists would second-guess every prescription prevented the imposition of a duty to warn on pharmacists.¹⁰⁴ The *Leesley* court reasoned that imposing a duty to warn would be “very burdensome” to pharmacists and that the legislative policy of Illinois in 1988 opposed expanding the liability of health professionals.¹⁰⁵

98. *Id.*

99. *Leesley v. West*, 518 N.E.2d 758, 763 (Ill. App. Ct. 1988).

100. *Id.*

101. *Id.* See also *Kirk*, 513 N.E.2d at 392 (discussing the general policies behind the learned intermediary rule). The policies behind the learned intermediary rule suggested that prescription drugs proved a fathomable exception to the RESTATEMENT (SECOND) OF TORTS § 388 (1965) that requires marketers of goods to warn users of the inherent dangers of a product. *Id.* Prescription drugs should be an exception because they are complex and require specialized knowledge to understand their effects. *Id.* The physician has the capacity as a medical expert to determine what information is applicable to a patient and accordingly to convey the applicable warning. *Id.* Since it is the physician that determines which drug should be prescribed to a patient, and not the drug manufacturer, the patient should be warned by the physician, not the drug manufacturer. *Id.* (citing *Reyes v. Wyeth Lab.*, 498 F.2d 1264, 1276 (5th Cir. 1974)).

102. *Fakhouri v. Taylor*, 618 N.E.2d 518, 521 (Ill. App. Ct. 1993).

103. *Jones v. Irvin*, 602 F. Supp. 399, 402 (S.D. Ill. 1985); *Leesley*, 518 N.E.2d at 762-63 (stating that the imposition of a duty would be burdensome to pharmacists).

104. *Jones*, 602 F. Supp at 402.

105. *Leesley*, 518 N.E.2d at 762-63. See Louis P. Milot, *Tort Law - The Manufacturer's and Pharmacist's Duty to Warn Consumers of Risks and Side Effects of Prescription Drugs*. *Leesley v. West*, 165 Ill.App.3d 135, 518 N.E.2d 758 (2d Dist.1988), 13 S. ILL. U. L.J. 1003, 1011 (1989) (discussing policy reasons used to support the no duty to warn rule in *Leesley*). The *Leesley* court reasoned that “[t]he foreseeability of injury to an individual consumer in the

C. Other Approaches to the No Duty to Warn Rule

Although Illinois courts uphold the no duty to warn rule, other jurisdictions hold that pharmacists may have a duty to warn.¹⁰⁶ The jurisdictions holding that pharmacists may owe a duty to warn reason that: (1) pharmacists should warn when they have specific knowledge of a patient's predisposition,¹⁰⁷ (2) a duty to warn is compelled by public policy and reason,¹⁰⁸ and (3)

absence of any particular warning also varies greatly depending on the medical history and condition of the individual facts which we cannot reasonably expect the pharmacist to know." 518 N.E.2d at 762. Additionally, the court stated that "requiring [the pharmacy] to convey the warnings it receives to its customers would be very burdensome." *Id.* Furthermore, the court determined that "[m]anufacturers of prescription drugs . . . are not required to provide cautionary information directly to the consumers of the drugs. Imposing that burden on pharmacists, therefore, may well mean they must bear the additional costs of reproducing the material they receive." *Id.* at 763. The *Leesley* court concluded by stating that "[w]e simply decline to subject pharmacists to liability for failure to give warnings which the physician has not requested. We believe that this position is most consistent with this State's legislative policy against expanding the liability risks of health professionals." *Id.*

106. See *Docken v. Ciba-Geigy*, 739 P.2d 591, 593 (Or. Ct. App. 1987) (holding that the pharmacist "no duty" defense was another way of stating that the harm suffered by the plaintiff was not a foreseeable risk of the pharmacist's actions, and the court could not, as a matter of law, hold that the harm suffered by the plaintiff was not foreseeable). See also David B. Brushwood, *The Pharmacist's Duty To Warn: Toward A Knowledge-Based Model Of Professional Responsibility*, 40 DRAKE L. REV. 1, 32-42 (1991) [hereinafter *The Pharmacist's Duty To Warn*] (discussing pharmacist duty to warn cases in the 1980s); Jill Casson Owen, *The Pharmacist's Duty To Warn: Lasley v. Shrake's Country Club Pharmacy*, 37 ARIZ. L. REV. 677, 679-88 (1995) (discussing the evolution of cases that hold both for and against the no duty to warn rule). See also *supra* note 26 and accompanying text for a list of jurisdictions that have held a pharmacist may have a duty to warn.

107. *Hand v. Krakowski*, 453 N.Y.S.2d 121, 123 (N.Y. App. Div. 1982). The court in *Hand* stated:

Here, [the defendant] knew that the decedent was alcoholic and knew, or should have known, that the prescribed drugs were contraindicated and, therefore, extremely dangerous to the well-being of its customer. Clearly, under these circumstances, the dispensing druggist may have had a duty to warn decedent of the grave danger involved and to inquire of the prescribing doctors if such drugs should not be discontinued.

Id.

108. *Riff v. Morgan Pharmacy*, 508 A.2d 1247, 1253-54 (Pa. Super. Ct. 1986). "In the instant case the testimony of the medical experts, . . . established that the conduct of [the defendant's] pharmacists fell below the level of reasonable conduct in the practice of pharmacy." *Id.* at 1253. The court further explained:

If the consensus of the medical community is that a safety net of overlapping responsibilities is necessary to serve the best interests of patients, it is not for the judiciary to dismantle the safety net and leave patients at the peril of one man's human frailty. Reason and public

whether a pharmacist owes a duty to warn presents a genuine issue of material fact precluding summary judgment.¹⁰⁹

In 1994, the Supreme Court of Indiana provided one of the most recent and thorough examinations of whether pharmacists should have a duty to warn in *Hooks v. McLaughlin*.¹¹⁰ In *Hooks*, the plaintiff sought treatment for a previous injury by obtaining a prescription for drugs containing propoxyphene.¹¹¹ The plaintiff became addicted to the propoxyphene and subsequently consumed the drugs at almost two and a half times the prescribed dosage.¹¹² The plaintiff sued the Hooks pharmacy claiming that the Hooks' pharmacists should have refused to refill the prescription.¹¹³ Hooks filed a motion for summary judgment claiming that they

policy compel rejection of any attempt to apply indemnification principles to the facts of the instant case.

Id. at 1253-54.

109. *Docken*, 739 P.2d at 593. "We cannot say as a matter of law that the harm was not foreseeable or that the complaint fails to allege facts from which a jury could find defendants negligent." *Id.* *Dooley v. Everett*, 805 S.W.2d 380, 386 (Tenn. Ct. App. 1990). "[W]hether the duty to warn of potential drug interaction is included within the pharmacist's duty to his customer is a disputed issue of fact preventing the granting of summary judgment." *Id.* *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514, 519 (Ind. 1994). "What constitutes due care in a particular case will depend upon the circumstances of that case, and will usually be a question of fact." *Id.*

110. 642 N.E.2d at 514.

111. *Id.* at 516. The plaintiff had previously treated his injury with Darvocet and Darvon and became addicted to propoxyphene, the active ingredient in those medications. *Id.* Darvon is a brand of Propoxyphene Hydrochloride manufactured by Eli Lilly & Co. PHYSICIANS' DESK REFERENCE, *supra* note 5, at 1218. Propoxyphene is a "centrally acting narcotic analgesic agent" that is indicated for relief of pain. *Id.* A warning against Darvon indicates that Darvon should not be prescribed to patients that are addiction-prone. *Id.* Darvocet is generally similar to Darvon with the exception that Darvocet contains acetaminophen. *Id.* DARVOCET-N, DRUG FACTS & COMPARISONS 244 (March 1995). The plaintiff was treated for addiction in 1982, 1983, and 1987. *Hooks*, 642 N.E.2d at 516. In 1988, the plaintiff resumed treatment for his back injury obtaining prescriptions for drugs containing propoxyphene compounds. *Id.*

112. *Hooks*, 642 N.E.2d at 516. In one instance, the plaintiff refilled his prescription twenty-four times in a sixty-day period for a total of 1,072 tablets. *Id.* Those 1,072 tablets should have lasted the plaintiff 138 days, however the plaintiff consumed them in sixty-two days. *Id.* The prescriptions were filled twelve times in one month, resulting in either the plaintiff or his wife appearing at the Hooks pharmacy for a prescription refill every two or three days. *Id.* The prescribing physician refused to order any additional refills after realizing the excessive rate at which the plaintiff was consuming the drugs. *Id.* After the physician refused to order any more refills, the plaintiff suffered depression and even threatened to kill himself with a shotgun. *Id.*

113. *Id.* The plaintiff alleged that the Hooks' pharmacists should have refused to refill the prescription because they should have known that the plaintiff was consuming the drugs at an excessive rate. *Id.*

had no such duty.¹¹⁴

The Indiana Supreme Court affirmed the trial court's denial of summary judgment stating that "[t]he relationship between pharmacist and customer is a direct one based upon contract and is independent of the relationship between physician and patient."¹¹⁵ The *Hooks* court concluded that the relationship between a pharmacist and a customer is proximate enough to justify imposing a duty.¹¹⁶ Although the *Hooks* court stated that the prescribing physician should warn the patient about drug side effects, the court held that pharmacists have a duty to prevent "the overuse and misuse of prescription drugs."¹¹⁷ The Indiana Supreme Court further held that "pharmacists must exercise that degree of care that an ordinarily prudent pharmacist would under the same or similar circumstances."¹¹⁸

The Tennessee Court of Appeals held in *Dooley v. Everett* that the no duty to warn rule should not apply in an action against a pharmacist.¹¹⁹ In *Dooley*, a pharmacist simultaneously filled Erythromycin and Theophylline prescriptions for a young child.¹²⁰ Upon filling the Erythromycin prescription, the pharmacist failed to warn against the potential interaction between Erythromycin and Theophylline.¹²¹ As a result of the concurrent use of the drugs, the child suffered cerebral seizures due to toxic levels of Theophylline in his body.¹²² The *Dooley* court held that

114. *Id.* The trial court denied the motion and upon an interlocutory appeal, a majority of the Indiana Court of Appeals held that *Hooks* owed no duty, reasoning that the imposition of such a duty "would undermine the physician-patient relationship." *Id.*

115. *Id.* at 517. The court stated that "we do not perceive that physicians and pharmacists will become adversaries if pharmacists are expected to cease refilling prescriptions where the customers are using the drugs much more rapidly than prescribed." *Id.* at 519.

116. *Id.* at 517. The court commented:

[i]t is a matter of common understanding that customers rely upon pharmacists for [the pharmacist's] expertise. Upon this basis, we conclude that the relationship between pharmacist and customer is sufficiently close to justify imposing a duty It is a matter of common expectation . . . that pharmacists possess expertise regarding the dispensing of prescription drugs.

Id.

117. *Hooks*, 642 N.E.2d at 519.

118. *Id.*

119. 805 S.W.2d 380 (Tenn. Ct. App. 1990).

120. *Id.* at 381. Theophylline is a prescription drug used for asthma treatment. *Id.* See also XANTHINE DERIVATIVES, DRUG FACTS & COMPARISONS 178 (Feb. 1991) (stating the pharmacology of Theophylline and other Xanthine Derivatives). Erythromycin is generally used for the treatment of infections. ERYTHROMYCIN, DRUG FACTS & COMPARISONS 343 (Jan. 1992).

121. *Dooley*, 805 S.W.2d at 381.

122. *Id.*

pharmacists have a duty to exercise the standard of care required by the pharmacy profession in the pharmacist's community.¹²³ A disputed question of fact concerning whether a duty to warn against potential drug interactions existed, and therefore, summary judgment (based on the no duty to warn rule) was reversed.¹²⁴

D. Rebutting Support for the No Duty to Warn Rule

1. The Physician-Patient Relationship

The relationship between a pharmacist and a customer may be independent of the physician-patient relationship. The Indiana Supreme Court supported this view in *Hooks*.¹²⁵ The *Hooks* court held that consumers commonly look to a pharmacist's expertise in drugs when a prescription is filled.¹²⁶ Additionally, the court held that pharmacists and physicians will not become adversaries if pharmacists have a duty to warn, but instead, such a duty actually may encourage pharmacists and physicians to work together.¹²⁷ The *Hooks* court also held that a pharmacist's duty to warn had no effect on the previously established duties of a physician.¹²⁸

A pharmacist who warns a customer that alcohol should be avoided while taking a drug, or other similar warnings, does not require the pharmacist to know anything about a patient's medical history. Such warnings may be appropriate based on knowledge of the type of drug prescribed, and knowledge of the patient's medical history is not necessary. The Illinois Pharmacists Association has stated that a pharmacist counseling a patient on the side effects of prescription drugs does not interfere with the physician-patient relationship, but it actually compliments that relationship by providing guidance to a patient on how to use a drug after a

123. *Id.* at 385.

124. *Id.* at 386.

125. *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514, 517 (Ind. 1994). The *Hooks* court held that the relationship between the pharmacist and the customer was based on privity of contract. *Id.* But see *Rozny v. Marnul*, 250 N.E.2d 656, 660 (Ill. 1969) (holding that tort liability in Illinois will no longer be measured by privity, but by whether a defendant owes a duty to the plaintiff).

126. 642 N.E.2d at 517.

127. *Id.* at 519. Additionally, the American Medical Association Policy H-35.999 states that the "contribution of pharmacy as an independent profession is assisting physicians toward the constant goal of improved patient care is recognized and commended; . . . [t]he AMA urges physicians to encourage and support the continued growth of pharmacy as a valuable and necessary member of the health care team." The American Medical Association Policy Finder H-35.999 *Medicine And Pharmacy Relations*, (visited July 29, 1999) <http://www.amaassn.org/apps/pf_on...e&doc=policyfiles/HOD/H-.999HTM>.

128. *Hooks*, 642 N.E.2d at 519.

physician determines which drug the patient should use.¹²⁹ Pharmacists who warn patients actually increase the patient's awareness and interest in their drug therapy.¹³⁰ This heightened awareness in their drug therapy may positively impact the physician-patient relationship.¹³¹

2. *The Learned Intermediary Rule*

A Tennessee Appellate Court weighed the learned intermediary rule while discussing whether a pharmacist should have a duty to warn in *Dooley*.¹³² The *Dooley* court determined that the Tennessee legislature adopted the learned intermediary rule as an exception to the manufacturer's duty to warn in strict liability cases.¹³³ The court decided that the issue of whether a pharmacist owes a duty only involves the pharmacist-customer relationship, and the drug manufacturer is not relevant.¹³⁴ The court further held that the defenses available to a drug manufacturer in a strict liability suit are not applicable in a pharmacist's duty to warn case.¹³⁵

Mr. David Brushwood, a noted authority on the topic of pharmacist liability, discussed the misapplication of the learned intermediary rule to pharmacist duty to warn cases.¹³⁶ Mr. Brushwood points out that the learned intermediary rule is a defense used by drug manufacturers, and not a doctrine to determine whether liability exists.¹³⁷ The logic behind allowing drug manufacturers to pass their duty to warn onto the prescribing physician is that the physician is more proximate to

129. Memorandum *Amicus Curiae* of The Illinois Pharmacists Association at 11, *Frye v. Medicare-Glaser Corp.* 605 N.E.2d 557 (Ill. 1992) (No. 72908).

130. DAVID B. BRUSHWOOD, *PHARMACY MALPRACTICE LAW AND REGULATION* § 8.11 at 259 (2d ed. 1998).

131. *Id.*

132. 805 S.W.2d 380, 380 (Tenn. Ct. App. 1990).

133. *Id.* at 386.

134. *Id.*

135. *Id.* See also *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 434 (Tenn. 1994) (holding that the Court of Appeals in *Dooley* properly rejected the learned intermediary rule as a defense where the pharmacist failed to warn a customer of a possible drug interaction between two drugs prescribed by the same physician).

136. BRUSHWOOD, *supra* note 130, § 8.3, at 242. Other works by Mr. Brushwood include: RICHARD R. ABOOD & DAVID B. BRUSHWOOD, *PHARMACY PRACTICE AND THE LAW* (2d ed. 1997) [hereinafter ABOOD & BRUSHWOOD, 2d ed. 1997]; David B. Brushwood, *The Pharmacist's Duty Under OBRA-90 Standards*, 18 J. LEGAL MED. 475 (1997) [hereinafter *The Pharmacist's Duty Under OBRA-90 Standards*]; RICHARD R. ABOOD & DAVID B. BRUSHWOOD, *PHARMACY PRACTICE AND THE LAW* (1994); *The Pharmacist's Duty To Warn*, *supra* note 106, at 1; DAVID B. BRUSHWOOD, *MEDICAL MALPRACTICE PHARMACY LAW* (1986).

137. BRUSHWOOD, *supra* note 130, § 8.3, at 244.

the patient than the manufacturer and thus better able to warn.¹³⁸ However, Mr. Brushwood argues that this logic should not exempt the pharmacist because the pharmacist is arguably more proximate to the patient than the physician.¹³⁹

The Illinois Pharmacists Association (IPhA) has argued a practical approach for not extending the learned intermediary rule to pharmacists.¹⁴⁰ The IPhA argues that “[r]ealistically, the pharmacist knows as much, and generally more, about a drug’s propensities than the prescribing physician”¹⁴¹ The National Association of Boards of Pharmacy (NABP) has advocated that extending the learned intermediary rule to pharmacists would effectively “sanction the sealing of the pharmacist’s lips.”¹⁴² Additionally the NABP has stated that extending the rule to pharmacists would grant pharmacists a “blanket immunity, sanctioning silence when public safety demands the pharmacist to speak.”¹⁴³

3. “Public Policy” Justifications Against the No Duty to Warn Rule

In *Riff v. Morgan Pharmacy*, a plaintiff brought an action against a pharmacy for failing to warn of the dangers of a prescription suppository from which she suffered toxic effects, causing permanent damage to her foot.¹⁴⁴ The *Riff* court held that public policy requires that pharmacists be accountable for failing to exercise care with respect to the harm involved.¹⁴⁵ The *Hooks* court stated that a societal interest in preventing the use and misuse of prescription drugs would be furthered by recognizing that pharmacists may have a duty to warn.¹⁴⁶

138. *Id.*

139. *Id.*

140. Memorandum *Amicus Curiae* of The Illinois Pharmacists Association at 10, *Frye v. Medicare-Glaser Corp.* 605 N.E.2d 557 (Ill. 1992) (No. 72908).

141. *Id.* See *infra* note 237 and accompanying text for a discussion of the differences in pharmaceutical education requirements between physicians and pharmacists.

142. Memorandum *Amicus Curiae* of The National Association of Boards of Pharmacy at 31, *Frye v. Medicare-Glaser Corp.* 605 N.E.2d 557 (Ill. 1992) (No. 72908).

143. *Id.*

144. 508 A.2d 1247, 1249 (Pa. Super. Ct. 1986).

145. *Id.* at 1251. The court stated “pharmacists who prepare and dispense drugs and medicines for use in the human body must be held responsible for the failure to exercise the degree of care and vigilance commensurate with the harm which would be likely to result from relaxing it.” *Id.*

146. *Hooks v. McLaughlin*, 642 N.E.2d 514, 519 (Ind. 1994).

II. ANALYSIS OF THE NO DUTY TO WARN RULE: GOING BEYOND THE PREVIOUS ARGUMENTS

This Part provides an analysis of the no duty to warn rule in Illinois. Section A will discuss the no duty to warn rule in conjunction with the common law of Illinois. Section B will discuss the no duty to warn rule in conjunction with state and federal statutory considerations. Finally, Section C will discuss the no duty to warn rule and the profession of pharmacy.

A. *Searching for Guidance from Illinois Common Law*

1. *The Duty Analysis*

To assert that a pharmacist has a duty to warn, a plaintiff must file an action against a pharmacist for negligence.¹⁴⁷ A negligence action in Illinois must set forth the existence of a duty owed to the plaintiff by the defendant, a subsequent breach of that duty, and an injury to the plaintiff that was proximately caused by the defendant's breach of the duty owed.¹⁴⁸ Therefore, in order for a plaintiff to sustain an action against a defendant for negligence, the plaintiff must first prove that the defendant owes the plaintiff a duty, and then prove that the defendant breached that duty by failing to conform to the applicable standard of care.¹⁴⁹ The no duty to warn rule effectively precludes any plaintiff from successfully asserting a negligence claim based on a pharmacist failing to warn of any danger regarding a prescription drug.¹⁵⁰ With the blanket no duty to warn rule, courts may hold that no duty exists (and therefore no action for negligence) without any inquiry into the relationship between the parties, or the applicable

147. See *Widlowski v. Durkee Foods*, 562 N.E.2d 967, 968 (Ill. 1990) (discussing the requirements for a negligence action in Illinois).

148. *Id.* In *Widlowski*, the defendant's employee bit off a portion of a nurse's finger while the nurse was treating the employee for his injuries related to a work accident. *Id.* The nurse filed a complaint alleging that the defendant employer and employee were both negligent for allowing the employee to be exposed to nitrogen gas that caused the employee to become ill and eventually bite off part of the plaintiff's finger. *Id.*

149. *Id.* at 970. The *Widlowski* court held that the defendant owed no duty to the plaintiff and therefore the trial court correctly granted the defendant's motion to dismiss. *Id.*

150. See e.g., *Fakhouri v. Taylor*, 618 N.E.2d 518, 519 (Ill. App. Ct. 1993) (holding that pharmacists do not have a duty to warn a customer that a drug prescription amount exceeded the manufacturer's recommended dosages); *Leesley v. West*, 518 N.E.2d 758, 759 (Ill. App. Ct. 1988) (holding that pharmacists have no duty to warn a customer of the potential hazards of prescription drugs); *Eldridge*, 485 N.E.2d 551, 554-55 (Ill. App. Ct. 1985) (holding that pharmacists have no common law duty to warn a physician that a drug is being prescribed in dangerous amounts and therefore the court properly granted the defendant's motion to dismiss).

standard of care of the pharmacist.¹⁵¹

The no duty to warn rule exposes a fundamental question – whether it is proper for courts to hold that no duty exists without inquiring into the relationship between the parties. If Illinois common law allows the existence of a duty to be determined without an inquiry into the relationship between the parties, then the no duty to warn rule may be consistent with Illinois common law. However, if Illinois common law requires some inquiry before dispelling the existence of a duty, then the no duty to warn rule is inconsistent with Illinois common law.

Whether a duty exists is a question of law.¹⁵² Thus, the *Eldridge*, *Leesley*, and *Fakhouri* courts were within their authority in determining that pharmacists owe no duty to warn.¹⁵³ However, courts should not dispel the existence of a duty before determining whether the risk of harm to the plaintiff would be reasonably foreseeable to the defendant – the “foreseeability factor.”¹⁵⁴ To determine whether a duty exists, a court should inquire “whether the defendant and the plaintiff stood in such a relationship to one another where the defendant is obliged to conform to a standard of conduct for the benefit of the plaintiff” – the “relationship factor.”¹⁵⁵ In determining liability for failing to take steps to prevent harm to others, a court should look for a relationship between the parties that justifies imposing a duty.¹⁵⁶

151. If the plaintiff cannot place a duty on the pharmacist because of the no duty to warn rule, the plaintiff's action will fail due to the lack of an essential element of a negligence action.

152. *Widlowski*, 562 N.E.2d at 968.

153. *Fakhouri*, 618 N.E.2d at 519; *Leesley*, 518 N.E.2d at 759; *Eldridge*, 485 N.E.2d at 554-55.

154. *Widlowski*, 562 N.E.2d at 968. The *Widlowski* court stated “in determining whether the defendant owed a duty to the plaintiff, the court will consider whether the risk of harm to the plaintiff was reasonably foreseeable.” *Id.* See *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514, 517 (Ind. 1994) (discussing that a duty should only be imposed when a “reasonably foreseeable victim” is injured by a “reasonably foreseeable harm”); *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 435 (Tenn. 1994) (holding that a pharmacy was not liable to a plaintiff because the plaintiff failed to show that his injury was reasonably foreseeable to the pharmacy, and as a result, the pharmacy's duty to warn did not extend to the plaintiff); *ABOOD & BRUSHWOOD*, 2d ed. 1997, *supra* note 136, at 266 (discussing the foreseeability factor used in the *Hooks* decision, that is, whether it is foreseeable that a pharmacist's customer may be injured by a prescription drug).

155. *Widlowski*, 562 N.E.2d at 968. See also *ABOOD & BRUSHWOOD*, 2d ed. 1997, *supra* note 136, at 265-66 (discussing the relationship factor used in the *Hooks* decision, that is, what type of relationship existed between the pharmacist and the customer in *Hooks*); *KEETON ET AL.*, *supra* note 22, § 53, at 356 (stating that a “duty is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff”).

156. *KEETON*, *supra* note 22, § 53, at 373-74. For nonfeasance liability, “it is necessary to find some definite relation between the parties, of such a

Furthermore, when deciding whether a duty exists, a court should examine the likelihood of an injury to the plaintiff, and the extent of the burden to be placed on the defendant – the “likelihood factor.”¹⁵⁷

The *Eldridge*, *Leesley*, and *Fakhouri* courts apparently failed to use the Illinois common law factors discussed above to determine if pharmacists should have a duty. The *Eldridge* court based its holding that pharmacists have no duty to warn because of: (1) prior decisions of other jurisdictions, and (2) the physician's duty to warn under the learned intermediary rule.¹⁵⁸ The *Leesley* court briefly discussed the ability of pharmacists to foresee an injury to a customer, but ultimately held that pharmacists have no duty to warn based upon the physician's duty under the learned intermediary rule.¹⁵⁹ The *Fakhouri* court decided not to impose a duty to warn on pharmacists on the basis of: (1) the *Eldridge* and *Leesley* decisions, (2) the physician's duty under the learned intermediary rule, and (3) a fear that imposing a duty on pharmacists would interfere with the physician-patient relationship.¹⁶⁰

The *Eldridge* and *Fakhouri* courts did not discuss the foreseeability factor.¹⁶¹ Additionally, the *Eldridge*, *Leesley*, and *Fakhouri* courts did not inquire into the relationship factor.¹⁶² Finally, the *Eldridge*, *Leesley*, and *Fakhouri* courts did not discuss the likelihood factor in determining if the pharmacist should owe a duty to warn.¹⁶³

While the existence of a duty is a question of law, Illinois law does require a court to discuss the foreseeability, relationship, and likelihood factors before determining whether a duty exists.¹⁶⁴ The *Eldridge*, *Leesley*, and *Fakhouri* courts erred by not determining whether pharmacists should have a duty by analyzing the foreseeability, relationship, and likelihood factors.¹⁶⁵ The no duty to warn rule violates Illinois common law precisely because the rule prevents the consideration of these factors as outlined by the

character that social policy justifies the imposition of a duty to act.” *Id.*

157. *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 513 N.E.2d 387, 396 (Ill. 1987).

158. 485 N.E.2d 551, 552-53 (Ill. App. Ct. 1985).

159. 518 N.E.2d 758, 762-63 (Ill. App. Ct. 1988).

160. 618 N.E.2d 518, 519-22 (Ill. App. Ct. 1993).

161. *See Widlowski v. Durkee Foods*, 562 N.E.2d 967, 968 (Ill. 1990) (discussing the foreseeability factor).

162. *See id.* (discussing the relationship factor).

163. *See Kirk*, 513 N.E.2d at 396 (discussing the likelihood factor).

164. *Id.*; *Widlowski*, 562 N.E.2d at 968.

165. *Kirk*, 513 N.E.2d at 396; *Widlowski*, 562 N.E.2d at 968. Since the Illinois Supreme Court has outlined the factors a court should consider when determining if a duty exists, it appears that the *Eldridge*, *Leesley*, and *Fakhouri* courts erred by not following those common law rules.

Illinois Supreme Court.¹⁶⁶ Additionally, the no duty to warn rule and Illinois common law are inconsistent because of the Illinois rule that creates a duty to warn when a defendant possesses unequal knowledge over a plaintiff, and the defendant is aware that harm might occur if no warning is given.¹⁶⁷ Pharmacists certainly have a greater knowledge about prescription drugs than their customers. The foregoing analysis of Illinois common law has shown that the pharmacist's no duty to warn rule is fundamentally unsound because it fails to allow courts to properly inquire whether a duty should exist.

2. *Standard of Care Analysis*

The relationship between the no duty to warn rule and the pharmacist's requisite standard of conduct further illustrates the rule's incompatibility with Illinois common law. A duty requires a person to conform to a particular standard.¹⁶⁸ The Illinois Pharmacy Act declared the profession of pharmacy a professional practice in the State of Illinois.¹⁶⁹ Illinois courts hold professionals to a professional standard of care determined by comparing the conduct of the defendant to the conduct of a reasonably prudent member of the same profession acting in a factually similar situation.¹⁷⁰ Therefore, Illinois pharmacists have a duty to conform to a professional standard of care, and courts should determine whether a pharmacist has breached that standard of care by comparing actions to those of a reasonably prudent pharmacist in the same factual situation.¹⁷¹ However, since this

166. *Widlowski*, 562 N.E.2d at 968; *Kirk*, 513 N.E.2d at 396.

167. *Proctor v. UpJohn*, 682 N.E.2d 1203, 1211 (Ill. App. Ct. 1997). "A duty to warn exists only when there is 'unequal knowledge and the defendant, possessed of such knowledge, knows or should know that harm might occur if no warning is given.'" *Id.* at 1211.

168. *See Widlowski*, 562 N.E.2d at 968 (stating that "[a] duty requires a person to conform to a certain standard of conduct").

169. The Pharmacy Practice Act of 1987, 225 ILL. COMP. STAT. 85/1 (West 1996). The practice of pharmacy in Illinois is a professional practice "affecting the public health, safety and welfare and is subject to regulation and control in the public interest." *Id.*

170. *Advincula v. United Blood Serv.*, 678 N.E.2d 1009, 1020 (Ill. 1996). *See also Pittman v. Upjohn*, 890 S.W.2d 425, 434 (Tenn. 1994) (holding that pharmacists have a duty to exercise the standard of care that is required by the pharmacy profession in the same or similar communities in which the pharmacist practices); RESTATEMENT (SECOND) OF TORTS § 299A (1965) (discussing the standard of conduct applicable to professionals).

171. *See generally* Tara L. Furnish, *Professional Malpractice, Departing from the Traditional No Duty to Warn: A New Trend for Pharmacy Malpractice?*, 21 AM. J. TRIAL ADVOC. 199 (1997) (discussing the trends of professional pharmacy malpractice, including case citations for jurisdictions both imposing and not imposing the no duty to warn rule, as well as citations to legal periodicals discussing this subject).

rule places no duty to warn on pharmacists, the rule effectively allows a pharmacist to act below the required professional standard of care, and avoid liability for negligence.¹⁷²

The relationship between the standard of care and duty is complex.¹⁷³ According to *Prosser and Keeton on the Law of Torts*:

[the term "duty" should be used] for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other, and to deal with particular conduct in terms of a legal standard of what is required to meet the obligation. In other words, "duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same – to conform to the legal standard of reasonable conduct in the light of the apparent risk . . . [t]he distinction [between duty and the standard of care] is one of convenience only, and it must be remembered that the two are correlative, and one cannot exist without the other.¹⁷⁴

"A duty, in negligence cases, may be defined as an obligation . . . to conform to a particular standard of conduct."¹⁷⁵ Because Illinois has a standard of conduct required of professionals, those professionals have a duty to conform to that standard.¹⁷⁶ The analysis of Illinois common law indicates that it is inconsistent to have both a pharmacist no duty to warn rule and a pharmacist's duty to conform to the professional pharmacy standard of care. The no duty to warn rule actually prevents pharmacists from having a duty to warn even when the professional pharmacist standard of care would require a warning. In short, this rule eliminates a duty that may otherwise be required by the professional pharmacist standard of care. For example, if a reasonable and prudent pharmacist provides a warning in a given situation, a pharmacist that does not provide a warning in that situation has breached the professional pharmacist standard of care, but not the no duty to warn rule.¹⁷⁷ The standard of care

172. In a situation where a reasonable and prudent pharmacist would warn a customer not to drink alcohol with a certain drug, a pharmacist failing to warn a customer is thereby acting below the standard of a reasonably prudent pharmacist, but is not negligent because there was no duty to warn.

173. See, e.g., *Lasley v. Shrake's Country Club Pharmacy*, 880 P.2d 1129, 1132 (Ariz. Ct. App. 1994) (stating that the Arizona Supreme Court has cautioned lower courts against juxtaposing the standards of care and duty).

174. *KEETON ET AL.*, *supra* note 22, at 356.

175. *Id.*

176. See *Advincula*, 678 N.E.2d at 1020 (stating that all Illinois professionals "must use the same degree of knowledge, skill and ability as an ordinarily careful professional would exercise under similar circumstances").

177. See *RESTATEMENT (THIRD) OF TORTS* § 6(6) (Proposed Final Draft 1997) (discussing liability for inadequate warnings).

§ 6 Liability of Seller or other Distributor for Harm Caused by Defective Prescription Drugs and Medical Devices

analysis of Illinois common law further shows that the pharmacist's no duty to warn rule is inappropriate because the rule undermines the standard of care required of pharmacists.

B. Statutory Considerations

Both federal and state legislation address the duties of pharmacists.¹⁷⁸ In 1990, Congress passed the Omnibus Budget Reconciliation Act (OBRA-90) intending, *inter alia*, to increase the quality and efficiency of the Medicaid prescription program and improve the quality of pharmaceutical care that Medicaid patients receive.¹⁷⁹ Another purpose of OBRA-90 is to help pharmacists and physicians reduce drug interactions and adverse reactions to prescription drugs.¹⁸⁰ One of the OBRA-90 requirements for a

(b) For purposes of liability . . . a prescription drug or medical device is defective if at the time of sale . . . the drug

. . . .

(3) is not reasonably safe due to inadequate instructions or warnings . . .

(d) A prescription drug . . . is not reasonably safe because of inadequate instructions or warnings if reasonable instructions or warnings regarding the foreseeable harm are not provided to: . . .

prescribing and other health care professionals who are in a position to reduce the risks of harm in accordance with the instructions or warnings

(e) A retail seller or other distributor of a prescription drug or medical device is subject to liability for harm caused by the drug or device if: . . . at or before the time of sale or other distribution of the drug or medical device the retail seller or other distributor fails to exercise reasonable care and such failure causes harm to persons.

Id.

ABC Pharmaceuticals manufactures and distributes a prescription drug to reduce blood pressure. ABC supplies pharmacies with pamphlets explaining the risks and warning patients against drinking alcohol while taking the drug. ABC asks the pharmacies to give the pamphlets to patients when dispensing the drug. The P Pharmacy received the pamphlets but negligently failed to give them to patients. P is subject to liability to those patients suffering injury for whom the pamphlets would have been effective in avoiding risks of usage.

Id. § 6 cmt. h, illus. 4.

178. See The Omnibus Budget Reconciliation Act of 1990 (OBRA-90), 42 U.S.C. § 1396r-8 (1990), for an example of a federal statute addressing pharmacists, and The Pharmacy Practice Act for an Illinois statute discussing pharmacists' duties in Illinois. See also ILLINOIS PHARMACISTS ASSOCIATION, ILLINOIS PHARMACY LAW MANUAL (3d ed. 1995) (presenting a comprehensive collection of Illinois laws that are applicable to pharmacists).

179. John C. West & David E. Smith, *A Prescription For Liability: The Pharmacy Mandate of the Omnibus Budget Reconciliation Act of 1990 and Its Impact Upon Pharmacists' Common Law Duties*, 2 J. PHARMACY & L. 127, 128-30 (1994) (discussing the dual purpose of OBRA-90). See *The Pharmacist's Duty Under OBRA-90 Standards*, *supra* note 136, at 475 (discussing OBRA-90 and pharmaceutical care).

180. OBRA-90 requires states to implement drug use review programs

state to receive federal Medicaid funds is that each state must implement drug use review (DUR) programs.¹⁸¹ The DUR requires that a pharmacist must offer to discuss with each Medicaid patient matters that the pharmacist believes are significant, including the prescription drug's side effects, possible interactions, and special precautions for the administration to and use by a patient.¹⁸² Congress intended pharmacists to take an active role in a patient's drug use and utilize their professional knowledge and judgment to help ensure that a patient's drug use is safe and effective.¹⁸³

The Illinois legislature passed the Pharmacy Practice Act (PPA) in 1987.¹⁸⁴ The PPA declares the practice of pharmacy in Illinois a professional practice.¹⁸⁵ The PPA also declares that the practice of pharmacy is a practice affecting the health, safety, and welfare of the citizens of Illinois.¹⁸⁶ The PPA further states that the practice of pharmacy should be controlled and regulated according to the "public interest."¹⁸⁷ The PPA defines the practice of pharmacy as the care given to patients which may include

designed to reduce adverse reactions to drugs and drug interactions. 42 U.S.C. § 1396r-8(g)(1)(A). See also *infra* notes 181-82 and accompanying text for a discussion of the drug use review programs.

181. 42 U.S.C. § 1396r-8(g)(1)(A). "In order to meet the requirement of section 1396b(i)(10)(B) . . . a State shall provide, by no later than January 1, 1993, for a drug use review program . . . for covered outpatient drugs in order to assure that prescriptions (i) are appropriate, (ii) are medically necessary, and (iii) are not likely to result in adverse medical results." *Id.* See *The Pharmacist's Duty Under OBRA-90 Standards*, *supra* note 136, at 487-92 (discussing the OBRA-90 drug use review system and its impact on pharmacists' duties).

182. 42 U.S.C. § 1396r-8(g)(2)(A)(I). The statute further states:

The pharmacist must offer to discuss . . . matters which in the exercise of the pharmacist's professional judgment . . . the pharmacist deems significant including the following . . . (cc) Special directions and precautions for preparation, administration and use by the patient . . . (dd) Common severe side or adverse effects or interactions and therapeutic contraindications that may be encountered, including their avoidance, and the action required if they occur.

Id. See also West & Smith, *supra* note 179, at 129-32 (1994) for a discussion of OBRA-90's DUR's.

183. See *supra* note 182 and accompanying text for a discussion of the pharmacist's active role in patient's drug use. See also Gary G. Cacciatore, *Computers, OBRA 90 and the Pharmacist's Duty to Warn*, 5 J. PHARMACY & L. 103, 110-13 (1996) (discussing the impact of OBRA-90 on pharmacists); Richard Hight Gastineau, *Drug Therapy Counseling: Whose Duty to Warn?*, 2 J. PHARMACY & L. 293, 311-22 (1994) (discussing the impact of OBRA-90 on pharmacist's responsibilities).

184. The Pharmacy Practice Act of 1987, 225 ILL. COMP. STAT. 85/1 (West 1996).

185. *Id.*

186. *Id.*

187. *Id.*

providing information on drug interactions and side effects.¹⁸⁸ The PPA further maintains that it should be "liberally construed" to carry out its objectives and purposes.¹⁸⁹ Not only does the PPA suggest that pharmacists should warn, but it also states that its provisions should be liberally construed to help promote the health, safety, and welfare of the citizens of Illinois.¹⁹⁰

The no duty to warn rule is inconsistent with the PPA's goals of promoting public health, safety, and welfare because the rule precludes pharmacists from ever having a duty that would promote those goals.¹⁹¹ The no duty to warn rule is not only inconsistent with the PPA's definition of the practice of pharmacy, it is by no means a liberal construction of that definition.¹⁹²

188. *Id.* § 3(d). "Practice of pharmacy' means the provision of pharmaceutical care to patients which may include, but is not limited to, (1) patient counseling . . . (3) providing information on the therapeutic values, reactions, drug interactions, side effects, uses, selection of medications and medical devices, and outcome of drug therapy." *Id.* Patient counseling is defined as the pharmacist or the pharmacist's designee offering to counsel. *Id.* § 3(r). The following includes the National Association of Boards of Pharmacy's 1996-1997 list of states that require counseling for new prescriptions: Ala.; Alaska; Ariz.; Ark.; Cal. when a patient is present in the pharmacy; Conn.; Del.; Fla. - only an offer to counsel is required; Ga.; Haw. - OBRA-90 requirements; Idaho - when applicable/appropriate; Ill. - only an offer to counsel is required; Ind. - only an offer to counsel is required; Iowa; Kan.; Ky.; La. - unless deemed inappropriate; Me.; Md.; Mass.; Minn.; Miss. - when applicable/appropriate; Mo.; Mont.; Neb.; Nev.; N.H.; N.J.; N.M.; N.Y.; N.C. - must be made by pharmacist or pharmacist intern/extern; N.D.; Ohio; Okla. - pharmacist may use professional judgment; Or.; Pa.; R.I.; S.C.; S.D.; Tenn.; Tex.; Utah; Vt.; Va.; Wash.; W. Va. - only an offer to counsel is required; Wis.; and Wyo. NAT'L ASSOC. OF BOARDS OF PHARMACY, SURVEY OF PHARMACY LAW 1996-1997 62-63 (1996). Colorado is the only state that does not require patient counseling for new prescriptions. *Id.* The following includes the National Association of Boards of Pharmacy's 1996-1997 list of the states that require patient counseling for prescriptions for non-Medicare patients: Ala.; Alaska; Ariz.; Ark.; Cal. - when a patient is present in the pharmacy; Del.; Fla. - only an offer to counsel is required; Ga.; Idaho; Ill. - only an offer to counsel is required; Ind. - only an offer to counsel is required; Iowa; Kan.; Ky.; La.; Me.; Mass. - only an offer to counsel is required; Miss.; Mo.; Mont.; Neb.; Nev.; N.H.; N.M.; N.Y.; N.C.; N.D.; Ohio; Okla. - yes, when applicable/appropriate; Or.; Pa.; R.I. S.D.; Tenn.; Tex.; Utah; Vt.; Va.; Wash.; W. Va. - only an offer to counsel is required; Wis.; and Wyo. *Id.* The states that do not require patient counseling for prescriptions for non-Medicare patients are: Colo.; Conn.; Haw.; Md.; Minn.; S.C.; and Wyo. *Id.*

189. The Pharmacy Practice Act § 1.

190. *Id.*

191. *Id.* The public health, safety, and welfare are not promoted by a rule that does not impose upon a professional, who knows more about prescription drugs than any other professional, a duty to warn of a drug's dangerousness. *Id.* Such a rule actually jeopardizes the public health, safety, and welfare. *Id.*

192. *Id.* § 3(d). The PPA's definition of the practice of pharmacy states that pharmaceutical care "may include, but is not limited to" providing information on drug interactions and side effects. *Id.* Reading the definition more

Additionally, a rule that precludes a highly educated, state licensed, professional pharmacist from ever having a duty to warn a customer of the possible adverse effects of a drug violates the "public interest."¹⁹³

C. Pharmacy Profession

The American Pharmaceutical Association (APhA) has stated that "[t]he mission of pharmacy is to serve society as the profession responsible for the appropriate use of medications, devices, and services to achieve optimal therapeutic outcomes."¹⁹⁴ The APhA has further stated that the phrase "optimal therapeutic outcomes" declares that the profession of pharmacy's ultimate goal is to promote public health, and the practice of pharmacy "accepts the attendant liabilities associated with medication use."¹⁹⁵ Both the Illinois Pharmacists Association and the National Association of Boards of Pharmacy express similar views on the roles of pharmacists.¹⁹⁶

In a memorandum *amicus curiae* to the Illinois Supreme Court, the Illinois Pharmacists Association (IPhA) suggested that the no duty to warn rule as applied to pharmacists was inconsistent with the practice of pharmacy.¹⁹⁷ The IPhA requested that the Court define a pharmacist's duty by recognizing pharmacists as professionals, and establishing the duties of a pharmacist consistent with the duties of a professional.¹⁹⁸ The IPhA also asserted that:

imposing upon the pharmacy profession the same duty as that owed by other professionals practicing their professions, this Court reconciles common law with state and federal legislation, encourages pharmacists to disseminate valuable information, increases the likelihood of patient compliance with drug therapy,

liberally would not promote a pharmacist's no duty to warn. *Id.*

193. *See id.* §§ 6-8 (discussing the licensing of Illinois pharmacists). *See also id.* § 1 ("It is further declared to be a matter of public interest and concern that the practice of pharmacy . . . merit and receive the confidence of the public."). It should be noted that the Illinois Pharmacists Association had substantial impact on The Pharmacy Practice Act. *See* H.R. 1432, 85th Gen. Assembly, 52nd Legis. Day, 176-77 (Ill. 1987) (discussing the adoption of the Bill pending an amendment reflecting the agreements made with the IPhA).

194. Supplemental Memorandum *Amicus Curiae* of the Illinois Pharmacists Association app. 2, *Frye v. Medicare-Glaser Corp.*, 605 N.E.2d 557 (Ill. 1992) (No. 72908).

195. *Id.*

196. *See* the discussion of *Frye*, *supra* notes 59-72 (discussing the IPhA and the NABP's arguments to the Illinois Supreme Court).

197. Supplemental Memorandum *Amicus Curiae* of the Illinois Pharmacists Association at 9, *Frye v. Medicare-Glaser Corp.*, 605 N.E.2d 557 (Ill. 1992) (No. 72908).

198. *Id.*

and reduces health care costs.¹⁹⁹

Not only is the IPhA advocating the elimination of the no duty to warn rule, it points out how inharmonious the rule is with the profession of pharmacy itself.

The National Association of Boards of Pharmacy (NABP) has also advocated the elimination of the no duty to warn rule. In an *amicus* brief to the Illinois Supreme Court, the NABP requested the Court to conclude that pharmacists should have a duty to warn.²⁰⁰ The NABP stated that to conclude otherwise would ignore the intent and language of the PPA thereby placing the public health and welfare at risk.²⁰¹ The NABP asserted that the PPA's legislative declaration, definition of "practice of pharmacy," and the definition of "dispense," by their language alone, impose a duty to warn on pharmacists.²⁰² Furthermore, the NABP asserted that excusing pharmacists from a duty to warn causes pharmacists to ignore their education, professional training, and the standards of practice established by the pharmacy profession.²⁰³ The NABP's position on the elimination of the no duty to warn rule is compatible with the IPhA.²⁰⁴ Not only does the NABP advocate the elimination of the no duty to warn rule, it argues that the rule is inconsistent with the language of the PPA and the standards of practice established by the pharmacy profession.²⁰⁵

Consumers spend twelve to thirteen billion dollars a year on prescription medication.²⁰⁶ Astonishingly, researchers estimate

199. *Id.* at 11-12.

200. Brief *Amicus Curiae* of the National Association of Boards of Pharmacy at 34, *Frye v. Medicare-Glaser Corp.*, 605 N.E.2d 557 (Ill. 1992) (No. 72908).

201. *Id.* at 16.

202. *Id.* at 6-9.

203. *Id.* at 16.

204. Supplemental Memorandum *Amicus Curiae* of the Illinois Pharmacists Association at 9-12, *Frye v. Medicare-Glaser Corp.*, 605 N.E.2d 557 (Ill. 1992) (No. 72908).

205. Brief *Amicus Curiae* of the National Association of Boards of Pharmacy at 16, *Frye v. Medicare-Glaser Corp.*, 605 N.E.2d 557 (Ill. 1992) (No. 72908).

206. THE DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., AN INTRODUCTION TO FDA DRUG REGULATION A MANUAL FOR PHARMACISTS 41 (1995). See also The National Consumers League, *Press Release* (visited Nov. 21, 1998) <<http://www.nclnet.org/foodanddrug.html>> (discussing reliance on prescription drugs).

Americans rely heavily on prescription medicines to maintain good health making the issue of interactions between prescription drugs and certain foods of increasing importance . . . [t]he National Consumers League is publishing a brochure to alert consumers to possible drug interactions. 'Approximately 85 million American adults take one or more prescription medicines,' said Linda Golodner, president of the National Consumers League. 'Yet, despite this widespread use, many consumers do not know about potential risks, side effects and possible' drug interactions'. . . [t]he effects of drug interactions can range from

that up to one-half of patients are consuming their medication incorrectly.²⁰⁷ Amid concern over the misuse of prescription medication, the Food and Drug Administration (FDA) and several other organizations founded the National Council on Patient Information and Education (NCPIE).²⁰⁸ NCPIE constructed five questions that patients should ask their physicians *and* their pharmacists.²⁰⁹ Among these questions are: (1) will there be any side effects?, and (2) should I avoid any other drugs?²¹⁰ Additionally, the FDA states that pharmacists can provide comprehensive information about drug interactions, side effects, and precautions; and pharmacists should make themselves available to provide basic information regarding prescriptions.²¹¹

The no duty to warn rule also disrupts the education of pharmacists. The disparity between the judicial system rulings and the pharmacy profession's views on a pharmacist's duty to warn creates difficulty for pharmacy professors torn between teaching the profession's view or the court's view of pharmacist duties.²¹² Pharmacy students study the "imperatives of warning patients of risks of irrational drug use and of possible adverse reactions" for several years only to be confused by judicial decisions that hold pharmacists have no duty to warn patients.²¹³

mild to severe and may include weakness, fatigue, muscle aches and rash. In addition, the effects of food and drug interactions can often be confused with common medical problems such as arthritis pain or a cold or flu.

Id.

207. THE DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., *supra* note 206, at 41.

208. *Id.*

209. *Id.* "The five questions are: (1) What is the name of the drug and what is it supposed to do? (2) When do I take it and how much? (3) How should I take it and for how long? (4) Will there be any side effects? (5) Should I avoid any foods, activities, or other drugs?" *Id.*

210. *Id.*

211. *Id.*

212. Paul G. Grussing, *A Comparison of Empirical Studies of Pharmacy Practice with Judicial Descriptions*, 44 DRAKE L. REV. 483, 484 (1996).

213. *Id.* See AMERICAN ASSOCIATION OF COLLEGES OF PHARMACY, OATH OF A PHARMACIST (declaring a pharmacist's devotion to the profession of pharmacy). The following is the oath that pharmacists traditionally take upon graduation:

At this time, I vow to devote my professional life to the service of all humankind through the profession of pharmacy. I will consider the welfare of humanity and relief of human suffering my primary concerns. I will apply my knowledge, experience, and skills to the best of my ability to assure optimal drug therapy outcomes for the patients I serve. I will keep abreast of developments and maintain professional competency in my profession of pharmacy. I will maintain the highest principles of moral, ethical, and legal conduct. I will embrace and advocate change in the profession of pharmacy that improves patient

Despite the no duty to warn rule, pharmacists continue to expand their educational training and superior pharmaceutical knowledge, recognizing that the increasing number of prescriptions dispensed increase the possibility of prescription drug injuries.²¹⁴

The above analysis illustrates that the pharmacist's no duty to warn rule is inconsistent with: (1) Illinois common law principles of duty and standard of care,²¹⁵ (2) federal and state statutory provisions,²¹⁶ and (3) the pharmacy profession.²¹⁷

III. PROPOSING THE ELIMINATION OF THE PHARMACIST'S NO DUTY TO WARN RULE IN ILLINOIS

This Part proposes the elimination of the pharmacist's no

care. I take these vows voluntarily with the full realization of the responsibility with which I am entrusted by the public.

Id.

214. Michael J. Holleran R.Ph., *The Pharmaceutical Access and Prudent Purchasing Act of 1990: Federal Law Shifts the Duty to Warn from the Physician to the Pharmacist*, 26 AKRON L. REV. 77, 85 (1992). See *The Pharmacist's Duty To Warn*, *supra* note 106, at 503 (stating that "[p]harmacists' knowledge of drugs surpasses that of any other health professional."). Pharmacists continue their education through various professional services that episodically provide them with updates on recent developments in the pharmacy profession. One such service is PHARMACIST'S LETTER (LETTER). In July 1998, LETTER informed pharmacists that Posicor was being removed from the market due to drug interactions. *Drug Interactions*, PHARMACIST'S LETTER (Therapeutic Research Center, Stockton, Cal.) July 1998, at 37. The July 1998 LETTER also warned pharmacists against a combination of Viagra and nitrates. *Id.* A September 1997 LETTER instructed pharmacists to be aware of drug interactions and the order in which multiple drugs are given. *Drug Interaction*, PHARMACIST'S LETTER (Therapeutic Research Center, Stockton, Cal.) Sept. 1997, at 53-54. In an August 1997 LETTER, pharmacists were warned to watch for drug interactions with Posicor, a new calcium blocker for hypertension. *Cardiology*, PHARMACIST'S LETTER (Therapeutic Research Center, Stockton, Cal.) Aug. 1997, at 45. The LETTER instructed pharmacists to "[m]ake sure patients DON'T take posicor with Seldane . . . Hismanal . . . or Propulsid . . . because of the risk of arrhythmias." *Id.* The Letter also warned pharmacists that "[s]ome other drugs can be taken with Posicor, but they might need to be given in LOWER doses." *Id.* See also *infra* note 237 and accompanying text for an example of the differences in pharmacy related educational requirements between physicians and pharmacists.

215. See Part II (A)1 and (A)2 of this Comment for a discussion of the no duty to warn rule and Illinois common law principles.

216. See Part II (B) of this Comment for a discussion of the inconsistencies between the no duty to warn rule and state and federal statutory provisions.

217. See Part II (C) of this Comment for a discussion of the profession of pharmacy's reaction to the no duty to warn rule. See also *The Pharmacist's Duty To Warn*, *supra* note 106, at 54 (stating that reliance on professional standards as the predecessor to legal standards is appealing because it is hard to argue that anyone knows pharmacists as well as they know themselves).

duty to warn rule in Illinois.²¹⁸ Illinois should eliminate the pharmacist's no duty to warn rule because, as this Comment has illustrated, the no duty to warn rule is inconsistent with Illinois common law,²¹⁹ state and federal legislation,²²⁰ and the profession of pharmacy.²²¹ In addition to the aforementioned deficiencies, another justification for eliminating the no duty to warn rule is that the rule is completely unnecessary. Ironically, the pharmacist no duty to warn rule should be eliminated because Illinois pharmacists do not have a duty to warn. Illinois pharmacists have a duty to conform to the professional pharmacist standard of care.²²² Therefore, a failure to warn is only relevant if the professional pharmacist standard of care requires a warning. Then, the failure to warn is only relevant because the professional pharmacist standard of care has been breached.²²³ To determine if a duty has been breached, Illinois courts should only look to whether the pharmacist's conduct has breached the duty to conform to the professional pharmacist standard of care.²²⁴

However, eliminating the no duty to warn rule would not be tantamount to imposing a duty to warn in all circumstances. If courts eliminate the no duty to warn rule, a pharmacist would only be obligated to warn in situations where the professional pharmacist standard of care would be breached by not giving a warning.

A. Judicial Solution

The next time a court examines the no duty to warn rule, it should hold that the rule is contrary to Illinois common law.²²⁵

218. See *supra* notes 28-105 and accompanying text for a discussion of the no duty to warn rule as applied in Illinois.

219. See Part II (A)1 and (A)2 of this Comment for a discussion of the no duty to warn rule and Illinois case law that conflicts with the application of the no duty to warn rule.

220. See Part II (B) of this Comment for a discussion of the no duty to warn rule and state and federal legislation that conflicts with the no duty to warn rule.

221. See Part II (C) of this Comment for a discussion of the conflicts between the profession of pharmacy and the no duty to warn rule.

222. See *Advincula v. United Blood Serv.*, 678 N.E.2d 1009, 1020 (Ill. 1996) (holding that professionals are to be held to a professional standard of care); *Widlowski v. Durkee Foods*, 562 N.E.2d 967, 968 (Ill. 1990) (setting forth the necessary elements of a negligence action in Illinois).

223. See *Advincula*, 678 N.E.2d at 1020 (finding that professionals must adhere to a higher standard of care); *Widlowski*, 562 N.E.2d at 968 (setting forth the necessary elements of a negligence action in Illinois).

224. See *Advincula*, 678 N.E.2d at 1020 (holding that professionals are to be held to a professional standard of care); *Widlowski*, 562 N.E.2d at 968 (discussing the elements necessary to make out a negligence action in Illinois).

225. See *supra* notes 147-77 and accompanying text for a discussion of how

First, the court should state that it is erroneous to conclude that a defendant pharmacist has no duty to a plaintiff without first examining the relationship between the pharmacist and the plaintiff.²²⁶ Second, the court should state that pharmacists have a duty to conform to the professional pharmacist standard of care, and that duty is circumvented by the no duty to warn rule.

The court should hold, just as the Illinois Supreme Court has unambiguously held, that in order to determine whether a duty exists, courts should examine the relationship between the parties to determine whether the risk of harm to the plaintiff was likely or reasonably foreseeable.²²⁷ Absent such a consideration, it is improper for a court to determine that no duty exists.²²⁸ The court should hold that since the no duty to warn rule precludes any inquiry into the relationship between the plaintiff and the pharmacist, the rule is contrary to Illinois common law.²²⁹ Additionally, the court should note that the no duty to warn rule abrogates the Illinois pharmacist professional standard of care.²³⁰ Once a court examines the no duty to warn rule with respect to both Illinois common law negligence claims and the general tort

the no duty to warn rule is contrary to Illinois common law.

226. See *supra* notes 154-167 and accompanying text for a discussion of the failure of the no duty to warn rule to inquire into the relationship between the plaintiff and the defendant in order to determine whether a duty exists.

227. *Widlowski*, 562 N.E.2d at 968. See *Proctor v. Upjohn*, 682 N.E.2d 1203, 1211 (Ill. App. Ct. 1997) (stating “[a] duty to warn exists only when there is ‘unequal knowledge and the defendant, possessed of such knowledge, *knows or should know that harm might occur* if no warning is given.’”) (emphasis added).

228. *Widlowski*, 562 N.E.2d at 968. See also *Advincula*, 678 N.E.2d at 1021 (“It remains the case, however, that while professional conduct in Illinois will be measured against a professional standard, all persons, including professionals, both medical and nonmedical [sic], are also obligated, generally to exercise due care or ordinary care, commensurate with the apparent risk.”); *Rhodes v. Illinois Cent. Gulf R.R.*, 665 N.E.2d 1260, 1267 (Ill. 1996) (“[I]n resolving whether a duty exists, a court *must* determine whether there is a relationship between the parties requiring that a legal obligation be imposed upon one for the benefit of the other.”) (emphasis added); *Jackson v. Michael Reese Hosp. & Med. Ctr.*, 689 N.E.2d 205, 212 (Ill. App. Ct. 1997) (“To determine if a defendant owes a duty to a plaintiff, we *must* decide whether their relationship was such that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff.”) (emphasis added).

229. See *supra* notes 225-28 and accompanying text for a discussion of Illinois common law requiring a court to inquire into whether a defendant stands in a relationship to a plaintiff that requires the imposition of a duty.

230. See KEETON ET AL., *supra* note 22, § 56, at 356 (discussing the standard of care in cases of negligence). See also *The Pharmacist's Duty Under OBRA-90 Standards*, *supra* note 136, at 495-96 (discussing the application of Prosser's hornbook on torts in an emerging trend in pharmacy litigation away from the no duty to warn). For further discussion, see also Part II (A)1 and (A)2 of this Comment.

law concepts of duty and standard of care, the court should have ample authority to eliminate the no duty to warn rule.²³¹

B. Legislative Solution

Additionally, the Illinois legislature could eliminate the no duty to warn rule. The legislature could amend the PPA to state that pharmacists have a duty to warn a patient or the physician, if in their professional judgments, pharmacists believe a possible problem exists with a patient's drug therapy.²³² Since the IPhA had substantial input into the PPA, the Illinois legislature should not have difficulty passing an amendment to the PPA that reflects the IPhA's position against the no duty to warn rule.²³³

One of the concerns with eliminating the no duty to warn rule is a fear of increased drug costs. Generally, this fear is based on the idea that exposing pharmacists to liability (and litigation) would cause higher costs to insurers and that cost would be passed on to consumers resulting in higher drug costs. However, it is unlikely that the elimination of the no duty to warn rule would cause an increase in drug costs. Arguably, the elimination of the no duty to warn rule could decrease the cost of prescription drugs by way of fewer injuries, less litigation, and lower insurance/health care costs.²³⁴ For example, elimination of the no duty to warn rule will encourage pharmacist activism and thereby:

(1) help prevent a patient from consuming a drug, or drug combination that may cause injury; increase a patient's knowledge of the drugs they are receiving; and accordingly decrease the number of injuries attributed to prescription drugs;

(2) lower patient injuries which lead to lower health care and insurance costs incurred by such injuries, and lessen litigation based on prescription drug injuries; and

231. See *supra* notes 147-77 and accompanying text for a discussion of common law negligence claim and the general tort law concepts of duty and standard of care as applicable to the no duty to warn rule in Illinois.

232. The PPA currently defines the "practice of pharmacy" as the care to patients which may include providing information on drug interactions and side effects. The Pharmacy Practice Act of 1987, 225 ILL. COMP. STAT. 85/3(d) (West 1996). The PPA could be amended to include specific language that states "the practice of pharmacy shall include providing patients with information on drug interactions and side effects when, in the pharmacist's professional judgment, such warnings are deemed necessary." *Id.* Additionally, the legislative declaration of the PPA could be amended to state that "[p]harmacists should be held to a professional standard of care that shall promote the public health, safety, and welfare," or similar language to that effect. *Id.*

233. Supplemental Memorandum *Amicus Curiae* of the Illinois Pharmacists Association at 9-12, *Frye v. Medicare-Glaser Corp.*, 605 N.E.2d 557 (Ill. 1992) (No. 72908).

234. *Id.* at 11-12.

(3) lower health care and insurance costs as well as less litigation which will save insurers, health care providers, and the general public money.

Pharmacists do much more than simply fill prescriptions.²³⁵ Along with its other imperfections, the no duty to warn rule prevents pharmacists from achieving the professional recognition they deserve.²³⁶ Pharmacists are highly educated health care professionals with extensive knowledge of pharmaceuticals.²³⁷ Pharmacists are most often in the best position to educate patients regarding a drug's potential dangers.²³⁸ The positive impact that a

235. See The Pharmacy Practice Act § 3(d) (defining the practice of pharmacy as including: (1) patient counseling; (2) monitoring drug use and prospective drug utilization review; (3) providing information on drug interactions, side effects, drug use, and selection of medications; (4) participation in drug selection and monitoring usage; and (5) compounding and dispensing drugs and medical devices). See also *supra* notes 82-83 and accompanying text (discussing Justice Breslin's special concurrence in *Suarez* where Justice Breslin states that pharmacists do more than only fill prescriptions). Additionally, pharmacists earn a respectable salary for the difficult work they are required to perform; the national median salary of a pharmacist in 1996 was \$55,300. Kelly Smith, *Invest in Yourself – Salary Roundup*, MONEY, Sept. 1998, at 133. By way of comparison, the 1997-1998 national median salary of an attorney in private practice was \$76,400. *Id.*

236. Roseann B. Termini, *The Pharmacist Duty to Warn Revisited: The Changing Role of Pharmacy in Health Care and the Resultant Impact on the Obligation of A Pharmacist to Warn*, 24 OHIO N.U. L. REV. 551, 556 (1998).

Today the role of the pharmacist has indeed changed from that of counting and pouring to one of a professional with an active role. The advent of the active role encompasses greater responsibilities. Today public policy dictates that, especially for addictive type drugs, the professional pharmacist should assume the duty to refuse to fill a valid prescription. Consequently, imposing the higher standard not only in terms of a duty to warn but also in terms of the refusal to fill a valid prescription could ultimately lessen litigation because the customer is now informed. Furthermore, the pharmacist will finally achieve the professional recognition deserved.

Id. at 565-66.

237. See *The Pharmacist's Duty Under OBRA-90 Standards*, *supra* note 136, at 503 (stating that a "[p]harmacist's knowledge of drugs surpasses that of any other health professional."). For example, the Midwestern University Chicago College of Pharmacy program requires, *inter alia*, nine quarter hours of pharmaceuticals, seventeen quarter hours of pharmacotherapeutics, ten quarter hours of pharmacology, three quarter hours of clinical pharmacokinetics, three quarter hours of pharmacy law, and three quarter hours of quality assurance and effective pharmacy practice. Midwestern University, 1998/1999 Catalog CCP 10 (1998). By comparison, the Midwestern University Chicago College of Osteopathic Medicine requires only twenty weeks of pharmacology instruction. *Id.* at CCOM 13.

238. See BRUSHWOOD, *supra* note 130, § 8.3, at 244 (stating that pharmacists are proximate to patients and may know each patient's characteristics). See also *The Pharmacist's Duty Under OBRA-90 Standards*, *supra* note 136, at 503 (stating that pharmacists are gatekeepers that can help

pharmacist has in a patient's drug therapy can be substantial.²³⁹ A recent study found that when a pharmacist accompanied physicians on medical rounds in an intensive care unit, the rate of preventable adverse drug events decreased by sixty-six percent.²⁴⁰ Additionally, physicians accepted ninety-nine percent of all recommendations made by pharmacists.²⁴¹ This positive impact of pharmacists is not surprising considering the superior pharmacological knowledge that pharmacists possess.²⁴²

While the no duty to warn rule does not prevent pharmacists from voluntarily warning a customer, it does prevent pharmacists from a legal obligation to warn in *any* situation. The no duty to warn rule should cease to exist not only because the rule is inconsistent with Illinois common law, but because eliminating the rule can save lives.²⁴³

CONCLUSION

The pharmacist's no duty to warn rule is both flawed and unnecessary. The rule upsets Illinois common law, ignores legislative intent, and undermines the profession of pharmacy. Illinois requires a standard of care for pharmacists. At times, that standard of care may require a pharmacist to provide a warning. Therefore, it is wrong for Illinois to have a blanket no duty to warn rule that prevents pharmacists from being held to that standard. Illinois courts should be allowed to inquire whether a pharmacist has breached a duty to conform to the professional pharmacist standard of care by failing to warn.

detect and prevent potential problems with a patient's drug therapy). Patients may also be in a better position to discuss their illness and treatment with their pharmacists because, on average, a patient has a mere 23.1 seconds to voice their concerns before being redirected by their physician. M. Kim Marvel et al., *Soliciting the Patient's Agenda - Have We Improved?*, 281 JAMA 283, 286 (1999).

239. Charles Marwick, *Drug Safety Takes Cooperation*, 282 JAMA 267, 267-70 (1999).

240. *Id.*

241. *Id.*

242. See *supra* note 237 for a discussion of the pharmacological education of pharmacists.

243. It is estimated that prescription drugs are involved in as many as 100,000 deaths per year. MOORE, *PRESCRIPTION FOR DISASTER* 17 (1998). It has also been estimated that prescription drugs severely injure one million people per year. *Id.* at 48. An individual has a twenty-six percent lifetime chance of being severely injured by a prescription medication, compared to a two percent chance of being severely injured in an automobile accident and a smoker's nine percent chance of dying from lung cancer. *Id.* at 49. Consequently, if a pharmacist warns a patient of a possible danger of a prescription drug, then the patient has a better opportunity to avoid that danger and prevent serious injury or death as a result of the prescription drug. *Id.*

The no duty to warn rule is illogical, and while the rule may have seemed prudent at one time, it should cease to exist. As Oliver Wendell Holmes said: "precedents survive in the law long after . . . the reason for them has been forgotten The result of following them must often be failure and confusion from the merely logical point of view."²⁴⁴

244. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 35 (1881).