IN THE SUPREME COURT OF FLORIDA

YOUR DRUGGIST, INC.

Petitioner,

v. **CASE NO. SC05-1191**

ROBERT POWERS, etc., et al.,

Respondents.

_____/

B.A.L. PHARMACY, etc.,

Petitioner,

v. **CASE NO. SC05-1192**

ROBERT POWERS, etc., et al.,

Respondents.

_____/

***AMICUS CURIAE* BRIEF OF THE FLORIDA RETAIL FEDERATION AND THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES IN SUPPORT OF PETITIONERS**

KATHERINE E. GIDDINGS
Florida Bar No. 0949396
JOSEPH W. HATCHETT
Florida Bar No. 34486
MARTIN R. DIX
Florida Bar No. 499080
JAMES E. JOANOS
Florida Bar No. 039636
AKERMAN SENTERFITT
106 East College Ave., Suite 1200
Tallahassee, Florida 32301
Telephone: (850) 224-9634
Telecopier: (850) 222-0103
katherine.giddings@akerman.com
Attorneys for the *Amici* Associations

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STATEMENT OF INTEREST

Amici Curiae, the Florida Retail Federation (FRF) and the National Association of Chain Drug Stores (NACDS) file this *Amicus Curiae* Brief in support of Petitioners, Your Druggist, Inc., and B.A.L. Pharmacy.

FRF is a statewide trade association whose 10,500 members include persons and entities in the business of retail sales. FRF represents its members' interests on pharmacy and other issues before the Florida Legislature, various regulatory agencies, and the courts. NACDS has nearly 200 retail chain member companies nationwide, and, 25 of those members collectively operate over 2,700 retail chain pharmacies in Florida and employ nearly 7,300 Florida pharmacists. A majority of these Florida pharmacies are also members of FRF.

As explained herein, the Fourth District's decision in *Powers v. Thobhani,* 903 So. 2d 275 (Fla. 4th DCA 2005), is unwarranted and will have extremely harmful ramifications on the *Amici's* members, the thousands of pharmacists in Florida, and Florida's citizens. In effect, the lower court, through a new judicial pronouncement, has recast the role and responsibilities of the entire pharmacy profession in Florida.

SUMMARY OF THE ARGUMENT

In *Powers*, the Fourth District held for the first time in Florida that pharmacies[1] can be held liable in negligence for failing to warn patients of potential risks in filling prescriptions closely in time and of potential adverse reactions of drug combinations, even when those prescriptions are lawfully prescribed and otherwise valid on their face. The Fourth District's decision is contrary to decisions of this Court and two other district courts of appeal. It also is contrary to the overwhelming majority of other jurisdictions that have considered the issue, and it is based on a misreading of a pharmacist's responsibilities under the law. Essentially, the Fourth District has created new roles and responsibilities for the entire pharmacy profession in Florida, and has done so in a manner that is not only harmful – but also sets a standard that is impossible to attain.

Because of physicians' medical judgment and knowledge of their patients' medical history, the affirmative duty to warn properly belongs to physicians, not pharmacists. To hold otherwise would require a pharmacist to practice medicine,

[1] In the *Powers* decision, the Fourth District held that the complaint in this case "states a cause of action for negligence on the part of the pharmacies." *Powers*, 903 So. 2d at 276 (emphasis added). Throughout the decision, however, the court sometimes states that it is the pharmacy's duty to warn and other times states that it is the pharmacist's duty. *See, e.g., id.* at 279 (in analyzing duties under statute and rules, court uses the terms "pharmacy's duty to warn" and "pharmacist's duty to warn" interchangeably). The decision contains no discussion regarding why a pharmacy has a duty to warn, even though the cited statute and rules clearly govern only pharmacists, not pharmacies.

duplicate warnings, second-guess prescriptions, and otherwise interfere with the physician-patient relationship – and to do so without a physician's training and without examining the patient, reviewing the patient's complete medical history, or even knowing the condition for which the medication was prescribed.

Imposing an affirmative duty to warn on pharmacists could cause consumers to object to the use of a drug and ignore their physician's instructions, thereby jeopardizing the consumer's life or health. Pharmacists seeking to avoid liability will begin counseling all consumers (even those who have been taking the same medication for years), which will greatly delay the filling of prescriptions; prevent the sick and elderly from having relatives and friends pick up their medications; prevent convenient delivery of prescriptions by mail; and unnecessarily impact the cost of dispensing medications.

By placing the duty to warn on physicians rather than pharmacists, courts have left no ambiguity as to the person with liability if a necessary warning is not issued. This Court should not obscure the bright line of responsibility by requiring pharmacists to interpose themselves between physicians and patients when pharmacists are presented with a lawful prescription that is valid on its face.

ARGUMENT

IMPOSING AN AFFIRMATIVE DUTY TO WARN ON PHARMACISTS MISCONSTRUES FLORIDA LAW AND WILL HAVE EXTREME, NEGATIVE EFFECTS.

Standard of Review.

Amici agree with Petitioners that, because this case involves a pure issue of law, the standard of review is *de novo.*

Argument.

In the decision under review, the Fourth District held for the first time in Florida that pharmacies can be held liable in negligence for failing to warn patients of potential risks in filling lawful and valid prescriptions closely in time and of potential adverse reactions of drug combinations. The Fourth District's decision is contrary to decisions of this Court and two other district courts of appeal, and it is contrary to the overwhelming majority of other jurisdictions that have considered the issue. The decision also is based on a fundamental misreading of a pharmacist's responsibilities under the law. In effect, the Fourth District, through a new judicial pronouncement, has significantly altered the role and responsibilities of the entire pharmacy profession in Florida.

Under this Court's long-established precedent, to preserve the rights of consumers, pharmacists have no duty to warn. Instead, under their duty of care, pharmacists must warrant that: (1) they will compound the drug prescribed; (2)

they have used due and proper care in filling the prescription; (3) they have used proper methods in the compounding process; and (4) they have not infected the drug with some adulterating foreign substance. *McLeod v. W.S. Merrell Co., Division of Richardson-Merrell, Inc.*, 174 So. 2d 736, 739 (Fla. 1965). As illustrated by the chart attached to this brief, this holding is consistent with the overwhelming majority of federal and other state courts having considered this issue. *See Morgan v. Wal-Mart Stores, Inc.*, 30 S.W.3d 455, 461 (Tex. Ct. App. 2000) (majority of courts considering whether pharmacist has duty to warn customers of potential hazards or side effects of prescribed drugs have held that a pharmacist has no such duty when the prescription is proper on its face and neither the physician nor the manufacturer has required that the pharmacist give the customer any warning). Those courts conclude that, because of the physician's medical judgment and knowledge of the patient, the affirmative duty to warn properly belongs to physicians, not pharmacists. Courts have reasoned that, to hold otherwise, could require a pharmacist to practice medicine, duplicate warnings, second-guess prescriptions or otherwise interfere with the physician-patient relationship – and to do so without a physician's training and without examining the patient or reviewing the patient's complete medical history.

For instance, in *Walker v. Jack Eckerd Corp.*, 434 S.E.2d 63, 67 (Ga. Ct. App. 1993), the court refused to impose a duty to warn on pharmacists because

doing so could interfere with the trusted doctor-patient relationship. The court recognized that patients have different reactions to and tolerances for drugs and that the severity of a patient's condition may warrant a different level of risk acceptance. Thus, the court concluded that physicians, not pharmacists, are best suited to monitor and evaluate these factors. *Id.* at 67-68.

Perhaps best stated by a federal court in *Jones v. Irvin,* 602 F.Supp. 399, 402-403 (S.D. Ill 1985), although a pharmacist owes a consumer the highest degree of prudence, thoughtfulness, and diligence, a pharmacist has no duty to warn the consumer or notify the physician that the drug is being prescribed in dangerous amounts, that the consumer is being over medicated, or that the various drugs in their prescribed quantities could cause adverse reactions to the consumer. Instead, this is the prescribing physician's duty. *Id.* at 402. The physician has the duty to know the characteristics of the drug being prescribed; to know how much of the drug can be given to the patient; to elicit from the patient what other drugs the patient is taking; to properly prescribe various combinations of drugs; to warn the patient of any dangers associated with taking the drug; to monitor the patient's dependence on the drug; and to tell the patient when and how to take the drug. *Id.* The court also recognized the corresponding duty of the patient to inform the physician of the other drugs the patient is taking. "Placing these duties to warn on the pharmacist would only serve to compel the pharmacist to second guess every

prescription a doctor orders in an attempt to escape liability." *Id.* at 402 (emphasis added).

As set forth in the attached chart, case after case reaffirms the *Jones'* decision. The public policy underpinning these decisions arises from the learned intermediary doctrine, which typically acts as an exception to a manufacturer's duty to warn customers in products liability cases. *See Morgan,* 30 S.W.3d at 462. Under this doctrine, the manufacturer has a duty to inform the prescribing physician of the drugs' dangers. The physician, who is the one with medical training, experience and knowledge of the patient's medical history, then chooses the type and quantity of the drug to be prescribed, and is charged with advising and warning the patient accordingly. As explained in the Initial Brief of Petitioner B.A.L. Pharmacy, this doctrine is well-established in Florida.

Although the learned intermediary doctrine generally applies to the relationship among physician, patient, and manufacturer, the doctrine has been applied in other jurisdictions with equal force to the relationship among physician, patient, and pharmacist. For instance, in *McKee v. American Home Products Corp.*, 782 P.2d 1045, 1050 (Wash. 1989), the Washington Supreme Court concluded that in both circumstances, the physician is in the best position to relate the propensities of a drug to the physical idiosyncrasies of the patient. The consistent theme among the cases holding no duty to warn under the learned

intermediary doctrine is consistent with this Court's decision in *McLeod*: a pharmacist who correctly fills a prescription as directed by a physician has no duty to question a prescription that is valid on its face or to warn either the physician or the patient of dangerous side effects. This conclusion is also consistent with Federal and Florida law.

Federal law distinguishes between non-prescription "over-the-counter" drugs, which are sufficiently safe for consumers to decide whether to take by themselves, and prescription drugs, which may be taken only upon diagnosis and supervision by a prescriber. 21 U.S.C. § 353. For non-prescription drugs, the package inserts and other written materials that accompany the product (collectively referred to as the "labeling") must provide warnings and other "adequate directions for use" directly to consumers that are intelligible to the "layman." 21 U.S.C. § 352(g). For prescription drugs, however, federal law specifically exempts pharmacies from the labeling requirements regarding warnings and directions for use that are applicable to the packaging for non-prescription drugs. 21 U.S.C. § 353(b)(2) (any drug dispensed by prescription shall be exempt from the requirements of 21 U.S.C. § 352). In other words, written consumer warnings must be provided with the packaging for over-the-counter, non-prescription drugs because there is no physician intermediary; but

those warnings are not required with prescription drugs given the physician's role in prescribing those drugs.

Congress created this labeling exemption for prescription drugs based on its recognition that, due to the complex safety concerns associated with prescription drugs, providing generalized warnings directly to consumers was almost always "not feasible." Walsh, *The Learned Intermediary Doctrine: The Correct Prescription for Drug Labeling*, 48 Rutgers L. Rev. 821, 826 (1996). Such warnings also could cause a consumer to wholly ignore their physician's informed instructions by relying on the pharmacist and to object to the use of a drug, thereby jeopardizing the consumer's life or health. *See, e.g.*, *Carmichael v. Reitz*, 70 Cal. App. 3d 958, 988, 95 Cal. Rptr. 381 (Cal. Ct. App. 1971). Thus, manufacturers of prescriptions are required to provide warnings to physicians, but it is physicians who, acting as learned intermediaries between manufacturers and patients, have the responsibility to advise their patients of these warnings when appropriate.

Once provided with these warnings by manufacturers, physicians apply their medical judgment to diagnose the patient; review the patient's complete medical history; decide which prescription drug best meets the patient's particular treatment needs; and decide which warnings are appropriate for a particular patient. Courts across the country recognize that, as a medical expert, the prescribing physician can take into account the propensities of a drug, as well as

the susceptibilities of the patient. The choice the physician makes is an informed one – an individualized medical judgment bottomed on knowledge of the patient. *See, e.g., Evraets v. Intermedics Intraocular,* 29 Cal. App. 4th 779, 788 (1995) (noting patients rely on their physician's skill and judgment to select or furnish a suitable medication).

Like manufacturers, pharmacists know a great deal about prescription drugs. However, neither pharmacists nor manufacturers apply "medical judgment" to diagnose a patient, select a drug, and decide which warnings are relevant and applicable to that particular patient. It would be inequitable to apply the learned intermediary doctrine to insulate manufacturers of drugs from liability for failure to warn while imposing such a duty on the pharmacists who dispense those drugs.

The application of the learned intermediary doctrine to pharmacists was recently reinforced by the Alabama Supreme Court in *Walls v. Alpharma USPD, Inc.*, 887 So. 2d 881, 886 (Ala. 2004). The Court reasoned that the doctrine foreclosed any duty on a pharmacist filling a physician's prescription, which was valid and regular on its face, to warn the patient of the risks or potential side effects of a prescribed medication unless the prescription itself or the law ordered otherwise. *Id.* Drawing from other jurisdictions, the Court agreed that no duty can be imposed on a pharmacist, concluding:

> Because the decision to prescribe a specific drug involves an analysis of the patient's unique condition and a balancing of the risks and

> benefits of a given drug, the cases extending the learned intermediary doctrine to pharmacists reason that imposing a duty to warn on the pharmacist would intrude on the doctor-patient relationship and would force the pharmacist to practice medicine without a license.

Id. at 885.

Consistent with the concept that it is the physician's duty, based on "medical judgment," to decide which warnings are appropriate for a particular patient, Florida law imposes no affirmative duty to warn on pharmacists. In finding otherwise, the Fourth District selectively quotes from the statutory definition for the term "dispense" and cites to two Florida Administrative Code provisions as a basis for determining that a pharmacist's duty to warn already exists – thus, it concludes that public policy supports imposing a cause of action for a failure to warn. The court's reading of these authorities is taken out-of-context and misconstrues the regulatory scheme governing pharmacists and pharmacies. No explicit duty to warn the patient under these statutes and rules exists. Indeed, the definition of the term "dispense" in Section 465.003(6) merely provides that pharmacists are to provide counseling on proper **drug usage**, either orally or in writing, and then, only if in the exercise of the pharmacist's professional judgment such counseling is necessary. Florida Administrative Code Rule 64B16-27.820 clarifies this definition by instructing that the pharmacist must merely **offer to counsel** when, in the pharmacist's judgment, such counseling is necessary. Thus, a

pharmacist has no duty to warn the consumer or second-guess the physician's instructions under these authorities.

Patient counseling rules were an outgrowth of the Omnibus Budget Reconciliation Act of 1990. 42 U.S.C. § 1396r-8. The Act, which changed the funding and scope of prescribed drug services for Medicaid patients, required states to include provisions for patient counseling and prospective drug use review in order to impose federal upper limit pricing for multisource drugs. 42 U.S.C. § 1396r-8(g). Florida's rules were adopted in 1993 and have not been altered since that time. Similar rules or statutes were adopted in every other state. *See Tinder v. Lewis County Nursing Home Dist.*, 207 F.Supp. 2d 951 (E.D. Mo. 2001). Notably, consistent with the First and Fifth District's decisions in *Johnson v. Walgreen Co.*, 675 So. 2d 1036 (Fla. 1st DCA 1996), and *Estate of Sharp v. Omnicare*, 879 So. 2d 34 (Fla. 5th DCA 2004), a majority of the courts considering the issue have concluded that similar statutes and rules do not establish any cause of action. [2]

[2] *See* cases discussed hereinafter, and: *Kohl v. Am. Home Products Corp.,* 78 F.Supp. 2d 885 (W.D. Ark. 1999) (Arkansas statute defining pharmacy care and practice of pharmacy does not create generalized duty to warn given the role of the physician in determining the appropriate drug to be prescribed); *Suarez v. Pierard,* 663 N.E.2d 1039, 1043 (Ill. Ct. App. 1996) (Illinois Pharmacy Practice Act does not create a cause of action of damages for violation of the act); *Nichols v. Central Merchandise, Inc.,* 817 P.2d 1131, 1132 (Kan. Ct. App. 1991) (no duty to warn was created by regulation requiring pharmacists to initiate oral consultation on new prescriptions as a matter of routine to encourage proper patient drug utilization and administration); *Perkins v. Windsor Hosp. Corp.,* 455 A.2d 810, 816 (Vt. 1982)

The other administrative regulation relied on by the Fourth District, Rule 64G16-27.300, governs quality improvement. This rule was implemented for the purpose of creating a pharmacy medical review committee to afford an opportunity to review the factors that can cause a "quality-related event" (e.g., a misfill) without exposing the members of the quality improvement committee to either liability or discovery. The rule creates a process to review the causes of medication errors and allow for correcting mistakes – it was not created as a mechanism to find pharmacists liable for not warning of physician prescribing errors. Indeed, protecting members of quality improvement committees from liability and discovery was one of the key recommendations of the National Association of Boards of Pharmacy's Task Force to Develop Recommendations to Best Reduce Medication Errors in Community Pharmacy Practice. *See* Task Force Report, Recommendation 3, at 4.[3]

Just this year, two other state courts confirmed that administrative regulations do not change the common law regarding a pharmacist's duty to warn. In *Chamblin v. K-Mart Corp.*, 2005 WL 487733 (Ga. Ct. App. Mar. 3, 2005), a Georgia court held that administrative rules identifying general tasks for

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(upholding judgment for pharmacy because definition of "practice of pharmacy" is not a statutory codification of the tort liability of pharmacists).

[3] Available at: http://www.nabp.net/ftpfiles/task_force_reports/2005/RTFReduceMedErrors.pdf (last accessed 9-6-05).

pharmacists are demonstrative of pharmacists as trusted professionals with a variety of important responsibilities, but such rules cannot be reasonably read to impose a general duty to warn patients. Last month, a Michigan court reached a similar conclusion. *See Saukas v. Walker Street Pharmacy, Inc.*, 2005 WL 1846289 (Mich. Ct. App. Aug. 4, 2005) (unpublished op.).

Like Florida, the Georgia regulation at issue in *Chamblin* required dispensing pharmacists "to offer to counsel patients about their medications." In ruling that the administrative regulations did not impose a general duty to warn, the Georgia court relied heavily on *Morgan v. Wal-Mart Stores, Inc.*, 30 S.W.3d 455 (Tex. Ct. App. 2000), in which the Texas court held that, even though the Texas rules and regulations for pharmacists reflect their professional responsibilities, those rules and regulations "cannot be reasonably read to impose a legal duty to warn patients . . . ." *Id.* at 467. Again, like Florida, the Texas statutes and regulations mention, as part of a pharmacist's practice, patient counseling, including counseling on common severe side effects or adverse effects.

Almost all states have enacted laws and regulations governing pharmacists and an offer to counsel. As the above cases illustrate, however, those laws and regulations do not create a new cause of action for pharmacist's failure to warn. Indeed, if such laws and regulations were read to create a cause of action, significant harm to consumers would occur.

If upheld, the Fourth District's decision in *Powers* would corrupt the physician-patient relationship, effectively requiring pharmacists to practice medicine without a license. The decision requires pharmacists to question the medical expertise of a licensed physician. It would upset the delicate diagnostic balance between the treating physician, who has the advantages of medical training, and a thorough, individualized examination of the patient. As recognized in *Eldridge v Eli Lilly & Co.*, 138 Ill. App. 3d 124, 127 (1985):

> The propriety of a prescription depends not only on the propensity of the drug, but also on the patient's condition. A prescription which is excessive for one patient may be entirely reasonable of the treatment of another. To fulfill the duty which the plaintiff urges us to impose would require the pharmacist to learn the customer's condition and monitor his drug usage. To accomplish this, the pharmacist would have to interject himself into the doctor-patient relationship and practice medicine without a license.[4]

Moreover, the Fourth District's decision imposes an impossible standard because pharmacists simply do not have adequate information to fulfill any duty to warn. Physicians are not required to tell pharmacists why a particular drug has

[4] *See also Jones v. Irvin,* 602 F.Supp. 399, 402 (S.D. Ill. 1986) (placing these duties to warn on pharmacist would only serve to compel the pharmacist to second guess every prescription a doctor orders in an attempt to escape liability); *Raynor v. Richardson-Merrell, Inc.*, 643 F.Supp. 238, 246 (D.D.C. 1986) (such a duty would, in effect, require a pharmacy to substitute its judgment for that of the prescribing physician); *Ramirez v. Richardson-Merrell, Inc.*, 628 F.Supp. 85, 88 (E.D. Pa. 1986 (To impose a duty to warn on the pharmacist would be to place the pharmacist between the physician, who, having prescribed the drug, presumably knows the patient's condition as well as his or her complete medical history, and the patient. Such interference in the patient-physician relationship can only do more harm than good).

been prescribed – to do so could violate physician-patient confidentiality. Drug manufacturers are not required to train pharmacists about the hazards associated with their products. Consumers are not required to provide pharmacists with a detailed medical history and diagnosis. Without a complete medical history and diagnosis and without thorough training about the hazards of a particular drug, pharmacists cannot be expected to know exactly which warnings are appropriate. *See, e.g., Walker v. Jack Eckerd Corp.*, 434 S.E.2d 63, 67-68 (Ga. Ct. App. 1993) (because patients have different reactions to and tolerances for drugs and because it is the physician, not the pharmacist, who is aware of these factors as well as the severity of a patient's condition, which may warrant a different level of risk acceptance, a pharmacist has no duty to warn that the various drugs in their prescribed quantities could cause adverse reactions to the patient).

Often, a single drug may be prescribed to treat several different conditions. Doctors are allowed to prescribe a drug even if the drug has not been approved by the FDA to treat the patient's particular condition. *Washington Legal Found. v. Henney*, 202 F.3d 331, 332-33 (D.C.Cir. 2000) (prescribing drugs for off-label uses is commonplace and often a ubiquitous practice). While the FDA allows physicians to prescribe drugs for unapproved uses, it does not allow drug manufacturers to mention those unapproved uses in any package inserts or other labeling sent to pharmacists. *Id.* Thus, combining these factors with the fact that

consumers generally do not provide all relevant medical information to their pharmacists (and in most cases have no inclination to do so), it is often impossible, and even dangerous, for a pharmacist to infer a patient's condition from the fact a particular drug has been prescribed.

Further, in many instances, imposition of a duty to warn on pharmacists is impractical. Unlike physicians, who spend time with each patient and know each patient's medical history, pharmacists often fill hundreds of prescriptions per day. If pharmacists are required to warn patients regarding adverse effects, as opposed to merely offering to counsel on drug usage when warranted in the pharmacist's professional judgment, pharmacists will have to take time from filling prescriptions to counsel each patient – to the detriment of other patients waiting for their prescriptions to be filled. To avoid liability, pharmacists also would routinely contact a patient's physician to verify that the physician really meant to prescribe the drug and dosage for which the prescription was written. Given the difficulty in reaching the physician, this will not only greatly delay dispensing (sometimes for days); it also will impact the cost of filling prescriptions, which ultimately will be passed on to consumers.

Additionally, imposition of an affirmative duty to warn will prevent convenient and speedy delivery of medications. Florida law allows a medication to be picked up by either the patient *or the patient's agent.* § 465.003(6) (dispense

means transfer of possession of drug by pharmacist to consumer or consumer's agent). Relatives or friends often pick up prescription drugs for others, especially for underage, sick or invalid patients. Drugs also are frequently provided through delivery or by mail to a patient. *See, e.g.*, § 465.0197, Fla. Stat. Pharmacists have no affirmative duty to counsel as to drugs purchased through an Internet pharmacy or delivered by mail – they are merely required to provide a toll-free number so patients may reach the pharmacist if desired. §§ 465.0156(1)(e); 465.0197(3)(e). The imposition of a duty to warn may cause pharmacists to eliminate these beneficial and speedy methods of delivery, requiring instead that the patient personally appear to receive warnings.

Without knowing which warnings are appropriate for a particular patient, pharmacists seeking to avoid liability also would have to give all potentially applicable warnings to every patient. The voluminous warnings provided by drug manufacturers' package inserts are highly complex and unintelligible to the average consumer. As a result, these warnings would be inadequate to enable the average consumer to evaluate the benefits and risks attendant to the use of such drugs. Giving all warnings could also be hazardous. *See Carmichael v. Reitz*, 70 Cal. App. 3d 958, 988, 95 Cal. Rptr. 381 (1971). Providing all potentially applicable warnings could unnecessarily frighten consumers, and could discourage them from taking necessary drugs. *Id.* (concluding that a patient might refuse

lifesaving drugs if warnings are not filtered by a doctor). *See, e.g.*, Brushwood, *The Pharmacist's Duty to Warn: Toward a Knowledge-Based Model of Professional Responsibility*, 40 Drake L. Rev. 1, 5 n.14 (1991) ("The harm that comes from overwarning or from unnecessary warnings is not simply that a patient might forego needed therapy, but additionally that risk disclosure would interfere with patient participation in rational decisionmaking").

By placing the duty to warn on physicians rather than pharmacists, courts have left no ambiguity as to the person with liability if a necessary warning is not issued. This Court should not obscure the bright line of responsibility by requiring pharmacists to interpose themselves between physicians and patients when the pharmacist is presented with a lawful prescription that is valid on its face.

CONCLUSION

For the reasons expressed in this *Amicus Curiae* Brief and the Initial Briefs filed on behalf of Petitioners, Your Druggist, Inc., and B.A.L. Pharmacy, the *Amici* respectfully request that this Court quash the district court=s decision in this case.

Respectfully submitted,

KATHERINE E. GIDDINGS
Florida Bar No. 0949396
JOSEPH W. HATCHETT
Florida Bar No. 34486
JAMES E. JOANOS
Florida Bar No. 039636
MARTIN R. DIX
Florida Bar No. 499080
AKERMAN SENTERFITT
106 East College Ave., Suite 1200
Tallahassee, Florida 32301
Telephone: (850) 224-9634
Telecopier: (850) 222-0103
katherine.giddings@akerman.com
Attorneys for the *Amici* Associations

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail this 14th day of September, 2005, to all persons on the attached service list.

KATHERINE E. GIDDINGS

CERTIFICATE OF SERVICE LIST

Stephanie D. Alexander, Esq.
Tripp Scott, PA
Post Office Box 14245
Fort Lauderdale, FL 33302
Attorneys for Respondents

Scott A. Cole, Esq.
Gene P. Kissane, Esq.
Cole, Scott & Kissane, PA
Pacific National Bank Building
1390 Brickell Venue, 3rd Floor
Miami, FL 33131
Attorneys for Petitioner Your Druggist

Mark L. Pomerantz, Esq.
Pomerantz & Landsman
12955 Biscayne Blvd., S-202
North Miami, FL 33181
Attorneys for Petitioner Your Druggist

Jay B. Green, Esq.
Jonathan M. Matzner, Esq.
Green, Ackerman & Frost, P.A.
1200 Corporate Place, Suite 301
1200 North Federal Highway
Boca Raton, FL 33432
Attorneys for Petitioner The Medicine Shoppe

Lee Friedland, Esq.
Wites, Kapetan & Friedland, PA
1701 West Hillsboro Blvd., S-305
Deerfield Beach, FL 33442
Attorneys for Defendant, Shirin Thobani, MD

Hala A. Sandridge, Esq.
Fowler White Boggs Banker
501 East Kennedy Boulevard
Suite 1700
Tampa, FL 33602
Attorneys for *Amicus*, The Long Term Care Pharmacy Alliance

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the type size and style used throughout this Brief is the 14 Point Times New Roman Proportionally-spaced Font.

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KATHERINE E. GIDDINGS

INDEX TO APPENDIX

SURVEY OF STATE LAW REGARDING PHARMACY'S DUTY TO WARN

State	Case	Holding
Alabama	*Walls v. AlPharma USPD, Inc.*, 887 So. 2d 881, 886 (Ala. 2004)	"The learned-intermediary doctrine forecloses any duty upon a pharmacist filling a physician's prescription, valid and regular on its face, to warn the physician's patient, the pharmacists' customer, or any other ultimate consumer of the risks or potential side effects of the prescribed medication except insofar as the prescription orders, or an applicable statute or regulation *expressly* requires . . . To the extent that the learned-intermediary doctrine applies, the duty to determine whether the medication as prescribed is dangerously defective is owed by the prescribing physician and not by the pharmacist filling the prescription." (Emphasis added).
Arizona	*Lasley v. Shrake's Country Club Pharmacy, Inc.*, 880 P.2d 1129, 1130-31 (Ariz. Ct. App. 1994), *rev. denied* October 4, 1994	In a negligence action, where pharmacy mailed two highly addictive drugs to an out of state customer over a ten year period, pharmacy owed customer reasonable duty of care, and it was error to hold otherwise as a matter of law.
Arkansas	*Kohl v. Am. Home Prods. Corp.*, 78 F. Supp. 2d 885, 892-93 (W.D. Ark. 1999) (applying Arkansas law)	In a negligence and strict liability action, pharmacies have a duty to exercise due care and diligence, but "generally have no common-law or statutory duty to warn customers of the risks associated with the prescription drugs they purchase."
California	*Hooper v. Capoblanco*, No. 99AS01792 (Cal. Super. Ct. Nov. 15, 2000)	The prevailing weight of decisional authority holds that the doctor, not the pharmacist, is charged with warning of the risks associated with medications. The legislature is in a better position to determine whether such a duty should be imposed.
Connecticut	*Plante v. Lomibiao*, 38 Conn. L. Rptr. 902, 2005 WL 1090180 (Conn. Super. Ct. March 31, 2005) (unpublished opinion)	In a negligence action, the court followed prior decisions of Connecticut trial courts and held that, absent special circumstances such as specific knowledge of potential harm to a patient or that the prescription was "patently and unambiguously harmful" to the patient (i.e., a fatal dose was prescribed), a pharmacist owes no duty to warn

Prepared by: Katherine Eastmoore Giddings, Akerman Senterfitt
106 East College Avenue, Suite 1200, Tallahassee, Florida 32302
Direct Dial 850-425-1626; Telecopier 850-222-0103
katherine.giddings@akerman.com; www.akerman.com

	Carafeno v. Gordon, 9 Conn. L. Rptr. 88, 1993 WL 170215 (Conn. Super. Ct. 1993) (unpublished opinion)	the customer of the potential dangers of a prescribed medication. Opining that, unless there are special circumstances, a pharmacy has no duty to warn as to possible side effects of medication prescribed by a physician. Pharmacist's duty is to accurately fill prescription.
	Deed v. Walgreen Co., 38 Conn. L. Rptr. 311, 2004 WL 2943271 (Conn. Super 2004) (unpublished opinion)	In a wrongful death action, the court recognized that there was no general duty to warn. Pharmacists only have a limited duty based on the presence of additional factors, such as known contraindications, that would alert a reasonably prudent pharmacist to a potential problem, or when the pharmacist voluntarily assumes such a duty. Connecticut statute which requires pharmacists to undertake a drug utilization review and offer counseling does not create a private cause of action.
Florida	*McLeod v. W.S. Merrell Co.*, 174 So. 2d 736, 739 (Fla. 1965)	In a breach of warranty case, the court held that pharmacist's only duties when filling prescription are to compound drug prescribed, use due and proper care in filling prescription, use proper compounding methods, and ensure that prescription has not been adulterated.
	Johnson v. Walgreen Co., 675 So. 2d 1036, 1038 (Fla. 1st DCA 1996)	Affirming dismissal of a case against pharmacist because there is no duty to warn about potential adverse reactions and whether liability should be imposed on pharmacists is a policy argument "best made in the legislative context."
	Pysz v. Henry's Drug Store, 457 So. 2d 561, 562 (Fla. 4th DCA 1984)	Where physician knew of type and amount of drugs prescribed, pharmacist was not negligent in filling prescriptions for Quaaludes over a nine year period without warning customer of the addictive quality of the drug. "It is the physician who has the duty to know the drug he is prescribing and to properly monitor the patient." The *Pysz* court recognized, however, that "a factual situation could exist which would support an action for negligence against a druggist who has lawfully filled a prescription issued by a licensed physician."

	Estate of Sharp v. Omnicare, 879 So. 2d 34, 35 (Fla. 5th DCA 2004)	In a negligence action, recognizing Florida has sharply limited the duties owed by a pharmacist to a customer and affirming the dismissal of the complaint because the court could not "discern in the complaint a duty" owed by the pharmacy to the patient. The court remanded to grant plaintiff another opportunity to amend, but reaffirmed that a pharmacist's duties in Florida are sharply limited by the holding in *McLeod v. W.S. Merrell.*
	Dee v. Wal-Mart Stores, Inc., 878 So. 2d 426 (Fla. 1st DCA 2004)	Reaffirming the holding in *McLeod*, the court reversed the dismissal of a negligence claim against the pharmacy, which alleged that a pharmacy filled a prescription that was four months old and did not contain any time limit for filling or using the prescription. Held: Pharmacy must use due and proper care in filling a prescription. Where prescription for opioids is unreasonable on its face because four months old, even though lawful as written, filling prescription may be breach of duty.
	Powers v. Thobani, 903 So. 2d 275, 278 (Fla. 4th DCA 2005) (certifying conflict with *Johnson* and *Sharp*)	In a negligence action, when defendant pharmacies allegedly filled large number of prescriptions for one customer for narcotics and drugs in a short period of time, it was error to dismiss negligence claims against pharmacies because court was "unwilling to hold that under no set of alleged or discoverable facts" could the plaintiff sustain negligence claims at the motion to dismiss stage.
Georgia	*Chamblin v. K-Mart Corp.*, 612 S.E. 2d 25, 29 (Ga. Ct. App. 2005)	In a negligence case arising after the Board of Pharmacy implemented regulations requiring pharmacist to counsel all patients, the court held that pharmacists do not have a duty to warn customers of every potential side effect of a prescription drug.
	Walker v. Jack Eckerd Corp., 434 S.E. 2d 63, 67-98 (Ga. Ct. App. 1993)	In a negligence action, summary judgment was appropriate for defendant because a pharmacist has no duty to warn that the various drugs in their prescribed quantities could cause adverse reactions to the customer. Duty to prescribe and monitor is the physician's.

	Presto v. Sandoz Pharm. Corp., 487 S.E. 2d 70, 74 (Ga. Ct. App. 1997)	Prior to implementation of regulations requiring pharmacists to counsel patients, pharmacist had no duty to warn of prescription drug's side effects.
Illinois	*Happel v. Wal-Mart Stores, Inc.*, 766 N.E. 2d 11181126-29 (Ill. 2002)	In a negligence action, where pharmacy took the affirmative step of collecting information regarding a patient's *known* allergies and had knowledge of drug contraindications, the pharmacy had a narrow duty either to notify the physician or warn the patient of the potential danger. The pharmacy's prior knowledge of the patient's allergy and contraindication distinguished this case from other Illinois cases holding that a pharmacist generally has no duty to warn.
	Kirk v. Michael Reese Hosp. & Med. Ctr., 513 N.E. 2d 387 (Ill. 1987)	In a negligence and strict liability action against a hospital for a failure to warn, the hospital did not have a duty to warn patient of the adverse effects because that duty is owed by the physician.
	Kasin v. Osco, 728 N.E. 2d 77, 81 (Ill. App. Ct. 2000)	In a negligence action, although pharmacy voluntarily supplied customer with a list of some side effects for a prescription, pharmacy was under no general duty to warn customer of all possible side effects.
	Jones v. Irvin, 602 F. Supp. 399, 402-03 (S.D. Ill. 1985) (applying Illinois law)	In a negligence action, where pharmacist correctly fills a valid prescription, pharmacist has "no duty to warn 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." Noting that "overwhelming majority of recent state cases stand for the proposition that the pharmacist has no duty to warn."
	Fakhouri v. Taylor, 618 N.E. 2d 518, 521-22 (Ill. App. Ct. 1993)	In a wrongful death action, the court noted that the Illinois Pharmacy Act does not impose a duty to warn and pharmacist had no duty to warn customers of prescribed dosages in excess of manufacturer's recommended limits. The court declined to impose a greater duty on the pharmacist for correctly filling a valid prescription than the duty

		imposed on the manufacturer of the drug. "To impose a duty to warn . . . would be to place the pharmacist in the middle of the doctor-patient relationship, *without* the physician's knowledge of the patient." (emphasis in original).
	Frye v. Medicare-Glaser Corp., 605 N.E. 2d 557, 560-61 (Ill. 1992)	In a claim for negligent undertaking, the court did not consider whether a pharmacist had an affirmative duty to warn. The question presented was whether, once the pharmacy voluntarily assumes the duty to warn, that duty was performed negligently. The court held that the pharmacy discharged its voluntarily assumed duty properly. It accurately warned of three side effects, and to require the pharmacy to warn of all potential side effects would be difficult from a practical standpoint. The court stated that "it is the prescribing physician's duty to convey these warnings to patients."
	Leesley v. West, 518 N.E. 2d 758 (Ill. Ct. App. 1988)	Learned intermediary doctrine extends to pharmacists.
	Eldridge v. Eli Lilly & Co., 485 N.E. 2d 551, 555 (Ill. Ct. App. 1985)	In a wrongful death action, 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."
Indiana	*Hook's SuperX, Inc. v. McLaughlin*, 642 N.E. 2d 514, 518-520 (Ind. 1994)	In a negligence action, although pharmacist is held to standard of care of an ordinary pharmacist, the responsibility of warning patients about drug side effects lies with physicians, not pharmacists. The court emphasized that "pharmacists are not insurers against a customer becoming addicted to medication legally prescribed by physician." However, the court held that a pharmacist does have a duty "to cease *re*filling prescriptions where the customers are using the drugs much more rapidly than prescribed," but the court recognized that refilling prescriptions faster than prescribed is not necessarily a breach of duty for a pharmacist. (Emphasis added).

	Ingram v. Hook's Drugs, Inc., 476 N.E. 2d 881, 887 (Ind. Ct. App. 1985)	In a negligence action, under Indiana regulations, a duty to warn patient of the drug hazards is placed on physician, and pharmacist has no duty to warn of all the hazards associated with a prescription drug but only a duty to include warnings found in the prescription.
Kansas	*Nichols v. Cent. Merch., Inc.*, 817 P.2d 1131, 1133-34 (Kan. Ct. App. 1991)	In a negligence action, where a pharmacist accurately filled a valid prescription with no clear errors on the prescription, the application of the learned intermediary doctrine foreclosed the imposition of any duty to warn of side effects, stating: "Because the decision to prescribe a specific drug involves an analysis of the patient's unique condition and a balancing of the risks and benefits of a given drug, the cases extending the learned intermediary doctrine to pharmacists reason that imposing a duty to warn on pharmacists would intrude on the doctor patient relationship and would force the pharmacist to practice medicine without a license."
Louisiana	*Guillory v. Dr. X*, 679 So. 2d 1004, 1010 (La. Ct. App. 1996)	In medical malpractice action, absent an excessive dosage or other obvious error, pharmacist has no duty to "question a judgment made by a physician as to the propriety of a prescription or to warn customers of the hazardous side effects associated with a drug."
	Kinney v. Hutchinson, 449 So. 2d 696, 698 (La. Ct. App. 1984)	In a negligence action, learned intermediary doctrine applied to pharmacist and thus pharmacist had no duty to warn of prescription drug's adverse effects.
	Aucoin v. Vicknair, 1997 WL 539889, *3 (E.D. La. Aug. 29, 1997) (applying Louisiana law)	In a negligence action, the court, in a motion to remand to state court for lack of subject matter jurisdiction, noted that Louisiana law provides that pharmacist has duty to fill a prescription correctly or warn patient or physician of obvious inadequacies or excessive dosage, but did not mention a general duty to warn of side effects.
	Gassen v. E. Jefferson Gen. Hosp., 628 So. 2d 256, 258 (La. Ct. App. 1993)	In a negligence action, pharmacist has a limited duty to fill prescriptions correctly and inquire or verify from the physician *clear errors in the prescription*, such as excessive dosage or when the prescription is irregular on its face. This Louisiana court

		distinguished the *Kinney* case because *Kinney* (no duty to warn) involved a failure to warn of adverse effects. *Gassen* is about a prescription which was allegedly incorrect on its face.
Maryland	*Rite Aid Corp. v. Levy-Gray*, 876 A.2d 115 (Md. Ct. Spec. App. 2005)	In a negligence and breach of warranty action, a pharmacy's inclusion of a patient package insert with a prescription constituted an express warranty, the breach of which was a question of fact for the jury. The jury found the pharmacy not liable on the negligence count because the physicians have the duty to warn. Pharmacists have the duty to dispense the drug in accordance with the physician's prescriptions and not inject themselves in the physician-patient relationship.
	Raynor v. Richardson-Merrell, Inc., 643 F. Supp. 238, 246 (D.D.C. 1986) (adopting Maryland law)	Under common-law or product liability theory, a pharmacy which filled prescription that was valid on its face could not be held liable for failure to warn when pharmacy did not compound or alter the drug or substitute a different brand or generic version.
	People's Service Drug Stores, Inc. v. Somerville, 158 A. 12 (Md. 1932)	In a negligence action, when pharmacist accurately fills a facially-valid prescription, there is no duty to warn or to refuse to fill the prescription because it calls for a higher dose of a drug. "It would be a dangerous principle to establish that a druggist cannot safely fill a prescription because it is out of the ordinary."
Massachusetts	*Cottam v. CVS Pharmacy*, 764 N.E. 2d 814, 820-822 (Mass. 2002)	In a negligence action, court applied learned intermediary doctrine to pharmacies and holding that generally a pharmacy has no duty to warn its customers of side effects of prescription drugs; pharmacy only has duty to warn if it voluntarily assumes the duty to warn, it is a factual question as to the scope of the *assumed* duty (emphasis added).
	Brienze v. Casserly, 2003 WL 23018810 (Mass. Super. Ct. Dec. 19, 2003)	In a negligence action, there is no general duty to warn, but where pharmacy filled two prescriptions for customers that were known to adversely interact and that triggered an alert on the pharmacy computer, the pharmacy had a duty to warn the patient.

Michigan	*Stebbins v. Concord Wrigley Drugs, Inc.*, 416 N.W. 2d 381, 387-88 (Mich. Ct. App. 1987)	Plaintiff sued pharmacy for failure to warn of the side effects of the prescription. Although the court noted that, in Michigan, a pharmacist is "held to a very high standard of care in filling prescriptions," the court adopted the rule of *Pysz* (Florida) and *Irvin* (Illinois) as follows: A pharmacist has no duty to warn of possible side effects of a prescription which is "proper on its face and neither the physician nor the manufacturer has required that any warning be given to the patient by the pharmacist."
	Adkins v. Mong, 425 N.W. 2d 151, 152-54 (Mich. Ct. App. 1988)	In a negligence action, pharmacist is not liable for correctly filling a facially valid prescription from a licensed physician because pharmacist has no legal duty to "monitor and intervene with a customer's reliance on drugs prescribed by a licensed treating physician."
	Saukas v. Walker Street Pharmacy, Case 03-01868-NH, Slip Op. at 2-3 (Mich. Ct. App. Aug. 5, 2005)	In a negligence action, pharmacy which correctly filled a valid prescription had no duty to warn of potentially harmful interactions between a patient's prescribed medications.
Mississippi	*Moore v Mem'l Hosp. of Gulfport*, 825 So. 2d 658, 664-65 (Miss. 2002)	In a negligence action, extending learned intermediary doctrine to pharmacists, noting that pharmacy regulations "do not establish a legal duty of care to be applied in a civil action," and holding that, with limited exceptions such as prior knowledge of customer's contraindicated health problem or filling prescription in quantities inconsistent with recommended dosage guidelines, pharmacists have no duty to warn.
	In re Diet Drugs Prods. Liab. Litig., 2004 WL 966263, *2 (E.D. Pa. May 4, 2004)	Noting *Moore*, holding that the learned intermediary doctrine applies to pharmacists, who thus are under no legal duty to warn.
	In Re Rezulin Prods. Liab. Litig., 133 F. Supp. 2d 272, 289 (S.D.N.Y. 2001) (applying Mississippi law)	Predicting that the Mississippi Supreme Court would likely extend learned intermediary doctrine to pharmacists, and also noting that majority of states confronted with the question have shielded pharmacists from liability from failure to warn, strict liability, and

		breach of warranty claims.
Missouri	*Horner v. Spalito*, 1 S.W. 3d 519, 522 (Mo. Ct. App. 1999)	In a negligence action, reversing summary judgment for pharmacy in negligence action where interaction between two drugs was at issue. One prescription was for a hypnotic drug prescribed at three times the normal dose. The pharmacist called the physician's office to inquire about the higher dose. The scope of the pharmacist's duty is a question of fact that depends on each case, and the record was not sufficiently developed for the appeals court to determine if the pharmacist fulfilled his duty.
Nevada	*Heredia v. Johnson*, 827 F. Supp. 1522, 1525 (D. Nev. 1993) (applying Nevada law) *Nev. St. Bd. of Pharmacy v. Garrigus*, 496 P.2d 748, 749 (Nev. 1972)	In a negligence and strict liability action, "pharmacist must be held to a duty to fill prescriptions *as prescribed* [,] properly label them (include the proper warnings) . . . and be alert for plain error." (emphasis added). In a license revocation review, the Nevada Supreme Court noted that it would be unsafe policy to restrict pharmacists from filling prescriptions simply because "it is out of the ordinary." Pharmacists should not second guess a licensed physician unless in such circumstances it would be "obviously fatal."
New York	*Bichler v. Willing*, 397 N.Y.S. 2d 57, 59-60 (N.Y. App. Div. 1977) *Ullman v. Grant*, 450 N.Y.S. 2d 955, 956-57 (N.Y. Sup. Ct. 1982) *Javitz v. Slatus*, 461 N.Y.S. 2d 44 (N.Y.	In strict liability, negligence, and breach of warranty action, where pharmacist filled prescription exactly as directed and made no oral or written warranty as to the drug's safety or side effects, the court, adopting the reasoning in *McLeod* (Florida) and *Batiste* (North Carolina), dismissed all three claims against pharmacist. In strict liability, negligence, and breach of warranty action, where pharmacist filled a prescription with a substitute drug as permitted by the prescribing physician, the court held that "a pharmacist is not negligent unless he knowingly dispenses a drug that is inferior or defective." Moreover, the pharmacy has no duty to "warn the plaintiff of possible side effects in the use of a drug." The court granted summary judgment on all three causes of action. Summary judgment for pharmacy on failure to warn and breach of

	App. Div. 1983) *Negrin v. Alza Corp.*, 1999 WL 144507, *4 (S.D.N.Y. 1999) (applying New York law)	warranty claims. In strict liability, negligence, and breach of warranty action, where there were no allegations that the pharmacy did anything other than correctly fill a prescription and dispense the product as packaged by the manufacturer, there was no basis for liability under New York law, and the court dismissed the claims against the pharmacy.
	In re New York County Diet Drug Litig., 691 N.Y.S. 2d 501, 502 (N.Y. App. Div. 1999)	Affirming motion to dismiss claims against pharmacists under theories of negligence, breach of warranty, and strict liability because plaintiffs did not allege that pharmacists failed to fill prescriptions properly as directed by physician or that the pharmacists were aware, at the time of filling the prescription, of any conditions which contraindicated the dispensing of the drugs at issue.
	Hand v. Krakowski, 453 N.Y.S. 2d 121 (N.Y. App. Div. 1982)	In a negligence action, reversing summary judgment for pharmacy because the standard of care was a jury issue when pharmacist, *who personally knew the customer*, had prior knowledge that the customer was an alcoholic and that prescribed drugs were contraindicated for alcohol. Under these specific circumstances, the trier of fact may reasonably conclude that the pharmacist had a duty to warn.
North Carolina	*Batiste v. Am. Home Prods. Corp.*, 231 S.E. 2d 269, 275-76 (N.C. Ct. App. 1977)	Pharmacist is not liable in negligence, strict liability, or breach of warranty for failure to warn of risks or problems resulting from the use of a drug "compounded or sold in strict compliance with the physician's order."
	Ferguson v. Williams, 399 S.E. 2d 389, 393 (N.C. Ct. App. 1991)	In medical malpractice action, although pharmacist has the duty to act with "due, ordinary care and diligence" when filling prescriptions, a pharmacist who properly fills valid prescription is under no duty to warn customer of risks associated with taking the medicine.

Oregon	*Griffith v. Blatt*, 51 P.3d 1256 (Ore. 2002)	In a negligence and strict liability action, because Oregon's product liability statute specifically incorporated Restatement (Second) of Torts provision regarding sellers of drugs, the learned intermediary defense doctrine was inapplicable to a strict liability claim of failure to warn, and the court reversed summary judgment granted in favor of pharmacy. The extent of liability under the product liability statute was not addressed by the court. The dismissal of the negligence claim for failure to warn was affirmed without discussion.
	Docken v. Ciba-Geigy, 790 P.2d 45, (Ore. Ct. App. 1990)	In a negligence action, whether pharmacy had a duty of care to warn of the potential risks of prescription drugs is an issue to be answered by expert testimony as to the standard of care in the community.
Pennsylvania	*White v. Weiner*, 562 A.2d 378, 385-86 (Pa. Super. Ct. 1989, *per cur. aff'd* 583 A.2d 789 (Pa. 1991)	In a medical malpractice and strict liability action, the application of learned intermediary doctrine means that pharmacist has no duty to furnish a warning with the drugs dispensed.
	Coyle v. Richardson-Merrell, Inc., 584 A.2d 1383 (Pa. 1991)	In a product liability action, when drug is available only upon prescription of a duly licensed physician, the required warning is to the physician, not the public or the patient, and the pharmacist has no duty to warn about the risks of drugs that have already been supplied.
	Makripodis v. Merrell-Dow Pharm, Inc., 523 A.2d 374, 377-79 (Pa. Super. Ct. 1987)	There is no duty, in a claim for breach of warranty or for strict liability, on a pharmacist to warn customer of all possible adverse consequences associated with a drug. Pharmacist only warrants that the drug is compounded with due care in the strength and quantity prescribed and that the drug is unadulterated and that proper methods were used in compounding process. The physician must be made aware of the risks, not the consumer. The court could "perceive no benefit to be derived from the imposition of strict liability upon the pharmacist who properly dispenses a prescription drug upon the prescription of a duly licensed physician."

	Mazur v. Merck & Co., 964 F.2d 1348, 1356 (3d Cir. 1992) (applying Pennsylvania law)	In a product liability action, Pennsylvania law does not impose an independent duty to warn patients of the risks of prescription drugs the pharmacists dispense.
	Ramirez v. Richardson-Merrell, Inc., 628 F. Supp. 85 (E.D. Pa. 1986) (applying Pennsylvania law)	In a negligence action, despite expert testimony and excerpts from the *Standards of Practice for Professional Pharmacy*, the court, adopted the limited duties of a pharmacist listed in *McLeod v. W.S. Merrell Co.*, 174 So. 2d 736 (Fla. 1965) and refused to impose a duty to warn of potential side effects because "it would be illogical and unreasonable . . . to impose a greater duty on the pharmacist who properly fills the prescription than is imposed on the manufacturer."
	Riff v. Morgan Pharmacy, 508 A.2d 1247, 1252 (Pa. Super. Ct. 1986), *rev. den.* 524 A.2d 494 (Pa. 1987)	In a negligence action, where prescription for a legend drug failed to specify maximum safe dosage and where pharmacy issued four refills which were unauthorized by doctor, pharmacy failed to exercise its legal duty of due care and diligence by not warning the patient or notifying the physician of the obvious inadequacies on the face of the prescription.
Tennessee	*Dooley v. Everett*, 805 S.W. 2d 380 (Tenn. Ct. App. 1991)	In a negligence action involving the interaction of two drugs, whether pharmacist has a duty to warn is a question of fact that precludes grant of summary judgment.
	Pittman v. Upjohn Co., 890 S.W. 2d 425, 435 (Tenn. 1994)	In a case where a pharmacist knew that a drug which could cause dangerous conditions even if taken according to doctor's orders was prescribed by the physician without warning the patient, the pharmacy, which *knew* there was no warning given, had a duty to warn the patient of dangers involved in taking the subject medication. The drug was ingested accidentally by one of the patient's relatives, who sustained permanent brain damage. The court held that the injury to the relative was not foreseeable, so the duty to warn did not extend to him.

Texas	*Wimm v Jack Eckerd Corp*., 3 F.3d 137, 142 (5th Cir. 1993) (applying Texas law)	In a negligence and product liability action, where prescription cough medicine was allegedly dispensed with improper instructions, court affirmed grant of summary judgment for pharmacy based on no general duty to warn.
	Morgan v. Wal-Mart Stores, Inc., 30 S.W. 3d 455, 466-67 (Tex. App. 2000), *rev. den.* Jun. 14, 2001, *pet. for reh'g den.* Sept. 20, 2001	In a negligence action, absent evidence of special circumstances or "unusual factual situations," pharmacists are not legally obligated to warn patients of adverse consequences of drugs they dispense. The Texas regulatory scheme also does not impose a general duty to warn on pharmacists.
Utah	*Scharrer v. Stewart's Plaza Pharmacy, Inc.*, 79 P.3d 922, 925, 933 (Utah 2003)	In a strict liability action, a pharmacist compounded and created a one-a-day "fen-phen" capsule, which physicians started to prescribe and the same pharmacist filled. The Utah supreme court extended the learned intermediary doctrine to pharmacists and held that a pharmacist is not liable under a strict liability theory when the pharmacist properly fills a physician's prescription. It also held that a pharmacist's duty of care in negligence actions is to exercise the "reasonable degree of skill, care, and knowledge that would be exercised by a reasonably prudent pharmacist in the same situation," but that pharmacists are protected from claims in negligence if they "fill a prescription precisely as directed by the manufacturer or physician."
Washington	*Silves v. King*, 970 P.2d 790, 794 (Wash. Ct. App. 1999)	In a negligence action, pharmacist is under no duty to warn patient or question prescribing physician's judgment.
	McKee v. Am. Home Prods. Corp., 782 P.2d 1045, 1054-56 (Wash. 1989)	In negligence, strict liability, or breach of warranty action, a pharmacist has duty to accurately fill a prescription and be alert for clear errors (as the court stated by analogy, a clear error is one that is obvious or known such as the factual scenarios in *Hand* and *Riff*) but does not have the duty to question the judgment made by the physician or warn of potential risks. The physician is in the best position to assess the patient and determine proper drug therapy, and only the physician can correlate the needs of the patient with the

		proper drug and amount to be prescribed. Washington pharmacy laws do not require a warning to be given by a pharmacist – it is a voluntary undertaking as compared to other mandatory duties (Pharmacist "must orally explain to the patient . . . directions for use and any additional information . . . to assure the proper utilization of the medication"). "If the Legislature intended pharmacists to be liable for failure to warn, the Legislature could have so provided."
Washington, D.C.	*Raynor v. Richardson-Merrell, Inc*., 643 F. Supp. 238, 246 (D.D.C. 1986) (adopting Maryland law), *Ealy v. Richardson-Merrell, Inc.*, 1987 WL 159970 Prod. Liab. Rep. (CCH) ¶11,326 (D.D.C. 1987)(applying District of Columbia law)	Under common-law or product liability theory, a pharmacy which filled prescription that was valid on its face could not be held liable for failure to warn when pharmacy did not compound or alter the drug or substitute a different brand or generic version. In a product liability case, pharmacies in the District of Columbia which accurately fill prescriptions are under no duty to warn of potential side effects.