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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LIEUTENANT TAYLOR,

Plaintiff and Appellant,

v.

THRIFTY PAYLESS, INC.,

Defendant and Respondent.

B232635

(Los Angeles County  
Super. Ct. No. BC426055)

APPEAL from a judgment of the Superior Court of Los Angeles County,

John P. Shook, Judge. Affirmed.

Law Offices of Alvin L. Pittman, Alvin L. Pittman; and Christie E. Webb for  
Plaintiff and Appellant.

Manning & Kass, Ellrod, Ramirez, Trester, Jeffrey L. Lenkov, Steven J. Renick  
and Martin Holly for Defendant and Respondent.

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Lieutenant Taylor became seriously ill after taking medications prescribed to another person, which he obtained at a Rite Aid pharmacy. Plaintiff alleges that the medications were dispensed to him together with his own prescription medications without his knowledge that some of the medications were prescribed to another person. A jury found that Thrifty Payless, Inc., doing business as Rite Aid, was not negligent in dispensing the medications to plaintiff.<sup>1</sup> Plaintiff contends the evidence does not support the verdict. We conclude to the contrary that substantial evidence supports the verdict. We therefore will affirm the judgment.

### ***FACTUAL AND PROCEDURAL BACKGROUND***

#### *1. Evidence Presented at Trial*

##### *a. Undisputed Evidence*

Undisputed evidence presented at trial showed that plaintiff visited a Rite Aid pharmacy on December 2, 2008, to fill a prescription. He was told to return later. He returned the next day and was given two medications prescribed to him and four medications prescribed to Lennette Taylor, whom he did not know. The medications prescribed to Lennette Taylor were identified by a prescription number, and those prescribed to plaintiff were identified by the next consecutive prescription number. But the instruction sheets given with the medications all stated the same order number. For several weeks, plaintiff took all of the medications more or less in accordance with the instructions, until he became very ill, suffering kidney failure and heart injury.

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<sup>1</sup> We will refer to Thrifty Payless, Inc., as Rite Aid for convenience.

b. *Plaintiff's Case*

Plaintiff testified as follows:

Plaintiff dropped out of school in the eighth grade and is illiterate. He was regularly prescribed medication for diabetes and high blood pressure. He visited a doctor on December 2, 2008, complaining of a persistent cough with excessive phlegm. The doctor wrote him a prescription, and plaintiff took it directly to a Rite Aid pharmacy. A male pharmacist who attended him there stated that something else was supposed to “go with this medicine” and that the pharmacist would have to call plaintiff’s doctor to straighten it out. Plaintiff stated that he would return for the medication the next day.

Plaintiff returned to the pharmacy the next day. He stated to a female employee, “I want to pick up for Lieutenant Taylor.” The employee placed a single plastic bag on the counter, emptied its contents and called a female pharmacist to the counter. The pharmacist asked plaintiff whether Lieutenant was his given name. He replied that it was. The pharmacist then looked at each container of medicine, told plaintiff how frequently to take the medicine and placed each container back in the bag. Plaintiff signed his name on a small electronic pad separately for each medication. Plaintiff did not state that he was picking up medicine for Lennette Taylor, and no one at the pharmacy mentioned that name to him.

Plaintiff began taking the new medication the following day. He continued to take his insulin and high blood pressure medication as well. He first noticed some adverse feelings after approximately two weeks. He visited a hospital emergency room

on February 8, 2009, complaining that he was having difficulty breathing and was experiencing chest pain. By that time he had stopped taking some of the medication. At the conclusion of his emergency room visit, he was prescribed additional medication to assist his breathing. He later resumed taking most of the medication that he had obtained from Rite Aid but continued to feel ill effects.

Plaintiff returned to the emergency room at a later date. This time the doctor told him that his heart and kidney had been seriously injured and asked what medication he had been taking. He made a phone call to his housemate who informed the nurse of the medications. Plaintiff was transferred to another hospital where his housemate informed another nurse of the medications that he had been taking. At or about that time, plaintiff learned for the first time that some of the medications that he had been taking were not intended for him.

Plaintiff spent two weeks in the hospital. He was released for a few days and then returned to spend another week in the hospital. He had experienced kidney failure and began to receive dialysis three times per week.

A doctor testified at trial that some of the medications prescribed to Lennette Taylor were highly toxic to plaintiff, particularly in combination with other medications that he was taking. The doctor testified that Taylor developed kidney failure and heart failure as a result of taking medications that were not prescribed to him, and particularly as a result of taking those medications in combination with other medicine that had been prescribed to him.

c. *Defense Case*

Adie Recio, a pharmacist employed by Rite Aid, testified for the defense on direct examination as follows:

Pharmacy customers must sign for prescription medication on an electronic pad, but first must answer certain questions on the pad. The customer must mark a box indicating whether the medication is for the customer or for someone else. The customer also must indicate whether he or she has been counseled by the pharmacist on the medication or, instead, declines counseling.

Rite Aid's standard procedure when a customer is counseled for prescription medication is that the customer first is told to whom the medication is prescribed. Then the customer is told the name of the medication, the condition for which the medication is prescribed, the instructions for use and side effects, and is told that the medication must be taken only according to the instructions.

All medications prescribed to a customer are placed in a single bag, or more than one bag clipped together, and are not be commingled in the same bag with medications prescribed to another person. An instruction sheet for each medication also is placed inside the bag. If a customer picks up medication prescribed to another person, that medication is placed in a separate bag apart from any medication prescribed to the customer. Each prescription has a separate prescription number.

Plaintiff would have signed only once for all four medications prescribed to Lennette Taylor that he picked up on December 3, 2008, although a separate computer printout could be generated for each medication showing his signature and other

information. Each of the four medications prescribed to Lennette Taylor had the same prescription number, while the two medications prescribed to plaintiff that he picked up that same day had a different prescription number.

On cross-examination, Recio testified at times that she could not recall what had occurred on that particular occasion two years earlier, while at other times she explained in detail what had occurred and stated repeatedly, “There was no mistake.” She stated that she asked plaintiff whether he was picking up for Lennette Taylor as well as himself and that he did not respond but completed two separate transactions, first for Lennette Taylor and then for himself, and paid \$4.20 for Lennette Taylor’s medications. She stated that customers often picked up medication for their family members and that she had assumed at the time that plaintiff was doing so.

Rite Aid also presented documentary evidence suggesting that plaintiff had completed two separate transactions, first for Lennette Taylor and then for himself, and that the “other” box was checked in the first transaction indicating that he was picking up medication for someone other than himself.

Dr. Raffi Simonian, a pharmacist, testified as an expert witness for Rite Aid. Dr. Simonian stated that Taylor’s testimony that he had signed separately for each medication, completed only a single transaction and received both his own medications and those prescribed to Lennette Taylor together in one bag was inconsistent with the records. Dr. Simonian stated that, in his opinion, Rite Aid had satisfied the applicable standard of care.

Dr. Dale Isaeff, a cardiologist, also testified as an expert witness for Rite Aid. He stated his opinion that plaintiff had failed to take his own medications as directed and that plaintiff's taking of the medications prescribed to Lennette Taylor did not cause either his kidney failure or his heart injury. Dr. Isaeff acknowledged that he had referred to "pharmacy error" or "prescription error" in a declaration filed in support of Rite Aid's summary judgment motion, but explained that he was referring to an error in a broad sense meaning some miscommunication, and was not suggesting that Rite Aid had committed an error.

## *2. Procedural Background*

Plaintiff filed a complaint against Rite Aid in November 2009, alleging a single count for negligence. The trial court denied Rite Aid's motion for summary judgment. A jury trial commenced in January 2011. Plaintiff moved after the close of evidence for a partial directed verdict on the issue of liability. The trial court denied the motion.

The jury returned a special verdict answering "No" to the question, "Was Rite Aid negligent in the dispensing of medication to Lieutenant Taylor?" The trial court entered a defense judgment on February 3, 2011. Plaintiff moved for a new trial, arguing among other things that the denial of his motion for a partial directed verdict was error and that the evidence did not support the finding that Rite Aid was not negligent. The trial court denied the motion. Plaintiff timely appealed the judgment.

## ***CONTENTIONS***

Plaintiff contends the evidence compels the conclusion that Rite Aid negligently dispensed to him medications prescribed to another person together with his own

medications, without his knowledge. He contends the denial of his motion for a partial directed verdict on liability was error, and the evidence does not support the jury's finding that Rite Aid was not negligent.

### ***DISCUSSION***

#### ***1. Standard of Review***

We review factual findings by the trier of fact under the substantial evidence standard. Substantial evidence is evidence that a rational trier of fact could find to be reasonable, credible and of solid value. We view the evidence in the light most favorable to the judgment and accept as true all evidence tending to support the judgment, including all facts that reasonably can be deduced from the evidence. We must affirm the judgment if an examination of the entire record viewed in this light discloses substantial evidence to support the judgment. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429; *Mealy v. B-Mobile, Inc.* (2011) 195 Cal.App.4th 1218, 1223.)

#### ***2. Substantial Evidence Supports the Finding of No Negligence***

Taylor contends Recio's testimony was so self-contradictory and illogical that it cannot constitute substantial evidence of what occurred and cannot support the finding that Rite Aid was not negligent. Viewing the evidence in the light most favorable to the judgment, as we must, we conclude that the potential inconsistencies in Recio's testimony do not totally defeat its evidentiary value. Instead, her comments that she could not recall what had occurred two years earlier reasonably could be construed as



brief, temporary memory lapses, or equivocation that she quickly overcame, or references to specific details that she did not recall rather than to the events as a whole.

The following testimony illustrates our point:

Plaintiff's counsel: "According to you, what happened was Lieutenant Taylor comes into the store and he's asked if he is there to pick up Lennette Taylor's medication. Is that right?"

Recio: "That's right."

Plaintiff's counsel: "Do you know why they asked him if he was there to pick up Lennette Taylor's medication if he didn't mention Lennette Taylor?"

Recio: "Wait. Say that again. I'm sorry."

Plaintiff's counsel: "Do you know why Lieutenant Taylor was asked if he was there to pick up Lennette Taylor's medication?"

Recio: "Okay. Actually, this was two years ago, more than two years ago. I really don't have a recollection at all, because what I did was give the—what do you call that—the instructions and how to use it. But I mentioned the name, 'Lennette Taylor,' but he didn't say anything about Lennette."

Plaintiff's counsel: "I'm at a loss. It's very important, so we need to be clear about this."

Recio: "Okay."

Plaintiff's counsel: "Are you telling us that all of the medication was on a counter at the same time, and you picked up one that might say Lieutenant Taylor, and then you picked up another one and it might say Lennette Taylor?"

Recio: “It was Lennette first that he picked up, and then him.”

Plaintiff’s counsel: “So it’s your testimony that you gave him what he asked for, is that right?”

Recio: “That’s right.”

Despite briefly stating that she could not recall what had occurred two years earlier, Recio testified in the next breath that Taylor failed to respond when she mentioned the name Lennette Taylor. The jury reasonably could have concluded that Recio initially faltered in her recollection but then recalled the encounter. Or the jury reasonably could have understood her stated inability to recall to relate specifically to why she asked Taylor asked whether he was picking up for Lennette Taylor rather than more generally to the events that occurred. Recio later explained that she had assumed that Lennette Taylor was a family member or a friend. In our view, her testimony is by no means fatally inconsistent.

Taylor also cites Recio’s testimony at the end of the following exchange:

Plaintiff’s counsel: “Their lawyer wrote about a pharmacy error, and it’s still your testimony that you didn’t make an error. Is that right?”

Recio: “Because he picked up the prescription of the same name, and I was not aware of the fact that it was not for him, because it was the same name. It was a relative or a friend.”

Plaintiff’s counsel: “Now, ma’am, I don’t know if I understood your answer. Is it still your testimony that as the pharmacist, you made no error in giving Lieutenant Taylor medication that should have been given to Lennette Taylor?”

Recio: “After he picked up the prescription—it was more than two years ago. I don’t have any clue at all what happened.”

Even if Recio’s testimony on this point reveals some equivocation, doubt or contradiction, it does not necessarily render her other testimony totally without evidentiary value. Instead, we conclude that the weight of her testimony and her credibility as a witness were questions of fact for the jury to decide viewing her testimony as a whole in light of all of the evidence presented at trial.

Recio testified that she asked plaintiff whether he was picking up for Lennette Taylor as well as himself. She testified that he did not respond but proceeded to complete two separate transactions. She stated that she counseled him on all of the medications and that her usual practice in counseling a customer was to state to whom the medication was prescribed, the name of the medication, the condition for which the medication was prescribed, the instructions for use and the side effects, and to state that the medication must be taken only according to the instructions.<sup>2</sup> We conclude that this evidence, together with the documentary evidence indicating that Taylor signed twice for two separate transactions and the expert testimony by Dr. Simonian to the same effect are sufficient to support the jury’s finding that Rite Aid was not negligent in dispensing the medications.

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<sup>2</sup> Evidence Code section 1105 states, “Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.”

Plaintiff also points to the fact that the order number for all six medications was the same and argues that Recio's explanation for this fact was inadequate. He contends the fact that Rite Aid identified both his medications and Lennette Taylor's medications by the same order number compels the conclusion that all of the medications were dispensed at the same time and in the same bag. We disagree. Recio testified that each customer's prescription is automatically assigned a separate order number at the time the prescription is filled. But her testimony also suggested that she did not fully understand how order numbers were assigned. Recio testified concerning order numbers:

"It differs. But the printout from the computer, it depends on how many you print out. We were not responsible for the serial number down there. It is the computer. We can't tamper with that. However it comes out, that is through the computer."

Contrary to plaintiff's argument, neither Recio's testimony on order numbers nor any other evidence presented at trial compels the conclusion that all of the medications were dispensed to Taylor together in one bag without his knowledge that some of them were prescribed to another person. Other purported discrepancies noted by plaintiff also fail to establish as a matter of law that the evidence supporting the verdict was inherently improbable or otherwise insufficient to support the verdict. We conclude that substantial evidence supports the jury verdict and that plaintiff has shown no error in the denial of his motion for a partial directed verdict or the denial of his new trial motion.

***DISPOSITION***

The judgment is affirmed. Rite Aid is entitled to recover its costs on appeal.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.