

Kares v Townsend

2007 NY Slip Op 31596(U)

June 7, 2007

Supreme Court, New York County

Docket Number: 0113956/2002

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Solomon
Justice

PART 55

MICHAEL ICAROS
- v -
Re EDWARD TOWNSEND JR.

INDEX NO. 113956/02
MOTION DATE 3/19/07
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for strike expert disclosure

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4-5</u>
Replying Affidavits _____	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. -- Pre-trial conference is scheduled for 6/25/07 at 2 PM

FILED
JUN 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6-7-07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----x

MICHAEL KARES,

DECISION and ORDER

Plaintiff,

Index No. 113956/02

-against-

R. EDWARD TOWNSHEND, JR. As Executor of
the Estate of PETER I.A. SZILAGYI, M.D.,

Defendant.

FILED
JUN 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

Jane Solomon, J.:

In this malpractice action, defendant moves for: 1) an order striking plaintiff's pharmacology and psychiatry expert witness disclosures on the grounds that they were not timely served in accordance with this court's order dated November 13, 2006; or in the alternative, 2) an order striking plaintiff's pharmacology expert witness disclosure on the grounds that the expert witness is not qualified to offer opinions about psychiatric standards of care and an order striking the psychiatry expert witness disclosure on the grounds that the expert's opinions are speculative; and 3) an order dismissing the Complaint on the grounds that this action is not supported by valid expert opinions. For the reasons stated below, the motion is granted in part and denied in part.

Plaintiff commenced this action in July of 2002. Plaintiff alleges that Dr. Szilagyi failed to diagnose and treat plaintiff's true psychological condition, i.e. hypomania and

bipolar disorder. Plaintiff also alleges that Dr. Szilagyi failed to schedule follow-up appointments to monitor the prescribed dosages of Luvox and ignored certain signs and symptoms of mania, increased alcohol consumption, increased speed of thinking, increased energy level, increased debt and negative changes in sleep patterns. The Complaint asserts that the doctor's alleged negligence exacerbated plaintiff's gambling disorder, resulting in a significant loss of money and loss of reputation.

"It is well settled that the determination of a witness' qualification to testify as an expert rests in the sound discretion of the trial court...and 'will not be disturbed in the absence of a serious mistake, an error of law or an improvident exercise of discretion.'" Steinbuch v Stern, 2 AD3d 709, 710 [2d Dept 2003], quoting Pignataro v Galarzia, 303 AD2d 667, 667-668 [2d Dept 2003]. "'A witness may be qualified as an expert based upon '[l]ong observation, actual experience and/or study.'" Id., quoting McLamb v Metropolitan Suburban Bus Auth, 139 AD2d 572 [2d Dept 1988].

Initially, defendant argues that plaintiff's expert testimony should be stricken pursuant to CPLR § 3126(2) as untimely. It is undisputed that plaintiff was required to serve the expert witness disclosure by December 18, 2006. Plaintiff

did not serve such disclosure until January of 2007. However, defendant has not demonstrated that plaintiff's conduct was willful or that defendant would be prejudiced. See, Leeds v Lenox Hill Hospital, 6 AD3d 232 [1st Dept 2004]; Sanchez v City of New York, 266 AD2d 127 [1st Dept 1999]; Crowley v Montefiore Hosp and Medical Center, 128 AD2d 443 [1st Dept 1987]. Therefore, this portion of the motion is denied.

A. Dr. Wurpel

Plaintiff seeks to introduce expert testimony from John Wurpel, M.S., Ph.D, who is a pharmacologist and an Associate Professor of Pharmaceutical Sciences. Dr. Wurpel would be expected to opine on the pharmacology, monitoring and adverse effects associated with the use of Luvox.

Dr. Wurpel would testify that use of Luvox is associated with numerous side effects and adverse reactions. These include changes in, among other things, mood, outlook, cognitive behavior, impulsive behavior and mania. Other effects include nervousness, agitation and psychotic reactions.

Dr. Wurpel would further testify that he believes that plaintiff developed an adverse reaction (mania) from the use of Luvox. He would also testify that Dr. Szilagyi failed to recognize this adverse reaction and therefore failed to treat

such condition. Finally, he would testify that Dr. Szilagyi should have reduced plaintiff's dose or changed his therapy by administering a different antidepressant drug.

In general, an expert who is not a doctor is not qualified to render a medical opinion or to testify as to whether a doctor deviated from accepted standards of medical care in treating the plaintiff. See, Elliot v Long Island Home, Ltd, 12 AD3d 481, 482 [2d Dept 2004] (nurse not qualified to render medical opinion); Mills v Moriarty, 302 AD2d 436 [2d Dept 2003] ("nurse-practitioner, who was not a medical doctor, was not qualified to render a medical opinion as to the relevant standard of care and whether the defendants had deviated from that standard"). In Jordan v Glens Falls Hosp, 261 AD2d 666, 667 [3d Dept 1999], the plaintiff submitted an affidavit of a pharmacologist who opined that "in light of plaintiff's past medical history, defendant should have prescribed 'prophylactic antimicrobial therapy'." The trial court rejected such testimony. In affirming that decision, the Appellate Division, Second Department noted that the expert witness possessed a Ph.D. in pharmacology, and an "impressive curriculum vitae". Id. However, he was not a medical doctor and thus neither his education or his professional experience qualified him to render an opinion as to the course of treatment the defendant should have undertaken. Id. As such, his proposed testimony could not

be considered competent medical opinion with regards to the defendant's negligence. Id.

Here, Dr. Wurpel is not qualified to render a medical opinion or to opine on whether Dr. Szilagyi's treatment of plaintiff deviated from accepted standards of medical care. Dr. Wurpel is not a medical doctor. Nothing in his curriculum vitae suggests or demonstrates that he is qualified to opine on the type of treatment that plaintiff should have received.

Dr. Wurpel is, however, qualified to opine on the general pharmacological effects of Luvox. Pharmacology, generally, "involves the study of drugs, the properties and reactions of drugs and the relation of these properties and reactions to their therapeutic value, including the effect of chemical substances on various organs of the body." Karasik v Bird, 98 AD2d 359, 362 [1st Dept 1984]. In Karasik, the court permitted the pharmacological expert to testify "where the critical issue for the jury's determination was the effect, if any, upon the organs of the decedent's body of the chronic ingestion of the drugs prescribed by [the defendant]..." Id. at 363. Here, as a pharmacologist, Dr. Wurpel possesses the expertise to opine on the various possible effects that Luvox has on a person who is taking the drug, including adverse side

effects. Therefore, he may offer expert testimony on that topic in this action.

B. Dr. Thomas Gutheil

Plaintiff also seeks to introduce testimony from Dr. Thomas Gutheil, who is a practicing physician and a board-certified psychiatrist. Dr. Gutheil would testify that, with a reasonable degree of medical certainty, Dr. Szilagyi's treatment of plaintiff deviated from accepted standards of medical care and that such treatment was the proximate cause of plaintiff's injuries.

Defendants do not argue that Dr. Gutheil is not qualified to testify in this action. Instead, they argue that Dr. Gutheil's testimony should not be permitted because his opinions are speculative and conclusory. This is unpersuasive.

Dr. Gutheil is clearly qualified to testify as an expert in this action based on his medical and psychiatric credentials. Moreover, his proposed testimony adequately sets forth that Dr. Szilagyi failed to properly monitor plaintiff's use of Luvox and failed to diagnose hypomania, which allegedly resulted from plaintiff's use of Luvox. According to Dr. Gutheil, Dr. Szilagyi also failed to schedule follow-up appointments for plaintiff, failed to prescribe appropriate blood

work, failed to reduce plaintiff's intake of Luvox and failed to prescribe a mood stabilizer or other anti-psychotic drug.

It is, of course, for the finder of fact to determine what weight, if any to accord to plaintiff's expert testimony. See, In re Timothy M., 307 AD2d 295, 296 [2d Dept 2003]; Bodensick v. Schwartz, 292 AD2d 411 [2d Dept 2002]. However, defendant has not demonstrated that this testimony should be excluded. Accordingly, it is

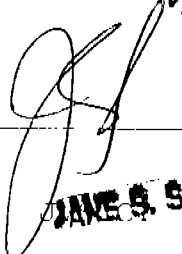
ORDERED that defendant's motion is granted to the extent that Dr. Wurpel may not render a medical opinion or to opine on whether Dr. Szilagyi's treatment of plaintiff deviated from accepted standards of medical care; and it is further

ORDERED that the motion is otherwise denied; and it further is

ORDERED that counsel shall appear in Part 55, 60 Centre Street, Room 432, New York, NY for a pre-trial conference on June 25, 2007 at 2 PM.

DATED: June 7, 2007

ENTER:

FILED
JUN 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON