

**Cunneen v Upper E. Side Pain Medicine, P.C.**

2016 NY Slip Op 31442(U)

July 15, 2016

Supreme Court, New York County

Docket Number: 160006/2013

Judge: Joan B. Lobis

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X

JOSEPH CUNNEEN, SR. as Administrator of the  
Estate of JOSEPH CUNNEEN, JR., Deceased and  
JOSEPH CUNNEEN, SR., Individually,

Plaintiffs,

Index No. 160006/2013

**Decision and Order**

-against-

UPPER EAST SIDE PAIN MEDICINE, P.C.,  
GORDON FREEDMAN, M.D., JOEL KREITZER,  
M.D., VINO THOMAS, M.D., BELLE  
HARBOR CHEMISTS, INC., RICHARD  
LONGO, AND JONATHAN GLASHOW, M.D.,

Defendants.

-----X

**JOAN B. LOBIS, J.S.C.:**

This medical malpractice action arises out plaintiff Joseph Cunneen, Jr.'s (decedent) prescription pain medication overdose and consequent death on November 30, 2011. Plaintiffs allege his death resulted from defendants' mismanagement of his pain medications and failure to properly monitor him. On October 30, 2013 plaintiffs brought this action for medical malpractice, personal injuries, and wrongful death. Defendants Upper East Side Pain Medicine, P.C., Gordon Freedman, M.D., Joel Kreitzer, M.D., Vinoo Thomas, M.D. (collectively the UES defendants) and Jonathan, Glashow, M.D., and defendants Belle Harbor Chemists, Inc. and Richard Longo (collectively the Belle Harbor defendants) separately move for summary judgment. The parties discontinued against Dr. Glashow subsequent to filing these motions. The motions are consolidated for disposition. For the reasons below, Belle Harbor's motion is granted and the UES defendants' motion is granted in part.

Decedent first presented to Dr. Glashow on August 16, 2006 for shoulder pain associated with injuries he sustained, in December 2005. He treated with Dr. Glashow for various orthopedic issues until October 4, 2010, during which time Dr. Glashow performed several surgeries and prescribed a variety of pain medications. Eventually, Dr. Glashow concluded that decedent's pain was disproportionate to his underlying orthopedic pathology and referred him to Upper East Side for specialized pain management treatment. Decedent treated with Dr. Kreitzer from his first presentation to Upper East Side on March 4, 2009 until May 12, 2010. On October 26, 2009 decedent began treating with Dr. Thomas in addition to Drs. Glashow and Kreitzer. From June 8, 2010 to August 3, 2010 he also treated with Dr. Freedman. Both Dr. Glashow and the UES defendants wrote prescriptions which plaintiff filled at Belle Harbor Chemists, Inc. Pharmacist Longo is a shareholder of Belle Harbor Chemists, Inc. and also works there as a pharmacist.

The UES defendants first argue that plaintiffs' claims against Drs. Kreitzer, and Freedman are time-barred because Dr. Kreitzer's last contact with decedent was May 12, 2010 and Dr. Freedman's last contact with decedent was August 3, 2010. In addition, they argue that treatment rendered by defendants was always within the standard of care, and that it did not proximately cause any alleged injury. Finally, they argue that there is no evidence of malicious conduct to warrant punitive damages.

In support of their motion, the UES defendants submit the affirmation of Philip J. Wagner, M.D., a New York licensed physician who is board certified in anesthesiology and pain medicine. Based on his review of the relevant records, Dr. Wagner opines to a reasonable degree of medical certainty that all care rendered by the UES defendants was in accordance with accepted

practice and did not cause decedent's death. Dr. Wagner states that Drs. Kreitzer and Freedman prescribed medications at the lowest safe and effective doses, in appropriate combinations that did not create undue risks for decedent. He opines that defendants properly monitored decedent's medication and did not perceive signs of drug abuse or addiction. Additionally, he avers that because Drs. Freedman and Krieter last prescribed medication to decedent over a year before his death, and because he was under the care of Dr. Thomas, decedent's death could not have been proximately caused by their treatment. Dr. Wagner opines that Dr. Thomas formed an appropriate alternative plan to pain medication, and when that plan was unsuccessful he both formed a plan to reduce and possibly discontinue decedent's pain medication, and recommended that decedent receive counseling or attend in-patient rehabilitation and detox. Dr. Wagner states that when decedent refused, Dr. Thomas reasonably concluded that he could not unilaterally reduce decedent's medications or force him into rehabilitation, and therefore there was no reasonable alternative to his decision to continue counseling decedent with the intention of eventually reducing or eliminating his use of pain medications. Further, Dr. Wagner states that it was not foreseeable that the medications would cause or contribute to decedent's death because Dr. Thomas continued to prescribe them in the same combination and dosages that decedent had tolerated for over a year without incident.

The Belle Harbor defendants argue that they cannot be held liable for negligence or medical malpractice because they filled decedent's prescriptions as directed by the physicians and were not aware that decedent had any conditions which would render the prescribed drugs contraindicated. They argue that Dr. Wagner's expert affirmation demonstrates that the prescriptions were not so inappropriate that the pharmacy defendants should have declined to fill

them. Further, they argue that plaintiffs' informed consent claim does not apply to them because a pharmacist has no duty to obtain a customer's informed consent in this context. Additionally, they argue the wrongful death cause of action must be dismissed against them because their failure to decline to dispense medications cannot reasonably be considered a substantial factor in causing decedent's death. They contend that if there is any doubt that medications should be dispensed to a patient, their custom and practice is to call the treating physicians to verify. In this case, they argue, had they called they would have been assured that the prescriptions were correct as written, and if they had refused to fill them decedent would have presented to another pharmacy. In support of their motion they attempted to submit the affirmation of Dr. Maria Toscano, but they only filed the signature page with the Court.

Plaintiffs argue that the UES defendants do not meet their burden. They state that defendants' expert does not address certain testimony from decedent's parents, a note from Dr. Glashow in the UES chart demonstrating his discomfort with the medications prescribed to decedent, issues raised by decedent's worker's compensation carrier's representative, or the medical examiner's findings. Further, they argue that the expert did not address a September 9, 2011 urine test which allegedly proved drug abuse because the low presence of drugs in decedent's system suggested he was stockpiling pills. They argue that Dr. Wagner's expert opined that all treatment was within the standard of care but does not provide an explanation for decedent's death. Further, plaintiffs argue that the claims against the UES defendants are not time-barred because each treating doctor in a team of doctors is deemed to participate in treatment until its termination. They state that the continuous treatment doctrine tolls the statute of limitations against doctors alleged to have committed malpractice in a group practice, such as this one, where the patient was

a patient of the group. Further, they argue they are entitled to punitive damages because 1) defendants consciously disregarded the Controlled Substance Agreements decedent signed, 2) there is clear evidence of misuse of lethal medication, and 3) defendants ignored warnings from Liberty Mutual representatives about over-prescribing and misuse of pain medications.

Plaintiffs argue that although Pharmacist Longo testified that the Belle Harbor defendants possess evidence that the prescriptions were proper and were filled in accordance with the physician's specific directives, they have not provided it. Plaintiffs contend that they are entitled to an adverse inference because defendants' failure to provide these records has placed them at a significant disadvantage in proving their claim. They allege that Dr. Glashow acknowledges there is an expectation that a pharmacist will provide instructions as to proper use of prescribed medications, including the maximum to take in a particular day, and that Mr. Longo failed to provide such information even though he testified they are readily available to him. Plaintiffs state that the Belle Harbor defendants ignored red flags that decedent was misusing his medication and were well aware of decedent's addiction.

Plaintiff submits the redacted affirmation of a New York licensed physician who is board certified in anesthesiology. After reviewing the relevant records, plaintiffs' expert concludes to a reasonable degree of medical certainty that the UES defendants departed from the accepted standard of care in their treatment of decedent and that their negligent prescription of medication and failure to monitor him caused his death. The expert avers that the standard of care required the UES doctors to conduct urine or blood testing, random pill counts, keep records with respect to what medications were taken, arrange a consultation with an addiction specialist or psychiatrist, and take action pursuant to the Controlled Substance Agreement decedent signed in response to

indications that he was not taken his medications as prescribed. The expert opines that when the medications decedent used are not taken as prescribed they interact with each other causing respiratory depression and hypoxia, which results in the brain not getting enough oxygen and eventually death. The expert states that any offer by the doctor to assist with decedent's rehabilitation, if made at all, was cursory and far too late and that the defendants were put on notice of decedent's drug problem when Dr. Glashow refused to write further prescriptions and when they received a "red flag" from decedent's worker's compensation carrier raising concerns about decedent's treatment plan.

Additionally, plaintiffs submit a notarized letter with a certificate of conformity from Matthew C. Lee, M.D. R.Ph., a Virginia licensed physician who is also a pharmacist licensed to practice in Virginia, Kentucky, and North Carolina. Based on his review of the relevant records, Dr. Lee affirms to a reasonable degree of professional certainty that it is impossible for him to determine whether the medications were properly dispensed without information as to the frequency and dosage of the medications prescribed to decedent, but that they were prescribed at very high dosages and in combination would have had a synergistic effect on one another, and that they caused decedent's death. He avers that a pharmacist has a duty to provide his patient adequate instructions regarding how and when to take the medications prescribed as well as the potential adverse effects of combining medications, and to inform the prescriber when there is an indication that the patient is not taking medications as directed. He states that there is no evidence that the pharmacist warned decedent about the risks of the medications or that they should not be taken with certain over-the-counter medications. He states that pharmacist Longo should have called the

prescribing doctors to advise them that decedent brought his prescriptions to be filled early, and by failing to do so, he deprived decedent of the opportunity for appropriate intervention.

In reply the UES defendants argue that plaintiffs' assertions about their expert's affidavit are insufficient to establish that they are not entitled to summary judgment. They argue that Dr. Glashow did not testify that he was uncomfortable with decedent's medications but rather that he deferred to the pain management specialists. Further, they argue that Dr. Thomas did not ignore the alleged red flags raised by decedent's worker's compensation carrier, but instead addressed the issues when he recommended that decedent consider admittance to inpatient rehabilitation centers. Further, they argue that plaintiffs incorrectly contend that their expert did not address the September 2011 urine test, stating that there were reasonable explanations for the unexpected absence of certain drugs in decedent's system especially where, as here, decedent did not exhibit other signs associated with medication abuse. They argue that plaintiffs' expert misinterprets the medical examiner's findings. Additionally, they argue that plaintiffs' expert states that they prescribed decedent unusually high dosages of medication but does not opine as to what appropriate doses are, and he does not explain why pill counts or drug testing were indicated in decedent's case. Further, they argue, plaintiffs' expert does not opine that implementing pill counts or testing would have prevented decedent's death. Whether or not the claims are time-barred, they assert, plaintiffs do not explain how a causal relationship can exist when the treatment occurred more than a year prior to decedent's death. They argue that they had no duty to supervise after decedent was discharged from their care, and that they cannot be vicariously liable for subsequent treatment rendered by another employee of the group. They argue that the action must be dismissed against Upper East Side Pain Medicine, P.C. because there are no allegations of

independent malpractice and no triable issues of fact concerning its treatment. Finally, they reiterate that there is no cause of action for punitive damages.

The Belle Harbor defendants argue that Dr. Lee accuses them of ignoring duties that do not exist. They assert that New York does not require a pharmacist to warn a patient about risks associated with drugs he is prescribed, and that instead physicians are responsible for giving such warnings. They also assert that there is no duty for a pharmacist to report suspicions that a patient is not taking medications as directed. Moreover, they argue, each prescription comes with a printout advising patients of the drug's side effects and uses, sets forth and when to take each medication. Pharmacist Longo testified pursuant to his normal practice he would have spoken to decedent about side effects when he dispensed the medication. The Belle Harbor defendants argue that plaintiffs have not shown evidence of a deviation. They argue that Dr. Lee, who is not licensed in New York State, cannot testify as to the standard of practice here. They also point out that while plaintiffs' experts have testified decedent was taking inordinate amounts of medication, there is no testimony that the prescription doses were outside standard guidelines. They contend that they were not on notice that decedent was abusing his medications. They state that Pharmacist Longo testified that on several occasions decedent asked when his prescriptions could be refilled and not, as plaintiffs argue, whether he could fill them early. Additionally, they state based on the medical examiner's report, at the time of his death decedent had not ingested pills left over from a prior prescription, and while plaintiffs' expert testified that combining decedent's medications could result in death, the medical examiner found his cause of death to be an overdose. Therefore, they assert, plaintiffs did not show proximate cause. With respect to their failure to disclose the readily available documents to which they refer, they assert that plaintiffs' counsel did not mail the

demand for dosing instructions until they filed the note of issue and plaintiffs do not explain how the missing instructions or printouts could create a triable issue of fact. They argue that it is contradictory for plaintiffs to argue both that defendants did not heed direct warnings from Dr. Glashow and decedents' worker's compensation carrier, and that if the pharmacy had informed defendants that he presented early from time to time they could have intervened successfully.

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. *E.g.*, Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). The affidavit must recite all material facts and show, where defendant is the movant, that the cause of action has no merit. *Id.* Courts grants the motion if, upon all the papers and proof submitted, it is warranted as a matter of law in directing judgment. *Id.* Summary judgment proceedings are for issue spotting, not issue determination. *See, e.g.*, Suffolk County Dep't of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994).

In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. *E.g.*, Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). The expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 195. The expert cannot make conclusions by assuming material facts not supported by record evidence. *Id.* Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard

of care.” Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep’t 2010). A defendant’s expert opinion must “explain ‘what defendant did and why.’” Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep’t 2003)).

Once the defendant makes a prima facie showing, the burden shifts to the plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). To meet that burden, a plaintiff must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure proximately caused the injuries. See Rogues, 73 AD.3d at 207. Where opposing experts disagree, the disputed issues must be resolved by a fact finder and summary judgment is precluded. Barnett v. Fashakin, 85 AD.3d 832, 835 (2d Dep’t 2011); Frye v. Montefiore Med. Ctr., 70 AD.3d 15, 25 (1st Dep’t 2009).

Here, defendants satisfy their prima facie burden. Through their experts, the UES defendants establish that all care to decedent was in accordance with accepted practice in that they prescribed proper medications for decedent’s condition, appropriately monitored him, and attempted to implement alternatives to medication. The Belle Harbor defendants demonstrate that there is no reason to believe they did not fill all of decedent’s prescriptions in accordance with the prescribing doctors’ orders, and that they did not have reason to believe decedent had a condition which rendered his prescriptions contraindicated. This is sufficient to shift the burden to plaintiffs.

Plaintiffs’ expert’s testimony, however, creates triable issues of fact as to whether the UES defendants negligently prescribed medication to decedent or failed to properly monitor

him for signs of addiction. The UES defendants do not provide support for their challenge to plaintiffs' contention that the statute of limitation for Drs. Freedman and Kreitzer's treatment tolled because they were part of a team of treating doctors with Dr. Thomas. They argue that plaintiffs do not demonstrate how their treatment could have proximately caused decedent's death. Plaintiffs' expert testimony however creates a triable issue of fact as to whether their failure to appreciate signs of his addiction and continuous prescription of contraindicated medication directly led to his addiction and subsequent overdose.

Plaintiffs do not, however, create a triable issue of fact as to whether the Belle Harbor defendants were negligent. As the Belle Harbor defendants argue, a pharmacist generally cannot be found liable for negligence absent an allegation that he or she failed to follow a physician's directive, had knowledge that the prescription was contraindicated, or engaged in active negligence. See Abrams v. Bute, 138 A.D.3d 179 (2d Dep't 2016); Brumaghim v. Eckel, 94 A.D.3d 1391, 1392 (3d Dep't. 2012). In response, plaintiffs do not show that pharmacists have a duty to intervene upon a suspicion that a patient is not taking his medication as directed exists. Additionally, there is no evidence that the Belle Harbor defendants knew decedent was not taking his medication as directed. Plaintiffs' argument that the Belle Harbor defendants did not fill decedent's prescriptions properly and did not warn decedent about the possible harmful effects of his medications is purely speculative, and their argument that they are prejudiced by the defendants' failure to produce computer generated documents with dosages and warnings is not enough to create a triable issue of fact. Plaintiffs have not demonstrated that the individual prescriptions were so inappropriate the pharmacy defendants should be liable for filling them. Additionally, plaintiffs have not alleged the type of malicious conduct necessary to warrant

punitive damages as to any defendant. The Court has considered the remainder of the parties' arguments and they do not alter the outcome.

Accordingly, it is

ORDERED that motion sequence 003 is granted to the extent it seeks to dismiss the cause of action for punitive damages; and it is further

ORDERED that the remainder of motion sequence 003 is denied; and it is further

ORDERED that motion sequence 004 is granted; and it is further

ORDERED that the caption is hereby amended to reflect the discontinuance against Dr. Glashow. The new caption shall read:

-----X

JOSEPH CUNNEEN, SR. as Administrator of the Estate of JOSEPH CUNNEEN, JR., Deceased and JOSEPH CUNNEEN, SR., Individually,

Plaintiffs,

Index No. 160006/2013

**Decision, Order, and Judgment**

-against-

UPPER EAST SIDE PAIN MEDICINE, P.C., GORDON FREEDMAN, M.D., JOEL KREITZER, M.D., and VINO THOMAS, M.D.,

Defendants.

-----X

The parties are directed to use the new caption and the Clerk of the Court is directed to enter judgment accordingly.

Dated: *July 15*, 2016

ENTER:



\_\_\_\_\_  
JOAN B. LOBIS, J.S.C.