

Javorowsky v Ahmed
2019 NY Slip Op 34757(U)
April 9, 2019
Supreme Court, Nassau County
Docket Number: Index No. 605777-16
Judge: Robert A. Bruno
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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LINDA JAVOROWSKY, Individually and as
Administrator of the Estate of BRIAN SCOTT BAIKO,

TRIAL/IAS PART 12

Plaintiff,

-against-

Index No.: 605777-16
Submission Date: 2/5/19
Motion Sequence: 001

FARHANA AHMED, D.O., MOHAMMED A. HADI,
D.O., ANDREW S. WEBER, M.D.,

DECISION & ORDER

Defendants.
-----X

Sequence #001

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Upon the foregoing papers, the motion by defendants FARHANA AHMED, D.O. and MOHAMMED A. HADI, D.O., for an Order pursuant to CPLR §3212, dismissing plaintiff's complaint as to the moving defendants, is determined as set forth below.

This is a medical malpractice action predicated upon allegations of negligence in prescribing methadone. Plaintiff alleges that the moving defendants' negligence resulted in the death of plaintiff's decedent from an overdose of methadone and Xanax. The following facts are taken from the parties' submissions and do not constitute findings of fact by the Court. Except where otherwise noted, the facts recited below are undisputed.

The moving defendants, FARHANA AHMED, D.O. ("Dr. AHMED") and MOHAMMED A. HADI, D.O., ("Dr. HADI") are pain management physicians in the same practice group who treated plaintiff's 40 year old son, BRIAN SCOTT BAIKO ("Mr. BAIKO") from January 2014 through July 2014.

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Mr. BAIKO first presented to Dr. HADI on January 28, 2014 with complaints of pain, which Mr. BAIKO attributed to a prior motor vehicle accident. Dr. HADI testified that upon examination and review of radiological studies, he determined that Mr. BAIKO had cervical disc herniations, lumbar disc herniations and a left knee derangement. Dr. HADI concluded that Mr. BAIKO had chronic pain syndrome in the spine. Dr. HADI saw Mr. BAIKO in two-week intervals over the six-month period from January through July 2014, and repeatedly gave Mr. BAIKO prescriptions for a two-week supply of methadone. He last saw Mr. BAIKO on July 15, 2014.

On July 29, 2014, Mr. BAIKO was seen, for the first and only time, by Dr. AHMED, who was covering for Dr. HADI. Dr. AHMED prescribed another two-week dose of methadone. In the early morning hours of August 1, 2014, Mr. BAIKO was found unresponsive, and was brought to Nassau University Medical Center, where he was pronounced dead at 4:18 AM. The autopsy report identified the cause of death as “[c]ombined acute intoxication with methadone and alprazolam.”

Plaintiff, who is Mr. BAIKO’s mother and the administrator of his estate, commenced this action with the filing of the Summons and Complaint on July 28, 2016. In her First Amended Complaint [*NYSCEF Doc. 3*], plaintiff alleges that the moving defendants departed from good and accepted standards of practice in prescribing methadone and alprazolam (Xanax) to Mr. BAIKO. Plaintiff also sued co-defendant ANDREW S. WEBER, MD, Mr. BAIKO’s primary care physician, on the basis that he negligently prescribed clonazepam (Klonopin) to Mr. BAIKO.

The Bill of Particulars as to Dr. HADI [*NYSCEF Doc. 52*] lists the various drugs allegedly prescribed by Dr. HADI and the dates on which the prescriptions were filled by the pharmacy. According to the Bill of Particulars, Dr. HADI was negligent in (i) prescribing methadone for pain management to Mr. BAIKO, who was a known drug addict; (ii) prescribing excessive quantities of methadone (ranging from 60-105 10 mg. tablets), which exposed Mr. BAIKO to the danger of overdosing, rather than providing a single dose at a time, to be administered under supervision; and (iii) prescribing large doses of other medications that dangerously interacted with methadone. The Bill of Particulars as to Dr. AHMED [*NYSCEF Doc. 53*] similarly alleges the prescription of an excessive supply of methadone on July 29, 2014, particularly in combination with the other substances that Mr. BAIKO was taking or had recently taken, which exposed Mr. BAIKO to the danger of overdose.

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Defendants Dr. HADI and DR. AHMED move for summary judgment dismissing the action as against them, on the ground that their care and treatment of Mr. BAIKO was in accordance with accepted standards of pain management practice. In support of their motion, the moving defendants submit, among other things, the Affirmation of Steven H. Pinsky, their expert physician (“Dr. Pinsky”), who is board certified in anesthesiology with a sub-certification in pain medicine [*NYSCEF Doc. 27*].

Dr. Pinsky outlines the course of care and treatment rendered to Mr. BAIKO from January through July of 2014, based upon the records and testimony he reviewed, as set forth in the opinion. Based upon the foregoing, Dr. Pinsky concludes that Dr. HADI and Dr. AHMED appropriately evaluated Mr. BAIKO, took an appropriate history, performed an appropriate physical examination of Mr. BAIKO, and prescribed appropriate medications.

Dr. Pinsky opines that each of the allegations contained in the Bill of Particulars are without merit and are unsupported by the records and testimony. With respect to the allegation that the moving defendants inappropriately prescribed methadone to a known drug addict, Dr. Pinsky states, essentially, that there is no evidence in the record to indicate that Mr. BAIKO was a known drug addict. Mr. BAIKO denied use of illicit drugs. Mr. BAIKO presented with a significant history of back pain, neck pain and knee pain, which he described as constant and achy. His subjective complaints of pain were substantiated by prior radiological studies and a proper clinical examination.

Dr. Pinsky notes that, at the initial visit, Mr. BAIKO reported that he had previously been in a methadone program at Nassau University Medical Center, where he had been taking 100 mg. of methadone from which he was weaned. He also reported seeing a psychiatrist monthly for psychiatric medications. Dr. Pinsky also notes that Mr. BAIKO was identified as opioid dependent.¹ For that reason, Dr. Pinsky states, the moving defendants had Mr. BAIKO sign an opioid agreement, and Mr. BAIKO agreed to monthly urine toxicology screenings, as well as to be monitored by the Prescription Monitoring Program run by New York State. In June of 2014, Mr. BAIKO was seen by Dr. Jason Dorfman, a psychologist in the moving defendant’s office, for an addiction screening. Mr. BAIKO admitted to use of cocaine, pills and heroin in his twenties, but none of the toxicology screenings ordered by the moving defendants revealed the

¹ Dr. Pinsky elaborated upon the distinction between opioid dependence and opioid addiction: “Medically, there is a tremendous difference between opiate dependence, which is a finding that in order to participate in activities of daily living with less pain and being able to function normally, the medication is required. Opiate addiction is a much more severe dependence on opioids.” [*NYSCEF Doc. 27*, ¶12]

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presence of illicit drugs. Dr. Dorfman's assessment confirmed opioid dependence, not opioid addiction.

With respect to the allegation that the manner of prescription was inappropriate (prescribing a two-week supply to be taken independently, as opposed to a single dose to be administered under supervision), Dr. Pinsky noted that in the methadone program at NUMC, after a short period of time, Mr. BAIKO was given a prescription to take on his own. Further, under Dr. HADI's care, Mr. BAIKO had been taking methadone on his own, without incident, since February 2014. There was nothing in the record to indicate that Mr. BAIKO was not taking the medication as prescribed. Mr. BAIKO denied any suicidal ideation. According to Dr. Pinsky, the prescription of multiple doses of methadone, to be taken in accordance with the physician's directive, is appropriate and in conformity with the standard of care for treating a patient with chronic pain syndrome.

With respect to the allegation that the moving defendants prescribed large doses of other medications that dangerously interacted with methadone, Dr. Pinsky noted that the other pain medications that were prescribed by Dr. HADI, including, MS Contin (morphine) and Fentanyl, were not prescribed at the same time as the methadone. When Mr. BAIKO reported that he was not getting sufficient relief from the methadone, each of these medications was tried separately, and alternatively, but was ultimately discontinued after Mr. BAIKO reported more relief with less unwanted side effects from the methadone. As to the non-opioid medications that were prescribed for Mr. BAIKO, including Xanax, Klonopin, Zanaflex and Zoloft, Dr. HADI denies that he ever prescribed Xanax or Klonopin for Mr. BAIKO. In any event, however, Dr. Pinsky opines that none of the medications were contraindicated for a patient taking methadone for chronic pain.

Finally, Dr. Pinsky opines, as to causation, that "the prescriptions given by Dr. HADI and Dr. AHMED in the dosages prescribed was not a competent producing cause of the patient's apparent overdose or his demise."

"The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury". . . . On a motion for summary judgment, a defendant physician must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby. In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars. Once a defendant has made such a showing, the burden shifts to the plaintiff to

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submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician, but only as to those elements on which the defendant met the prima facie burden.” *Bendel v Rajpal*, 101 AD3d 662, 662-663 (2d Dept. 2012) (internal citations and quotation marks omitted).

At bar, the Court finds that the moving defendants have met their *prima facie* burden to demonstrate that the moving defendants did not depart from the accepted standard of care in the treatment of chronic pain. Dr. Pinsky’s opinion on that issue is sufficiently detailed and supported by evidence in the record. On the issue of causation, however, the Court finds Dr. Pinsky’s opinion to be wholly conclusory and thus insufficient to make a *prima facie* showing. See *Pullman v Silverman*, 28 NY3d 1060 (2016).

Accordingly, the burden shifts to plaintiff only on the issue of departure – plaintiff need not establish causation in order to survive summary judgment. See *Bendel*, 101 AD3d at 663; *Stukas v Streiter*, 83 AD3d 18 (2d Dept. 2011).

In opposition, plaintiff submits the Affidavit of her expert physician, Richard L. Stieg, MD, MHS (“Dr. Stieg”), who is board certified by the American Board of Psychiatry and Neurology, and by the American Board of Pain Medicine and the American Board of Addiction Medicine. On the issue of departure, Dr. Stieg opines, in sum and substance, that the moving defendants departed from the accepted standard of care insofar as they prescribed methadone, without appropriate risk mitigation strategies, to a patient with a longstanding history of heroin addiction, a history of psychiatric care, and a recent history of noncompliance with the use of additional opioid medications.

Specifically, Dr. Stieg maintains that Dr. HADI was aware, from the initial meeting, that Mr. BAIKO was seeing a psychiatrist monthly for psychiatric medications, and that he had a longstanding history of methadone use for an addiction disorder. According to Dr. Stieg, this awareness required risk mitigation strategies, including (1) communication with the psychiatrist and primary care physician to attend to any potential interaction between the medications prescribed by each of them; and (2) attempting to obtain the previous medical records of opioid addiction treatment.

Further, Dr. Stieg opines, in substance, that Dr. HADI failed to heed certain warning signs that Mr. BAIKO was at risk for drug abuse. First, according to Dr. Stieg, Mr. BAIKO’s reports to Dr. HADI that methadone was not working to help his pain, nor were two other opioids, MS Contin (prescribed for only a month) and Fentanyl (prescribed for only four days),

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should have alerted Dr. HADI to the possibility that Mr. BAIKO was using these drugs, not for chronic pain, but for the treatment of his opioid use disorder. Instead, Dr. HADI increased the dosage of methadone from 40 mg to 70 mg per day.

Second, Dr. Stieg asserts, Dr. HADI was aware of potential new abuse when Mr. BAIKO's urine drug test was positive for morphine in July of 2014 (a drug he had not been prescribed for months). Although Dr. HADI purportedly warned Mr. BAIKO that methadone would be discontinued if his urine was positive for morphine again, Dr. Stieg asserts that there is no indication in the record that a repeat urine drug test was performed at this time (July 2014), or that Mr. BAIKO's psychiatrist was consulted regarding the alteration in Mr. BAIKO's drug taking behavior.

Third, Mr. BAIKO's only prescription for alprazolam (Xanax) during the relevant time period was filled on March 27, 2014. The presence of alprazolam metabolite in some of Mr. BAIKO's urine tests both before and several months after March 27, 2014 suggests that Mr. BAIKO was getting Xanax from an illicit source.

In Dr. Stieg's opinion, the failure to employ reasonable risk mitigation strategies in the face of evidence that the patient was at risk for inappropriate use of controlled substances represented substandard care on the part of all defendants, which was directly responsible for Mr. BAIKO's death on 08/01/2014.

The Court finds that Dr. Stieg's opinion, although imperfect, is sufficiently supported by evidence in the record to raise a triable issue of fact on the question of departure.² The assertion that Dr. HADI was aware of Mr. BAIKO's history of addiction as early as his initial visit is supported by Dr. HADI's notation in the medical record that "Pt has been in methadone program in the past. No longer attends program. Pt has been on 100 mg/day methadone and weaned off in the past." Notably, Dr. HADI referred to Mr. BAIKO's attendance in a methadone *program*, as opposed to merely having received a prescription for methadone. In view of the typical purpose of such programs, Dr. HADI's description can be read as an awareness that Mr. BAIKO had received treatment for opioid addiction. Although Dr. HADI now recalls Mr. BAIKO telling him that he was in the methadone program for pain, not heroin addiction, because he could not find a pain management doctor [*HADI deposition*, p. 23-24, NYSCEF Doc. 34], such testimony merely

² As discussed above, the Court need not consider the sufficiency of plaintiff's proof on causation insofar as the moving defendants have failed to make their *prima facie* showing on that issue.

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raises issues of fact, and, in any event, does not contradict the opinion of plaintiff's expert that such information should have prompted further inquiry.

Dr. Steig inaccurately states, however, that there was no evidence in the record that Dr. HADI ordered a repeat urine test after receiving the test results indicating the presence of morphine. The record shows that the first urine test revealing the presence of morphine was performed on June 3, 2014 [*NYSCEF Doc. 48*]. A repeat test performed on June 17, 2014 also revealed morphine, which measured at a higher level than on the June 3, 2014 result. According to Dr. HADI's records for that date, "Pt took one of his old oxycontins due to pain which we had given 3 months ago. Pt was absconded [sic] told not to do that again." Subsequent urine samples taken on July 1, 2014 and July 15, 2014 were negative for morphine. However, the final urine sample taken on July 29, 2014 was positive for morphine, at a higher level than on June 17, 2014.³ The Court does not find that the inaccuracy of Dr. Steig's observation on this point undermines the probative value of Dr. Steig's opinion as a whole, or his opinion that the positive morphine result was another warning sign that should have, at minimum, prompted consultation with Mr. BAIKO's psychiatrist.

Dr. Stieg's opinion that Mr. BAIKO was obtaining Xanax from illicit sources is supported by the record of urine test results indicating the presence of Xanax when there was no record of a corresponding prescription. Defense counsel rightly contends that Dr. Steig failed to provide scientific support for the proposition that Xanax and Methodone are dangerous in combination. Nonetheless, Dr. Stieg appears to have offered such evidence for another purpose – to demonstrate that the moving defendants were aware, or should have been aware, of Mr. BAIKO's risk for drug abuse, based upon repeated urine test results indicating the presence of un-prescribed medications.

The Court acknowledges that Dr. Stieg does not explicitly state that the accepted standard of care required the moving defendants to limit the quantity of methadone made available to Mr. BAIKO to a single dose per visit. Nonetheless, Dr. Stieg's failure to specify the precise risk management strategies that should have been employed by the moving defendants (other than obtaining the full record from the methadone program and consulting with Mr. BAIKO's other prescribing physicians) does not constitute a failure to identify a departure at all. See *Manganiello v Ahmed*, 130 AD3d 583 (2d Dept. 2015). Dr. Steig's Affidavit, read as a whole,

³ The record suggests that this final result was not available to Dr. AHMED on July 29, 2015, when she prescribed 105 10 mg tablets of methadone. Moreover, there is no indication that the office urine test, sent to the lab for confirmation, revealed this result. Nor has any expert opined that the moving defendants had any affirmative obligation, upon receiving the results, to take any action with respect to the prescription that had just been written.

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states the opinion that increasing Mr. BAIKO's dosage and continuing to prescribe large doses of methadone in the face of evidence that Mr. BAIKO tended to abuse controlled substances, was a departure from accepted pain management practice. For purposes of raising an issue of fact in opposition to summary judgment, the Court finds this proof sufficient.

Upon the record presented, the Court finds that the opinions of the parties' respective experts conflict with respect to the appropriate standard of care and the moving defendants' conformity or departure. Such conflicts are appropriately resolved by the trier of fact. See *Douayi v Carissimi*, 138 AD3d 410 (1st Dept. 2016).

The Court has considered the remaining contentions of the parties and finds that they do not warrant discussion or alter the determination herein. Based upon the foregoing, it is

ORDERED, that the motion by defendants FARHANA AHMED, D.O. and MOHAMMED A. HADI, D.O., for an Order pursuant to CPLR §3212, dismissing plaintiff's complaint as to the moving defendants, is *denied*.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: April 9, 2019
Mineola, New York

ENTER:



Hon. Robert A. Bruno, J.S.C.

ENTERED

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