

Sege v Price

2020 NY Slip Op 35162(U)

November 27, 2020

Supreme Court, Nassau County

Docket Number: Index No. 608553/2018

Judge: Helen Voutsinas

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 25
Present: Hon. Helen Voutsinas, J.S.C.**

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**VINCENT SEGE, deceased, by KATHLEEN SEGE, as
Executrix of his Estate, and KATHLEEN SEGE
individually,**

**Index No.: 608553/2018
Motion Sequence No.: 003**

Plaintiffs,

-against

Short Form Order

**JOHN PRICE, M.D., HARRY SCHINDER, M.D., and
SCHOOL STREET FAMILY PRACTICE,**

Defendants.
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The following papers were read on this motion:

Notice of Motion, Affirmation, Expert Affirmation, Exhibits.....	1
Affirmation, Expert Affirmation in Opposition, Exhibits.....	2
Reply Affirmation.....	3

Upon the foregoing papers, the motion by defendants, Harry Schinder, M.D. and School Street Family Practice (“School Street”), for an Order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint as against said defendants, is determined as herein provided.

This is an action for personal injuries and wrongful death of plaintiff’s decedent, Vincent Sege, based on a theory of medical practice, stemming from his death by suicide on July 5, 2016. A cause of action for negligent hiring and supervision is also asserted as against defendant School Street. Plaintiff Kathleen Sege, the decedent’s widow, also asserts a cause of action, individually, for loss of services.

The action was commenced with the filing of a summons and complaint on June 26, 2018. School Street filed its answer on July 23, 2018. Dr. Schinder filed his answer on July 31, 2018. Thereafter, plaintiff moved to consolidate this action with a prior action instituted by plaintiff in this Court against co-defendant John Price, M.D., under index number 609922/2017, and the two matters were consolidated by Order dated October 25, 2018 (J. Parga).

In essence, the plaintiff alleges that Dr. Schinder and School Street failed to properly diagnose and treat the patient Vincent Sege’s depression; place the patient on proper medication; monitor and manage decedent’s medication; refer the patient to a psychiatrist; assess the patient’s

risk for suicide; properly document the patient's symptoms; communicate with the patient's other treating physicians; follow-up with the patient; and timely hospitalize the patient. Plaintiff also alleges that Dr. Schinder and School Street were negligent in changing the patient's medication; and failing to maintain the patient's medical records. Plaintiff also alleges vicarious liability and negligent hiring and supervision against School Street.

As a result of the alleged malpractice, plaintiff alleges that the patient suffered from: anxiety, depression, lack of motivation, change in mental status, personality changes, suicidal thoughts, emotional swings, cognitive distortions, behavioral changes, loss of enjoyment of life, and death.

Decedent had been a long time patient of the School Street practice, dating back to July 8, 1989. He was treated with respect to his weight, diabetes, hyperlipidemia (high cholesterol), hypertension, benign hypertrophy (enlarged prostate), erectile dysfunction, smoking cessation, and depression. The patient's first complaint of depression was documented on February 16, 1998. Dr. Schinder, a family medicine practitioner, first started treating decedent on February 26, 2012. Prior to that, decedent had been seeing Dr. Luigi Capobianco in the same internal medicine practice up until that visit. Following that initial visit, decedent presented to Dr. Schinder's office over the course of several years. Dr. Schinder saw decedent approximately sixteen (16) times, with the last visit being on April 12, 2016.

Decedent was first seen by defendant Dr. Price, a psychiatrist, on June 21, 2016. He reported a history of depression for many years. He reported anxiety over everything, nervousness, isolation from family and friends, among other symptoms, and stated that the symptoms were getting worse and worse. He reported sleeping issues, panic attacks, fatigue, disappointment in himself, and that he can't carry on a normal life. At that first visit, Dr. Price diagnosed him with severe depression, with a great deal of anxiety and panic attacks. Decedent presented to Dr. Price on June 28, 2016, and again on July 5, 2016. At the last visit, Dr. Price recommended hospitalization in a psychiatric hospital for evaluation and treatment of decedent's symptoms. Tragically, in the evening of July 5, 2016, after decedent's last visit with Dr. Price, decedent was found deceased in his garage, having committed suicide by self-inflicted gunshot wound to the head.

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing of entitlement to judgment as a matter of law after tendering evidence sufficient to eliminate any material issue of fact from the case. (See *Beck v. Westchester County Health Care Corp.* 52 AD3d 555 [2d Dept 2008]). Defendant has the burden of affirmatively demonstrating the merits of its defense. Until the movant establishes its entitlement to judgment as a matter of law, the burden does not shift to the opposing party to raise an issue of fact and the motion must be denied. Further, the courts are required upon defendant's motion for summary judgment to view the evidence in the light most favorable to the plaintiff. (See *Healy v. Spector*, 287 AD2d 541 [2d Dept 2001]). However, once the moving party establishes its entitlement to judgment through the tender of admissible evidence, the burden shifts to the non-moving party to

raise a triable issue of fact. (See *Pierson v. Good Samaritan Hosp.* 208 AD2d 513 [2d Dept 1994]). These standards are of course equally applicable to motions for summary judgment in medical malpractice actions. The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage. On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured as a result. (See *Rebozo v. Wilen* 41 AD3d 457 [2d Dept 2007]). In opposition, the plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice, and such departure was a competent producing cause of the injury. General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment. (See *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Zak v. Brookhaven Memorial Hosp. Medical Center*, 54 AD3d 852 [2d Dept 2008]).

In support of their motion for summary judgment, defendants Dr. Schinder and School Street submit, inter alia, the expert affirmation of a family medicine expert, Michael M. Fishkin, D.O., a licensed physician in New York State. Dr. Fishkin was board certified in family medicine from 1976 to 2016, maintained an active family medicine private practice for forty (40) years and is presently Chief Medical Officer at Island Nursing and Rehabilitation Center in Holtsville, New York.

In Dr. Fishkin's opinion, mental health and mood disorder treatment, including treating depression with medication/anti-depressants, is well within the scope of care for a family practitioner like Dr. Schinder, who testified that he has treated patients with depression and anxiety since joining the School Street practice. Dr. Fishkin opined that family medicine is the practice of treating the patient as a whole, which includes mental healthcare. It is Dr. Fishkin's opinion, stated to a reasonable degree of medical certainty, that the treatment provided to the patient by the moving defendants was within the standards of good and accepted medical practice. Specifically, in Dr. Fishkin's opinion, Dr. Schinder properly managed the patient's chronic anxiety and depression with appropriate anti-depressant and anti-anxiety medications, the dosages of which were timely and appropriately managed over the prolonged course of Dr. Schinder's treatment, and Dr. Schinder evaluated the patient with sufficient frequency to evaluate and adjust ongoing treatment as necessary. Moreover, in Dr. Fishkin's opinion, the patient never exhibited suicidal ideation or expressed suicidal thoughts during the course of his treatment with Dr. Schinder such that voluntary or involuntary hospitalization, or referral to a psychiatrist was required, and therefore, the patient's death was not a direct result of Dr. Schinder's care.

Dr. Fishkin bases his findings on his experience as a family medicine practitioner, including the diagnosis and treatment of depression, anxiety, and psychosis in a family medicine setting. He affirms that over the course of his career he has treated hundreds of patients with such conditions and as such he is intimately familiar with the diagnosis, treatment, and prognosis for such presentations. He states that in preparation for his affirmation, he reviewed the pleadings,

bills of particulars, medical records of defendants and prior treatment providers, and the deposition transcripts. He affirms that his opinions are stated to a reasonable degree of medical certainty.

The Court finds that Dr. Fishkin's factually detailed affirmation was sufficient to demonstrate moving defendants' entitlement to judgment as a matter of law. (See *Abbotoy v. Kruss*, 52 AD3d 1311 [4th Dept 2008]). Based on the foregoing, moving defendants presented a *prima facie* case that they did not depart from accepted standards of care in their treatment of plaintiff's decedent, and were not a substantial factor in causing any of the patient's injuries or death.

In opposition to the motion, plaintiff submits, *inter alia*, the affirmation of plaintiff's expert, whose name has been redacted. The proffered expert is a New York State licensed physician and is board certified in internal medicine. It is the opinion of the expert, with a reasonable degree of medical certainty, that the failure to perform a proper assessment upon decedent on April 12, 2016, the date of his last visit with Dr. Schinder, was a departure from good and accepted medical practice. The expert opines that given decedent's medical history and presenting complaints and symptoms, good practice dictated that his mental health required thorough evaluation at this visit, a complete mental health screening, a referral to a psychiatrist, and he required close follow up given his mental status at the time, as well as the change in his psychotropic medication. Plaintiff's expert opines that the failure to properly assess and formulate an appropriate follow up plan for decedent on April 12, 2016, allowed his mental health status to further deteriorate. He stated that the decedent continued to become worse, up until his presentation to Dr. Price, and that the failure to timely implement an appropriate plan for decedent, including close follow up and referral to a psychiatrist, allowed his symptoms to worsen, to the point of extreme distress, culminating in his suicide. The expert states that this departure was a substantial factor and proximate cause in decedent's pain, suffering, and death.

Specifically, the expert states that, as of April 12, 2016, decedent had a long history of depression, and had undergone prior psychiatric treatment. At his last visit he had reported he "felt down" and on April 12 he admitted that he was having a hard time with his depression. According to Dr. Schinder's note, he "appeared sad." The expert states that at that point a comprehensive mental health assessment was necessary, which should have consisted of additional questioning regarding his status, including questions regarding his sleeping habits, fatigue or energy levels, concentration levels, interest in social activities, familial relationships, eating habits, and mood, how long these symptoms or behaviors have been occurring, and with what frequency. Further, the assessment must be documented in the patient's medical records, as answers to these questions provide a physician significant information regarding the patient's mental health, allowing the physician to understand the potential severity of a patient's condition, and guides the plan of treatment. The expert states that Dr. Schinder did not perform such an assessment on decedent on April 12, 2016, and notes that nothing in the chart is documented regarding answers to any of these questions or similar questions. The expert states that Dr. Schinder's deposition testimony shows that he would only perform "informal" assessments of a patient, and he would not perform a comprehensive assessment of a patient's mental health.

The expert states that while not every patient requires such a detailed assessment, the history, complaints, and presentation of decedent on April 12, 2016 should have triggered this assessment. Plaintiff's expert notes that Dr. Fishkin, the defendant's expert, does not mention anywhere in his affirmation that, on April 12, 2016, for the first time, it was documented that decedent "appears sad." Plaintiff's expert contends that this is an extremely significant observation in a patient with a long psychiatrist history reporting symptoms, denoting a change in his status, and that this observation coupled with his complaints and history, required Dr. Schinder to perform a comprehensive assessment. Plaintiff's expert opines that, given the testimony of Mrs. Sege regarding her husband's complaints and condition at this time coupled with the notes of Dr. Price, that had a comprehensive mental health screening been conducted on April 12, 2016 it would have revealed that decedent's symptomology was severe, and had his symptomology been revealed at that time, referral to a psychiatrist and close follow up would have been warranted.

Plaintiff's expert further opines that Dr. Schinder departed from good and accepted medical practice at the final visit regarding the handling of decedent's medication. He notes that the chart indicates decedent was instructed to "taper" his Paxil, however nothing is documented regarding the instructions he gave. Dr. Schindler also changed his medication to Cymbalta, a medication that decedent had never previously taken. The expert states that there are serious risks for a patient to discontinue Paxil abruptly, and that a significant number of patients taking Paxil for a long enough period of time experience withdrawal symptoms of varying intensity and duration when they stop or reduce their dosage. The most common withdrawal symptoms, according to the expert, are increased anxiety, mood swings, and irritability. The expert states that a patient must be given specific instructions regarding the tapering, and be followed closely for any signs or symptoms of withdrawal. The expert also states that changing his medication to Cymbalta also required close follow up, as it can have potentially harmful side effects, or may be ineffective in treating the patient's symptoms. He notes that Dr. Schinder himself documented "to follow for response" however there are no additional follow up instructions documented. Plaintiff's expert notes that Dr. Schinder did document that he called the patient twice to speak with him regarding his lab work, and then did actually speak to the patient on April 21, 2016, but none of these notes indicate that he inquired regarding Mr. Sege's mental health.

The Court finds that plaintiff's expert states with specificity, referencing the relevant medical records and deposition testimony, that the defendants departed from good and accepted medical practice, and that those departures were a cause of decedent's injuries and death. Thus, the affirmation of plaintiff's expert was sufficient to raise triable issues of fact in opposition to the prima facie showing by defendants regarding defendants' treatment of the decedent and causation of decedent's injuries and death.

Where the parties' experts present conflicting opinions as to departures from accepted dental practice, summary judgment must be denied. (*See Robinson-Reese v. Kopp*, 62 AD3d 980 [2d Dept 2009]). The conflicting opinions raise a credibility issue which must be resolved by a jury (*Shehebar v. Boro Park Obstetrics and Gynecology, P.C.*, 106 AD3d 715 [2d Dept 2013];

Adjetay v. New York City Health & Hosp. Corp., 63 AD3d 865 [2d Dept 2009]; *Shields v. Baktidy*, 11 AD3d 671 [2d Dept 2004]).

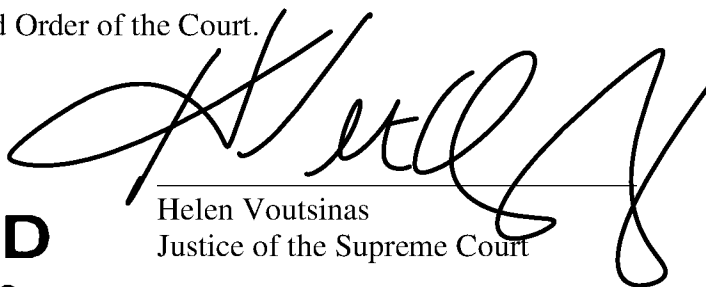
The Court notes that plaintiff, through counsel, has advised that plaintiff does not oppose the portion of defendants’ motion that seeks dismissal of the cause of action for negligent hiring and supervision. (See Affirmation in Opposition of Carolyn M. Caccese, Esq., at par. “5”).

Accordingly, defendants Harry Schinder, M.D. and School Street Family Practice’s motion for summary judgment is **GRANTED, but only to the extent that plaintiff’s third cause of action for negligent hiring and supervision set forth in the complaint against the moving defendants is DISMISSED**. The motion is otherwise **DENIED**.

The case is presently scheduled for a Pre-Trial Conference on February 8, 2021, in the Calendar Control Part. Due to the ongoing coronavirus pandemic and potential changes in Court operations, the parties should monitor for changes in the status of the next scheduled appearance on the Court’s website.

This constitutes the Decision and Order of the Court.

Dated: November 27, 2020
Mineola, NY



Helen Voutsinas
Justice of the Supreme Court

ENTERED
Dec 01 2020
NASSAU COUNTY
COUNTY CLERK’S OFFICE