Unreported Disposition
Slip Copy, 2013 WL 5289602
(Table), 2013 N.Y. Slip Op. 51540(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

Teresa DeVito, as Administrator of the Goods, Chattels, and Credits which were of ANGELA DeVITO, deceased, Plaintiff,
v.
James R. Peri, M.D., Defendant.

21480/2012
Supreme Court, Kings County
Decided on September 9, 2013

Digest-Index Classification:Physicians and Surgeons--Malpractice--No special relationship existed between plaintiff's decedent and defendant physician thus, no duty of care was owed to plaintiff's decedent

OPINION OF THE COURT

Marsha Steinhardt, J.

Defendant, James R. Peri, M.D., moves for an order pursuant to CPLR §3212 dismissing the case and granting summary judgment in his favor. He claims that there is no physician-patient relationship or a special relationship between the defendant and plaintiff's decedent, the patient's wife, which would have given rise to the existence of a duty of care. Defendant argues that as no duty was owed to the decedent, there was no breach by the defendant and, therefore, no action lies under the law. Plaintiff opposes the motion.

Plaintiff, Theresa DeVito, is the daughter of the decedent and Angelo DeVito, who was a patient of the defendant. In this action, commenced with the filing of a Summons and Verified Complaint on or about November 7, 2012, plaintiff asserts three causes of action. In a cause of action sounding in medical malpractice for the treatment of patient Mr. DeVito, plaintiff claims that defendant, Dr. Peri, inappropriately and improperly prescribed and continued to prescribe Zoloft to Mr. DeVito from February 25, 2012 through April 12, 2012 without giving warning to ***2** the family of potential side effects of the drug. No special relationship existed between plaintiff's decedent and defendant to warrant extending the duty owed by the defendant to the patient. Plaintiff also interposes a cause of action for lack of informed consent claiming that defendant did not properly inform Mrs. DeVito of the risks of the medication. Specifically, plaintiff claims that a result of Dr. Peri s failure to warn the patient, decedent or the family of violent propensities allegedly associated with the medication, Mr. DeVito became violent and murdered his wife. The third cause of action is for the wrongful death of Mrs. DeVito.

In response to this motion, plaintiff argues that Dr. Peri owed a duty to Mrs. DeVito, arising from the treatment rendered to her husband, which included prescribing a medication with an allegedly known risk of causing violent behavior and by soliciting her cooperation, to ensure her husband took such medications as prescribed. Plaintiff contends that Dr. Peri developed and maintained a special relationship with his patient's wife and as a result he had a duty and obligation to her to render good and acceptable care to her husband. Furthermore, she states that Dr. Peri failed to inform Mrs. DeVito of the risk of her husband becoming a danger to himself and others as a result of the patient's use of Zoloft and that he failed to warn and educate Mrs. DeVito about the risks involved with the use of Zoloft, including increasing agitation, anger and propensity for violence, aggression and hostile behavior.

The medical records submitted with the motion indicate that Mr. DeVito was seen by Dr. Peri in an office visit on May 1, 2008. The note for that visit indicates that the patient was on Zoloft 100 milligrams and Ativan daily. The note indicates that the patient was nervous and depressed for one year and that there appeared to be a family history of depression. The next note penned by Dr. Peri, dated February 13, 2012, indicates that the patient was depressed but was not taking medication at that time. A chest x-ray revealed moderate bronchitis, a mild enlargement of the right helium of the lung and a small nodule at the right lower lobe of the lungs. An abdominal sonogram performed on February 15, 2012 revealed a mildly enlarged liver. A renal ultrasound and echocardiogram performed on February 16, 2012 revealed no significant findings. A thyroid ultrasound performed on February 24, 2012 revealed an enlarged thyroid gland. Dr. Peri's notes of an office visit on February 24, 2012 indicate that Mr. DeVito appeared depressed. He prescribed Zoloft 50 milligrams per day, ordered a thyroid sonogram and repeat bloodwork and urinalysis.

At an office visit on March 2, 2012, Mr. DeVito complained of weakness and that he had one episode of vomiting. Dr. Peri noted that Mr. DeVito's weight was down a couple of pounds and that the patient was not compliant with the medications prescribed.

Dr. Peri's record of the March 20, 2012 visit indicates that patient's daughter, the plaintiff, was present for that office visit. In addition to follow-up x-rays and a CT scan to rule out lung cancer, Dr. Peri ordered an MRI of the patient's head to rule out a brain lesion or other neurological causes of the patient's depression. Dr. Peri advised the patient to come back for vitamin B-12 shots.

The last time Dr. Peri saw Mr. DeVito was on April 12, 2012. The note indicates that the patient was not taking the Zoloft as prescribed and that he had failed to appear for B12 shots. On April 18, 2012, the patient shot and killed his wife at their home.

Plaintiff submits the affidavit of Theresa DeVito in opposition to the motion. Ms. DeVito states that she and her mother advised Dr. Peri that the prescribed Zoloft was upsetting and ***3** disturbing Mr. DeVito. Ms. DeVito states that she was present for the office visit of March 20, 2012 during which she told Dr. Peri that her father was displaying paranoid and verbally abusive behavior. She states she told Dr. Peri that her mother was frustrated by the bickering, tense atmosphere and his paranoid behavior. She advised that Mr. DeVito had become agitated and anxious and asked that Zoloft be discontinued. She explained that Mr. DeVito believed that his wife was trying to poison him and insisted that his daughter cook his meals. She states that Dr. Peri never advised her or Mrs. DeVito of any warnings associated with the medication or informed of risks attendant with its use.

Plaintiff also submits the affirmation of Peter R. Breggin, M.D., a psychiatrist licensed to practice in the state of New York. Dr. Breggin opines that a special relationship existed between Dr. Peri and the decedent and that Dr. Peri owed a duty to warn the family about the risks associated with the drug.

Plaintiff also submits the FDA approved Zoloft label which states, in relevant part,

Zoloft (sertraline hydrochloride)

Suicidality and Antidepressant Drugs

Antidepressants increased the risk compared to placebo of suicidal thinking and behavior (suicidality) in children, adolescents, and young adults in short-term studies of major depressive disorder (MDD) and other psychiatric disorders. Anyone considering the use of Zoloft or any other antidepressant in a child, adolescent, or young adult must balance this risk with the clinical need. Short-term studies did not show an increase in the risk of suicidality with antidepressants compared to placebo in adults beyond age 24; there was a reduction in risk with antidepressants compared to placebo in adults aged 65 and older. Depression and certain other psychiatric disorders are themselves associated with increases in the risk of suicide. Patients of all ages who are started on antidepressants therapy should be monitored appropriately and observed closely for clinical worsening, suicidality, or unusual changes in behavior. Families and caregivers should be advised of the need for close observation and communication with the prescriber. Zoloft is not approved for use in pediatric patients except for patients with obsessive compulsive disorder (OCD). (See Warnings: Clinical Worsening and Suicide Risk, Precautions: Information for Patients, and Precautions: Pediatric Use)

Clinical Worsening and Suicide Risk: Patients, their families, and their caregivers should be encouraged to be alert to the emergence of anxiety, agitation, panic attacks, insomnia, irritability, hostility, aggressiveness, impulsivity, akathisia (psychomotor restlessness), hypomania, mania, other usual changes in behavior, worsening of depression, and suicidal ideation, especially early during antidepressant treatment and when the dose is adjusted up or down. Families and caregivers of patients should be advised to look for the emergence of such symptoms on a day-to-day basis, since changes may be abrupt. Such symptoms should be reported to the patient's prescriber or health professional, especially if they are severe, abrupt in onset, or were not part of the patient's presenting symptoms. Symptoms such as these may be associated with an increase risk for suicidal thinking and behavior and indicate a need for very close monitoring and possibly changes in the medication. ***4**

The courts have repeatedly held that, in order to reach any discussion about deviation from accepted medical practice, it is necessary first to establish the existence of a duty. (See e.g. *Cregan v Sachs*, 65 AD3d 101 (1st Dept. 2009); *Burtman v Brown*, 97 AD3d 156 (2d Dept. 2012). “In the absence of duty, there is no breach and therefore no liability.” *DeAngelis v. Lutheran Med. Ctr.*, 84 AD2d 17, 22 (2d Dept. 1981),

affd., 58 NY2d 1053 (1983); *Klein v. Bialer*, 72 AD3d 744 (2d Dept. 2010). The existence of a duty is a question of law to be determined by the court. (See, *Purdy v Public Admin of the County of Westchester*, 72 NY2d 1, 8 (1988); *Eiseman v State of New York*, 70 NY2d 175, 187 (1987); *De Angelis v Lutheran Med. Center*, 58 NY2d 1053, 1055 (1983); *McNulty v City of New York*, 100 NY2d 227, 232 (2003). It is generally not an appropriate subject for expert opinion. *Dallas-Stephenson v Waisman*, 39 AD3d 303 (1st Dept. 2007); *Burtman v Brown*, 97 AD3d 156 (2d Dept. 2012).

It is also axiomatic that "[f]oreseeability should not be confused with duty." *Pulka v. Edelman*, 40 NY2d 781, 785 (1976). Neither the concept of foreseeability nor the zone of risk defines a duty, but instead "only circumscribes the boundaries of a duty after it has been established that one exists" *Ellis v. Peter*, 211 A.D2d 353, 356 (2d Dept. 1995).

It has long been recognized that, as a general rule, the sine qua non of a medical malpractice claim is the existence of a doctor-patient relationship. Indeed, it is this relationship which gives rise to the duty imposed upon the doctor to properly treat his or her patient. *Fox v. Marshall*, 88 AD3d 131, 138 (2d Dept. 2011), see, *Bazakos v. Lewis*, 12 NY3d 631, 634 (2009); *Ellis v. Peter*, supra; see also, *Spiegel v. Goldfarb*, 66 AD3d 873, 874 (2d Dept. 2009). Therefore, a doctor's "duty of care is ordinarily only one owed to his or her patient" *(Purdy v. Public Adm'r of the County of Westchester*, supra at 9) and correspondingly, the element of duty would normally be missing from a claim made against a doctor by one who is not that doctor's patient. *Fox v. Marshall*, 88 AD3d 131, 138 (2d Dept. 2011).

Although, generally, a doctor only owes a duty of care to his or her patient, "a doctor's duty can, in limited circumstances, encompass nonpatients who have a special relationship with either the physician or the patient." *McNulty v City of New York*, 100 NY2d 227, 232 (2003); see, *Tenuto v Lederle Labs., Div. of Am. Cyanamid Co.*, 90 NY2d 606, 613 (1997); *Klein v. Bailer*, 72 AD3d 744, 746 (2d Dept. 2010). Thus, this is the exception and not the rule. Indeed, the Court of Appeals holds that "(a)lthough in limited circumstances a physician's duty of care has been extended to a patient's family members, our courts have been especially circumspect in doing so." *Cohen v Cabrini Med. Ctr.*, 94 NY2d 639, 642 (2000).

The Court of Appeals in *Tenuto v Lederle Labs., Div. of Am. Cyanamid Co.*, supra, held that the circumstances in that case gave rise to a special relationship between the defendant doctor and a nonpatient, the infant's parent. In that case, plaintiffs alleged a failure to warn the infant's parents of personal health risks associated with vaccination of the infant with the live polio vaccine, namely, the risks posed by contact with the vaccinated infant's saliva or feces. The oral vaccine of live polio viruses carry the risk that contact with the live virus, discharged from the patient's bowel in excretion or from the mouth in saliva, can result in paralytic polio in a person unvaccinated or with a compromised immune system. The manufacturer of the vaccine included a warning that such a risk be communicated to caregivers of children receiving the vaccine. In that case, the infant's father, after having undergone surgery, contacted paralytic polio in the course of caring for his child in the days after the infant was vaccinated. ***5**

The Court concluded that a duty of reasonable care extended to plaintiffs despite the absence of a direct doctor/patient treatment relationship between the parents and the defendant doctor. The court noted that this relationship is based upon the status and responsibilities of the primary caretakers of an infant and their reliance on the advice provided by pediatricians. Under such circumstances a special relationship exists giving rise to a duty to warn the parents of the infant patient.

In *Cohen v. Cabrini Medical Center*, supra, the Court of Appeals declined to extend the imposition of legal duty on the defendant physician to prevent injury to the patient's wife. In that case, the defendant doctor treated plaintiff, Alan Cohen, for infertility. Defendant told Cohen and his wife that a surgical procedure would enhance fertility. After the procedure, Cohen's sperm count decreased. The couple sued the doctor, interposing a cause of action on behalf of Mrs. Cohen, claiming personal injuries sustained by her as a result of the decreased fertility of her husband. Specifically, she claimed that she had to undergo in vitro fertilization in order to conceive and claimed physical and psychological harm as a result.

In so deciding, the Court looked to the *Tenuto* case noting that, in that case, three factors determined whether a duty arose. The critical factors identified were that the parent had engaged the physician and relied exclusively on his professional advice, the physician's acts created a serious risk of physical harm to the parent and the physician knew or should have known that the failure to warn the parents of the serious peril heightened the risk. *Cohen*, supra. at 643.

The Court noted that in *Cohen*, although the wife participated in her husband's consultations with the doctor, no treatment or care was ever contemplated for her. Acknowledging that lower courts had found a duty to a spouse where the procedure at issue was undertaken specifically and expressly to prevent the wife's pregnancy and consequential harm (see, *Miller v Rivard*, 180 AD2d 331 (3d Dept.1992); *Weintraub v Brown*, 98 AD2d 339 (2d Dept. 1983); *Sorkin v Lee*, 78 AD2d 180 (4th Dept. 1980), the court remarked that, in *Cohen*, the purpose of the procedure performed to the patient was not to prevent physical harm to the wife but to provide a benefit, ie, to promote conception. Additionally, in *Cohen*, the claimed physical harm to the wife was not the direct outcome of the physician's alleged malpractice.

The Court of Appeals in *McNulty v. City of New York*, 100 NY2d 227 (2003) also expressed a reluctance to expand a doctor's duty of care to encompass nonpatients and refused to find that the defendant physician's duty extended to the plaintiff, a nonpatient. The plaintiff in that case had come into contact with a friend who was diagnosed with meningitis. Plaintiff, having spent time with the patient, asked the defendant physician, who was treating her friend for the illness, whether she should seek treatment. The defendant allegedly answered that she did not need treatment. Plaintiff asked other doctors the same question as well. Some days later, plaintiff fell ill and was ultimately diagnosed with the same type of meningitis as her friend. In determining that a special relationship did not exist, the Court held that since the duty that plaintiff sought to extend was based on a doctor-patient relationship the injury must have arisen from the doctor's treatment of the patient. *McNulty* at 233. In that case, the Court noted that the injury to the plaintiff did not arise from the treatment and that the plaintiff had not hired the defendant doctor or relied exclusively on his advice.

The Court distinguished that case from the circumstances in *Tenuto*, noting that in *Tenuto* the special relationship between the parents and the defendant doctor was based on their ***6** reliance on the doctor as the infant's primary caretakers. *McNulty* at 233 citing, *Tenuto* at 614. The Court described the duty of an infant's primary caretaker as "heightened by the reality that a necessary part of the comprehensive services provided by pediatricians is the provision of advice to the parents who engage them." *McNulty* at 233.

A number of cases before the Second Department have been similarly found to be lacking the requisite special relationship and faced dismissal. The Second Department in *Ellis v. Peter*, 211 AD2d 353, 356 (2d Dept.1995), acknowledged that the wife, a member of the community at large, may be considered to be in the class of persons whom defendant "knew or should have known were relying on him for (a duty of care) to his patient," nevertheless refused to find that the defendant doctor had a duty to warn the patient's wife of his infectious disease, i.e., tuberculosis. *Ellis* at 356 citing, *Eiseman v State of New York*, supra at 188. In reaching its determination, the court regarded the wife as a "member of the community at large" and did not recognize the spouse as being any different from anyone else with whom the patient was in close contact. Indeed, the court stated that "if the physician owes a duty to a patient's spouse to warn her about his patient's condition, such a duty would also logically extend to other individuals with whom the patient was in close contact, such as other relatives, e.g., his children, co-workers, or even fellow commuters." *Ellis* at 356. This outcome, the court noted, would "expand traditional tort concepts," which it refused to do. *Ellis* at 356.

The Second Department in *Fox v. Marshall*, 88 AD3d 131 (2d Dept. 2011), declined to find a duty owed by a mental health physician to the murder victim of his patient. In that case, plaintiff's mother was murdered by Defendant Evan Marshall, a voluntary patient at a residential mental health and substance abuse facility. While on a day "pass" Marshall forced his way into the decedent's house, killing and dismembering her. Plaintiff brought a suit against the facility sounding in negligence and medical malpractice against the psychiatrist for failing to diagnose Marshall's mental ailments. The issue of whether the physician owed a duty to the decedent, a member of the general public, rested on whether a physician-patient relationship existed. The court concluded that "regardless of any sense of outrage which is evoked by the heinous actions of [the patient], society's interest is not best served by concluding that a doctor who treats a patient, within the context of mental health, undertakes a duty to the public at large. *Fox* at 140.

In *Pingtella v. Jones*, 305 AD2d 38 (4th Dept 2003) plaintiff alleged that the defendant doctor's treatment of plaintiff's wife constituted malpractice resulting in her stabbing their child. The complaint alleged, *inter alia*, that defendant failed to warn family members that the patient was experiencing psychotic episodes and, on appeal, plaintiff contended that the defendant owed a duty to the child to render proper and appropriate medical care to the mother. In determining that no special relationship existed, the Court noted that the patient did not seek treatment from the doctor to prevent injury to

the son, rather, defendant treated the patient to improve her mental health. The Court further noted that defendant had no control over the patient's conduct and the patient had no history of violence.

In other cases regarding this issue, the Second Department has examined whether the physician is in a position to exercise some level of control over the patient to determine whether a special relationship exists. See, *Citera v. County of Suffolk*, 95 AD3d 1255 (2d Dept.2012); *Malave v Lakeside Manor Homes for Adults, Inc.*, 105 AD3d 914 (2d Dept. 2013). In *Citera v. County of Suffolk*, supra, decedent was murdered in her home by her son who was receiving ***7** outpatient psychiatric care from the defendant. The day before the murder took place, a psychiatrist from the psychiatric center evaluated the patient after he had a physical altercation with another family member. The physician concluded that the patient was stable and did not require admission for treatment. In making a determination in that case, the court noted that "the Court of Appeals has recognized a duty to control the conduct of others where there is a special relationship: a relationship between defendant and a third person whose actions expose plaintiff to harm such as would require the defendant to attempt to control the third person's conduct; or a relationship between the defendant and plaintiff requiring defendant to protect the plaintiff from the conduct of others.'" *Citera* at 379 citing, *Purdy v. Public Adm'r of County of Westchester*, supra at 8; see *Schrempf v. State of New York*, 66 NY2d 289, 294-295 (1985); *Eiseman v. State of New York*, supra at 188--189; *Fox v. Marshall*, supra at 135--136. To give rise to a duty to protect a third party it must be shown that defendant had the necessary authority or ability to exercise the requisite control over the patient's conduct so as to give rise to a duty to protect the victim. *Citera* at 379. Thus, the Second Department held that a duty of care did not exist in that case finding that the defendant did not have the authority or ability to control the conduct of the patient. The court further noted that such control and duty is more limited in cases involving outpatient treatment than in cases involving persons confined to mental institutions where such institutions may evidence control or authority over a patient. *Schrempf v State of New York*, supra; see, *Fox v Marshall*, supra; see also, *Malave v Lakeside Manor Homes for Adults, Inc.*, supra.

In this case, the circumstances do not give rise to a special relationship between the decedent and the defendant which would evoke a duty to warn on the part of the defendant. The treatment rendered to Mr. DeVito was sought by the patient himself and its purpose was to promote his well being by treating his depression as well as his other health problems. Dr. Peri's duty to the patient was to improve his health by treating his maladies; Dr. Peri bore no obligation to the family. There is no evidence that, in the course of Dr. Peri's treatment of the patient, he contemplated treating Mrs. DeVito in conjunction with the treatment he was rendering to Mr. DeVito or that the treatment rendered to Mr. DeVito directly involved the decedent. (See, *Cohen*, supra.).

Furthermore, the treatment Mr. DeVito sought from Dr. Peri was not to prevent injury to his wife. (See, *Pingtella*, supra.). Indeed, no history of violence is noted anywhere in Dr. Peri's records and the family did not report that Mr. DeVito displayed physical acts of violence. In sum, Mr. DeVito behavior as discussed with Dr. Peri was not such as to evoke a duty to require him to attempt to control the conduct of Mr. DeVito. (See, *Citera*, supra.).

Additionally, accepting Theresa DeVito's asertions that her father appeared restless and agitated and that this was communicated to defendant, there is no indication that by using Zoloft Mr. DeVito posed a threat of violence to his wife, family or others. Thus, there is no evidence that the physician knew, or should have known, that failure to warn of any alleged side effects of the medication heightened Mrs. DeVito's risk of harm. There is also no evidence that the defendant, by prescribing Zoloft to the patient, created a serious risk of harm to his wife. Significantly, a thorough reading of the packaged warnings given by the manufacturer identifying the risks associated with the medication does not reveal homicide as a possible side effect. The warnings clearly state suicide as a known adverse reaction with the warning applying most ***8** specifically to children. Indeed the warnings note that studies have shown no increase in the risk of suicide in adults beyond the age of 24 and that the probability of risk of suicidality decreases in the 65 and older population. Mr. DeVito was 75 years old. Thus, the evidence does not support a claim that physical harm was the direct outcome of the physician's alleged malpractice. (See, *Cohen*.)

Plaintiff's claim that Mrs. DeVito and Ms. DeVito were present at some of the office visits is unavailing as their presence does not give rise to a special relationship. (See, *Cohen*, supra.). Although the family was involved in the care, treatment and medical testing of the patient, the recipient of the treatment and the one in a position to rely on the advice of the physician, was Mr. DeVito, not his family. The court is cognizant that family members receive a benefit from

the successful treatment of a loved one, however this is a gratuitous benefit and not a duty owed to the family.

Plaintiff's cause of action for lack of informed consent must also be dismissed. Public Health Law § 2805-d(3) provides that ”Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation. (Emphasis added). Thus, the cause of action under this section extends to only the patient. Plaintiff's argument that defendant has a duty to obtain informed consent from Mrs. DeVito for treatment rendered to Mr. DeVito is misguided and is not the law. As discussed above, Mrs. DeVito was not the patient; therefore, a claim for lack of informed consent does not apply.

Similarly, the claim for wrongful death on behalf of Mrs. DeVito must be dismissed. An action for wrongful death may be premised on a cause of action to recover for medical malpractice. See generally, *Friedmann v. New York Hospital-Cornell Medical Center*, 65 AD3d 850 (1st Dept.2009). As no duty was owed to the decedent on the medical malpractice claim, a claim for her wrongful death may not be maintained. See generally, *Lee v City of New York*, 162 AD2d 34 (2d Dept. 1990).

Applying these principles to the matter at bar, the defendant demonstrated his entitlement to judgment as a matter of law dismissing the complaint (see, *Alvarez v Prospect Hosp*., 68 NY2d 320, 324 (1986). No special relationship existed between plaintiff's decedent and defendant to warrant extending the duty owed by the defendants to the patient.

Accordingly, the complaint is dismissed and the clerk is directed to enter judgment on behalf of the defendant.

ENTER,

HON. MARSHA L. STEINHARDT

J.S.C.