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Doctor's Legal Malpractice Claim Tossed Based on Her Failure to Demonstrate "But For" Causation

March 28, 2017
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Manveen Saluja, M.D. v. Honigman Miller Schwartz & Cohn, LLP, 2017 WL 1033751 (Mich. 2017)

Brief Summary

Summary judgment in favor of defendants was affirmed based on plaintiff's failure to establish that but for the defendants' alleged negligence, the outcome of the underlying proceedings would have been different and more favorable for plaintiff.

Complete Summary

Plaintiff is a medical doctor whose colleague, Dr. G. Krishna Kumar, asked her to advise on treatment for Dr. Kumar's mother, an elderly woman who lived in India. Plaintiff testified that from 2004 to 2010, she wrote prescriptions for fentanyl, a schedule II controlled substance, for the woman. Plaintiff understood that while she would write the prescriptions, Dr. Kumar would then fill the prescriptions and carry the drugs to India to give to his mother. Plaintiff estimated that she prescribed approximately 285 patches of fentanyl over that six-year period for woman.

On the morning of March 28, 2012, plaintiff's staff called and notified her that DEA agents were at the office to investigate. Plaintiff then called the defendant law firm and asked to speak to one of the firm's attorneys. Plaintiff was informed that particular attorney was unavailable, and the call concluded. Plaintiff called back and asked to speak with any lawyer. Plaintiff was then routed to speak with another attorney at the firm. Plaintiff informed the attorney that DEA agents were present at her office and that she did not know what to do. Upon arrival, plaintiff continued to speak with the attorney and asked if the DEA agents would speak to her lawyer. After handing the phone over, the agent and the attorney talked for several minutes, and the agent gave the phone back to plaintiff, whereupon the attorney then told plaintiff to “go ahead with it,” meaning to comply with the agents' investigation. At that point, the phone conversation ended.

The DEA agents then requested to see the file pertaining to woman in India. After plaintiff produced the file, agent Sandra White-Hope allegedly stated that there was a fine of $5,000 per prescription plus jail time for the offenses. Then, according to plaintiff, agent White-Hope handed plaintiff a form and said, “sign it

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or you're going to jail." At this point, plaintiff did not call anyone for advice, and instead simply signed the form. The form was a "voluntary surrender of controlled substances privileges" form where plaintiff voluntarily surrendered her DEA Certificate of Registration.

A few days later, the DEA offered to reinstate plaintiff's controlled substances privileges, except for schedule II and II-N privileges, which would remain restricted for a period of three years. Then, plaintiff and her new team of lawyers were able to negotiate the restricted period down to two years. Not fully satisfied, however, plaintiff went over the local DEA office's "head" and contacted the DEA office in Washington, D.C. When the local office learned of this attempt, the two-year offer to plaintiff was withdrawn. Ultimately, however, the local branch honored the original three-year restriction deal.

Plaintiff then filed her legal malpractice action against defendants. Plaintiff claimed, *inter alia*, that defendants should have advised her that she was not required to sit for the DEA interview and that she should not sign a voluntary release of her DEA privileges. Defendants moved for summary judgment and attacked plaintiff's ability to prove the essential element of causation. Simply put, defendants argued that plaintiff could not show how anything would have been different for plaintiff if she had received purportedly "perfect" advice. Plaintiff responded that causation was "direct and clear." Plaintiff relied on the testimony of an attorney, Eli Stutsman, who stated that had defendants acted properly, there was "a good chance" that plaintiff would not have lost her DEA registration. Defendants argued that plaintiff's position was nothing more than speculation. Indeed, defendants pointed to Dr. Kumar's situation as proof that had plaintiff not surrendered her DEA registration, she still would have lost her privileges. Defendants noted that Dr. Kumar did not initially surrender his privileges but nonetheless received a deal similar to what plaintiff received - a restricted license for three years. Defendants also highlighted the testimony of one of plaintiff's standard-of-care experts, Steven Fishman, who testified that it would have been speculation to opine on whether plaintiff would have received a better deal than the one she received had defendants instructed her to not cooperate with the DEA agents.

The trial court granted defendants' motion. The court found that plaintiff failed to offer any evidence to show how any result would have been different had defendants given different advice. The court noted that plaintiff's expert's testimony was inadequate to show that an outcome would have been different because (1) he admitted that he could not specifically say what the outcome would have been had plaintiff not surrendered her DEA registration, and (2) under *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich.App. 602 (1997), such expert testimony amounts to speculation and is inadequate to prove how the DEA would have acted had plaintiff not surrendered her registration.

Plaintiff appealed, but the appellate court affirmed. Plaintiff argued that the testimony of her expert, Stutsman, was sufficient to create a question of fact on causation. The court disagreed. At his deposition, Stutsman opined that had defendants given competent advice, such as telling plaintiff to reschedule the interview with the DEA agents to another time when she could be ready with an attorney, plaintiff never would have voluntarily surrendered her DEA registration. Stutsman explained that possessing the DEA registration was crucial in his view because the registration represented a bargaining or settlement "chip." And by holding onto that "chip," there was a "good chance" that plaintiff "would have kept her registration intact," compared to her ultimate settlement of a three-year restricted period. However, immediately after Stutsman stated he thought plaintiff "could have survived this with her entire registration intact," he admitted: "Now, I don't know that [for sure]." When questioned further, Stutsman stated multiple times that he did not know what the ultimate punishment would have been.

The appellate court agreed with the trial court that Stutsman's testimony was inadequate to prove causation because it was too speculative. First, Stutsman was not an expert on DEA decision-making. Second, while he opined at one point that plaintiff would have gotten through this encounter with the DEA with her license fully intact, he also admitted: "I don't know that [for sure]." Third, the court found that it was telling that Stutsman was unable to specifically identify what plaintiff's outcome with the DEA would have been had defendants given different advice. The court concluded that Stutsman's mere opinion that the outcome would have been different, without any supporting evidence, amounted to nothing more than mere conjecture and speculation and was inadequate for plaintiff to prove causation.

The court held that because plaintiff failed to offer any "substantial evidence," which would show that plaintiff's outcome with the DEA would have been any different had defendants given purportedly correct advice, plaintiff failed to create a genuine issue of fact on this causation element, and the trial court thus properly granted defendants' motion for summary judgment.

Significance of Opinion

Although this is an unpublished opinion, it is significant because it again demonstrates that in order to prevail in a legal malpractice action, a plaintiff must generally establish that but for the defendant's alleged negligence, the plaintiff would have prevailed in the prosecution or defense of the underlying claim(s) or the outcome would have been more favorable for plaintiff. Speculation will not suffice.

For more information please contact Terrence P. McAvoy.

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