

# Prescribing High Potency Medication to Known Drug Abuser: Is the Doctor Liable for Resulting Foreseeable Injuries?

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In *Komlodi v. Picciano, et. al.*, 217 N.J. 387 (2014), the question before the New Jersey Supreme Court was whether the trial court erred in instructing the jury to consider whether a patient's drug addiction and alcohol abuse were pre-existing conditions that proximately caused the injuries she suffered when she orally ingested Fentanyl, a pain medication contained in patches prescribed solely for external application to the skin. The issue at trial was whether the prescribing physician was liable for the resulting injuries.

Dr. Picciano prescribed Fentanyl skin patches to help alleviate lower back pain suffered by the (incapacitated) plaintiff, Michelle Komlodi, age 31. Dr. Picciano had treated the plaintiff for many years as a primary care physician and was aware of her patient's long-term history of substance abuse, both with alcohol and drugs. Dr. Picciano testified that she believed her patient "really had back pain" and was not drug seeking. She decided to treat her patient's back pain temporarily, knowing that Michelle had an appointment at a behavioral health clinic shortly thereafter. She further testified that she had advised her patient that she could not consume alcohol was using the Fentanyl patch.

On August 2, 2004, while drinking heavily, the plaintiff ripped open a patch with her teeth and swallowed the medication. This resulted in suppressed respiratory function and anoxic brain injury. Ms. Komlodi has been left with severe and permanent brain injury.

The plaintiff's primary liability theory was that that Dr. Picciano was negligent in prescribing the patch since, in view of the patient's history of drug and alcohol abuse, it was foreseeable that she would misuse the patch by deliberately applying the gel to her mouth or gums, or use the patch while consuming alcohol. At trial, the jury was given a Scafidi charge to consider prior alcohol abuse as a pre-existing medical condition. The jury was also given an intervening cause charge. The jury determined that the plaintiff had proven that Dr. Picciano deviated from accepted standards of family practice during her treatment of Ms. Komlodi and that Dr. Picciano's deviation increased the risk of harm posed by Michelle's pre-existing condition. However, the jury also determined that the plaintiff failed to prove that the increased risk was a substantial factor in producing the ultimate harm or injury suffered by Michelle. Thus, the jury returned with a verdict in favor of Dr. Picciano.

The Appellate Division reversed and remanded for a new trial. On Appeal, the plaintiff contended that the Scafidi charge was inappropriate because the defendant did not prove that a pre-existing disease or condition contributed to the patient's injury. The plaintiff further contended that the judge improperly gave the "but for" proximate cause charge. The court stated:

Here, the evidence did not clearly establish a Scafidi case, the jury charge included both "but

for” and pre-existing condition/increased risk instructions, and the charge barely mentioned the facts and theories of the parties. Those errors require that the case be remanded for a new trial....In the case before us, plaintiff expressly objected during the charge conference to the court giving a Scafidi charge. The application of the Scafidi causation standard was far from clear. Defendants did not specifically identify Michelle’s preexisting condition as drug-seeking behavior, dependency on alcohol, dependency on drugs, or dependency generally. In short, defendants did not identify “the preexisting disease and its normal consequences.” *Fosgate v. Corona*, 66 N.J. 268, 272 (1974). Having failed to do so, defendants were not entitled to a Scafidi charge.

The Appellate Division also found that the trial judge did not properly identify the claimed pre-existing condition to guide the jury. Instead, in the jury charge, the trial judge merely referred to Michelle’s “medical condition” and “problems” without reference to any defense proofs or theories. This factual issue made an intervening charge improper if the patient’s biting the patch was a foreseeable action in view of her medical and mental history.

The Appellate panel has one dissenting Justice, which, therefore, permitted this case to be heard by the Supreme Court as of right.

On May 20, 2014, the New Jersey Supreme Court issued a unanimous decision. The decision of the Appellate Court was affirmed and modified. The no-cause at the trial level was vacated, and the case remanded.

If one reads the entire opinion, there is no question that this jury received a very complex and somewhat convoluted charge, one that even many lawyers would find difficult to follow. The Supreme Court agreed with the Appellate Division that the Scafidi charge was improperly given in that the trial judge never identified for the jury what the claimed “pre-existing” condition was, although the jury was told to consider whether the prescription of the Fentanyl patch increased the risk of harm to the patient and was a substantial factor in causing the patient’s injuries. Further, the harm that was caused was not due to any progressive disease or disorder but, rather, by the patient’s own conduct after the Fentanyl patch was prescribed. They further agreed that the superseding/intervening cause charge was given in error in that the standard charge of “foreseeability” was a sufficient charge in this factual scenario. Moreover, the Supreme Court found that the trial judge improperly failed to mold the law to the facts of this case, resulting in clear capacity to confuse the jury.

A second Komlodi case was filed after the Supreme Court opinion, and the initial complaint has been temporarily dismissed without prejudice until discovery in the second matter is completed. The two cases will then be consolidated for trial in Middlesex County.



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