Vermont Superior Court
Orleans Unit
Filed: 4/6/2023

STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket # 129-6-16 Oscv

IN RE:

CHRISTINE BILLIS

Petition for Post Conviction Relief

Decision on State's Motion for Summary Judgment (Motion #30)

In this case Petitioner seeks post conviction relief from a conviction based on a plea. Petitioner was the driver in a car crash in September of 2009 in which her husband died. Two years after the crash, she was charged with first degree murder in connection with the crash. The case was resolved as a result of an agreement to a plea to involuntary manslaughter and she received a sentence of 7-15 years.

Petitioner seeks relief from the conviction on two grounds: ineffective assistance of counsel, and discovery of new evidence relating to drugs that Petitioner claims that she was taking at the time of the crash and which she claims had side effects not understood at the time of the crash or plea.

The Respondent State of Vermont ("State") has filed a motion for summary judgment. It argues that Petitioner cannot prove either claim without expert medical testimony, and Petitioner does not have a medical expert.

Petitioner did not file a response to the State's Statement of Undisputed Facts in the manner required by V.R.C.P. 56 (c)(2), which states as follows:

> A nonmoving party responding to a statement of undisputed material facts and asserting that a fact is genuinely disputed, that the materials cited do not establish the absence of a genuine dispute, or that the moving party cannot produce admissible evidence to support the fact, must file a paragraph-by-paragraph response, with specific citations to particular parts of materials in the record that the responding party asserts demonstrate a dispute, including depositions, documents, electronically stored information, affidavits, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other admissible materials. The responding party must reproduce each numbered paragraph of the moving party's statement before including the response thereto.

V.R.C. P. 56 (c)(2).

Because Petitioner did not properly dispute the State's facts, the court considers those facts "undisputed for purposes of the motion" pursuant to V.R.C. P. 56 (d)(3).

Petitioner did, however, file her own Statement of Undisputed Facts as provided for in the rule: "To the extent that the responding party asserts that there are additional material facts that should be considered, the party may file a separate and concise statement of additional material facts in numbered paragraphs, with specific citations to particular parts of admissible materials in the record." V.R.C. P. 56 (c)(2). The State filed a response to Petitioner's Statement of Undisputed Facts in which the State disputes some of Petitioner's asserted facts and agrees with others.

The court relies in this decision on facts that the State has properly supported, additional facts that both parties agree are undisputed and are supported by admissible evidence,[1] facts that are pertinent to the claims before the court,[2] and the court record.

Undisputed Facts

On September 22, 2009, Petitioner Christine Billis crashed her car while driving on Route 5A in Charleston, Vermont. She received medical attention at the scene. Her husband, Charles Billis, who was riding in the passenger seat, died from injuries sustained in the crash.

On September 28, 2009, Petitioner was interviewed at her residence. She stated that she did not remember the entire event or offer anything about the crash. She described being treated for mental illness as well as what she referred to as a recent event/change in her health. She described problems with insomnia and napping during the day, for which she had been prescribed Ambien and she was set up to do a sleep study. She claimed to have stopped taking the medication 5 (five) days after starting it, because it "made me wicked stupid" and she said it gave her blackout spells soon after ingestion (before bedtime).

In 2011, a witness told the Vermont State Police that Ms. Billis had made statements to the witness indicating that Ms. Billis had intentionally crashed her car with the intent to kill her husband. The witness provided recordings of statements by Ms. Billis suggesting that Ms. Billis had intentionally crashed her car with the intent to kill her husband. Ms. Billis subsequently made further self-incriminating statements to the witness and to police, including stating to police that "my intent was to kill both of us."

On April 25, 2011, a detective met with Petitioner at her residence. During that conversation, she explained her mental health and the physical issues she was dealing with in 2009, including taking Chantix (beginning early September 2009) and anti-depressants and

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[1] See V.R.C. P. 56 (c)(2).

[2] For example, Petitioner argues in her memorandum related to the issue of ineffective assistance of counsel that "a material factual dispute exists as to whether this crash was intentional or an accident." Petitioner's Memorandum in Opposition, filed February 24, 2023, page 9. Actually, the facts for purposes of this claim are facts related to the issues of whether her attorney's work fell below the pertinent standard of professional practice, and if so, whether, as a result of such deviation, there is a reasonable probability that the result would have been different. The claims in this case do not call for factual resolution of whether the crash was intentional or an accident.

having sleep issues, for which she participated in a sleep study a day or two before the crash. She described her relationship with her husband as abusive (verbally and mentally) and financially controlling. She explained that she wanted a divorce and she left and came back because he promised to change. During this interview the detective asked if there was any chance that she crashed into the tree on purpose and she responded, "even though we didn't get along and I was angry and wanted a divorce, I didn't want him dead." She further explained that during their relationship she only had serious suicidal thoughts in July 2009, and that is when she sought mental health assistance. The detective obtained her prescriptions.

On June 1, 2011, Petitioner contacted the detective to advise that she wanted to meet again to discuss the incident. They met again on June 6, 2011 at her residence. A witness was also present. At that time she purportedly confessed to murder. She described that while driving she saw a tree ahead and her intent was to wrap around the tree—she thought they would both die.

Petitioner was arrested and charged with first degree murder in June of 2011. She was represented by Attorney David Sleigh. Pursuant to a plea agreement, she pled guilty to manslaughter on November 4, 2012 and received a sentence of seven to fifteen years.

This case was filed in June of 2016. Petitioner retained Dr. Alan Abrams as a medical expert. The case was protracted for several reasons but largely due to allowance of time for Petitioner to obtain a legal expert. No expert medical disclosures were made. By Order of May 7, 2021, the court ordered disclosure of expert witness opinions on both legal and medical issues by November 15, 2021. This date was later extended to June 29, 2022. Petitioner filed a motion on June 29, 2022 in which she sought an additional 60 days for the required disclosure of her experts. The court granted this request over the State's opposition and set August 29, 2022 as the firm final date and also specifically clarified what was required for compliance with the disclosure requirement.

On August 26, 2022, Petitioner's attorney filed a Motion for Relief (Motion #25) seeking an additional 60 days to provide the required disclosures for her medical expert, Dr. Abrams. In a ruling of September 21, 2022, the court denied the motion, thereby precluding expert medical evidence. Petitioner filed a follow-up Motion for Reconsideration (Motion #28) on October 10, 2022. The motion was denied in a ruling of December 2, 2022. The medical claim was not dismissed, but Petitioner was precluded from submitting expert evidence on the medical claim.

On August 26, 2022, Petitioner disclosed Attorney Robert Sussman as her legal expert and produced a timely expert report by Mr. Sussman. He was deposed on November 3, 2022. At his deposition, he expressed the opinion that because of Petitioner's mental health and medication history, Attorney Sleigh should have engaged a medical expert to explore possible defenses related to health, mental health, or medication, and that the decision not to engage a medical expert was a failure to meet the standards of a reasonably competent Vermont attorney.

He was asked about the second prong of an ineffective assistance claim—whether the deviation from the required standard resulted in a reasonable probability of a different outcome. He responded, that "[i]n order to present the second element, I do have to rely on the expert

testimony, because in order to show that the medical evidence would have made a difference, you need the medical expertise." He testified that there was a reasonable probability that if the case went to trial, with a "proper medical expert," there might have been a different outcome. If there had been a trial, he would have "relied on the [medical] expert to show why this was an accident as opposed to an intentional act." (Exhibit 5, Deposition transcript, page 20, lines 1-4).

Mr. Sussman stated in deposition: "Was this an involuntary act? Was it even a conscious act? I don't have the medical expertise to answer that. But if the expert comes back and says it may have been involuntary or it may have been an unconscious act, that's where the second prong can be satisfied." (Exhibit 5, Deposition transcript, page 23, lines 8-14).

Mr. Sussman did not provide expert opinion support for alternative theories of the ineffective assistance of counsel claim: alleged failure to challenge the admissibility of Petitioner's confession as involuntary (Mr. Sussman thought this challenge would require a medical expert); failure to file a motion to dismiss due to lack of corpus delicti (Mr. Sussman did not think such a motion would have succeeded); alleged failure to investigate a "meritorious accident defense" (Mr. Sussman thought this challenge would require a medical expert); or alleged failure to fully investigate the battered woman's defense (Mr. Sussman indicated that Attorney Sleigh did enough to investigate this).

Conclusions of Law

Ineffective assistance of counsel claim

Post-conviction claims of ineffective assistance of counsel are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, *id.*, as interpreted by the Supreme Court of Vermont, a petitioner must first show by a preponderance of the evidence that his trial counsel's assistance "fell below an objective standard of performance informed by prevailing professional norms." *In re Hyde*, 2015 VT 106, ¶ 17 (citing *In re Plante*, 171 Vt. 310, 313 (2000)). The petitioner must then also prove by a preponderance of the evidence "that there is a reasonable probability that, but for counsel's errors, the proceedings would have resulted in a different outcome." *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Allen*, 2014 VT 53, ¶ 20 (quoting *Strickland*, 466 U.S. at 694).

As to the first prong, both parties agree that Petitioner's expert concluded that trial counsel's assistance fell below the required professional standard. Mr. Sussman's opinion is that Attorney Sleigh should have engaged a medical expert to explore possible defenses related to health, mental health, or medication. Mr. Sussman opines that the decision not to engage a medical expert was a failure to meet the standards of a reasonably competent Vermont attorney. The State does not dispute that Petitioner can meet the burden on this element.

The State argues that Petitioner is unable to prove the second element: a reasonable probability that but for Attorney Sleigh's error, the result would have been different. *In re Combs,* 2011 VT 75 ¶ 9. A "reasonable probability is a reasonable chance and not merely an abstract possibility." *In re Fitzgerald*, 2020 VT 14 ¶ 32, citing *In re Burke*, 2019 VT 28, ¶ 18.

Thus, to prove this prong of the claim, Petitioner needs expert legal evidence to show that if a medical expert had been engaged by trial counsel, there is a reasonable probability of a different outcome.

Attorney Sussman was asked to express an opinion on the issue of the second prong, which he did. His opinion was that he would have to rely on the opinion of a medical expert to be able to say whether or not there was a reasonable probability of a different outcome. He acknowledged that he could not testify that there was such a probability without an opinion from a medical expert that the crash was an accident and not caused by an intentional act. Since no medical expert was timely disclosed on this issue, there is no expert opinion evidence to support this proposition. Thus Petitioner cannot prove the second prong of an ineffective assistance claim.

In addition, Petitioner does not have sufficient evidence to prove her claim of ineffective assistance of counsel for any of the alternative reasons alleged because either there is no medical expert on the issues as to which Attorney Sussman testified that one is needed, or, if no medical expert is needed, Attorney Sussman as the legal expert does not support a finding on the necessary elements.

The State is entitled to summary judgment on this claim.

Newly discovered evidence claim

Petitioner seeks to show that newly discovered evidence establishes lack of intent to commit the crime for which she pled guilty.

To succeed on such a claim, the following elements must be proved:

--there is evidence that has been discovered since the trial, or plea in this case
--the evidence could not have been discovered before the plea
--the evidence is material to the issue
--the evidence is not merely cumulative or impeaching, and
--the evidence will probably change the result if a new trial is granted.

State v. Charbonneau, 2011 VT 57, ¶13.

Petitioner claims that in July of 2009, approximately two months before the crash, the Food and Drug Administration ("FDA") issued a safety warning concerning Chantrix, which she alleges she was taking at the time of the crash.[3]

[3] Petitioner relies on her Exhibit 2. This appears on its face to be a July 1, 2009 letter from the manufacturer of Chantrix to health care professionals to heighten awareness of post-marketing reports of adverse events from Chantrix, and updating warning information. It does not mention the FDA. Neither the fact of any FDA warning nor the letter or the accuracy of its contents are supported by affidavit sufficient to provide a foundation for admissible evidence, so they cannot be relied upon as undisputed facts. Even considering the document as a statement of the manufacturer concerning possible adverse effects, it is inadmissible hearsay.

Petitioner claims that two months after the plea agreement, in January of 2013, the FDA issued a safety warning concerning Ambien, which she alleges she was taking at the time of the crash. Neither the fact of an FDA warning nor its specifics can be relied on as undisputed facts as alleged by Petitioner as they are not supported by admissible evidence.[4]

Petitioner claims that the newly discovered evidence of the FDA warnings is material and relevant to the determination of whether the crash was intentional or an accident. She argues that she does not need to prove causation. (Memorandum in Opposition, page 12). However, without evidence of causation between the drug(s) at issue and their effect on Petitioner in relation to the crash, Petitioner would not be able to prove that the newly discovered evidence would probably change the result. It is not enough to show that there was a new awareness of previously unrecognized negative side effects from either Chantrix or Ambien. Admissible evidence would also be needed to show that the level of her use of one or both of the drugs affected Petitioner at the time of the crash to a sufficient degree to have had a causal effect resulting in involuntary or unconscious action.

Vermont courts consistently require expert medical testimony to prove medical causation:

> [E]xpert testimony is ordinarily required to prove medical causation. *Brace v. Vergennes Auto, Inc.*, 2009 VT 49, ¶ 9, 186 Vt. 542, 978 A.2d 441 (mem.); *Wilkins v. Lamoille Cty. Mental Health Servs., Inc.*, 2005 VT 121, ¶ 16, 179 Vt. 107, 889 A.2d 245. Defendants have not shown that "the facts to be proved are such that any layman of average intelligence would know from his own knowledge and experience that the [alleged assault] was the cause of the injury," rendering expert testimony unnecessary. *Egbert v. Book Press*, 144 Vt. 367, 369, 477 A.2d 968, 969 (1984) (per curiam).

Sweet v. St. Pierre, 2018 VT 122, ¶ 26.[5]

The issue often arises in cases involving claims of medical negligence. No expert medical testimony on causation is needed if lay persons can easily understand the cause and effect relationship between an alleged cause and an effect asserted. The Vermont Supreme Court recognizes an exception for such circumstances, but concludes that expert evidence is usually required due to the complexity of effects on the human body:

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[4] Petitioner relies on her Exhibits 1, 3, 6, and 10. Exhibit 1, which purports to be a medication check summary sheet filled out on the day of the crash but unsupported by affidavit, indicates that by Petitioner's report she was prescribed or taking Ambien as of September 22, 2009. Exhibit 3 consists of news media accounts of an FDA warning issued in January of 2013 about the risk of morning-after impairment from the use of sleep aids, including Ambien. Exhibit 6 is a transcript of Dr. Abrams' June 1, 2010 testimony in a California case. Exhibit 10 is an 85 page transcript of the detective's interview with Petitioner on April 25, 2011. None of these documents are supported by affidavit or other basis for a foundation for admissibility. Moreover, there is no mention of Ambien during the interview, either by name or otherwise, nor of an FDA warning.

[5] In *Sweet,* the Court affirmed the trial court for excluding lay witness testimony that an alleged assault caused a stroke.

> ¶ 9. We start by examining the "common sense exception" (also known as the "common knowledge rule") presented by plaintiff. While we have never formulated a rule with either of these exact names, other courts and academics have done so. See generally J. King, *The Common Knowledge Exception to the Expert Testimony Requirement for Establishing the Standard of Care in Medical Malpractice,* 59 Ala. L.Rev. 51 (2007) (proposing reforms to the common knowledge rule). The reason for the general rule requiring expert testimony is that "[t]he human body and its treatment are extraordinarily complex subjects requiring a level of education, training and skill not generally within our common understanding." *Noyes v. Gagnon,* No. 2007–311, 2008 WL 2811231, at *2 (Vt. Feb. 6, 2008) (unpub.mem.), http://www.vermontjudiciary.org/d-upeo/upeo. aspx. We have joined other jurisdictions by holding that while medical malpractice plaintiffs must generally use an expert witness to satisfy their burdens of proving the elements of medical negligence, an exception to the "general rule exists in cases where the violation of the standard of medical care is so apparent to be comprehensible to the lay trier of fact." *Senesac v. Assocs. in Obstetrics & Gynecology,* 141 Vt. 310, 313, 449 A.2d 900, 902 (1982) (quotation omitted).

Taylor v. Fletcher Allen Health Care, 2012 VT 86, ¶ 9.

In *Taylor,* the court concluded that the issue of causation was "sufficiently complex as to be beyond the scope of common knowledge to a layperson." *Id.* Expert testimony was needed to support a claim that a fall in the hospital caused the failure of back surgery.

Even if Petitioner in this case were to establish that she was under the influence of one or both of the drugs and that awareness of pertinent side effects could not have been discovered in the exercise of due diligence prior to the guilty plea, in order to show that the evidence would probably change the result of the case, it would still be necessary to prove that the level of drug(s) in her body impacted her thought processes in a manner that compromised intentionality. Knowledge of the effects of pharmaceuticals in general on a person's mind and ability to make choices is not normally within the knowledge of typical jurors, and level of dosage is likely to be important in an analysis of causation. The court concludes that in this case expert medical evidence would be necessary on the issue of causation in order to prove that the outcome probably would have been different. Attorney Sussman opined that he would need medical expertise to determine whether Petitioner's act was a conscious or involuntary one, or whether the crash was an accident or an intentional act. Lay jurors would be in the same situation.

Even if Petitioner were able to prove specific levels of drug use and that new information about the drugs could not have been discovered prior to her plea, she still would be unable to prove the necessary element that newly discovered evidence would probably change the result. This is because she does not have a medical expert to provide expert medical testimony on the critical issue of causation.

Accordingly, the State is entitled to summary judgment on this claim.

Summary

Based on the foregoing, the State's Motion is *granted.* Judgment will issue this day.

Electronically signed April 6, 2023 pursuant to V.R.E.F. 9 (d).

Mary Miles Teachout
Superior Judge (Ret.), Specially Assigned