

<b>Johnson v Rosenberg</b>
2005 NY Slip Op 30441(U)
March 4, 2005
Supreme Court, New York County
Docket Number: 103876/07
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS  
*Justice*

PART 6

JOHNSON, JOHN

INDEX NO. 108602/2007

Plaintiff(s),

MOTION DATE 7/7/09

- v -

MOTION SEQ. NO. 003

ROSENBERG, STEVEN D.D.S.

MOTION CAL. NO.

Defendant(s).

The following papers, numbered 1 to 21, were read on this motion to/for summary judgment

<u>Notice of Motion / Order to Show Cause - Affidavits - Exhibits</u>	_____
<u>Answering Affidavits - Exhibits</u>	_____
<u>Replying Affidavits</u>	_____

PAPERS NUMBERED	
_____	1-17
_____	18-20
_____	21

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion

**MOTION DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION AND ORDER**

**FILED**  
MAR 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/11/10

JBL  
JOAN B. LOBIS, J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6**

-----X  
JOHN JOHNSON and ANN YIH JOHNSON,  
Plaintiffs,

Index No. 103876/07

-against-

**Decision and Order**

STEVEN N. ROSENBERG, D.D.S., STEVEN N.  
ROSENBERG, D.D.S., P.C. and STANLEY C.  
HEIFITZ, D.M.D.,  
Defendants.

**FILED**  
MAR 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**JOAN B., LOBIS, J.:**

Motion Sequence Numbers 002 and 003 are consolidated for disposition.

On March 7, 2005, plaintiff, John Johnson, who was 66 years old, presented to the dental offices of defendant Stanley Heifetz, D.D.S. s/h/a Stanley Heifetz, D.D.S. Dr. Heifetz performed an initial examination and took a full mouth series of x-rays. Mr. Johnson returned to Dr. Heifetz on March 15, 2005, at which time, Dr. Heifetz reviewed the x-rays taken the previous week with Mr. Johnson. Dr. Heifetz recommended, among other things, extracting teeth numbers 17 and 32 (the lower wisdom teeth). It appears that tooth number 32 was partially erupted as only the mesial aspect portion of the tooth was visible, and the rest of the tooth was covered by gum and bone. Additionally, there was moderate to severe bone loss noted on the mesial aspect of the tooth, causing a deep pocket between teeth numbers 31 and 32, which created a food trap that put Mr. Johnson at risk of infection. With respect to tooth number 17, Dr. Heifetz recommended extraction because the tooth was only partially erupted (partially covered by gum and bone), and had extensive decay. Dr. Heifetz referred Mr. Johnson to defendant Steven N. Rosenberg, D.D.S., an oral surgeon, for the extractions of these teeth. It appears that Dr. Heifetz is not affiliated with Dr. Rosenberg, and that they maintain separate offices at separate locations.

Mr. Johnson presented to Dr. Rosenberg's office on March 24, 2005. Dr. Rosenberg evaluated and examined Mr. Johnson, and also recommended that teeth numbers 17 and 32 be extracted. Prior to performing the extraction of the teeth, Mr. Johnson was presented with and signed a written consent form, outlining the risks associated with the procedure, which included temporary or permanent numbness to the lip, chin, tongue and/or gums.

Dr. Rosenberg extracted tooth number 17 without complication. However, during the extraction of tooth number 32, Dr. Rosenberg determined that the apical portion of the root of that tooth would be too difficult to remove, and, as a result, left that portion of the root in place. According to Dr. Rosenberg, the root was sitting on the inferior alveolar nerve, and an attempt to remove it could have resulted in injury. Following the procedure, Mr. Johnson was prescribed antibiotics and pain medication.

Mr. Johnson returned to Dr. Rosenberg for a post-operative visit on March 30, 2005. During this visit, Mr. Johnson reported numbness in his right lower lip that extended down his chin. Dr. Rosenberg determined that Mr. Johnson had a right paresthesia due to an injury to the inferior alveolar nerve during the extraction of tooth number 32. Dr. Rosenberg prescribed a Medrol Dose Pak, which is a cortical steroid used to reduce inflammation. Dr. Rosenberg testified at his deposition that he planned to follow the nerve injury, and, if the numbness did not resolve, he would refer Mr. Johnson to a specialist to explore surgical intervention. It is noted that Dr. Heifetz testified that Mr. Johnson telephoned him following the extraction and made complaints that he was not comfortable, felt tingling, and felt that something was off. Dr. Heifetz further testified that he had several phone conversations with Dr. Rosenberg regarding Mr. Johnson and his complaints.

According to Dr. Heifetz, Dr. Rosenberg assured him that he was providing post-op care relative to the injury.

Mr. Johnson returned to Dr. Rosenberg on April 1, 2005 and April 5, 2005 for further follow-up evaluations. According to Dr. Rosenberg, Mr. Johnson's condition appeared to be improving. Dr. Heifetz saw Mr. Johnson on April 5, 2005 and April 7, 2005 for treatment not related to the extractions. Dr. Heifetz could not recall whether Mr. Johnson made complaints relating to the extractions at this time.

Mr. Johnson saw Dr. Rosenberg again on May 2, 2005, with complaints of pain, numbness, and a cracking noise on the right side of his mouth while eating. Following the performance of radiological studies, Dr. Rosenberg ruled-out a fracture of the mandible. Mr. Johnson was given an appointment to return to see Dr. Rosenberg on May 9, 2005, however, it appears that Mr. Johnson did not show up for this appointment. It is noted that Mr. Johnson treated with Dr. Heifetz on four (4) occasions in late May and June 2005, in connection with bridge work to his upper and lower teeth. During these visits, Mr. Johnson complained of nerve damage since the extractions of teeth numbers 17 and 32.

On or about June 29, 2005, approximately two months after his visit of May 2, 2005, Mr. Johnson returned Dr. Rosenberg's office. During this visit, Mr. Johnson continued to complain of numbness in his lips and mouth. According to Mr. Johnson, Dr. Rosenberg repeatedly assured him that he was not in need of any further treatment and that he would regain sensation in the area

with time. Notwithstanding, Dr. Rosenberg, among other things, referred Mr. Johnson to Sal Ruggiero, D.M.D., a nerve repair specialist, for evaluation and further treatment. It appears that Mr. Johnson did not contact Dr. Ruggiero, and that Mr. Johnson sought no further treatment from Dr. Rosenberg following the visit of June 29, 2005. Mr. Johnson contends that he was advised by Dr. Heifetz that he should not seek treatment from Dr. Ruggiero, and that he should wait for the injury to resolve itself on its own.

Mr. Johnson treated with Dr. Heifetz until April of 2007. Mr. Johnson claims that although he treated with Dr. Heifetz for almost two-years after he ceased his treatment with Dr. Rosenberg, he was never referred to another oral surgeon to address his continuing complaints of numbness in his lip and chin. According to Mr. Johnson, he still suffers from a numb lip and chin.

Plaintiffs commenced the instant dental malpractice action against defendants, Dr. Heifetz and Dr. Rosenberg, as well as Steven N. Rosenberg, D.D.S., P.C., with the filing of a summons and complaint on or about June 21, 2007. Plaintiffs allege that defendants were negligent with respect to the manner in which they rendered dental care to Mr. Johnson, and as result of such negligent treatment caused injury to Mr. Johnson. Plaintiffs further allege that defendants failed to obtain informed consent from Mr. Johnson prior to the performance of the teeth extraction of March 24, 2005. The complaint also contains a derivative cause of action asserted by Mrs. Johnson. Discovery has been completed, a note of issue/certificate of readiness has been filed, and this action is now ready for trial. Defendants move for summary judgment, dismissing the complaint.

The party moving for summary judgment in a medical malpractice action must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant was negligent. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). “[B]are allegations which do not refute the specific factual allegations of medical malpractice in the bill of particulars are insufficient to establish entitlement to judgment as a matter of law.” Grant v. Hudson Val. Hosp. Ctr., 55 A.D.3d 874 (2d Dep’t 2008). Once the movant makes a *prima facie* showing, the burden shifts to the party opposing the motion “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” Alvarez, 68 N.Y.2d 324 (citation omitted). Specifically, in a medical malpractice action, a plaintiff opposing a summary judgment motion

must submit evidentiary facts or materials to rebut the *prima facie* showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact. . . . General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician’s summary judgment motion.

Id. at 324-25 (citations omitted).

In support of his motion, Dr. Heifetz relies upon, *inter alia*, the expert affirmation of a general dentist licensed to practice in the State of New York. Based upon the expert’s examination of plaintiff’s dental record, as well as other documents relating to the instant litigation, *i.e.*, deposition transcripts and bill of particulars, the expert opined that Dr. Heifetz was not negligent in any of the dental treatment rendered to Mr. Johnson. This expert sets forth that “Dr. Heifetz was at

all times in full accord with good and accepted dental practice . . . [and] that the treatment rendered by Dr. Heifetz was not a proximate cause or substantial factor in causing plaintiff's alleged injuries."

With respect to plaintiffs' allegations that Dr. Heifetz should not have recommended the extraction of the lower wisdom teeth, this expert finds that tooth number 32 needed to be extracted because leaving the tooth in place would cause dental problems in the future. According to this expert, tooth number 32 was not restorable because there was extensive bone loss in the area that was creating a pocket between teeth numbers 31 and 32. As a result of same, a failure to remove tooth number 32 could cause future complication, including "further bone loss and the potential for infection and dental decay, which placed the adjacent teeth and bone at risk." Dr. Heifetz's expert states that the extraction of tooth number 32 was necessary to create a stable environment needed to effectuate the restoration of teeth numbers 29 through 31. The expert also states that the extraction of tooth number 32 was the only treatment option because the tooth was a partially bony impacted tooth. With respect to tooth number 17, Dr. Heifetz's expert opines that the tooth "needed to be extracted because there was carries (decay) in the tooth and the carries could not be excavated." Moreover, tooth number 17 "could not be restored because the tooth was partially erupted (the tooth was partially submerged by soft tissue)."

Dr. Heifetz's expert further opines that ultimate determination of whether a tooth should be extracted and whether a patient was a proper candidate to undergo the procedure rests with the oral surgeon, who, in this case, was Dr. Rosenberg. Additionally, according to his expert, it was Dr. Rosenberg's responsibility to discuss the risks associated with such a procedure, as well as any

alternatives. Therefore, Dr. Heifetz, as the referring general dentist, “did not have a duty to obtain plaintiff’s informed consent.”

Dr. Heifetz’s expert also opines that, as Mr. Johnson’s general dentist, Dr. Heifetz had a “limited obligation regarding the follow-up care pertaining to nerve injuries and that that duty is satisfied if the general dentist ensures that the patient is under the care of an oral surgeon for such an injury.” Consequently, the expert states that Dr. Heifetz acted within accepted standards of care in this case by relying on Dr. Rosenberg to follow and care for the injury. Additionally, with respect to causation, Dr. Heifetz’s expert states that any failure on the part of Dr. Heifetz in providing post-operative care to Mr. Johnson was not a proximate cause of his injuries. According to the expert, very few patients recover from a nerve injury resulting from a tooth extraction, whether they have further treatment of the nerve injury or not.

In support of his motion, Dr. Rosenberg relies upon, *inter alia*, the expert affirmation of a licensed dentist, who practices in the field of oral and maxillofacial surgery. Based on an examination of Mr. Johnson, a review of his dental records, as well as other documents relating to the instant litigation, *i.e.*, deposition transcripts and bill of particulars, the expert opines that there is no basis for any malpractice claims against Dr. Rosenberg and that he acted within the standard of care throughout his treatment of Mr. Johnson.

This expert asserts that Dr. Rosenberg was not negligent in advising Mr. Johnson to have his lower wisdom teeth extracted. Based on Dr. Rosenberg’s medical records, Mr. Johnson had

a pocket depth of over 7 millimeters around tooth number 17. Additionally, there were evidence of bone loss distal to tooth number 31, which could lead to infection. According to his expert, as a result of these findings, Dr. Rosenberg appropriately found that these teeth were not restorable. Therefore, in the opinion of this expert, extraction was appropriate treatment for teeth numbers 17 and 32. Dr. Rosenberg's expert sets forth that the "treatment of [Mr. Johnson], including evaluation, establishment of diagnosis and extraction of teeth #17 and #32 were performed within the standard of care."

Regarding the lack of informed consent cause of action, Dr. Rosenberg's expert opines that the informed consent process was more than sufficient to allow Mr. Johnson to make an informed decision as to whether to undergo the recommended treatment, and that such process met the accepted standard of care. The expert makes this conclusion based on the written consent form and Dr. Rosenberg's notes. Dr. Rosenberg presented Mr. Johnson with a written consent form prior to the extraction of teeth #17 and #32, detailing the known risks of the procedure, including the possibility of temporary or permanent numbness to the lip, chin, tongue and/or gums. Mr. Johnson signed the form prior to the extraction. The expert also indicates that "Dr. Rosenberg noted within his chart that Mr. Johnson was advised of the possibility of bilateral temporary or permanent numbness of the lip, chin, tongue or gum."

This expert also sets forth that the injury claimed by Mr. Johnson to his right inferior alveolar nerve is "not in any way indicative of malpractice," and opines that the extractions were done properly. This expert notes that Dr. Rosenberg determined that the apical portion of the root

of tooth number 32 would be too difficult to remove as it was sitting on the nerve, and he properly left that portion of the root in place. The expert opines that Dr. Rosenberg acted appropriately in leaving that portion of the root in place and a failure to remove same was in no way malpractice.

Additionally, Dr. Rosenberg's expert opines that he was not negligent by failing to timely diagnose the injury to Mr. Johnson's right inferior alveolar nerve. According to the expert, Dr. Rosenberg properly examined Mr. Johnson post-operatively, properly treated him, as well as promptly responded to his complaints. In response to the claim that Dr. Rosenberg failed to timely refer Mr. Johnson to a specialist, the expert states that both Dr. Rosenberg and Mr. Johnson testified that Dr. Rosenberg referred Mr. Johnson to Dr. Ruggiero, a nerve repair specialist. The referral was given just over three months after the extraction procedure and it is the opinion of the expert that "this referral was timely and well within the standard of care."

Dr. Rosenberg's expert examined Mr. Johnson and found that he did suffer from a paresthesia of the distribution of a portion of the right inferior alveolar nerve. However, the expert concludes "that the fact there was an injury to the inferior alveolar nerve during the extraction procedure of tooth #32 is not evidence of malpractice and that the pre-operative evaluation, the surgical procedure, and the post-operative treatment were appropriate and all within the acceptable standard of dental/oral and maxillofacial surgical care."

In opposition to defendants' respective motions, plaintiffs submitted the expert affirmation of a dentist licensed to practice in New York, who is a Diplomat of the American Board

of Oral and Maxillofacial Surgery. Based on pertinent records of Mr. Johnson and various documents relating to the instant action, the expert concludes that both defendants “departed from the standard of care and departed from good and accepted practice in their treatment of John Johnson.” Plaintiffs’ expert further opines that defendants’ “departures directly resulted in causing John Johnson to suffer damages that he would not have suffered otherwise.”

Plaintiffs’ expert opines that it was a departure for Dr. Rosenberg to recommend and remove Mr. Johnson’s wisdom teeth. Mr. Johnson was 66 years old at the time of the procedure and the expert claims that removing impacted wisdom teeth on a patient of that age is rare and dangerous. Plaintiffs’ expert sets forth that it is well documented in the medical field that “the likelihood of injury to the inferior alveolar nerve during wisdom tooth extraction dramatically increases when the patient is over the age of 30 and the risks continue to proportionately increase with increase in age.” The only time wisdom teeth of a 66 year-old patient should be removed is if there is an urgent and necessary medical reason for doing so, which, the experts claims, did not exist in the instant situation.

Based on the panorex taken the same day as the procedure, the expert opines that it was likely that an injury would occur to plaintiff’s inferior alveolar nerve. The expert explains that the x-ray showed that tooth number 32 was “severely impacted, set deeply into the jawbone, and intertwined with the inferior alveolar nerve.” Furthermore, the expert states that “[i]t is blatantly evident upon reviewing the panorex that any attempt to extract tooth #32 would more likely than not result in injury to the inferior alveolar nerve.” As a result, the expert opines that it was a departure

on the part of Dr. Rosenberg “to fail to advise Mr. Johnson of the visit that he was more likely than not to sustain a nerve injury as a result of extracting tooth #32 given its position in the jaw.”

Plaintiff’s expert also opines that Dr. Rosenberg departed from good and accepted practice by failing to advise Mr. Johnson of alternatives to the extraction procedures. The expert asserts that Dr. Rosenberg’s reasons for removing tooth number 32 were not of any medical urgency and could have been treated without extracting tooth number 32. Specifically the expert states that Dr. Rosenberg failed to advise Mr. Johnson that as an alternative to the procedure “he could (1) simply do nothing and not necessarily be worse off or (2) forgo the extractions and consult a periodontist for more conservative, non-surgical treatment.” The expert notes that in the “alternatives to treatment” section of the consent forms given to Mr. Johnson it says “none.” Plaintiffs’ expert adds that Dr. Rosenberg never discussed the contents of the informed consent form with Mr. Johnson, and a failure to do so is also a departure on the part of Dr. Rosenberg.

The expert notes that Dr. Rosenberg’s departed from good and accepted dental practice in connection with the performance of the extraction of tooth number 32 by failing to perform a coronectomy. Instead of removing multiple sections of tooth number 32, including those portions contiguous with the inferior alveolar nerve, according to plaintiffs’ expert, Dr. Rosenberg should have performed a coronectomy, a technique whereby only the “coronal” portion of the tooth is removed and the nerve is fully avoided and protected. The expert opines that Dr. Rosenberg’s failure to perform a coronectomy instead of the extraction caused the injury to Mr. Johnson’s inferior alveolar nerve which resulted in a permanent loss of sensation in his lip and chin. Plaintiffs’ expert opines that Mr. Johnson has permanent numbness in his lip and chin, which is a direct result of

trauma to the inferior alverolar nerve that occurred during the extraction surgery of tooth number 32. The expert specifically sets forth that “the numbness is permanent and was directly a result of the negligence of Dr. Rosenberg.”

Lastly, with respect to Dr. Rosenberg, plaintiffs’ expert states that there is only a six-month window of opportunity within which a nerve can be repaired. Although Dr. Rosenberg gave Mr. Johnson the number for nerve repair specialist within six-months of his nerve injury, the expert opines that Dr. Rosenberg departed by failing to advise Mr. Johnson that there is a limited time within which to seek treatment from the specialist or otherwise risk his chance to regain sensation from a successful repair.

With respect to Dr. Heifetz, plaintiffs’ expert opines that Dr. Heifetz departed from good and accepted dental practice by advising Mr. Johnson that his numbness would go away on its own and that he would regain sensation in his lip and chin sensation over time. According to plaintiffs’ expert, Mr. Johnson detrimentally relied “on the false premise that additional treatment would be of no benefit,” which resulted in Mr. Johnson’s inability to obtain successful treatment for his injuries. Plaintiffs’ expert further opines that Dr. Heifetz departed by failing to refer Mr. Johnson to an oral surgeon for management of his nerve injury upon learning that Mr. Johnson was still suffering from the injury, and was no longer under the care of Dr. Rosenberg, or any other oral surgeon.

Plaintiffs’ expert sets forth that as a result of the departures discussed in his affidavit, Mr. Johnson “was caused to suffer damages that he would not have suffered from otherwise.

Specifically, he sustained an injury to his inferior alveolar nerve as a result of the negligent removal of his lower left wisdom tooth # 32. The injury has left Mr. Johnson with a permanent loss of sensation in his lower lip and chin. Mr. Johnson would not have sustained any of the above-mentioned damages but for the malpractice committed by the defendants herein.”

Mr. Johnson also submitted an affidavit in opposition to defendants’ motions. Mr. Johnson sets forth in his affidavit that he was advised by Drs. Heifetz and Rosenberg that he needed to have his lower wisdom teeth removed. Mr. Johnson further sets forth that he was presented a consent form by one of Dr. Rosenberg’s assistants while he was in the operating chair. According to Mr. Johnson, he signed the consent form without reading it. Mr. Johnson states that Dr. Rosenberg did not discuss the contents of the form with him, and never advised him or the risks of the procedure or any alternatives to the surgery. Mr. Johnson adds that had he “been advised of the risk of the procedures, of the difficult nature of the extractions, of the close proximity of the teeth to a nerve that could be injured, and of the serious potential for permanent injury to my lip and chin, [he] would never have agreed to proceed with the extractions.”

With respect to Dr. Heifetz, based upon the conflicting expert affidavits, issues of fact and credibility exist in connection with whether Dr. Heifetz departed from good and accepted dental care by advising Mr. Johnson that his numbness would go away on its own and that he would regain sensation in his lip and chin sensation over time; as well as in failing to refer Mr. Johnson to an oral surgeon for management of his nerve injury upon learning that Mr. Johnson was still suffering from the injury, and was no longer under the care of Dr. Rosenberg, or any other oral surgeon. Such issues cannot be resolved on this motion for summary judgment. See Bradley v. Soundview Healthcenter,

4 A.D.3d 194 (1st Dept. 2004); Morris v Lenox Hill Hosp., 232 A.D.2d 184 (1996). But, plaintiffs' expert does not address Dr. Heifetz's expert's opinion that he acted in accordance with good and accepted dental practice in connection with the care provided to Mr. Johnson prior to the performance of the subject extractions. Therefore, plaintiffs have not demonstrated that triable issues of fact exist with respect to issues relating to the adequacy of pre-operative care provided to Mr. Johnson by Dr. Heifetz. Additionally, as plaintiff's expert failed to contest the opinion that Dr. Heifetz did not have a duty to obtain Mr. Johnson's informed consent for the procedure being performed by Dr. Rosenberg, plaintiffs' informed consent cause of action, as asserted against Dr. Heifetz, must be dismissed.

With respect to Dr. Rosenberg, based upon the conflicting expert affidavits, issues of fact and credibility exist in connection with whether Dr. Rosenberg departed from good and accepted dental care (i) by removing Mr. Johnson's lower wisdom teeth given his advanced age, as well as the positioning of tooth number 32 in the jaw; (ii) in failing to remove only "coronal" portion of tooth number 32, thereby fully avoiding the nerve; and (iii) by failing to advise Mr. Johnson that there is a limited time within which to seek treatment from the specialist or otherwise risk his chance to regain sensation from a successful repair.

Lastly, in connection with plaintiffs' informed consent cause of action asserted against Dr. Rosenberg, Dr. Rosenberg established his *prima facie* entitlement to judgment as a matter of law by demonstrating that Mr. Johnson signed an informed consent form relating to the subject procedure. In opposition, plaintiff has not put forth any evidence that a reasonably prudent person in Mr. Johnson's position would not have undergone the surgery with the extractions, if fully

informed, which is required to prove such a cause of action. See Public Health Law § 2805-d(3). Therefore, Dr. Rosenberg's motion for summary judgment is granted with respect to plaintiffs' cause of action for lack of informed consent. See Thompson v. Orner, 36 A.D.3d 791 (2d Dept. 2007); Dickstein v. Dogali, 303 A.D.2d 443 (2d Dept. 2003); Dunlop v. Sivaraman, 272 A.D.2d 570 (2d Dept. 2000).

Based upon the foregoing, it is hereby


ORDERED that the motion of defendant Stanley Heifetz, D.D.S. s/h/a Stanley Heifetz, D.D.S. for summary judgment dismissing the complaint is granted with respect to plaintiffs' claims relating to the adequacy of pre-operative care provided to Mr. Johnson by Dr. Heifetz, and with respect to plaintiffs' cause of action for lack of informed consent, and is denied in all other respects; and it is further

ORDERED that the motion of defendants Steven N. Rosenberg D.D.S. and Steven N. Rosenberg, D.D.S. , P.C. for summary judgment dismissing the complaint is granted only with respect to plaintiffs' cause of action for lack of informed consent, and is denied in all other respects.

The parties shall appear for a pre-trial conference on March 23, 2010, at 9:30 a.m.

This constitutes the decision and order of the court

Dated: March 4, 2010

**FILED**  
MAR 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE  
  
JOSEPH B. LOBIS, J.S.C.