Abato v Miller
2012 NY Slip Op 33732(U)
March 19, 2012
Supreme Court, Kings County
Docket Number: 46024/02
Judge: Gloria M. Dabiri

At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of March, 2012.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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MAUREEN ABATO,

Plaintiff,

- against -

Index No. 46024/02

DR. EDWARD MILLER,

Defendant.

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The following papers numbered 1 to 6 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers Trial Transcripts, Bench Book	5, 6

Upon the foregoing papers, plaintiff moves for an order pursuant to CPLR 4401(a) and the common-law vacating the jury's verdict in favor of the defendant and directing a new trial.

BACKGROUND

Plaintiff Maureen Abato alleged that defendant Dr. Edward Miller committed malpractice with respect to oral surgery he performed on plaintiff's jaw on May 1, 2000 and that as a result of this malpractice she was required to undergo a second surgery on April 18, 2002 and suffered additional complications as the result of the second surgery. Plaintiff further asserts that she continues to suffer from dental problems as a result of the initial

surgery and the second surgery.

As is relevant here, in August 1998 plaintiff went to Dr. Marc Lemchen, an orthodontist, for an evaluation with respect to her dental problems. Dr. Lemchen found that plaintiff had a Class 2 Dental Relationship (also referred to as retrognathia), which means that her lower jaw was recessed or further back than her upper jaw.[1] After consulting with Dr. Lemchen, plaintiff elected to address this condition by undergoing bilateral mandibular advancement surgery (also referred to in layman's terms as lower jaw advancement surgery). During such surgery the oral surgeon intentionally fractures the lower jaw, repositions the jaw bones, and then uses hardware/fixation devices to hold the jaw in position while the bones heal. It is further undisputed that following the jaw advancement surgery the bones are still a little soft, and the patient must continue orthodontic care involving the use of elastics and braces in order to insure that the teeth remain properly positioned.

Before the surgery, Dr. Lemchen applied orthodontics to prepare plaintiff's mouth for the surgery, and referred plaintiff to Dr. David Beller, an oral surgeon, to perform the surgery. In further preparation for the surgery, Dr. Beller removed several of plaintiff's teeth. At some point in 1999, defendant, Dr. Edward Miller, an oral surgeon, joined Dr. Beller's practice. It was Dr. Miller who conducted the physical examination of plaintiff, took measurements of plaintiff's mouth and jaw, and made models and "mounting jigs" used to determine the proper positioning of plaintiff's jaw during the surgery and to correctly size the hardware or fixation devices that would be used to hold plaintiff's jaw in position after the surgery.

In taking these measurement, Dr. Miller noted that plaintiff's lower jaw was aligned

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[1]Aside from cosmetic issues related to this condition, it is also undisputed that plaintiff's teeth also did not properly meet up (a malocclusion), making it difficult for her to chew.

3.5 millimeters to the right of her facial midline. On April 5, 2000, Dr. Miller met with Dr. Lemchen in order to discuss the surgery, and, based on preliminary models, they had agreed that Dr. Miller, in addition to moving plaintiff's jaw forward, would bring her mandibular or lower jaw midline two millimeters to the left in order to align it with her facial midline. Following his April 26, 2000 examination of plaintiff, and based on models made from molds taken of plaintiff's teeth on that date, Dr. Miller concluded that he would not be able to move her mandibular midline to the left, and would leave the mandibular midline in its pre-surgery position. Dr. Miller asserts that he attempted to call Dr. Lemchen about this change in plans a couple of times, but was unable to reach him. On April 28, 2000, Dr. Miller faxed Dr. Lemchen a letter regarding this change in plans. While the letter made it into the plaintiff's file kept by Dr. Lemchen, it is unclear whether Dr. Lemchen saw the letter before the May 1, 2000 surgery.

Drs. Miller and Beller performed the surgery on May 1, 2000. Although both doctors were involved in the surgery, Dr. Miller performed more of the physical tasks during the surgery, including performing the bone fractures or "splits." After fracturing the jaw bones, the doctors used a small titanium plate to hold the right portion of the lower jaw together and seated the lower condyle into the socket of the upper jaw, and then performed the same procedure with the left lower jaw. At some point during the procedure, the doctors placed a plastic splint in plaintiff's mouth that was intended to train her lower jaw into the new bite after wire fixations were removed, and wired plaintiff's mouth shut as part of the fixation intended to insure that her jaw bones healed in the proper positions.[2]

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[2]At trial, plaintiff testified and her counsel questioned other witnesses regarding the impact this decision to wire plaintiff's mouth shut had on her ability to take medication for anxiety and depression. This theory of liability was not presented to the jury in the interrogatories, and plaintiff does not make any arguments with respect to it in the current motion.

On May 26, 2000, plaintiff returned for an office visit, and Dr. Miller removed the wire fixations. At that time, the splint appeared to be properly affixed. At some point prior to the June 5, 2000 appointment, plaintiff removed this splint, asserting that it had come off of the bracket to which it was attached. Dr. Lemchen also saw plaintiff on June 5, 2000, and on that day noted that plaintiff's lower jaw was off to the right, and that he would attempt to correct this through the use of elastics, but also noted that plaintiff might have to undergo a revision surgery to address the issue. Dr. Lemchen thereafter saw plaintiff on June 9, 2000 for adjustments, and then July 6, 2000, for adjustments. Plaintiff cancelled the next scheduled appointment, and did not see Dr. Lemchen until September 12, 2000, on which date she informed Dr. Lemchen that she did not want to wear elastics. Dr. Miller next saw plaintiff on that November 1, 2000, and described it as a good follow-up visit, and noted that plaintiff was still wearing elastics at that time. Dr. Lemchen also saw plaintiff that day, and then next saw her on November 28, 2000. Because plaintiff remained uncomfortable wearing the elastics, Dr. Lemchen, during plaintiff's December 5, 2000 visit, attached a bite fixer, which was a metal spring intended to perform the same function as the elastics. Plaintiff returned to Dr. Lemchen for adjustments on February 13, 2001, but did not make another visit to Dr. Lemchen until January 31, 2002, despite a treatment plan calling for visits every four to six weeks. In addition, through a telephone conversation with plaintiff on July 10, 2001, Dr. Lemchen's staff learned that plaintiff had cut off the bite fixer on her own.

At the January 31, 2002 visit, Dr. Lemchen referred plaintiff to Dr. Behrman for corrective surgery to address the remaining issues with plaintiff's bite. This surgery was intended to address issues with respect to her jaw midline being four millimeters off to the right and the seating of plaintiff's condyles with the ultimate intent of correcting plaintiff's bite. Dr. Behrman performed the procedure, called "Bilateral Sagittal Ramus Osteotomy,

Anterior Mandibular Horizontal Osteotomy" on April 23, 2002. In the procedure, Dr. Behrman removed the hardware attached during the prior surgery, re-fractured plaintiff's lower jaw bones and reset them to correct the midline, installed stents and plates in order to hold the bones in position, and used non-rigid elastic fixation (rubber bands) to hold the jaw in position and allow the condyles to find their natural position.

Following the surgery, Dr. Behrman's office records show that plaintiff failed to show up for her initial post-operative appointments scheduled for April 26, 2002, and April 29, 2002. Plaintiff did make the May 2, 2002, appointment, at which Dr. Behrman noted that plaintiff was straining to open her mouth, which was against Dr. Behrman's instructions. On May 13, 2002, plaintiff called to say that she could not make the appointment, and that a rubber band had broken. Plaintiff did make it into the office on May 16, 2002, and one of Dr. Behrman's residents replaced the rubber band. On May 20, 2002, plaintiff called Dr. Behrman and informed him that the rubber band had broken again. Dr. Behrman told plaintiff to call one of his residents, and meet the resident at the hospital in order to instal another rubber band, but plaintiff failed to do so. Dr. Behrman next saw plaintiff on May 23, 2002, and noted that plaintiff was missing several of the rubber bands, which she insisted broke when she sneezed. At this appointment, plaintiff insisted that Dr. Behrman remove the remaining rubber bands, and Dr. Behrman complied with the request to the extent of removing some of the bands. Dr. Behrman's records from June 2, 12, 23, 2002, and June 24, 2002 (the date of plaintiff's last visit with Dr. Behrman's office), note that plaintiff had continued problem with the rubber bands.

After this second surgery, plaintiff first saw Dr. Lemchen on June 14 and 17, 2002. At those visits, Dr. Lemchen noted that her jaw was in the correct position, and that he only had to move her jaw up and down so that her jaw closed properly. Shortly after the June 17

visit, plaintiff sent Dr. Lemchen a letter in which she stated, in effect, that she was frustrated with treatment, and wanted her braces off. On July 16, 2002, Dr. Lemchen complied with plaintiff's request, and removed her braces, and gave her a retainer. This was plaintiff's last visit with Dr. Lemchen, and her last visit with any orthodontist and was the end of any treatment relating to her jaw and bite.

Plaintiff commenced this action in October 2002 and, in addition to Dr. Miller, she named as defendants Drs. Beller, Lemchen, and Behrman and other doctors alleged to have been involved in the treatment of her jaw and the hospitals where the surgeries were performed. As of early May 2011, Drs. Beller and Miller were the only defendants remaining in the action. Approximately two weeks before the beginning of the trial, Dr. Beller reached a settlement with plaintiff, and the action as against him was discontinued. The action thereafter proceeded to trial with Dr. Miller as the only remaining defendant.

THE TRIAL

THE CONFLICT HEARING

Prior to opening statements, the court held a hearing in order to determine an application by plaintiff to disqualify Dr. Stephen Sachs, the oral surgeon hired by Dr. Miller to present expert testimony on his behalf, on the ground that Dr. Sachs had a conflict of interest because his partner, Dr. Michael Schwartz, had examined plaintiff in 2002 at the request of plaintiff's counsel at that time. At the hearing, Dr. Sachs testified that a few weeks before the trial he asked his office administrator to obtain the material his office had on plaintiff's case. The administrator obtained this material and placed it in Dr. Sachs' office. When he had an opportunity to review the material, he, for the first time, noticed that his office had a medical chart relating to a 2002 examination of plaintiff by Dr. Schwartz. Dr. Sachs further asserted that he was not aware of this examination when he was hired as

an expert for Dr. Miller, and when he conducted his examination of plaintiff and prepared his narrative report in October 2007. Dr. Sachs looked through the file and noticed that it contained a short note from Dr. Schwartz, a letter from plaintiff and logistical data, medical history and demographics. Other than looking to see what the chart contained, Dr. Sachs did not read the material. Dr. Sachs thereafter went to ask Dr. Schwartz about the examination. After Dr. Schwartz informed Dr. Sachs that he had examined plaintiff at the request of her then attorney and that he had informed the attorney that he didn't have any thing to offer in support of her case, Dr. Sachs did not discuss the matter further. Following the hearing, the court ruled that Dr. Sachs' knowledge of the file and Dr. Schwartz's examination did not present a conflict warranting the disqualification of Dr. Sachs.

THE TRIAL

PLAINTIFF'S CASE

In her own testimony, plaintiff generally described the problems she had with her mouth, jaw and bite following the surgery performed by Drs. Miller and Beller and the second surgery performed by Dr. Behrman, and how these problems affected her ability to chew her food. Plaintiff also asserted that she continues to suffer some numbness/loss of sensation in her mouth as the result of the second surgery performed by Dr. Behrman. With respect to the splint installed by Dr. Miller, plaintiff asserted that it came loose on its own, and that she removed it on her own because it made it difficult to eat and talk. Plaintiff also described the difficulty she had in replacing the elastics installed by Dr. Lemchen and asserted that the rubber bands installed by Dr. Behrman following his surgery kept popping out. Plaintiff also conceded that she missed or canceled some appointments, but asserted that, contrary to Dr. Lemchen's records, she did not go from February 2001 to January 2002 without seeing him. Plaintiff nevertheless was unable to supply any specifics as to when she

actually saw him in this period. Plaintiff also conceded that she has not seen any treating orthodontists since July 2002.

Following plaintiff's testimony, plaintiff's counsel read into the record portions of Dr. Beller's deposition testimony. In this testimony, Dr. Beller stated that plaintiff's three and one-half millimeter rightward deviation of her lower jaw preexisted the surgery, that no request was made to correct it, that the primary concern of the surgery was that everything would stay stable when the jaw was advanced, and that plaintiff had a good stable result as the result of the surgery.

Plaintiff next called Dr. Miller, who reiterated that plaintiff's rightward deviation predated the surgery. Although, as noted above, Dr. Miller originally intended to bring plaintiff's lower jaw close to the midline, he testified that, in doing the models based on the final examination of plaintiff, he found that bringing the lower jaw to midline would have made it impossible to close the gap between plaintiff's upper and lower teeth, and would have required other surgeries to correct that problem. Dr. Miller, however, conceded that he did not speak with Dr. Lemchen about this change in plans. While Dr. Miller asserted that he called Dr. Lemchen's office, he was unable to reach him. In addition, he only sent the fax regarding the change in plans to Dr. Lemchen on April, 28, 2000 (which elsewhere in the record was represented as the Friday before the surgery that was scheduled on Monday, May 1, 2000). When asked whether a surgery could have corrected the jaw's midline, Dr. Miller noted that a surgery involving the upper and lower jaw could have accomplished the goal of centering the jaw in the midline. However, Dr. Miller asserted that the original plan was to only move one jaw, and the primary goal of the surgery was to move the lower jaw forward in order to align the teeth. Moreover, Dr. Miller understood that the three to four millimeter differential from the midline could have been corrected by Dr. Lemchen's

orthodontic treatment. In addition, in contrast to plaintiff's assertion that the splint had come loose, Dr. Miller asserted that he had never had a splint come loose except on one occasion a patient had fallen and broken it. Finally, Dr. Miller asserted that follow-up with an orthodontist and wearing the elastics are as important as the surgery to the success of the treatment.

In his testimony, Dr. Behrman stated that a risk associated with the rigid fixation approach used by Dr. Miller is that when the jaw is released from the wires, there can be a rapid shift in the position of the jaw and condyles. Nevertheless, Dr. Behrman also noted that Dr. Millers' approach was a standard technique at the time of the surgery. While Dr. Behrman felt that the second surgery was recommended, he also stated that the second surgery was optional, and plaintiff could have continued with orthodontics. Dr. Behrman conceded that the second surgery was not a success, but asserted its failure could largely be attributed to plaintiff's failure to wear the rubber bands and continue with the orthodontic follow-up. Contrary to plaintiff's assertions, Dr. Behrman asserted that the rubber bands he used are extremely difficult to break, and that they generally only break when a patient actively tries to break them.

Plaintiff called Dr. Norman Betts as her expert oral surgeon. As is relevant here, Dr. Betts asserted that Dr. Millers' fax regarding his decision not to adjust plaintiff's jaw to the midline demonstrated inadequate communication between an oral surgeon and orthodontist given that there was no indication whether or not the change in plan was approved and that, although an orthodontist could have disguised the problem by moving the teeth, an orthodontist could not have moved the bones. Dr. Betts also opined that Dr. Miller departed from accepted practice in failing to unwire plaintiff's jaw when she first awoke after the first surgery in order to assure that the condyles were properly set. Dr. Betts concluded

that plaintiff needed to undergo the second surgery because of Dr. Miller's decision to leave the midline of the lower jaw off to the right and Dr. Miller's failure to properly set the condyles during the surgery. With respect to the second surgery performed by Dr. Behrman, Dr. Betts felt that the procedure was properly performed, but his decision not use elastics was a mistake given plaintiff's difficulties with compliance and the fact that the care would have required a lifetime of orthodontic follow-up, which plaintiff could not do.[3]

Plaintiff had also called Dr. Jon Ackerman, a prosthodontist, who examined plaintiff in June of 2010 and who noted that plaintiff had tenderness in her temporaomandibular joints, that the opening and closing of her mouth was limited in range, that she had pain and a tingling sensation in her jaw, an open bite and limited occlusion or contact of her teeth when chewing. The focus of Dr. Ackerman's testimony was plaintiff's condition as of the date of his examination, and he did not testify regarding the adequacy of the care provided to plaintiff.

DEFENSE CASE

Dr. Lemchen (whose direct testimony was taken out of turn during plaintiff's case) testified that plaintiff's chin alignment following the surgery was close enough to where he wanted it that it that he initially thought he could have corrected it with elastic forces, although he did not rule out the possibility of revision surgery. In addition, Dr. Lemchen asserted that, overall, plaintiff did not give the follow-up treatment a chance to work, in light of her failure to wear elastics, her removal of the splint and bite fixer, and her failure to make her follow-up appointments. It was in the context of these failures that Dr. Lemchen referred

[3]Although Dr. Betts had also testified that Dr. Miller failed to properly insure that his treatment did not interfere with plaintiff's ability to take her antidepressant medication, as noted above, that theory of liability was not submitted to the jury, and plaintiff has not addressed that theory of liability in her current motion.

plaintiff to Dr. Behrman in order to consider a second surgery. Dr. Lemchen again noted that plaintiff, following the second surgery, failed to wear Dr. Behrman's elastics and that plaintiff had requested that he (Dr. Lemchen) take off her braces and cease active orthodontic care well before he would have liked.

Dr. Miller testified again during the defense case as a defense witness. His testimony was similar to the testimony he gave as a witness for plaintiff. Dr. Miller again emphasized that the primary goal of the surgery was to advance the jaw front to back. He added that it is not always necessary to center the chin bone to achieve the desired orthodontic position given that the position of the chin bone is a secondary cosmetic effect that can be addressed at a later date. With respect to the positioning of the condyles, Dr. Miller's asserted that Dr. Betts' suggestion that he should have unwired plaintiff's jaw when she awoke presented a danger that the plates would flex and the condyles drop down. Finally, Dr. Miller concluded that he felt that his surgery was successful, and that plaintiff's lack of success with her treatment after the surgery was based on her non-compliance.

Dr. Miller's orthodontic expert was Dr. George Cisneros, who Dr. Beller had intended to call as his orthodontic expert, and for whom Dr. Beller had served a CPLR 3101(d) expert notice on plaintiff in 2007. During jury selection, approximately two weeks after Dr. Beller settled with plaintiff, Dr. Miller served a CPLR 3101(d) notice adopting Dr. Cisneros as his witness. Plaintiff thereafter objected to Dr. Miller calling Dr. Cisneros based on late notice and objected to Dr. Cisneros testifying that plaintiff's condition could have been corrected through orthodontics rather than surgery on the ground that such an opinion was not covered in the CPLR 3101(d) notice. The court, however, found that the issue of whether plaintiff's condition could have been addressed by orthodontics had been injected into the case by plaintiff, and that it would be fair to allow Dr. Miller to address the issue through his

orthodontist. The court gave plaintiff the option of calling an orthodontist in rebuttal, but plaintiff instead requested and was allowed the option of deposing Dr. Cisneros on this aspect of his testimony before Dr. Cisnero's testified.

In his testimony, Dr. Cisnero's asserted that Dr. Miller had moved the jaw where it needed to be, and that if plaintiff had not torn out the stent installed by Dr. Miller and had complied with Dr. Lemchen's post-surgery orthodontic regimen and worn her elastics, the second surgery would not have been required. Indeed, Dr. Cisneros stated that, even in light of plaintiff's condition in February 2002, plaintiff's condition could have been corrected by orthodontics if she could have been compliant with the treatment. Finally, based on photographs of plaintiff's teeth in 2007, Dr. Cisneros opined that plaintiff's condition could still be corrected by orthodontic means without further surgery.

After giving a brief history of the various approaches to the surgery at issue, Dr. Miller's expert oral surgeon, Dr. Stephen Sachs, testified that the approach used by Drs. Miller and Beller was one of several choices that was considered acceptable at the time of the surgery. Contrary to Dr. Betts' assertion that Dr. Miller should have unwired plaintiff's jaw to see that the condyles were correctly set, Dr. Sachs asserted that such an approach would have run the risk of causing the bone segments to move. Like Dr. Miller, Dr. Sachs also asserted that in moving the jaw forward the surgeon may have to compromise and sacrifice centering the jaw in the midline in order to insure that the occlusion or bite lines up in a way the provides the best functional result. Dr. Sachs concluded that Dr. Miller's surgery went as planed, and that Dr. Lemchen's failure to fix the plaintiff's occlusion after the surgery resulted from plaintiff's non-compliance and the gaps in treatment. Similarly, Dr. Sachs asserted that Lemchen's treatment after Dr. Behrman's second surgery did not work out as planned because of plaintiff's inability to cooperate and wear the elastics and the

difficulties inherent in the surgery performed.

JURY INTERROGATORIES AND VERDICT

At the conclusion of the defense case, plaintiff requested that the court submit general interrogatories asking the jury, "[d]id Dr. Miller depart from good and accepted standards of care in the practice of dentistry in the pre-operative planning of [plaintiff's] May 1, 2000 surgery?" and "[d]id Dr. Miller depart from good and accepted standards of care in the practice of dentistry in performing the May 1, 2000 surgery on Maureen Abato?" With respect to preoperative planning, plaintiff's counsel asserted that, although Dr. Betts testimony focused on the adequacy of the communication, "there are logical extensions of inadequate communication that make it more appropriate to submit" the question in the general sense. Similarly, with respect to the performance of the surgery, plaintiff's counsel asserted that Dr. Betts' discussion, while starting out with the problem with the setting of the condyles, "progressed to other topics that were problematic." The court rejected plaintiff's request, finding that plaintiff's request was not supported by the record.

Interrogatory 1A that was submitted to the jury read, "DID THE DEFENDANT **DR. EDWARD MILLER** DEPART FROM GOOD AND ACCEPTED STANDARDS OF ORAL AND MAXILLOFACIAL SURGICAL PRACTICE IN NOT UNWIRING THE JAW AND CHECKING THE POSITION OF THE CONDYLES DURING THE SURGERY OF MAY 1, 2000?" Interrogatory 2A read "DID THE DEFENDANT **DR. EDWARD MILLER** DEPART FROM GOOD AND ACCEPTED STANDARDS OF ORAL AND MAXILLOFACIAL SURGICAL PRACTICE IN NOT ADEQUATELY COMMUNICATING TO THE ORTHODONTIST HIS PRE-OPERATIVE PLAN TO LEAVE THE MANDIBULAR MIDLINE AS IT WAS PRE-OPERATIVE?" In reaching its verdict, the jury answered "no" to Interrogatory 1A and, although it answered yes to

Interrogatory 2A, the Jury found that the departure relating to the adequacy of his communicating his plan regarding the midline was not a substantial factor in causing injury to plaintiff.

PLAINTIFF'S MOTION

Pursuant to CPLR 4401(a), plaintiff now moves to vacate the verdict on the grounds that the verdict is against the weight of the evidence, and that the verdict should be set aside in the interest of justice based on: (a) the court's declining to give the more general verdict sheet requested by plaintiff; (b) the court's allowing Dr. Sachs to testify despite the conflict presented by Dr. Schwartz's examination of plaintiff; and (c) the court's allowing Dr. Cisneros to testify despite Dr. Miller's late CPLR 3101(d) notice and allowing Dr. Cinaros to give testimony beyond the scope of the section 3101(d) notice.

WEIGHT OF THE EVIDENCE

When the weight of the evidence is at issue, "the standard to be applied is whether the evidence so preponderated in favor of the [moving party] that the verdict could not have been reached on any fair interpretation of the evidence" (*Fioriellov Sasson*, 255 AD2d 549, 550 [1998], *lv denied* 93 NY2d 817 [1999]; *see also Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]; *Walter v Matano*, 81 AD3d 636 [2011]; *Moffatt v Moffatt*, 86 AD2d 864 [1982], *affd* 62 NY2d 875[1984]). Here, with respect to the performance of the surgery itself, despite Dr. Betts assertion that plaintiff departed from accepted medical practice in failing to unwire plaintiff's jaw to insure that the condyles were properly set, the jury also had before it Dr. Miller and Dr. Sachs' testimony that the surgery was properly performed, and that unwiring the jaw during the surgery presented the risk of causing the bone segments to move. Given this evidence, the evidence at trial did not preponderate in plaintiff's favor with respect to the performance of the surgery. Moreover, the fact that plaintiff's expert differed from

defendant's experts is not a ground to set aside the verdict as against the weight of the evidence, as the weight to be afforded conflicting expert testimony is "peculiarly within the province of the jury" (*Naveja v Hillcrest Gen. Hosp.*, 148 AD2d 429, 430 [1989]; *see also Walter*, 81 AD3d at 636-637; *see also Brotman v Biegeleisen*, 192 AD2d 410 [1993], *lv denied* 82 NY2d 654 [1993]).

Although the jury found that the Dr. Miller's failure to communicate his change of plan regarding the placement of plaintiff's lower jaw midline to Dr. Lemchen was a departure from accepted medical practice, the jury's finding that this departure was not a substantial factor in causing injury to plaintiff is supported by the trial record. Notably, in this respect, Drs. Beller and Miller testified that the primary goal of their surgery was the advancement of the jaw, and both Drs. Miller and Sachs asserted that, in order to reach the best functional result, Dr. Miller aligned the teeth in order to insure proper occlusion even though this left the jaw's midline off to the right. Moreover, Dr. Betts did not testify that the decision to leave the midline of plaintiff's jaw in its preoperative position was itself a departure from accepted medical practice. Plaintiff's claim based on this departure thus turned on whether Dr. Lemchen, and thus ultimately plaintiff, would have chosen a different approach to the treatment if Dr. Miller had properly communicated his change in plans. Such a claim is akin to a lack of informed consent claim, which claim was not argued by plaintiff or presented to the jury. Aside from these limitations on plaintiff's claim based on the improper communication, there was testimony from several of the doctors to the effect that the three to four millimeter deviation from the midline could have been corrected by the orthodontics, but the orthodontic approach did not work because of plaintiff's non-compliance with the treatment plan. Under these circumstances, it was reasonable for the jury to have found that, although Dr. Millers' failure to communicate his change of plans to

Dr. Lemchen was a departure, the departure was not a proximate cause of plaintiff's injury. Accordingly, plaintiff has failed to demonstrate that the verdict was against the weight of the evidence (*see Gomez v Park Donuts, Inc.*, 249 AD2d 266, 267 [1998]).

INTEREST OF JUSTICE

A motion to set aside the verdict in the interest of justice encompasses erroneous rulings on the admission of evidence, mistakes in the charge, misconduct, newly discovered evidence and surprise (*see Matter of De Lano*, 34 AD2d 1031, 1032 [1970], *affd on the opinion below* 28 NY2d 587 [1971]; *Gomez*, 249 AD2d at 267). A new trial on such grounds should only be granted if there is evidence that substantial justice has not been done – "i.e. whether it is likely that the verdict has been effected" (*Matter of De Lano*, 34 AD2d at 1032).

JURY INTERROGATORIES

Turning first to plaintiff's assertion that the interrogatories submitted improperly limited the factual issues relevant to liability and affected the jury's decision on causation, plaintiff's argument is not supported by the trial record. With respect to preoperative planning, Dr. Betts' testimony only supported the interrogatory that limited plaintiff's claim to a departure relating to Dr. Miller's failure to inform Dr. Lemchen of his change of plain relating to the midline. Contrary to plaintiff's current contention, nothing in Dr. Betts' testimony suggests that Dr. Miller's placement of the jaw's midline was negligent. Although Dr. Betts did state that leaving the midline at its preoperative position necessitated a second surgery, nothing in his testimony suggests that such a decision arises to the level of a departure from accepted medical practice. With respect to the performance of the surgery itself, the only real departure testified to by Dr. Betts was Dr. Miller's failure to unwire plaintiff's jaw in order to insure that the condyles were properly set. Accordingly, plaintiff

has failed to identify any evidence in the trial record that would have warranted broader interrogatories than those submitted by the court (*see Galarza v Crown Container Co., Inc.*, 90 AD3d 703, 704 [2011]; *Fallon v Damianos*, 192 AD2d 576, 577 [1993], *lv denied* 83 NY2d 751 [1994]; *Zimmerman v Jamaica Hosp.*, 143 AD2d 86, 88 [1988], *lv denied* 73 NY2d 702 [1988]).

DISQUALIFICATION OF DR. SACHS

Plaintiff next contends that the court should have disqualified Dr. Sachs from testifying based on a conflict that allegedly arose from a 2002 examination of plaintiff conducted by Dr. Schwartz, Dr. Sachs' partner, at the request of plaintiff's then lawyer. In determining whether disqualification of an expert is required, courts have employed a two-part analyses, "first seeking to determine if it was objectively reasonable for the party claiming to have initially retained the expert to conclude that a confidential relationship existed between them, and then, secondly, to ascertain if any confidential or privileged information was disclosed by said party to the expert" (*Roundpoint v V.N.A., Inc.*, 207 AD2d 123, 125 [1995]). While disqualification would generally be required by affirmative answers to both questions, a negative answer to one or the other question would render generally disqualification inappropriate (*id.*). Of note with respect to the disqualification of experts, and in contrast to the rules relating to the disqualification of attorneys, there is no rule imputing a conflict of interest to other members of a conflicted expert's firm (*see BP Amoco Chemical Co. v Flint Hills Resources, LLC*, 500 F Supp 2d 957, 960 [ND Ill 2007]; *Stencil v Fairchild Corp.*, 174 F Supp2d 1080, 1085-1086 [CD Cal 2001]; *Formosa Plastics Corp., USA v Kajima Intern., Inc.*, 216 SW3d 436, 451 [Tex App 2006]).

With respect to the first part of the analysis, given that plaintiff never consulted with or hired Dr. Sachs with regard to her claims in this action, and given that no such relationship

is imputed to Dr. Sachs based on plaintiff's consultation with Dr. Schwartz (*BP Amoco Chemical Co.*, 500 F Supp2d at 960), plaintiff did not have a confidential relationship with Dr. Sachs. In addition, plaintiff has not demonstrated that Dr. Sachs received any confidential information. Importantly, it would appear that Dr. Miller would have been entitled to discover any report prepared by Dr. Schwartz relating to his consultation with plaintiff (*see Pierson v Yourish*, 122 AD2d 202, 203 [1986]; *Moreno v Greater N.Y. Dental Adm'rs.*, 120 AD2d 343, 344-345 [1986]; *see also Rodriguez v Pontillo*, 278 AD2d 400 [2000]; *but see Santariga v McCann*, 161 AD2d 320, 322 [1990]). In any event, even if Dr. Schwartz had obtained confidential information and the office file relating to Dr. Schwartz's examination of plaintiff were deemed to contain confidential material, this court finds credible Dr. Sachs' testimony that he did not read the material in other than a cursory fashion and, based on his conversation with Dr. Schwartz, only learned that Dr. Schwartz felt he did not find anything to support plaintiff's case. Moreover, Dr. Sachs only learned that Dr. Schwartz had examined plaintiff after he (Dr. Sachs) had examined plaintiff and prepared his written report with respect that examination. Under these circumstances, plaintiff has failed to demonstrate that the court erred in declining to disqualify Dr. Sachs from testifying on Dr. Miller's behalf (*see Coates v Duffer's Golf Center, Inc.*, 2007 WL 1289890 [D Mass 2007]).

CPLR 3101(d) NOTICE

Plaintiff's final argument is that the court erred in allowing Dr. Cisneros to testify because Dr. Miller did not serve a CPLR 3101(d) notice with respect to Dr. Cisneros until jury selection, and because there was no notice that he would testify that plaintiff's current condition could be corrected by orthodontics without the need of surgery. It is undisputed that Dr. Cisneros had been retained by Dr. Beller, who had served a section 3101(d) notice

with respect to Dr. Cisnero's intended testimony in 2007. While Dr. Miller stood to benefit from Dr. Cisneros' testimony since his defense would have been linked with that of Dr. Beller if Dr. Beller had not settled, Dr. Miller did not hire Dr. Cisneros until after Dr. Beller had settled and the action against Dr. Beller was discontinued. Under these circumstances, Dr. Miller's service of the section 3101(d) notice on plaintiff during jury selection shortly after retaining Dr. Cisneros cannot be deemed a wilful or intentional violation of CPLR 3101(d) (*see Martin v Triborough Bridge & Tunnel Auth.*, 73 AD3d 481, 482 [2010], *lv denied* 15 NY3d 713 [2010]; *Cutsogeorge v Hertz Corp.*, 264 AD2d 752, 753-754 [1999]). Further, plaintiff cannot be deemed to have been prejudiced by the testimony (*see Cutsogeorge*, 264 AD2d at 754). In this regard, plaintiff had the notice submitted by Dr. Beller for several years prior to trial, and thus had an opportunity to prepare for Dr. Cisneros' testimony. In addition, the main part of Dr. Cisneros opinions were addressed by other witnesses without objection by plaintiff (*see Gilbert v Luvin*, 286 AD2d 600, 601 [2001]).

Although the section 3101(d) notices submitted by Dr. Beller and Dr. Miller apparently did not state that Dr. Cisneros would testify that plaintiff's current condition could be corrected without surgery,[4] the record shows that the failure to provide notice with respect to that aspect of Dr. Cisneros' testimony was unintentional. Further, it does not appear that plaintiff suffered any real prejudice given that the court would have allowed plaintiff to present rebuttal evidence on the issue and that it did allow plaintiff to voir dire Dr. Cisneros with respect to that aspect of his testimony outside the presence of the jury (*see Martin*, 73 AD3d at 482-483; *St. Hilaire v White*, 305 AD2d 209, 210 [2003]). In any event, any error in allowing such testimony is harmless, given that the testimony is only relevant to the issue

[4]The CPLR 3101(d) notices with respect to Dr. Cisneros are not in the record before the court. However, it is clear from the trial record that the notices did not indicate that Dr. Cisneros would testify that plaintiff's current condition could be corrected by orthodontics and that she would not need surgery.

of damages, an issue that was not reached given the jury's verdict (*see Martin*, 73 AD2d at 483; *Gilbert*, 286 AD2d at 600).

In sum, plaintiff's motion must be denied as she has failed to show that the verdict must be set aside as against the weight of the evidence or that she is entitled to a new trial in the interest of justice.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Hon. Gloria M. Dabiri