

Hammond v Layliev
2015 NY Slip Op 32128(U)
April 8, 2015
Supreme Court, New York County
Docket Number: 100869/2010
Judge: Joan B. Lobis
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

-----X
LOUISE SHARRY HAMMOND,

Plaintiff,

-against-

Index No. 100869/2010

Decision and Order

EMANUEL LAYLIEV, D.D.S., ALECIA GOLUB-EVANS
As EXECUTRIX of the ESTATE of JEFFREY
GOLUB-EVANS, D.D.S., NEW YORK CENTER FOR
COSMETIC DENTISTRY and NEIL ZANE, D.D.S.,

Defendants.
-----X

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

Motion sequence numbers 009, 010, and 011 are hereby consolidated for disposition. In this dental malpractice action, defendants Neil Zane, D.D.S. (Zane) (motion seq. no. 009), Emanuel Layliev, D.D.S. (Layliev) (motion seq. no. 010), Alecia Golub-Evans, as the executrix of the estate of Jeffrey Golub-Evans, D.D.S. (Golub-Evans), and the New York Center for Cosmetic Dentistry (the Center) (both under motion seq. no. 011), move for an order granting them summary judgment dismissing plaintiff Louise Sharry Hammond's (Hammond) complaint. Layliev alternatively moves for an order precluding Hammond from offering any evidence relating to her theory that Layliev's changing of her dental fillings caused her to suffer from temporomandibular joint disorder (TMD) and related symptoms or, alternatively, conducting a *Frye/Parker* hearing. *Frye v U.S.*, 293 F 1013 (DC Cir 1923); *Parker v Mobil Oil Corp.*, 7 NY3d 434 (2006).

Background

Starting in about 1999, Hammond, an attorney, was seen by doctors at Mt. Sinai's Selikoff Center for Occupational and Environmental Medicine (Mt. Sinai), where she was treated over many years for pain and weakness in both hands, pain in her elbows and arms, pain, numbness, and tingling in various fingers, and neck pain when she turned her head to either side. The doctor at Mt. Sinai believed that Hammond had work-related repetitive strain injuries (RSIs), which included myalgias, bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, rotator cuff syndrome, wrist and forearm tendonitis, and neck pain caused by trapezius fibromyalgia. Hammond was placed on physical disability leave, from which she never returned. Sometime after 1999, Hammond also developed neuropathy of her legs, which caused "random, spontaneous, burning issues." She also testified that years before 2007, she had a 10-day episode of facial neuropathy.

Meanwhile, between 1998 and 2005, Hammond had been seen by a dentist, John Marx, for comprehensive dental care. The chart of Hammond's treatment reflects no complaints or issues related to her bite or to her temporomandibular joints (TMJs). In 2007, Hammond, who was then 40, decided, for aesthetic reasons, to have several metallic amalgam fillings replaced with ones which would match the color of her teeth. A friend recommended Golub-Evans. Hammond made a May 30, 2007 appointment with him at the Center. When she arrived, an unspecified individual informed her that Layliev would be treating her instead. She identified TMJ as part of her dental and medical history. Hammond explained at her deposition that she had informed the office that she did not presently have TMJ symptoms, but only a history of them, and was told to

write TMJ on those places on the form. As to the question on the history form of whether she had ever been diagnosed with various medical conditions, Hammond wrote neuropathy and RSIs, and advised that she was then under a doctor's care for RSIs.

After she discussed filling replacement with Layliev that day, Hammond returned on June 19, 2007, at which time Layliev replaced fillings in teeth # 30 and 31, two back molars in Hammond's lower right jaw. On July 10, 2007, Layliev replaced the fillings in teeth # 18, 19, 20, and 21, molars and premolars located in her lower left jaw. According to Layliev, after replacing the fillings on those two dates, he removed any excess filling material and had Hammond bite down on articulating paper, which demonstrated that Hammond's bite and the fillings' shape appeared to be proper.

After Layliev replaced the fillings on July 10, Hammond informed him that something felt off, and that the teeth on the right were not touching. According to Hammond, Layliev then placed a strip of what Hammond believed was carbon (articulating) paper between her teeth on the right side and pulled it right through them, told Hammond that she was correct about her teeth not touching, and drilled some more on the new lower left fillings but did not use the articulating paper to check her bite after that drilling. Hammond asserted that she told Layliev that something still did not feel right, that "something felt off." Layliev allegedly replied that she was numb from the anesthetic and sent her home.

Hammond testified that after the anesthetic wore off that day, her teeth still felt off. Hammond called the office and told Becky, the receptionist, that something was off. Becky allegedly replied that they would deal with it at Hammond's next appointment, which had been scheduled for July 30, 2007.

Several days before July 19, Hammond called the office. Hammond reported that something was off and that there was pain in one of the lower left teeth in which Layliev had replaced fillings on July 10 (apparently tooth # 21). Layliev told Hammond to take Advil for two days and, if the tooth were still hurting, to call him. Because the pain continued, Layliev saw Hammond on July 19, at which time he reduced the fillings on teeth # 20 and 21. Layliev asserted that he used articulating paper multiple times that day and confirmed that Hammond's bite and the shape of the fillings "appeared" to be appropriate. Hammond testified that Layliev did not use the articulating paper that day, and seemingly testified that he never had her tap down on articulating paper, told her the tooth (evidently tooth # 21) was traumatized and would get better, and sent her home.

Hammond returned to the office on July 30, 2007 for previously scheduled work. She testified that she told Layliev that something was still off and that, although the tooth on the lower left (tooth #21) was not bothering her as much, it still hurt. Layliev allegedly responded that the tooth was traumatized and would get better. He then replaced the fillings in teeth # 14 and 15, two molars in her upper left jaw. The chart entry for that day recites "LL (lower left) feels better." Layliev testified that Hammond had informed him that the lower left felt better. He further testified

that, if she had informed him that she was still experiencing pain, he would not have proceeded with the work on the upper left. Layliev claims in his affidavit that, after refilling teeth # 14 and 15, he checked the bite and the shape of the new fillings with articulating paper and that they appeared appropriate.

When Hammond arrived home and the anesthetic wore off, she felt pain in a lower left tooth. That day, Hammond called the office and spoke to Becky, who allegedly yelled at her and told her to take Advil because her teeth were simply traumatized because she just had work done on them. Hammond asserts that she called several days later, telling Becky that she was in pain, that something was wrong, and that something was off. Becky put her on hold to speak to Layliev. She came back and told Hammond to take Advil for two days because her teeth were traumatized.

On Saturday afternoon, August 4, 2007, Hammond again called the office because her lower left and upper left teeth were hurting and she could not eat on them. The Center's answering machine gave Layliev's cell number, which Hammond then called. Layliev answered and, according to Hammond, after she asked to come in that day, he refused her request, stating that the office was closed, and that she should take Advil and call the office on Monday. On August 8, 2007, two days after Hammond discharged her, Layliev wrote a note in the office's chart, purportedly summarizing the August 4 phone conversation. The note recites that Hammond believed that the pain she was experiencing was more in the upper left than in the lower left, and, contrary to Hammond's version of the conversation, that she did not feel it necessary to be seen

ASAP, and could wait until Monday. The note further recites that she was to call back sooner if the pain or swelling increased.

Meanwhile, on Monday morning, August 6, Hammond called the office, said she had lost confidence in Dr. Layliev, and asked to be seen by Golub-Evans. Hammond saw Golub-Evans later that day and complained of pain in the upper left jaw, as reflected in the chart. When Layliev came near the entrance to the examining room, Hammond told him that she no longer wanted him to be her dentist and that Golub-Evans was now her dentist. Although Hammond testified that she could not fully open her mouth at that visit, Golub-Evans testified that she could fully open. Hammond was able to open wide enough for x-rays, which revealed no problem.

Golub-Evans testified that, on August 6, 2007, he reviewed the office's chart on Hammond. He further testified that he had no discussion with her about pain on the lower left and found no swelling and could not elicit pain. He checked Hammond's bite with articulating paper and found no problems. He did a standard TMJ screening and found nothing. Further, Golub-Evans found no signs of periodontal disease. He referred her to an endodontist, Dr. Shaeffer, and to a TMJ specialist, codefendant Zane. Because he did not know when Hammond would be seen, Golub-Evans prescribed both an antibiotic, in case she was developing acute pulpitis, and a muscle relaxant as a "prophylactic" measure. Golub-Evans made a chart notation of that Hammond needed root canal but followed the notation with two question marks. Golub-Evans asserts that because was not sure whether Hammond's pain was a dental or medical problem he told her to see the two dental specialists, and, if they could find nothing dental, she should see her physician.

Hammond contends that Golub-Evans had originally referred her to see Dr. Shaeffer, but thereafter called and referred her to Zane, a neuromuscular dentist. Hammond saw Zane the next day, according to Hammond, because Golub-Evans called Zane's office to ensure that she would be seen promptly.

When Hammond arrived at Zane's office, she received and filled out a TMD (temporomandibular disorder) Questionnaire. On the form, she indicated that her chief complaints were facial and jaw pain, muscle soreness, and tinnitus,¹ and that those complaints first started in July 2007. Hammond testified that, when she presented to Zane's office her jaw was tightened, shifting, cockeyed, and over to one side, and that when she was in the treatment room at least three people who worked with Zane came in and, upon seeing her, exclaimed, "[l]ook at her" and "oh my god," and that when Zane saw her he asked who had done this to her.

Zane's notes from the visit recite that Hammond's pain had started "immediately" after the anesthetic wore off in connection with the fillings Layliev replaced on July 10, and that it hurt when Hammond chewed and that she could not have her teeth touch. Limited mouth opening was noted by Zane. He determined that Hammond was having muscle spasms.

To relax the jaw muscles, relieve the pain, and enable Hammond to open her mouth, Zane sprayed fluoro-methane on the outside of her face in the vicinity of her jaw. Zane then applied a TENS unit to treat plaintiff's condition. Hammond testified that when Zane used the TENS unit on her he cranked it up, causing her jaw and head to slam repeatedly, leaving her in "major distress"

when she left the office and causing headaches and a change in the nature of her pain. Immediately after the TENS therapy, however, Hammond was able to open her mouth about the width of two fingers, enabling Zane to examine the various muscles of mastication. He found that, on palpation, the lateral pterygoid muscles were particularly tender. As the TENS therapy enabled Hammond to open her mouth wider, Zane was able to inject Lidocaine into those muscles to help relieve the pain and spasms. Following the injections, Hammond could move her jaw an unspecified amount.

Hammond, according to Zane, also complained of pain in tooth # 15. Although Zane could not elicit any response from that tooth via palpation or the use of Frigident, his note reflects that he performed a "[m]ild" occlusal adjustment, which he testified was to tooth # 15, and which his chart reflected was the tooth for which Golub-Evans had referred Hammond to the endodontist. Zane testified that the adjustment may have amounted to no more than a polishing of the filling, but that he could not recall how mild the adjustment was. Zane's note recites that Hammond was talking and opening her mouth better after his treatment and that he referred her to a Dr. Kellert, an endodontist. Zane explained that he made that referral because although his examination of tooth # 15 elicited no response, Hammond complained that it hurt.

That day, Zane made Hammond an appliance called an occlusal discluder to take home and place in her mouth whenever she could in order to bring her jaw a bit forward and relieve any stress or muscle spasm. Zane testified that he gave it to Hammond as insurance because, at the time she left, she was relieved of pain and her jaw could move. Zane further testified that his presumptive diagnosis of Hammond was that she had had an acute muscle spasm.

Hammond testified that Zane instructed her not to take the muscle relaxant and antibiotic prescribed by Golub-Evans. Zane testified that he instructed her to immediately contact him if the muscle pain returned, but that if she had any other pain she should go to her general dentist. Zane testified that he never spoke to Hammond again. Hammond also testified that Zane told her that he would follow up with her only by phone and that she should feel improvement the following week and that when she left the office he treated her as though he were through with her treatment. Hammond further testified that she called him twice within a week of having seen him because she was in pain and had headaches. Hammond claims that Zane told her to use moist heat and to keep doing the exercises he had given her.

In August 2007, after Hammond sought a copy of her records, Layliev called her to inquire as to her condition and informed her that she was welcome to return for follow-up care. By letter of August 28, 2007, both Golub-Evans and Layliev advised Hammond that they had tried to contact her to ask her about the condition with which she had presented at the Center. They advised Hammond that she was always welcome to contact them and return for follow-up care.

Starting in early September 2007, Hammond sought treatment from numerous providers about her complaints that her bite felt off and that she had pain on both sides of her face, muscle spasms, difficulty opening her mouth and speaking, and numerous headaches. Melinda Wagner, D.M.D. (Wagner) saw Hammond, beginning in October 2007. On examination, Hammond exhibited a derangement of her right TMJ, a deviated mandibular opening, tenderness in certain muscles, and severe hyperactivity of various muscles, including both lateral ptergoids

and the left masseter and temporalis muscles. Wagner elicited no pain on palpation of the TMJs. Wagner diagnosed Hammond with myofascial¹ pain dysfunction of her head and neck muscles, with a trigger point in the left masseter muscle. At that point, Wagner recommended conservative treatment, such as a TMJ orthotic. Hammond was upset because she did not understand what Wagner had proposed. Consequently, Hammond stopped seeing her.

Beginning in April 2008 Hammond saw Jennifer Bassiur, D.D.S., a dental pain management specialist, complaining, among other things, of difficulty bringing her teeth together. Dr. Bassiur diagnosed TMD and prescribed jaw exercises and an orthotic bite appliance. The next year, an April 3, 2009 note recited that teeth # 18-21 (the lower left teeth Layliev had treated) were in partial cross-bite, but were in occlusion. Given Hammond's pain, Dr. Bassiur recommended no restorative work and indicated there was "[n]o way of finding where deficiency in contacts exist."

Dr. Bassiur apparently referred Hammond to Steven Syrop, D.D.S., who saw her in his New York office between June and September 2009. His chart entry of June 12, 2009 recites, contrary to Dr. Bassiur's note of only two months earlier, that there was occlusion only on the third molars, i.e., on Hammond's wisdom teeth (teeth ## 1, 16, 17, and 32), and that Hammond had an anterior open bite. Dr. Syrop wrote to Dr. Bassiur that day, advising her of his findings and stating that a definitive diagnosis was elusive. He recommended continuation of the treatment modalities

¹ Myofascial means "[o]f or relating to the fascia surrounding and separating muscle tissue." Stedman's Medical Dictionary. Fascia is "sheet of fibrous tissue ... that encloses muscles and groups of muscles ..." Steadman's Medical Dictionary.

Dr. Bassiur started. He further recommended building up select teeth to see if that would provide a more comfortable bite sensation. His chart appears to indicate that he eventually built up teeth ## 18 and 2.

Hammond also saw an orthodontist, Dr. Richard Isaacson (Isaacson), in January 2008 and in February 2012. During the latter visit, Hammond informed him that she had seen a New York dentist in 2009 who had altered her teeth's landscape "by changing fillings to raise [her] bite and [by] shaving down teeth." Isaacson found, during his 2012 examination, that on using articulating paper, Hammond's teeth hit on her third molars, particularly on the left side, and that the "right side hits on everything, but not as much."

A maxillofacial surgeon, Jay Goldsmith (Goldsmith), examined Hammond on behalf of Zane in 2014 and found, as to her occlusion, that Hammond's teeth did not interdigitate well, that some of the occlusion was end-to-end, and that she had an anterior open bite. Although Goldsmith found no deviation of the mandible or maxilla and no definitive cross-bite posteriorly, he found that the mandible shifted 2 mm toward the left.

In the meantime, Hammond commenced this 2010 action, which asserts claims against the movants sounding in dental malpractice based on departures from standards of good and accepted dental practice and on the lack of informed consent (respectively, the first and second causes of action). The complaint alleges that the defendant dentists' alleged malpractice caused her myofascial pain disorder, TMD, muscle hyperactivity, internal derangement of her right TMJ,

crepitus and popping upon closing her left TMJ, daily muscle contraction headaches, and a deviated mandibular opening.

The Motions

Defendants move for an order granting them summary judgment. In addition, Layliev's motion alternatively seeks an order either precluding Hammond from offering evidence regarding her theory that by changing her fillings he caused her to suffer from TMD and related symptoms or directing a *Frye/Parker* hearing so that she can establish the scientific reliability of, and an evidentiary foundation for, her causation theory.

Layliev

Hammond's bill of particulars as to Layliev alleges that he departed from standards of good and accepted practice in, among other things, failing to properly: evaluate her dentition's condition before he replaced her fillings; place the injections and recognize the consequences of such failure; prepare the new filling site; place the new fillings at the appropriate depth; and evaluate jaw alignment. That bill also charges Layliev with failing to sufficiently follow up and address Hammond's complaints of persistent pain, discomfort, swelling, and immobility. Also listed as a departure, but presumably setting forth Hammond's lack of informed consent claim, is her allegation in the bill of particulars that Layliev failed to inform her of the risks and complications of "the procedures."

Layliev moves for an order granting him summary judgment, relying largely on his affidavit, on the affirmations of his two dental experts, Stanley Heifetz (Heifetz), apparently a general dentist, and Frank Tuminelli (Tuminelli), who is board certified in prosthodontics, on the parties' depositions, and on Hammond's dental and medical records. Layliev claims that he did not depart from accepted standards of care in replacing Hammond's fillings and that he appropriately determined that she was a candidate for filling replacement, properly injected her gums with an anesthetic, addressed her complaints, and was willing to continue to treat her. Heifetz adds that the treatment rendered by Layliev was insufficiently invasive to require his obtaining Hammond's informed consent, and that even if such consent were required, Layliev's deposition testimony shows that he advised Hammond of the reasonably foreseeable risks.

On the issue of causation, Tuminelli and Heifetz observe that Wagner diagnosed a deranged, right TMJ approximately two months after Hammond saw Layliev, and opine that such derangement would not have developed in two months of Layliev's treatment. On the issue of TMD, Tuminelli maintains that the medical and dental literature, some of which he attached to his affirmation, is devoid of support for Hammond's claim that the replacement of her fillings caused her TMD and anything flowing from it, explaining that "it is no longer accepted in the medical and dental communities that dental malocclusions [sic] problems cause TMD." Tuminelli concedes that malocclusion and bite problems can cause TMD, but only when the problem is gross, which he defines as no teeth touching on a side or where teeth are missing, circumstances he contends did not exist here. Tuminelli additionally maintains that the literature establishes that TMD is caused by fibromyalgia, myofascial pain, and other pain disorders. Tuminelli concludes

that Hammond's dental complaints most likely were caused by preexisting medical conditions which antedated Layliev's involvement and were treated at Mt. Sinai.

Hammond opposes Layliev's motion, relying on the affirmation of her counsel, Joel Kotick (Kotick), who is reputed to be an orthodontist, and on the affidavit of her expert, Howard Marshall (Marshall), a dentist, who has a certificate in periodontics but presently practices general dentistry and prosthetic restoration. Hammond claims there are issues of fact as to whether Layliev properly reduced the fillings he placed in the lower and upper left, addressed her complaints, and properly proceeded to replace the fillings in her upper left jaw following her complaints.

Marshall urges that, as a result of Layliev's negligence, Hammond's bite remained off, causing her pain, an inability to eat, muscle spasms, and muscle injury, thereby causing more pain, additional changes to the bite, an inability to properly speak, insult to the joint, "most probably the internal derangement," and seven years (and continuing) suffering in an attempt to restore her bite. Marshall asserts that there can be no informed consent if, after a patient indicates that her bite is uncomfortable, the dentist fails to inform her that restoration replacement cannot proceed while her bite is uncomfortable.

Kotick, who advises that he would welcome a *Frye* hearing, disputes Tuminelli's opinion that malocclusion does not cause TMD. Kotick notes that the literature cited by Tuminelli acknowledges that malocclusion is a factor in causing TMD, but not the predominant cause, as was once believed. Kotick contends that the current and more enlightened approach is to treat the

TMJ as any other joint, with the distinguishing factor being the occlusion of the teeth, and with the teeth and genetics determining the position of each of the mandibular condyles in its respective fossa. Because the TMJ, unlike other joints, is a bilateral joint with the left and right TMJs connected by the same bone (the mandible), Kotick claims that any occlusal change on one side will change the position of the condyle on the other side. Kotick maintains that the alteration of a tooth's anatomy or a change in the bite influences the condyle's position and the disc's position. Kotick concludes that the importance of occlusion in 2007 was just as significant as it is today.

Marshall disagrees with Tuminelli's position that the medical/dental literature shows that malocclusion causes TMD only when teeth are missing or the malocclusion is gross. Marshall asserts that "the most minor change in occlusion can throw off a bite and create problems with the TMJs, the joints, and the muscles. Marshall opines that replacement of a restoration can throw off a bite, and here, where Layliev replaced six restorations on the left side alone and adjusted Hammond's bite, the potential to throw off Hammond's bite certainly existed. Furthermore, Kotick observes that even codefendant Zane's expert opined that a cause of TMJ symptoms is misaligned teeth, which can cause muscle spasms, and that it is, therefore, appropriate for a dentist to perform an occlusal adjustment on a tooth to correct a patient's bite and address a spasm.

Noting that Hammond's dental problems emerged after Layliev's July 10, 2007 treatment, Marshall disputes Tuminelli's assertion that Hammond's prior medical conditions likely caused her TMD and related complaints. In particular, Marshall observes that Tuminelli never

examined Hammond nor did he identify any medical records he claimed to have reviewed, much less ones that contained his conclusion that Hammond's dental problems stemmed from earlier medical conditions.

Marshall also disputes Tuminelli and Heifetz's opinion that internal derangement is a cumulative disease process and opines that it can happen immediately. Marshall concedes that derangement is usually a progressive slipping of the disc, but opines that it can occur because of trauma, such as the stretching of the TMJ caused by extensive dental procedures where the patient has to keep his/her mouth open for prolonged periods, or from the overloading of the joint. Marshall also contends that derangement can occur from degenerative joint disease caused by malocclusion. Marshall concludes that Layliev's malpractice caused injury to Hammond's bite, muscles, and TMJ, and resulted in pain and suffering and extensive subsequent treatment.

In reply, Layliev's counsel, Gabrielle DeYoung (DeYoung), asserts, among other things, that the record is devoid of evidence that Hammond suffered from any traumatic event brought about by Layliev changing her fillings. DeYoung further asserts that Marshall and Kotick failed, through non-conclusory means, to refute Layliev's showing that the fillings replaced by him did not cause Hammond's TMD or bite problems. In particular, DeYoung maintains that they did not show that the current literature supports their contention that malocclusion caused by dental fillings contributes to TMD. DeYoung observes that Hammond did not provide copies of the literature to which Kotick cited and on which he relied, and asserts that Kotick's recitation of the

history of TMD is irrelevant because it is the current consensus in the dental community that governs.

Golub-Evans and the Center

Golub-Evans, who moves jointly with the Center, asserts that he is entitled to an order granting him summary judgment, relying on the affirmation of his expert, Mark S. Wolff, D.D.S. (Wolff) and other documents. Wolff contends that, because Golub-Evans rendered no invasive therapeutic treatment to Hammond, Golub-Evans was not required to obtain Hammond's informed consent.

As to the claimed departures, Golub-Evans takes the position that he appropriately and thoroughly investigated Hammond's complaint of pain in the upper left jaw, and the investigation revealed no occlusal problem. Golub-Evans claims that he properly referred her to TMJ and endodontic specialists, while providing her with an antibiotic and a muscle relaxant.

As for Hammond's claim that Golub-Evans improperly evaluated her jaw alignment, Wolff observes that Golub-Evans did not come to any definitive jaw alignment diagnosis, his findings were not final, and that his plan was for further analysis via the two specialists to whom she had been referred. Wolff further asserts that the treatment rendered by Golub-Evans consisted of basic dental techniques which neither created nor exacerbated any underlying pathology. Additionally, Wolff maintains that after Golub-Evans referred Hammond to the specialists, he was not in a position to follow up with Hammond unless he was contacted by

the specialist or by Hammond, which he was not. Wolff concludes that Golub-Evans' diagnostic evaluation was in accordance with good and accepted dental practice. In view of the foregoing, Wolff and Golub-Evans' counsel urge that the action must be dismissed as to Golub-Evans.

With respect to the Center, the notice of motion, and both Zane's counsel and Wolff's affirmations simply advise that summary judgment is also being sought on behalf of the Center, and that Wolff's affirmation, which merely goes on to describe why Golub-Evans' treatment was appropriate and caused Hammond no injury, is being offered in support of Golub-Evans and the Center's joint motion.

Hammond opposes the motion. As for the Center, Kotick baldly asserts that it has vicarious liability, but why or for whom is not stated. As for Golub-Evans, Kotick contends, without elaboration, that Hammond was referred to Golub-Evans' office and was assigned to Layliev, and that Golub-Evans has vicarious liability, presumably for Layliev, under the principles enunciated in Mduba v Benedictine Hosp., 52 A.D.2d 450 (3rd Dep't 1976).

As for Golub-Evans' alleged departures, Marshall asserts that the doctor's examination of Hammond was negligent, because, among other things, he did not ask about her history of neuropathy and whether it was confined to her hands and legs, did not recall if he had asked Hammond if she were in pain, did not discuss with Layliev Hammond's July 19, 2007 complaints of pain, did not know if Hammond's filling were reduced on July 19, 2007 because of pain, did not recall if he had discussed the complaints she had on July 19, 2007, did not refer her

for TMJ imaging, and did not talk to Zane. After listing the foregoing items, Marshall concludes, that “[a]ll of the above [wa]s negligent.” Marshall asserts that Golub-Evans’ contention that he found no problem after examining Hammond’s muscles is inconsistent with Hammond’s assertion that Golub-Evans told her she was in spasm. Marshall states that Golub-Evans’ testimony that Hammond could fully open her mouth is inconsistent with his prescribing a muscle relaxant. Marshall asserts that it is “close to impossible” to reconcile Golub-Evans’ claim that, when he saw Hammond on August 6, there was no muscle spasm and she could fully open, with Zane’s finding the next day that Hammond was in spasm and could not open her mouth. Marshall asserts that it is not the standard of care to prescribe a muscle relaxant if one has no muscle problem. Marshall also maintains that Golub-Evans’ alleged assertion that there were no prematurities is inconsistent with Zane’s alleged statement to Hammond that her bite was off and with Zane’s adjusting tooth # 15. Additionally, Marshall contends that Golub-Evans’ referral of Hammond to Zane constituted his “wash[ing] his hands of th[e] patient.” Marshall further claims that Golub-Evans “made no attempt to help [Hammond], and that such behavior constituted a departure from accepted standards of practice. Marshall maintains that because Golub-Evans did “[n]othing to help Hammond, she had to live one more day in distress.”

Zane

Zane, relying on the pleadings, the parties’ depositions, his records, the records of the Center and of Wagner and Bassiur, and on the affirmation of Zane’s expert, general dentist, Leslie Seldin, D.D.S. (Seldin), seeks an order granting him summary judgment dismissing the complaint as to him. Seldin, unsupported by any affidavit from Zane, urges that Hammond was

referred to Zane specifically for the "limited purpose of evaluating and potentially treating plaintiff's muscle spasms." Seldin claims that Zane appropriately and successfully treated the spasms, and that Zane properly and appropriately used fluoro-methane, TENS therapy, and Lidocaine injections. Seldin also claims that it is accepted practice to provide a discluder because it helps in relieving stress and muscles spasms caused by a misaligned bite.

Asserting that a cause of TMJ disorder and symptoms is misaligned teeth, which can stress the chewing muscles and cause them to go into spasm, Seldin maintains that Zane performed a mild occlusal adjustment on tooth # 15 to correct Hammond's bite and to address the muscle spasms. Seldin asserts that Zane's adjustment of Hammond's tooth was in accordance with accepted practice. Seldin also contends that Zane properly referred Hammond to Dr. Kellert due to her complaints of pain in tooth # 15. Further, Seldin asserts that Zane provided appropriate follow-up care, including telling Hammond to contact him if the muscle pain continued. Indeed, Seldin observes that during one subsequent phone call, Zane properly directed her to apply moist heat and to perform muscle exercises as precautions against future spasms.

As for Hammond's claim that Zane failed to inform her of the risks and complications of procedures, Seldin maintains that TENS, fluoro-methane spray, and Lidocaine injections are benign procedures, and that therefore this claim must be dismissed. Moreover, Seldin contends that Zane did not cause or exacerbate any of Hammond's injuries because Hammond's myofascial dysfunction and neck pain were diagnosed years before she saw Layliev, and because Hammond had indicated on Zane's TMD Questionnaire that her pain started after Layliev's July

10 treatment. Seldin concludes that all of Hammond's injuries antedated Zane's treatment of her, and that there is no evidence that Zane worsened these conditions.

In opposition, Marshall claims that there can be no informed consent to Zane's treatment because there was no diagnosis and because he failed to discuss what he was doing and why or the risks. As for the lack of a diagnosis, while noting that according to Hammond's testimony Zane had informed her that her bite was off because of Layliev's treatment, Marshall observes that Zane testified that he only diagnosed trismus due to spasm of the right and left lateral pterygoid muscles. Marshall contends that, because Zane failed to diagnose the cause of Hammond's muscle spasm, there was no diagnosis.

On the issue of departures, Marshall claims, among other things, that Zane's failure to review x-rays or refer Hammond for TMJ imaging was a total departure. Further, while noting that Zane palpated a host of muscles, Marshall maintains that Zane departed from accepted standards of care in failing to palpate the masseter and temporalis muscles, asserting that if Hammond could not open her jaw those would most likely be in spasm. Additionally, Marshall claims that Zane's treatment plan of fluoro-methane spray, TENS therapy, Lidocaine injections into the lateral pterygoid muscles, occlusal adjustment, an occlusal discluder, and muscle exercises, based on the diagnosis of two muscles in spasm, causing trismus, was not the standard of care. As for the spray, this treatment would be ineffective, because one has to spray the inside of the mouth, not the face. Further, Marshall contends that the spray did not treat the tinnitus and the unidentified jaw and face pain. Marshall asserts that the TENS therapy had no effect on the

jaw and face pain, and could not have affected the lateral pterygoid muscles. Moreover, Marshall maintains that, if Zane actually cranked up the TENS unit, as Hammond alleges, to the point of killing her it is absolutely wrong. Therefore, the use of TENS therapy constituted a departure.

As for the Lidocaine injections, Marshall claims, in essence, that Zane's testimony that Hammond could only open her jaw a few millimeters or one finger, is inconsistent with his having injected her. If Hammond had muscle soreness, facial and jaw pain, and tinnitus, Zane only injected her pterygoid muscles. This too was a departure. Because Zane testified years after the fact and the chart does not reflect which tooth he adjusted, Marshall questions the veracity of Zane's testimony that he performed an occlusal adjustment of tooth # 15. Moreover, Marshall maintains that it was a departure to adjust any tooth when the trismus was not fully resolved and the muscles were not completely free of spasm because bite adjustment is a complex process which requires completely relaxed muscles and the ability to fully open one's mouth. Marshall opines that adjusting the occlusion when opening remained limited was negligence resulting in loss of tooth structure and making the bite worse.

Marshall agrees that a discluder can be helpful in treating TMJ/TMD because it takes pressure off the joint and limits muscle activity. However, Marshall contends that because there was no finding that Hammond's jaw was retruded, there was no justification for creating a discluder that brought the jaw forward. As for the muscle exercises, Marshall claims that "they are rarely used in acute situations," and that no one instructs a patient who has undergone all the treatment rendered by Zane to do exercises, and that to do so is a departure. Marshall also opines

that, under all of the foregoing circumstances, Zane's sending Hammond home without a return appointment because he considered her to be cured was bizarre and grossly negligent.

Discussion

On summary judgment, the movant has the initial burden of prima facie establishing its entitlement to the requested relief by eliminating all material allegations raised by the pleadings. Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985); see also Joseph v City of New York, 122 A.D.3d 800, 801 (2nd Dep't 2014) (summary judgment properly denied where movant did not "address specific [relevant] claims in the plaintiff's verified bill of particulars ..."). The failure to meet that burden mandates the denial of the application, "regardless of the sufficiency of the opposing papers." Winegrad, 64 N.Y.2d at 853. Where the movant makes the requisite showing, the burden shifts to the other side to demonstrate the existence of a material fact. Ferluckaj v Goldman Sachs & Co., 12 N.Y.3d 316, 320 (2009). Because summary judgment "deprive[s] a party of his day in court," it "should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. . . ." Gibson v American Export Isbrandtsen Lines, 125 A.D.2d 65, 74 (1st Dep't 1987) (internal citation omitted); see Forrest v Jewish Guild for the Blind, 3 N.Y.3d 295, 315 (2004).

The right to recover for a lack of informed consent claim is limited to those cases involving non-emergency surgery, treatment, or procedures, or diagnostic procedures in which the body is invaded or its integrity is disrupted. Public Health Law § 2805-d; see Janeczko v Russell, 46 A.D.3d 324, 325 (1st Dep't 2007); Sample v Levada, 8 A.D.3d 465, 467 (2nd Dep't 2004);

Keselman v Kingsboro Med. Group, 156 A.D.2d 334, 335 (2nd Dep't 1989). To prima facie demonstrate a defendant's failure to obtain an informed consent, a plaintiff is required to show 1) that the practitioner failed to disclose that information which a reasonable practitioner would have disclosed under the circumstances about what he or she proposed to do and the risks, benefits, and alternatives to the proposed treatment, 2) that a reasonably prudent patient in the plaintiff's position would not have undergone the treatment if the allegedly withheld information had been provided, and 3) that the treatment was a cause of the patient's injury. Zapata v Buitriago, 107 A.D.3d 977, 979 (2nd Dep't 2013); see Balzola v Giese, 107 A.D.3d 587, 588 (1st Dep't 2013). A claim that a procedure was unwarranted does not state a lack of informed consent claim, but instead states a malpractice claim arising from a departure from standards of good and accepted practice. Benfer v Sachs, 3 A.D.3d 781, 783 (3rd Dep't 2004).

In moving for summary judgment on a lack of informed consent claim, a defendant must prima facie eliminate this claim as an issue. See e.g. Zapata, 107 A.D.3d at 979-980. A defendant moving for summary judgment on a plaintiff's departure claims must prima facie demonstrate that there were no departures from standards of good and accepted practice, or that the claimed departures did not proximately cause plaintiff's injuries. Ahmed v Pannone, 116 A.D.3d 802, 805 (2nd Dep't 2014); Roques v Noble, 73 A.D.3d 204, 206 (1st Dep't 2010).

As a threshold matter, the Court observes that the complaint alleges that the Center is a business entity, a partnership, and a corporation, and that Layliev, the Center, and Golub-Evans provided the personnel, including the dentists, dental assistants, and nurses, for Hammond's

treatment and care. Neither Hammond, the Center, Layliev, nor Golub-Evans addresses these allegations. The possibility that the Center was a partnership and that Layliev and Golub-Evans were its partners has not been eliminated by the moving defendants. Further, none of the copies of the Center's records presented on these motions indicates the nature of the Center's business status. The issue of the Center's vicarious liability for any of Layliev and Golub-Evans's malpractice and of these individual defendants' vicarious liability must be examined.

The Court additionally notes that, although Kotick claims to be an orthodontist, his affirmation is not offered as that of an expert's, as it does not identify him as a dentist or orthodontist or set forth any qualifications that would enable him to serve as an expert. Therefore, to the extent that Kotick purports to give an expert opinion, his affirmation will be disregarded. Further, to the extent that he makes reference to various medical/dental literature but does not provide their contents, they cannot be considered.

Layliev

Heifetz's contention that Layliev was not required to obtain Hammond's informed consent because the procedures were insufficiently invasive is without merit. In addition, it is undercut by Heifetz's opinion that Layliev was not negligent in injecting the anesthetic because injections are a blind process, rendering it impossible to know the exact location of a patient's nerves, i.e., that nerve injury is a risk of injection which can happen absent negligence. See Bernard v Bernstein, __ A.D.3d __, 2015 NY Slip Op 02084, *4 (2nd Dep't 2015). Nevertheless, Marshall does not refute Tuminelli and Heifetz's opinion that a patient will immediately experience a high

level of pain if a nerve is hit and that there were no such complaints after the injections were given by Layliev. Also, the pleadings are devoid of any claim of an infection or adverse drug reaction. Because an element of informed consent is that the procedure warranting the consent caused injury and plaintiff has failed to rebut Layliev's showing that a nerve was not hit, the element of injury resulting from the injections has been eliminated. That failure also undermines Marshall's claims that Layliev negligently performed injections. Accordingly, any claim that Layliev negligently injected Hammond or that any injection he performed injured Hammond is dismissed.

As to the drilling and filling, these are clearly violations of Hammond's bodily integrity warranting the giving of an informed consent because, as Layliev concedes, there were reasonably foreseeable risks of a temporary bite alteration and pain, presumably lasting until the requisite occlusal adjustments were made. Even Heifetz admitted, in essence, that, because there is a subjective element to a comfortable bite, a patient may need a later bite adjustment after the anesthetic wears off notwithstanding that the articulating paper failed to reveal any occlusion problem. Although Layliev testified and asserted in his affidavit that he had obtained Hammond's consent to the filling replacements by informing her of, among other things, the possibility of a reversible bite alteration and temporary pain, Hammond testified that she had asked Layliev if there were any risks involved in the filling replacements, and that he had replied that none existed, thereby raising an issue as to whether a proper informed consent was obtained.

Given the conflicting evidence, there is an issue as to whether Layliev departed from accepted standards of care in failing to follow up on Hammond's alleged July 30, 2007

complaints of pain on the lower left side of her jaw and something still feeling off, and in proceeding with the replacement of the upper left fillings that day. Specifically, Layliev testified that, on July 30, 2007, he would not have proceeded to replace the fillings in Hammond's two upper left teeth had she complained of pain that day. Hammond, on the other hand, testified that she had complained to Layliev from July 10, 2007 forward, including on July 30, when she told him that something was still off and that she was experiencing pain in the lower left, albeit less.

Hammond and Layliev's divergent testimony also creates an issue of fact as to whether Layliev checked Hammond's bite with articulating paper on July 10 and 19, 2007, and thus, as to whether Hammond's bite was in fact proper on those dates. Layliev never addressed or specifically denied Hammond's claim that, after he initially refilled her four lower left teeth on July 10, her teeth on the right did not come together, and that he had agreed with her in that regard, after he pulled a strip of paper right through them, which allegedly led him to immediately drill on the new lower left fillings. Golub-Evans never testified that he checked the bite on the lower left. Therefore, issues of fact exist as to whether Layliev departed from accepted standards of practice in failing to properly ensure the propriety of Hammond's bite on July 10 and 19, 2007.

Layliev additionally takes the position that his treatment did not require Hammond to have her mouth open for an inappropriate length of time, and that, in any event, causation is lacking. The Court first notes that Tuminelli is wrong in asserting that there is no support in the medical and dental literature for the proposition that extended dental treatment with one's mouth open can cause TMD. One of the medical writings on which he relies states that direct trauma in

the form of prolonged mouth opening can "trigger or aggravate TMD." quoting *Orofacial Pain*, Okeson, J., ed, 120, (1996). However, Marshall fails to address, other than in vague and conclusory terms, Heifetz and Layliev's claim that none of the treatment he rendered required prolonged opening of Hammond's mouth. In particular, Marshall does not adequately rebut their detailed showing of the treatment rendered to Hammond, and how that treatment was broken up into three sessions of no longer than an hour-and-a-half each, during which Hammond's mouth was not continuously open, because there were periods during which the anesthetic had to become effective and when tools and materials had to be prepared. Hammond does not refute the claim that each session took no longer than one-and-a-half hours, and she testified that she could not recall how long the treatment sessions lasted. As Marshall has failed to rebut Heifetz's showing regarding the propriety of the session lengths and the contention that during the sessions Hammond was not required to keep her mouth open continuously or for excessive time periods, any claim that Layliev was negligent in requiring Hammond to keep her mouth open too long is dismissed. See e.g. Foster-Sturup v Long, 95 A.D.3d 726, 728-729 (1st Dep't 2012); Giampa v Marvin L. Shelton, M.D., P.C., 67 A.D.3d 439, 439-440 (1st Dep't 2009).

Turning to the issue of causation, there is ample evidence to support that changing fillings could alter occlusion. Layliev admitted that a risk of fillings was improper occlusion and pain, but he asserted the effect was temporary. Layliev's experts neither explained the nature of the pain, e.g., whether it was muscular, nor contended that it could not evolve into spasms. In addition, Golub-Evans testified that prematurities in the fillings could affect the bite, and, thus, cause pain and affect the musculature. In light of the dispute as to whether Layliev checked

Hammond's bite on July 10, 2007 after he adjusted her fillings, and again on July 19, 2007, there is an issue as to whether there was at least some injury caused by Layliev's treatment.

As for Layliev's claim that he must be granted summary judgment or a Frye/Parker hearing because no association exists between Hammond's "alleged dental occlusion problems" and TMD, the law provides that when a party seeks to introduce novel scientific evidence, its reliability must be determined. Parker, 7 N.Y.3d at 446. Frye hearings are held to ascertain whether an expert's deductions are based on principles that are well enough established so as to have become generally accepted as reliable. Sadek v Wesley, 117 A.D.3d 193, 201 (1st Dep't 2014). General acceptance does not require a consensus, nor does it necessarily require that the majority of experts in the relevant field agree with the conclusion. Id. Instead, those who subscribe to the conclusion or theory must "have followed generally accepted scientific principles and methodology in evaluating clinical data to reach their conclusions." Id. (citation and quotation marks omitted); Styles v General Motors Corp., 20 A.D.3d 338, 342 (1st Dep't 2005). The general acceptance test serves to protect jurors from being led astray by experts whose scientific jargon serves to mask baseless theories. Marso v Novak, 42 A.D.3d 377, 379 (1st Dep't 2007).

A causation theory should be omitted only where it lacks any objective support and "is based solely upon the expert's own unsupported beliefs." Lugo v. New York City Health & Hosps. Corp., 89 A.D.3d 42, 56-57 (2nd Dep't 2011). The support does not have to parallel the circumstances at bar exactly as long as a synthesis of that which supports the theory "reasonably permits the conclusion reached by the [proponent's] expert." Marsh v Smyth, 12 A.D.3d 307, 312-

313 (1st Dep't 2004), Saxe, J., concurring; Sadek, 117 A.D.3d at 201-202. In deciding the admissibility of an expert's testimony, the court does not determine who is correct and who is incorrect, but, instead, whether there is enough support for the expert's position. Lugo, 89 A.D.3d at 56.

Frye is concerned with general reliability and usually pertains to whether new scientific tests, theories, processes, or techniques are admissible. Sadek, 117 A.D.3d at 201. A case involving the mechanism of an injury, namely, the "physiological process by which the damage came to occur," is usually not the sort of novel theory of causation which requires a *Frye* hearing. Sadek, 117 A.D.3d at 200-201; Marsh, 12 A.D.3d at 311; see Ratner, 91 A.D.3d at 73.

Tuminelli asserts that no link exists between Hammond's claimed occlusal problems and TMD because 1) the dental and medical communities no longer accept that "dental malocclusion problems cause TMD symptoms," 2) TMD is a "manifestation of global pain disorders such as Fibromyalgia and myofascial pain ...," and 3) malocclusion contributes to TMD only when there is gross malocclusion, namely when teeth are missing or no teeth are touching on one side, problems not experienced by Hammond. These contentions are inadequate to meet Layliev's prima facie burden of establishing a lack of causation and his right to summary judgment or a hearing. Aside from Tuminelli's failure to explain what Hammond's claimed dental occlusion problems stemming from Layliev's alleged malpractice are so as to exclude them from his alleged limited occlusal causes of TMD, the literature upon which Tuminelli relies does not support his contentions, and, in fact, undermines them. Initially the Court notes that this literature indicates

that TMD, which is most common in middle-aged women, is not one disorder but many, associated, among other things, with cranofacial pain; pain in the TMJs, jaw, and the muscles of mastication; headaches; ear pain and tinnitus; TMJ sounds, such as popping, crepitus, and clicking; and asymmetric or limited mandibular motion. See Tuminelli affirmation, exhibit 2, Temporomandibular Disorders, Scrivani, S., Keith, D. and Kaban, L., New England Journal of Medicine, 2008; Tuminelli affirmation, exhibit 3, Orofacial Pain, Okeson, J., ed (1996). Attached to one article cited by Tuminelli is the American Academy of Orofacial Pain's classification scheme for TMD, which sets forth the two main categories of TMDs, articular disorders and masticatory muscle disorders, which are each broken down, respectively, into eight and six other disorders, such as disc derangement disorders, trauma, and myofascial pain disorder, some of which are further broken down into a variety of other disorders. Tuminelli affirmation, exhibit 2, Temporomandibular Disorders, 2694. Given all of these potential TMDs, they are not, as Tuminelli suggests, simply a manifestation of global pain disorders.

Further, the literature upon which Tuminelli relies does not exclude malocclusion as a factor linked to TMDs, and demonstrates the falsity of his claim that malocclusion is a factor in TMD only when none of the teeth on one side touches or when teeth are missing. Instead the literature merely states that occlusion is not a primary factor, that risk of association between TMD and occlusion is relatively low, and that factors can combine to cause TMDs.² Whether this

² Additionally, the Court notes that, at least at the time of Hammond's examination by subsequent treater, Syrop, in 2009, and by Zane's independent medical examiner, Goldsmith, in 2014, Hammond was found to have an anterior open bite, one of the possible conditions for occlusion in the article cited by Tuminelli.

occlusion condition existed before Hammond saw Layliev, whether Layliev's treatment caused, contributed to, or aggravated this condition, thereby resulting in, or contributing to Hammond's TMD, are not addressed by Layliev.

Layliev's experts' bald and conclusory claim that Hammond's TMD was caused by her prior medical conditions is insufficient to prima facie establish that it was. Layliev's experts fail to explain why or how Hammond's preexisting pain conditions, which were believed to have been triggered by RSIs due to Hammond's desk job, made their way up to her masticatory muscles and her jaw. Layliev also fails to establish that Hammond's alleged malocclusion could not have been a trigger of a myofascial pain disorder in her masticatory muscles, as her RSIs caused by her job triggered her prior conditions.

Additionally, Layliev's experts did not opine that the derangement of Hammond's right TMJ, which was found two months after she was treated by Layliev, could not have been hastened or contributed to by her malocclusion, only that derangement is an injury which is necessarily caused by an unspecified cumulative systematic disease process which would not have developed in two months. Here, where Layliev has the burden in the first instance of establishing his entitlement to summary judgment, neither Tuminelli nor Heifetz indicates of what this cumulative process consisted, what would trigger the process, or how long it would have taken to develop. Further, while defense experts claim that the derangement would not have developed in two months, they do not indicate that TMD could not have developed in two months or that the malocclusion could not have triggered TMD in a TMJ that was in the process of deranging.

Except to discuss prolonged mouth opening, Tuminelli also fails to eliminate trauma, as explained in the text portions he submitted, as a cause or contributing factor of Hammond's TMD. Whether Hammond's fillings were too high and resulted, when Hammond bit down, in the application of forces to her masticatory structures which exceeded that of normal functional loading, i.e., direct trauma, which could have triggered or contributed to her TMD, has not been eliminated by Layliev. As already noted, Hammond testified about her painful attempts to bite down and eat, and stated that when she called Layliev on Saturday August 4, 2007 and advised him of that problem, he allegedly rebuffed her. Layliev has not eliminated the possibility that Hammond's allegedly maloccluded teeth resulted in the spasms which caused her jaw to tighten and shift over to one side, i.e., the stretching of her jaw, or direct trauma. Furthermore, although at least one of the articles upon which Tuminelli relies emphasizes that more than one cause can be responsible for TMD, Tuminelli wholly ignores the possibility that the occlusal changes and their sequelae allegedly wrought by Layliev were factors that contributed with others to cause Hammond's TMD. Because Layliev has not prima facie established his entitlement to summary judgment or to a hearing, the branch of Layliev's motion which seeks an order granting him summary judgment because of a lack of causation or a Frye/Parker hearing is denied, irrespective of the adequacy of the opposing papers.

Nonetheless, the court has concerns about whether Hammond ultimately will be able to establish causation. This is so because of the rather vague and conclusory nature of Marshall's affirmation, particularly on the causation issue, and the fact that it is unclear from Hammond's opposing papers whether she is still urging that myofascial pain dysfunction is one of

the injuries she suffered as a result of Layliev's alleged malpractice. Also, it is not apparent when Hammond's retained counsel was counsel first had his client's bite examined. After Layliev rendered treatment, Hammond's bite was adjusted by Zane, Wagner, and by Syrop, presumably making it difficult to know which, if any, teeth Layviev improperly refilled and adjusted, the extent to which they were improperly refilled or adjusted, and how precisely that threw off Hammond's bite before subsequent dentists adjusted her bite.

Further, Layliev has provided a copy of his CPLR 3101 (d) statements, but when this motion was made Hammond evidently had not yet served hers. Once Hammond serves proper, factually detailed CPLR 3101 (d) statements, Layliev's counsel should have a better understanding of Hammond's claims regarding which teeth Layliev improperly refilled or adjusted, how those filling replacements and adjustments were deficient, Hammond's causation theories including, specifically, how Hammond's bite was thrown off and her jaw was deranged, and the grounds for those opinions. If Hammond or any other party has not already done so, they shall serve their CPLR 3101 (d) statement(s) within 45 days of service of a copy of this order with notice of entry. If any party served with such a statement believes that it lacks compliance with CPLR 3101 (d), that party shall immediately upon receipt of the statement seek to obtain a corrected statement.

Golub-Evans and the Center

Hammond's counsel's bald and conclusory assertion that Golub-Evans has vicarious liability under the principles of Mduba, 52 A.D.2d 450, is without merit. Hammond has presented no evidence that Golub-Evans held himself out as furnishing all the services rendered to

her, including Layliev's. Hammond contacted the Center because a friend recommended Golub-Evans. That Hammond's first appointment, which was scheduled with Golub-Evans, was changed by unspecified individuals to one with Layliev, does not demonstrate that Golub-Evans held himself out to Hammond as providing all of the services. Moreover, Hammond's September 2007 letter, seeking a copy of her records, was addressed to the Center, and the responding covering letter, accompanying the copy of those requested records, was imprinted with the Center's name. However, as previously noted, the Center and Golub-Evans have failed to establish that the Center was not a partnership and that Golub-Evans was not one of its partners, and has, therefore failed to eliminate that basis for their vicarious liability for any of Layliev's malpractice.

The branch of the Center and Golub-Evans' motion which seeks to dismiss any claim that Golub-Evans did not obtain Hammond's informed consent to treatment rendered by him is granted. Marshall does not dispute that Golub-Evans was not required to obtain Hammond's informed consent, and he does not deny the absence of any invasive therapeutic treatment by Golub-Evans. In addition, the bill of particulars Hammond provided to these defendants does not claim that the medications prescribed by Golub-Evans were the subject of the lack of informed consent cause of action or that Hammond suffered injury from either of these medications, which were stopped by Zane the day after they were prescribed. Further, at least as to the muscle relaxant, Marshall's assertion that if Hammond was not suffering from muscle spasms the medications were unnecessarily prescribed supports a claimed departure rather than a lack of informed consent claim. Accordingly, the lack of informed consent causes of action asserted against the Center and Golub-Evans are dismissed to the extent that they are premised on Golub-Evans' failure to obtain

Hammond's informed consent to any treatment rendered by him, but are not dismissed to the extent that they are premised on the Center and Golub-Evans' claimed vicarious liability for Layliev's alleged failure to obtain Hammond's informed consent.

Golub-Evans prima facie established that he did not depart from accepted standards of dental practice in connection with the care and treatment he personally rendered to Hammond. In response, Hammond has failed to rebut Golub-Evans' showing. Marshall's assertion that Golub-Evans' examination of Hammond constituted negligence is wholly conclusory and fails to indicate why Golub-Evans should have done the things he allegedly failed to do and why each of those items amounted to negligence. As to whether Golub-Evans had discussed her neuropathy, Golub-Evans testified he told her he was not a physician and could not practice medicine, that he was unsure if her problem was medical, that she should first see the dental specialists to whom he referred her and that if they could not find anything she should see her physician. Marshall's opinions fail to state in a non-conclusory way that this was not proper practice. Nor does Marshall indicate how an isolated neuropathy in an unspecified area of Hammond's face for which a neurologist treated her years before is relevant to Hammond's currently alleged conditions or injuries. Moreover, this position is at odds with his assertion that Layliev's expert's conclusion that Hammond's entire prior medical history including her neuropathy was a cause of Hammond's TMD and related complaints has no substantive basis.

Marshall's position that Golub-Evans' failure to recall at his deposition whether he had asked Hammond on August 6, 2007 if she were in pain establishes that he was negligent lacks

merit because Golub-Evans' August 6 chart entry indicates that Hammond had complained to him of pain on her upper left side. The failure to recall something years after the treatment does not constitute a departure. This reasoning also applies to Marshall's assertion that Golub-Evans was negligent because he could not recall at his deposition whether he had discussed the complaints Hammond had on July 19, 2007. In any event, Golub-Evans testified that he had read the chart to see what treatment had been rendered by the office.

Even assuming for argument's sake that Golub-Evans had departed from the standard of care, causation is lacking. Marshall takes the position that when Hammond saw Golub-Evans she had to have been in spasm; and Hammond testified, and Golub-Evans' August 28 note indicated, that Hammond could not fully open her mouth when Golub-Evans saw her. Although it appears that any spasm was in its inception, Marshall testified that performing any adjustment, no matter how slight, when a spasm is not completely resolved and one cannot fully open one's mouth constitutes a departure. That opinion is supported by Zane's definition of neuromuscular dentistry as the science of achieving a bite that is harmonious with the path of closure that fully relaxed muscles wish to take, i.e., not a bite that muscles in spasm wish to take. In view of that, Golub-Evans could not have adjusted any malocclusion that day. Moreover, Marshall's fails to state in a non-conclusory manner what other treatment of the spasm Golub-Evans should have rendered on August 6.

Marshall's assertion that Golub-Evans abandoned Hammond lacks merit. When he could not definitively determine the cause of Hammond's pain, he prophylactically prescribed

medication and referred her to specialists. According to Hammond, Golub-Evans even called Zane's office to ensure that she was promptly seen by him, hardly an abandonment of the patient.

Marshall additionally examines Hammond's claim that Golub-Evans told her that she was in spasm. This claim is inconsistent with Golub-Evans's assertion that he could find no reason for Hammond's complaint of pain in her upper left jaw after performing an examination, including of her muscles and TMJ. Marshall does not explain why Golub-Evans would refer Hammond to a root canal specialist and prescribe an antibiotic if he were certain that Hammond's problem was neuromuscular in nature. As for Marshall's claim that it is not the standard of care to prescribe a muscle relaxant if one is not in spasm, neither the pleadings nor Marshall contends that the muscle relaxant caused Hammond any injury.

With respect to Marshall's contention that Golub-Evans's claim of no prematurities is inconsistent with Zane adjusting tooth #15, Hammond does not present any evidence disputing that Golub-Evans used the articulating paper to check her bite in her upper left jaw and found no occlusion problem. Further, Zane never stated what he found when he checked Hammond's bite on tooth # 15. Indeed, Golub-Evans' referral of Hammond to an endodontist for that tooth indicates that he was not sure that the problem with that tooth related to bite. Additionally, Zane's adjustment of that tooth was only slight, and he too referred Hammond to an endodontist after that adjustment because she complained of pain in that tooth. As previously discussed, Marshall contends that an occlusal adjustment constitutes a departure when spasms and an inability to fully open one's mouth are extant. Thus, even if there were a prematurity in tooth # 15, according to Marshall, Golub-

Evans should not have adjusted it. In view of all of the foregoing, the branch of the Center and Golub-Evans's summary judgment motion seeking an order dismissing all claimed departures from accepted standards of care under the complaint's first cause of action, is granted to the extent that all claims against the Center and Golub-Evans based on his alleged departures are dismissed, but is denied to the extent that the first cause of action is based on the Center and Golub-Evans' alleged vicarious liability for Layliev's departures.

Zane

The branch of Zane's motion which seeks an order dismissing Hammond's lack of informed consent cause of action is granted. Hammond's response to Zane's demand for a bill of particulars limited the issue to Zane's alleged failure to advise Hammond of the risks and complications of unspecified procedures. Marshall failed to dispute Seldin's opinion that the fluoro-methane spray, the TENS therapy, and the Lidocaine injections had no reasonably anticipated risks and were benign. Moreover, Marshall took the position, and Zane testified, that the spray was simply ineffective. Therefore, the necessary element of a lack of informed consent claim, namely, that the spray caused injury, is lacking. As for the Lidocaine, notwithstanding Marshall's failure to rebut the assertion that an informed consent was unnecessary, as previously indicated, injections usually require an informed consent. Nevertheless, Marshall's position was not that the injections injured Hammond, but that Zane limited their use to one set of masticatory muscles. Thus, again, the element of injury is patently lacking.

Marshall's opinion with respect to the TENS unit was not that Zane failed to inform Hammond of the risks of a properly used device, but that Zane improperly used it by cranking it up too high, a departure claim. To the extent that Marshall is claiming that the TENS treatment should not have been given at all because it could never have helped the pterygoid muscles, that too is a departure claim. In any event, Marshall's opinion that TENS therapy should not have been given to aid the pterygoid muscles overlooks Zane's testimony that the treatment was given to help "everything innervated by the fifth cranial nerve or to the muscles of mastication ... everything that makes the jaw move ... every muscle." Hammond's claim with respect to the occlusal adjustment is that it should not have been performed at all, again, a departure from accepted standards of practice, rather than a lack of informed consent claim. Thus, Hammond's second cause of action, sounding in the lack of an informed consent, is dismissed as to Zane.

As to the adequacy of Hammond's opposing papers on the issue of Zane's departures, Marshall's affirmation is largely composed of bald, conclusory allegations and fails to explain why many of Zane's acts and omissions constituted departures; contains various assertions of departures which patently lack causation; and sets forth Marshall's misapprehension of several relevant facts, such as stating that, after the TENS treatment, Hammond could only open her mouth the width of one finger, when she could open it the width of two fingers, which enabled Zane to examine her more thoroughly and inject her pterygoid muscles with Lidocaine, and asserting that the TENS treatment was intended to affect only the lateral pterygoid muscles. Nevertheless, the branch of Zane's motion which seeks an order granting him summary judgment dismissing the first cause of action as to him is denied because Zane has not prima facie eliminated all of the

departures set forth in pleadings. Further, Zane has failed to demonstrate that he did not worsen any injury allegedly caused by Layliev or that all of Hammond's injuries were caused by conditions which arose before Layliev's treatment.

While Hammond's bill of particulars charges Zane with failing to properly evaluate the conditions of Hammond's teeth, TMJs, and improper jaw alignment and in failing to use appropriate procedures to treat them, Zane maintains that Hammond was referred to Zane for the limited purpose of treating muscle spasms. As Zane makes this argument solely through Seldin, who lacks any personal knowledge, Zane has failed to establish that Hammond was referred to him for such limited purposes. In particular, Golub-Evans' notes do not reflect any diagnosis of muscle spasms or specifically indicate that he referred Hammond to Zane for treatment of spasms, and both Zane and Golub-Evans testified that they had no recollection of any discussions with each other. Even if Golub-Evans believed that Hammond could be developing a spasm, there is no indication that his referral of Hammond to Zane imposed a limitation on Zane's treatment to the spasm, rather than to a determination and treatment of its underlying cause, especially since Golub-Evans was aware that Hammond complained a month earlier about her bite and pain after Layliev replaced her fillings. The complaints Hammond listed on Zane's TMD Questionnaire did not include muscle spasms but instead tinnitus, face and jaw pain, and sore muscles. Zane, who testified that his longtime specialty was achieving a bite in harmony with the path which relaxed muscles wished to take, has failed to establish that Hammond was referred to him for the limited purpose of treating a muscle spasm.

Zane has offered no evidence that he appropriately evaluated Hammond's teeth, improper jaw alignment, or TMJs. At his deposition Zane, who equated a clicking TMJ with a displaced jaw, took the positions that he could not recall whether Hammond had clicks in her TMJ joints when he saw her, and that any such finding would not be important because there are people who have clicks who do not have pain. However, missing from his testimony was that Hammond's TMJs were not an issue. Further missing is a statement that none of those with clicks, i.e., those with displaced TMJs, has pain and TMD. Zane also acknowledged that if one lacked a clicking joint that did not mean that such person's jaw was not displaced. When asked whether there were diagnostic tests to determine whether one had a problem with their TMJs, Zane sidestepped the question and testified that he had ascertained by examination that the muscles were in spasm and treated the spasm. However, that does not establish that he appropriately evaluated Hammond's TMJs, that they had no problems, and that the underlying cause of the spasm could not be treated. Also, Zane never discussed Hammond's presenting complaint of tinnitus, and fails to assert that it was merely a symptom of the muscle spasms.

Questions of fact remain about Zane's evaluation of mild occlusal adjustment of tooth # 15 in her upper jaw. Zane did not testify that he adjusted it because, after testing that tooth with articulating paper, it warranted an adjustment, nor did he testify that tooth # 15's occlusion was the cause of the spasms or that he treated it because of the spasms. Zane merely testified that he slightly adjusted the tooth for which Golub-Evans had referred Hammond to an endodontist and which was hurting her. Further, Hammond testified that after Zane adjusted the tooth's

occlusion she "couldn't feel any difference." There is no indication that Zane examined any other teeth for malocclusion.

Although Zane gave Hammond a discluder to relieve stress or muscle spasms, he did not testify that he gave her the discluder because he had evaluated Hammond's teeth for occlusal disharmony and found disharmony. Here, where Zane takes the position that he was only treating spasms, never testified that he explored, diagnosed, and treated the underlying cause(s) of the spasms, or told Hammond to come back when the spasm subsided so that he could do so, there is a lack of a factual basis upon which Seldin -- who never examined Hammond and was not there at the time in issue -- can opine that what Zane did constituted an appropriate means of treating those underlying causes. Thus, he does not eliminate the issues in bill of particulars raises. At best, Zane established that he merely treated a symptom, but he does not establish that the underlying cause(s) could not have been ameliorated or cured. Furthermore, contrary to Zane's assertion that Hammond left his office relieved of her pain, Hammond maintains that she left his office in pain, continued to be in pain and complained to him of pain and headaches several times within days of her visit to his office, and she denied that he told her to return if there were problems. Accordingly, Seldin has failed to establish that Zane did not depart from accepted standards of care.

Even if Zane had prima facie met his burden of establishing a lack of departures, Hammond has raised an issue as to whether Zane departed from standards of accepted practice in at least several other ways. As for Marshall's claim that it was a departure to crank up the TENS unit to the extent that it caused Hammond severe pain, Zane testified that a purpose of the therapy

was to decrease pain perception, to relax the nerves and to try to break the spasm. As stated, Hammond denied that she left his office relieved of pain and claimed that Zane's use of the TENS unit caused her jaw and head to repeatedly slam and bang together and as a result she left in pain and with headaches. Neither Seldin nor Zane offers evidence indicating the device was incapable of being turned up so high that it caused one type of pain in an effort to relieve another.

As for tooth #15's occlusal adjustment, although Marshall questions whether it was that tooth which was adjusted because Zane's chart does not identify the tooth, Hammond had complained to Golub-Evans the prior day of pain in the upper left, Zane's chart recites that Golub-Evans had referred Hammond to an endodontist for tooth # 15, and tooth #15 was one of the two teeth in the upper left that Layliev had previously filled. However, for the purpose of this motion, Marshall sufficiently raises an issue as to whether any occlusal adjustment while Hammond's muscles were not completely free of spasm and her mouth could not fully open constitutes a departure. Zane testified that after the TENS therapy Hammond could only open her mouth about the width of two fingers, that normal opening is about 49 to 52 mm, and that after the Lidocaine injections Hammond was able to move her jaw an unspecified amount. Zane's chart of Hammond's treatment recites that after treatment, Hammond could talk and open "better." Zane also testified that he was not sure whether he adjusted tooth # 15's occlusion before the Lidocaine injections, but did it when Hammond could open wide enough for him to perform the adjustment. To what extent Hammond could open her mouth after the injections is unclear, but there is at least an issue as to whether the occlusal adjustment was done after the TENS therapy and before the injections when Hammond could not fully open her jaw. In view of the above, and of Zane's explanation of

the science of neuromuscular dentistry, there is an issue as to whether Zane departed from accepted practices in attempting to adjust the occlusion of tooth #15. On this latter issue, even subsequent treating dentist Wagner decided not to perform an occlusal equilibration until Hammond's myospasms significantly decreased. Seldin's assertion that the fact that subsequent dentists adjusted Hammond's occlusion establishes the propriety of Zane's adjustment of tooth #15 is unavailing because it may be that Hammond was spasm-free during those later adjustments.

As for causation, Seldin's bald and conclusory assertions that Zane did not worsen any injuries which existed before Hammond saw Zane and that there is no evidence that Zane worsened the conditions set forth in Hammond's bill of particulars are inadequate to prima facie demonstrate that Zane did not exacerbate or cause any injury. Further, Seldin's contention that "[o]f importance," Hammond testified that she was diagnosed with myofascial pain in 1999 and a neck syndrome in 2004 does not help Zane in meeting his prima facie burden of establishing a lack of causation because Seldin does not explain why this was of importance or how it was connected to the injuries claimed here. Seldin fails to indicate that all of the same muscles involved in this action were involved in Hammond's prior condition, and he does not opine that the same instrumentalities triggered both the prior conditions and the injuries Hammond claims here. As previously noted, Hammond's earlier conditions appear to have been attributed to a work-related RSIs, while the injuries here allegedly were triggered by the malocclusion and its sequelae, which negatively affected Hammond's TMJs and thus her bite, thereby deleteriously affecting various muscles. It is not even clear whether Seldin, a general dentist, has the requisite expertise to link Hammond's prior medical conditions to her claimed injuries in this case, a concern that is not

limited to him. Zane has also failed to prima facie establish that all of Hammond's alleged injuries were caused solely by Layliev. Accordingly, it is

ORDERED that the branch of Emanuel Layliev, D.D.S.'s motion seeking an order granting him summary judgment dismissing the complaint is denied, with the limited exceptions that summary judgment is granted to him only as to the claims that he negligently injected plaintiff with anesthetic, that any injection that he performed on plaintiff injured her, and that he was negligent in requiring plaintiff to keep her mouth open too long during any treatment session, and those limited claims are dismissed; and it is further

ORDERED that the branch of Emanuel Layliev, D.D.S.'s motion for an order either precluding plaintiff from offering any evidence relating to her theory that his replacement of her dental fillings caused her to suffer from temporomandibular joint disorder and related symptoms or, alternatively, conducting a *Frye/Parker* hearing is denied; and it is further

ORDERED that any party who has not already done so is directed to serve all of their CPLR 3101 (d) statements within 45 days of service of a copy of this order with notice of entry, and if any party believes that another party's CPLR 3101 (d) statement does not comply with that section's requirements, such party shall immediately upon receipt of a CPLR 3101 (d) statement take appropriate steps to secure a statement that does comply with that section of the CPLR; and it is further

ORDERED that, if any party is so advised, that party may, upon receipt of the other side's appropriate CPLR 3101 (d) statement(s), and sufficiently in advance of trial so that a full set of opposing and reply papers can be submitted before trial, move, by order to show cause, for an application in limine for a *Frye/Parker* hearing before the trial judge; and it is further

ORDERED that Alecia Golub-Evans and the New York Center For Cosmetic Dentistry's summary judgment motion is granted to the extent that the complaint is dismissed as to them only to the extent that it is based on the malpractice, under both causes of action, of Jeffrey Golub-Evans, D.D.S., but is denied to the extent that the complaint asserts claims based on Jeffrey Golub-Evans and the New York Center For Cosmetic Dentistry's alleged vicarious liability for the malpractice, under both causes of action, of Emanuel Layliev, D.D.S.; and it is further

ORDERED that Neil Zane, D.D.S.'s summary judgment motion is granted only to the extent that plaintiff's second cause of action, sounding in lack of informed consent, is dismissed; and it is further

ORDERED that the remainder of this action shall continue.

Dated: *Apr 8*, 2015

ENTER:

FILED

APR 09 2015 ⁴⁷

COUNTY CLERK'S OFFICE
NEW YORK



JOAN B. LOBIS, J.S.C.