

<b>Peirano v Winegarden</b>
2017 NY Slip Op 32283(U)
October 24, 2017
Supreme Court, New York County
Docket Number: 805143/15
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 11

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RICHARD PEIRANO,

Plaintiff

INDEX NO. 805143/15

-against-

DR ROBERT WINEGARDEN, DR. TATYIANA BERMAN,  
SOL STOLZENBERG, D.M.D., P.C., d/b/a TOOTHSAVERS,  
RAIMONE PEREZ, JERRY H. LYNN, D.D.S., and UNIVERSAL  
DENTAL,

Defendants.

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JOAN A. MADDEN, J.:

In this action seeking damages for alleged dental malpractice, defendant Sol S. Stolzenberg, D.M.D., P.C. d/b/a Toothsaunders (“Toothsaunders”) moves for an order (i) granting summary judgment dismissing the complaint against it based on the evidence in the record, or on statute of limitations grounds, or, alternatively, (ii) granting partial summary judgment dismissing the complaint against it with respect to all treatment occurring after the sale of the subject dental practice, and (iii) granting partial summary judgment dismissing the claim against it for punitive damages (motion seq. no. 002). Defendant Dr. Robert Winegarden (“Winegarden”) separately moves for summary judgment dismissing the complaint or, in the alternative, granting partial summary judgment dismissing all claims outside the applicable statute of limitations period and dismissing the claim against him for punitive damages (motion seq. 003).<sup>1</sup> Plaintiff opposes both motions, which are denied.

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<sup>1</sup>Motion sequence nos. 002 and 003 are consolidated for disposition.

## Background

This action, which was commenced on April 6, 2015, arises out of the dental care and treatment allegedly provided to plaintiff Richard Peirano (“Mr Peirano” or “plaintiff”) by the individual defendants between June 2008 and November 2013. Plaintiff’s treatment at Toothsavrs consisted of bridge work and crown repair and replacement on his upper teeth.

Plaintiff alleges that defendants departed from good and accepted standard of dental care (i) through the use of negligent diagnostic procedures; (ii) through negligent preparation of teeth and negligent design of prosthetic treatment; (iii) through the absence of any treatment plan; (iv) by permitting unlicensed technicians to diagnose and treat plaintiff; and (v) by failing to obtain informed consent.

Plaintiff testified that he first went to Toothsavrs in 2002 or 2003, for a chipped tooth, and that he saw defendant Jerry Lynn, D.D.S. (“Lynn”), who discussed putting crowns on ten upper teeth (teeth nos 4, 5, 6 X 8, 9, 10, 11, 12, 13)<sup>2</sup> for \$4,000 and plaintiff agreed to the plan (Plaintiff’s EBT at 46). Plaintiff testified that he met “Dr Bob” (referring to Winegarden) on his first visit to Toothsavrs and was examined by him (Id at 53). Plaintiff testified that placement of the ten crowns, he complained to Winegarden of “bleeding and pain,” and that the crowns were “ill-fitting” and Winegarden recommended that the ten crowns be replaced (Id at 61-62).

Plaintiff eventually agreed to have Toothsavrs replace the ten crowns, apparently sometime in 2008, and the replacement of these crowns and related work are at issue in this action. Plaintiff testified that Winegarden and Perez did the work on the same top teeth as were

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<sup>2</sup>The dental records identify the tooth numbers on entry date January 17, 2003; tooth number 7 is missing.

worked on in 2003 (teeth nos. 4,5, 6,8, 9, 10,11, 12, and 13). This work included a three-unit bridge work at teeth nos. 6 through 8 (with space at tooth no 7) and additional work on the upper left side of plaintiff's mouth (apparently referring to teeth nos. 12 through 14)<sup>3</sup> (Id at 78-80). Plaintiff did not recall when this work was done, although he testified that there was no gaps in time with respect to his treatment at Toothsavars (Id at 64). With respect to the work performed on the teeth on the upper left side of his mouth (i.e. teeth nos 12 through 14), he testified that Winegarden "ground down the two outside teeth and put of false tooth in between," and then put in a three unit bridge (Id at 80, 83). When asked whether Winegarden told him he was doing the work, plaintiff replied "not until he began and he ground down one of the two teeth" (Id at 80).

The record contains a consent form for "maxillary crowns," which was signed by plaintiff in 2008; however, plaintiff testified that he had "no idea" what he was agreeing to (Id at 88). The consent form states that plaintiff "has been informed of the reasons for the treatment/procedures , along with the expected benefits, risks, possible alternative methods of treatment, and possible consequences involved in the following: maxillary crowns." Plaintiff testified that the dental work was done by Winegarden and Perez; that he was not sure that the crowns were ever "permanent" or "final" since they were "in and out many times;" and that each visit at Toothsavars the crowns, both permanent and temporary, would come off and on, often in response to his complaints about the bite (Id at 93-97). Plaintiff also testified that "the crowns hurt, the gums were still bleeding [and there was] clicking in [his] ear when he chewed." (Id at 116). He discussed with Winegarden redoing the crowns again but Winegarden responded that

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<sup>3</sup>While plaintiff testified that the ten crowns were replaced with 13 crowns, it appears from the dental records that there was only one additional tooth involved in the work, tooth no. 14.

“we’ll see.” (Id at 117)

Plaintiff testified that he never saw a periodontist at Toothsavvers and that when he complained about bleeding gums Winegarden recommended “mouthwash and a softer toothbrush” and showed him how to brush and that these recommendations did not help with the bleeding and he told that to Winegarden (Id at 91-93). Winegarden, however, testified that plaintiff was told to see a periodontist, that plaintiff saw one on April 20, 2009 (Winegarden EBT at 49). The Toothsavvers treatment chart has an entry on April 20, 2009 by an unidentified individual (Toothsavvers’ motion, Exh. G). The entry indicates, inter alia, that plaintiff’s “gingiva (i.e. gums) are red and bulbous....crown margins are rough and irritating the gingival margin...[r]ecommend removal of crowns.” It also states that plaintiff was “going to call clinic where he has his cleanings.” Winegarden testified that plaintiff was suppose to “call the clinic where he was getting his treatment and set up an appointment [for perio treatment],” (Id at 50) Winegarden did not know if plaintiff went for such treatment but testified that [h]is tissue was a little better” and that while he did not record the improvement he would “always record bad gums” (Id).

With respect to the three unit at teeth nos. 6-8, plaintiff testified that in or about February 2013, a post/pin in the bridge and he was told by an individual (who he could not identify) at Toothsavvers that it would cost thousands of dollars to repair everything and that Toothsavvers could not just redo the post so that he went to non-party dentist Alvin Jacobs who made the repair for \$200 (Id at 118, 122-124, 126-127).<sup>4</sup> He testified that it was the only time he refused

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<sup>4</sup>While plaintiff testified that the post broke in February 2013, Toothsavvers’ records (Toothsavvers’ motion, Exh. G), show that the post broke in May 2012, and Dr. Jacobs records (Winegarden’s motion, Exh. L), show that Dr. Jacobs repaired the post in July 2012.

to pay for a proposed treatment at Toothsavvers. He also testified that Dr. Jacob's treatment was limited to the repair of the post, and that he did not examine his teeth or make any recommendations about his teeth, although he returned to Dr. Jacobs for a cleaning a few weeks later, but never returned to Dr. Jacobs again (Id at 140-143). Dr. Jacobs' medical records indicate that plaintiff was treated by Dr. Jacobs on July 11, 2012 (for an emergency which appears to be related to a post); on July 31, 2008 (for an examination and x-rays), on August 2, 2013 (for emergency), and August 8, 2013 (apparently for teeth whitening).

Plaintiff estimated that his last visit to Toothsavvers was in the spring or summer of 2013. His last visits were for adjustments of his crowns. During these visits, he would speak to Winegarden who would refer him to Perez to do the work (Id at 147). He testified that he stopped going to Toothsavvers because "they weren't doing a good job [or] doing what I [he] asked them to do" (Id at 148).

The dental records reflecting plaintiff's treatment (Toothsavvers Motion Exh M) indicate that plaintiff's first visit to Toothsavvers was on or about April 19, 2002; that he returned on a number occasions through October 3, 2003; the next record of plaintiff's treatment was approximately five years later on June 13, 2008 and reflects that plaintiff treated at Toothsavvers two more times in June of 2008, and then in March, April, May, June and July of 2009; in February, July, August, and September of 2010, in February, June, September, and December of 2011, and in April, May and June of 2012. The moving defendants maintain that September 21, 2011, was the last date that Winegarden rendered treatment to plaintiff for a chip in tooth no. 2,

and Winegarden testified that plaintiff began seeing Dr. Danzinger as of December 10, 2011<sup>5</sup> (Id at 75).

With respect to the June 28, 2012 visit, the medical records states “no Tx today (i.e. no treatment today).” Winegarden testified that he wrote the entry (Winegarden EBT at 70).

Notably, however, there is a record of an x-ray taken that day, which Winegarden testified that was probably taken “to make sure nothing changed [and] he did not want treatment [that day] because he did not want to pay any money (Id at 71). However, when asked if someone in the office would have to examine plaintiff before deciding he needed an x-ray Winegarden responded “correct” (Id at 72). The record also shows an x-ray was taken at Toothsavors on November 25, 2013. When asked if plaintiff was still a patient on November 25, 2013, Winegarden responded that he “didn’t know” and that “he did not see [plaintiff] so I can’t really talk about what happened” (Id at 76).

After plaintiff stopped treating at Toothsavors, he began treating at Columbia University Medical Center (“Columbia”)(Plaintiff EBT at 159-160). The Columbia records show that plaintiff’s first visit was on November 26, 2013 (Winegarden Motion, Exh. M). Records from Columbia regarding its July 10, 2014 consultation with plaintiff, indicate that a CBCT scan was performed and the report under the heading impression, states, *inter alia*, “1. Missing or endodontically treated teeth; 2. Apical periodontitis (i.e... acute or inflammatory lesion around the apex of the tooth root cause by bacterial invasion of pulp of tooth) , 3. Generalized moderate alveolar bone (i.e. the bone that contained in the tooth sockets) loss, 4. Degenerative changes of

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<sup>5</sup>The record shows that Dr. Danzinger, who is not a defendant in this action, extracted plaintiff’s tooth number two in April 2012.

the TMJs....” (Id). Plaintiff’s treatment at Columbia included a sinus lift, and implants inserted in his upper jaw (Id).

In his affidavit, plaintiff states that he initially went to Toothsavvers in 2002 for a chipped tooth and that although Toothsavvers maintains that he did not return to Toothsavvers between 2003 and 2008, he is “reasonably certain [he] went many times during that period as the crown were never right” (Plaintiff Aff. ¶ 2). In addition, he states that while Toothsavvers does not indicate any treatment after May 2012, he “can say with absolute certainty that [he] continued to return to Toothsavvers for dental treatment after that date” including in February 2013, after he had a bad fall and injured his teeth, and Winegarden referred him to Perez who performed the treatment (Id ¶’s 4, 5). He further states that in 2012, “they again tried to make him \$4,000. I refused to pay. I already paid twice. They agreed to continue which explains the x-rays dated June 27, 2012 and November 25, 2013” (Id ¶ 13). With respect to the x-rays, plaintiff states that he lived in New Jersey and “throughout [his] treatment with Toothsavvers, [he] never went from New Jersey to Toothsavvers in Manhattan just to have an x-ray and to receive no treatment” (Id ¶ 8). Plaintiff further states that he assumed that Winegarden ordered [the x-ray], as Perez “never ordered an x-ray” and Winegarden was the only dentist at Toothsavvers who he was dealing with relating to problems with his upper bridge (Id).

### Discussion

The first issue to be addressed by the court is whether this action, which was commenced on April 6, 2015, is barred by the applicable statute of limitations. “An action for medical [or dental] malpractice must be commenced within two years and six months of the date of accrual.” Massie v. Crawford, 78 NY2d 516, 519 (1991), citing CPLR 214-a. Moreover, “[a] claim

accrues on the date the alleged malpractice takes place.” Id (internal citation omitted). However, under the continuous treatment doctrine exception, the 2 ½-year period does not begin to run until the end of the course of treatment “when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint.” Prinz-Schwartz v. Levitan, 17 AD3d 175, 177 (1<sup>st</sup> Dept 2005); see also CPLR 214-a.<sup>6</sup> In such cases, the limitations period does not begin to run until the end of treatment. Smith v. Fields, 268 AD2d 579, 580 (2d Dept 2000). Here, if the continuous treatment doctrine is applicable, the date of plaintiff’s last treatment must be on or before October 6, 2012, which is two and a half years before the commencement of this action.

“The [continuous treatment] doctrine rests upon the belief that the best interests of a patient warrant continued treatment with an existing provider, rather than stopping treatment, as the [existing provider] not only is in a position to identify and correct his or her malpractice, but is best placed to do so.” Rudolph v. Lynn, 16 AD3d 261, 262 (1<sup>st</sup> Dept 2005), citing McDermott v. Torre, 56 NY2d 399, 408 (1982). “To invoke the doctrine, a plaintiff must establish a continuous course of treatment with a particular health care provider with respect to the condition that gives rise to the lawsuit.” Id (internal citation omitted). In this connection, “[t]he continuous treatment doctrine may be invoked where there was ‘further treatment [ ] anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during the last visit, in conformance with the periodic appointments

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<sup>6</sup>CPLR 214-a provides, in relevant part, that a medical malpractice action must be commenced within 2 ½ years from the date “of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to said act, omission or failure.”

which characterized the treatment in the immediate past.” Blaier v. Cramer, 303 AD2d 301,302 (1<sup>st</sup> Dept 2003), citing Richardson v. Orentreich, 64 NY2d 896, 898-899 (1985).

Here, plaintiff alleges malpractice in connection with Winegarden’s treatment of his upper teeth, including the crown and bridgework, the use of an unlicensed technician to perform some of this work, and the failure to treat and diagnose his need for periodontic treatment. Even assuming *arguendo* that the moving defendants met their burden of establishing that the two and a half statute of limitations period expired before the commencement of this action, plaintiff has raised a triable issue of fact as to whether continuous treatment doctrine applies to toll the limitations period based his deposition testimony, his affidavit and medical records, including those indicating that x-rays were taken at Toothsavers in June 2012 and November 2013.<sup>7</sup> Specifically, plaintiff testified and averred to a continuing course of treatment by Winegarden with respect to dental work performed on his upper teeth, which continued until at least November 2013, less than two and half years before this action was commenced in April 2015.<sup>8</sup> In addition, to the extent the moving defendants argue that certain treatment received by plaintiff was performed by other dentists at Toothsavers, such argument would not preclude the

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<sup>7</sup>To the extent that Toothsavers relies on the opinion of its expert that the action is untimely, such opinion is not controlling here as the determination of legal issues, such as applicability of the continuous treatment doctrine is the “exclusive prerogative of the court.” Williams v. New York City Transit Auth., 108 AD3d 403, 404 (1<sup>st</sup> Dept 2013).

<sup>8</sup>Contrary to Toothsavers’ position, such evidence is sufficient to provide “objective evidence” of plaintiff’s continued treatment by Winegarden, and the cases relied on by Toothsavers are factually distinguishable from the instant case, as they involved circumstances where the defendant medical provider was discharged by plaintiff (see e.g. McSheffrey v. Helou, 172 AD2d 728 (2d Dept 1991)) or discrete treatments not subject to the continuous treatment doctrine (see e.g. Farina v. Rish, 194 AD2d 642 (2d Dept 1993)).

application of the continuous treatment doctrine if it is found that plaintiff was a patient of Toothsav ers generally. See Mendrzycki v. Cricchio, 58 AD3d 171 (2d Dept 2008)(holding that where a patient treated at a group practice and the patient is considered a patient of the group as opposed to a particular physician, continuous treatment doctrine may toll the limitations period during the patients treatment by any physician in the group).

Moreover, while Toothsav ers' records show a gap in treatment, plaintiff's testimony and affidavit are sufficient to raise an issue of fact in this regard and, in any event, the purported gap in treatment appears to have occurred prior to 2008, when the complained of treatment began.<sup>9</sup> Furthermore, contrary to the moving defendants' argument, while there is evidence that plaintiff received treatment by Dr. Jacobs, including for the repair of the post in the three unit bridge (teeth nos 6 through 8) constructed and placed by Toothsav ers' dentists, such treatment does not, as a matter of law, "evince an intention to terminate" plaintiff's reliance on Toothsav ers' treatment.<sup>10</sup> Melup v. Morrissey, 3 AD3d 391, 391-392 (1<sup>st</sup> Dept 2004); See also Rudolph v. Lynn, 16 AD3d at 262-263 (discussions of plaintiff's crowns were unrelated to the cosmetic dentistry provided by Toothsav ers and therefore did not evince an intent to abandon defendant's treatment by Lynn). In this connection, plaintiff testified that he saw Dr. Jacobs for the limited purposes of replacing the post and for a cleaning, and the records from Dr. Jacobs are not dispositive in this regard. As for his treatment by Columbia, the record indicates that plaintiff did

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<sup>9</sup>Plaintiff argues that the gap in treatment in the dental records may be partially attributable to plaintiff's dental work being performed by Perez, an unlicensed technician, who did not make notes in his chart.

<sup>10</sup>Likewise, evidence that plaintiff received dental treatment from non-party dentist Steven Haber, DDS in August 2013, is not dispositive as to whether plaintiff intended to terminate treatment with Toothsav ers.

not begin to treat there until November 2013, the month the dental records show he last went to Tothsavers where he had an x-ray.

Next, with respect to whether Tothsavers may be held vicariously liable, Tothsavers has not met its burden of demonstrating as matter of law that it is not liable for the work of its treating dentists. Moreover, even if it met this burden, plaintiff has controverted this showing based on statements in his affidavit that (i) he never went to a specific dentist at Tothsavers but, instead, was treated by any dentist or technician he was assigned to, (ii) not one person or dentist told him they were independent contractors, (iii) he believed the dentists and technicians were all employees of Tothsavers, and (iv) he only paid Tothsavers. Moreover, the consent forms in the record identify the practice as "Tothsavers." Accordingly, issues of fact exist as to Tothsavers' vicarious liability based on its "agency or control" of the dentists at Tothsavers, and/or Tothsavers' "apparent or ostensible agency," of the dentists and technicians who treated plaintiff, even if they were not employed by Tothsavers. Hill v. St Clare's Hosp., 67 NY2d 72, 80 (1986); See also, Hampton v. Universal Dental, 140 AD3d 462 (1<sup>st</sup> Dept 2016)(finding issues of fact as to Tothsavers New York's vicarious liability for malpractice by Tothsavers New Jersey under a theory of ostensible agency or agency by estoppel based on evidence that plaintiff reasonably believed that the orthodontic treatment he was provided was by Tothsavers New York, even though it was performed in a satellite office in New Jersey); Chan v. Tothsavers Dental Care, Inc., 125 AD3d 712, 713 (2d Dept 2015)(denying Tothsavers' motion for summary judgment where Tothsavers failed to establish as a matter of law that it was not vicariously liable for the acts of its treating dentist); Erdorgan v. Tothsavers Dental Services, 57

AD3d 314, 315 (1<sup>st</sup> Dept 2008)(same).<sup>11</sup>

As for Toothsavers' request for summary judgment based on its argument that it sold Toothsavers to Danziger, P.C. d/b/a Universal Dental as of January 1, 2012, such request is denied as Toothsavers has not submitted sufficient evidence to demonstrate that validity of the sale.<sup>12</sup> Moreover, even assuming *arguendo* there were sufficient evidence of this sale, the sale of the practice would be insufficient to provide a basis for granting Toothsavers summary judgment, particularly as the vast majority of the complained of treatment occurred prior to the sale. In addition, for the reasons above, to the extent that Dr. Winegarden and the other dentists continued to hold themselves out as employees of Toothsavers, issues of fact exist as to Toothsavers' vicarious liability. Furthermore, while Toothsavers submits evidence that it was dissolved on March 20, 2012, such dissolution does not eliminate Toothsavers' potential liability. See Ford v. Pulmosan Safety Equipment Corp., 52 AD3d 710 (2d Dept 2008)(noting that "a

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<sup>11</sup>Contrary to Toothsavers' position, misleading actions are not a prerequisite to finding vicarious liability based on the theory of an ostensible agency or agency by estoppel. Moreover, Muslim v. Horizon Medical Group, 118 AD3d 681 (2d Dept 2014), on which Toothsavers' relies is not controlling here. In Muslim, the Appellate Division, Second Department affirmed the trial court's grant of summary judgment to the hospital in connection with treatment rendered by a pediatrician, noting that plaintiff did not "set forth facts sufficient to support the conclusion that the hospital engaged in some sort of misleading conduct." *Id* at 683. Notably, however, the court did not state that misleading conduct was a requirement to a finding of vicarious liability and, in fact, the case law is to the contrary. See Hill v. St Clare's Hosp., 67 NY2d at 80; See also, Hamptons v. Toothsavers, 140 AD3d at 462- 463.

<sup>12</sup>In support of its assertion regarding Toothsavers' ownership, Toothsavers fails to submit any documentary evidence but, instead, relies on an affidavit submitted by Dr. Stolzenberg who states that on January 1, 2012, "the dental practice was purchased and/or assumed by Lawrence R, Danziger, P.C. d/b/a Universal Dental from my P.C." In addition, Winegarden testified at his deposition that Danzinger Universal Dental owed the practice until May 2013, when he assumed its ownership.

dissolved corporation may ...be sued,” citing Business Corporation Law § 1008 )

As for Toothsavere' motion addressed to the substantive merits of the plaintiff's claims for dental malpractice, in support of its motion, Toothsavere submits the affidavit of Arnold Jutkowitz, DMD, a dentist licensed in New York State. Upon review of the relevant medical records, depositions and Bill of Particulars, Dr. Jutkowitz opines, to a reasonable degree of dental certainty that “Toothsavere did not depart from good and accepted standards of dental care in its care and treatment of plaintiff insofar as exam, diagnosis and diagnosis testing of plaintiff...[which] “were all appropriate], [and that] a CT scan was not necessary because implants were not done at Toothsavere ” (Jutkowitz Aff. ¶'s 18, 19).<sup>13</sup> He further opines that Toothsavere did not depart from good and accepted dental practice with respect to “negligently failing to diagnose or treat bone loss,” stating that x-rays taken of plaintiff's upper left area in 2016 compare to 2002 “was not relatively significant<sup>14</sup>” (Id ¶'s 32,33). He also opines that Toothsavere did not depart from good and accepted practice with respect to plaintiff's preparation, that is grinding and shaping for plaintiff's restorations, and that the teeth could not have been “over prepped” by Toothsavere since there was sufficient tooth structure for Columbia's re-prep of the teeth (Id ¶ 42). As for the crowns and bridgework, Dr. Jutkowitz states that “there is no evidence that Toothsavere departed in its crown and bridgework,” and that “plaintiff's dissatisfaction with the 2008 crowns over time could have been readily rectified by

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<sup>13</sup>While Dr. Jutkowitz discusses plaintiff's treatment in 2002, based on the bill of particulars and the plaintiff's expert affidavit, plaintiff's claims relates treatment beginning in 2008.

<sup>14</sup>Notably, however, the 2016 x-rays were taken after plaintiff received treatment at Columbia for over two years.

smoothing over the rough edges found.” (Id ¶ 45).

He further opines that plaintiff had “good perio” condition, citing alleged findings by a periodontist, Dr. Julie Hacker in April 2009 and by Columbia’s dentist in 2013, that plaintiff’s pocket depths were within normal limits (Id ¶ 47). As for allegations regarding the use of unlicensed dentists, Dr. Jutkowitz notes that plaintiff did not testify to any treatment by Lynn, and that to the extent Perez performed work on plaintiff and was a dental tech, it was appropriate for him to perform such work if supervised by a dentist. He also opines that Toothsavers’ record keeping was adequate.

With respect to causation, Dr. Jutkowitz opines that to a reasonable degree of dental certainty that “Toothsavers did not proximately cause, and was not a substantial factor in causing injury to plaintiff [and that] any need to replace restorations was caused by plaintiff’s gaps in returning [for treatment], poor oral hygiene...and [plaintiff’s] ‘saliva secretion’ condition” (Id ¶’s 61-62). He further opines that the “upper left bone loss was not caused by anything that Toothsavers did or did not do [and] Toothsavers did not ‘cause’ the need for bone grafting or sinus lift since that would d have been needed only if Toothsavers had ultimately done an implant” (Id ¶’s 63, 65). He also opines any ‘that “Columbia merely continued or completed the treatment contemplated by Toothsavers” (Id ¶’s 64).

A defendant moving for summary judgment in a dental malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing “that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged.” Roques v. Nobel, 73 AD3d 204, 206 (1st Dep’t 2010). To satisfy the burden, a defendant must present expert opinion testimony

that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. In claiming that any treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. See Joyner-Pack v. Sykes, 54 AD3d 727, 729 (2d Dep't 2008). Expert opinion which "merely recount[s] the treatment rendered, and opine[s] in a conclusory manner, that such treatment did not represent a departure from the standard of care....is insufficient." Tomeo v. Beccia, 127 AD3d 1071, 1072 (2d Dept 2015). Instead, a defense expert opinion must "elucidate the standard of care," and "explain what defendant did and why." Ocasio-Gary v. Lawrence Hosp., 69 AD3d 403, 404 (1st Dep't 2010), quoting Wasserman v. Carella, 307 AD2d 225, 226 (1st Dep't 2003)).

Here, Toothsavers' expert affidavit fails to meet the above standard insofar as certain of the expert's opinions are wholly unsupported by the specific facts in the record. For instance, while Toothsavers' expert states that Toothsavers did not depart from good and acceptable standards of dental care with respect to plaintiff's crowns and bridgework, he provides no factual basis for his opinion. In any event, to the extent Toothsavers met its burden, plaintiff has sufficiently controverted this showing.

The party opposing the motion is required to "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician (or dentist) that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact.... General allegations of [dental] malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion. Alvarez v. Prospect Hosp., 68 NY2d 320 at 324-325.

In opposition, plaintiff submits the expert affidavit of Howard Marshall, DDS, a dentist

licensed to practice in New York, who holds a post-graduate certificate in periodontics. Upon reviewing the deposition testimony and the treatment chart of Columbia, Toothsavvers, Dr. Jacobs and the x-rays and treatment rendered at Toothsavvers, Dr. Marshall opines, to a reasonable degree of dental certainty as follows. Marshall opines that “[t]he diagnostic procedures were negligent; the dentists at Toothsavvers failed to do a clinical periodontic examination and failed to periodontically probe, record depths of the pockets [which is], critical to treatment planning.; failed to take appropriate x-rays and evaluate the amount of bone support or refer [plaintiff] to a periodontist to evaluate the need for periodontic treatment and to refer [plaintiff] for a CAT Scan and implant evaluation before developing a treatment” (Marshall Aff. ¶ 9). As for causation, Dr. Marshall opines that [the above failures] led to “[a] haphazard, bizarre negligent treatment without any treatment plan resulting in continued failures, continued bleeding, temporomandibular joint problems, loss of bone support [and] loss of teeth” (Id). In connection with the periodontic treatment, he notes that “while the chart refers to treatment the only periodontic treatment was prescribing peridex [which is] clearly negligent periodontic treatment resulting in insult and injury to the tissues, pin, gingival [gum] swelling and bleeding and loss of bone” (¶ 11).

Dr. Marshall also opines that there was negligent prosthetic treatment which was “a complete failure” and specifically that “crowns and posts broke...[and that] the crowns [were] ill fitting as evidenced on x-rays,” and that this negligence “caus[ed] bleeding gums, destruction of bone and loss of teeth [and that] the [Toothsavvers] treatment chart admit[s] negligence stating there are sharp edges on the prosthesis causing injury to the gingiva [i.e. gums].” He further states that plaintiff’s treatment by Perez, an unlicensed technician “is illegal [and] resulted in ill

fitting broken restorations throughout treatment, continued pain and bleeding gums.”

Based on plaintiff’s expert affidavit, the court finds that plaintiff has raised a triable issue of fact as to whether as to plaintiff’s treatment at Toothsavvers committed malpractice (i) through the use of negligent diagnostic procedures, including the failure properly evaluate plaintiff’s condition, including his periodontic condition and bone support ; (ii) through negligent preparation of teeth and negligent design and of prosthetic treatment, and (iii) through its illegal use of an unlicensed technician to perform dental work. Moreover, while Marshall’s affidavit does not state that defendants departed from the applicable standard of care, as he opines that defendants were negligent and that such negligence proximately caused plaintiff’s injuries, and his opinion is based on the factual record, it is sufficient to raise a triable issue of fact. See Menzel v. Plotnick, 202 AD2d 558, 559 (2d Dept 1994); see also, Somoza v. St. Vincent’s Hosp. and Medical Center of New York, 192 AD2d 429, 432 (1<sup>st</sup> Dept 1993)(noting that “particular terminology is not necessary [in expert’s affidavit] where substance of affidavit is sufficient to raise triable issue of fact”).

With respect to causation, the opinion of plaintiff’s expert is sufficient to demonstrate “the requisite nexus between the malpractice allegedly committed and the harm suffered” so as to raise an issue of fact as to causation for the jury. See Dallas-Stephenson v. Waisman, 39 AD3d 303,307 (1st Dep’t 2007); See generally, Deridiarian v. Felix Contr. Corp., 51 NY2d 308, 315 (1980) (noting that the issue of proximate cause is generally an issue for the jury). In particular, plaintiff has raised issues of fact as to causation based on the opinion that the failure to perform proper diagnostic procedures before commencing work on plaintiff’s upper teeth, were substantial factors in causing plaintiff’s injuries. In addition, with respect to the departures

relating to ill fitting crown and bridgework, and Toothsav ers' use of an unlicensed technician to performing certain of plaintiff's dental work, plaintiff's expert sufficiently alleges that these departure was a proximate cause of plaintiff's injuries.<sup>15</sup>

The next issues concern plaintiff's claim of lack of informed consent. "Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable ... dental ... practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation." Public Health Law § 2805-d(1).

A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that a plaintiff was informed of any foreseeable risks, benefits, or alternatives of the treatment rendered. Koi Hou Chan v. Yeung, 66 AD3d 642, 643 (2d Dept 2009); see also, Smith v. Cattani, 2 AD3d 259, 260 (1<sup>st</sup> Dept 2003)(defendant entitled to summary judgment where "documentary evidence establishes that before each of plaintiff's seven surgeries, defendant notified him of the reasonably foreseeable risks and benefits of the surgery, as well as alternatives to the proposed treatment").

Defendants have not met this burden. While Toothsav ers' expert opines that the dentists at Toothsav ers "explained the procedures, risks, and alternatives to the plaintiff-patient," such opinion is insufficient, as it is unsupported by the record, which includes a generic consent form used by Toothsav ers, and plaintiff's deposition testimony that there was no discussion as his

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<sup>15</sup>While plaintiff alleges a departure based on a lack of a treatment plan, his expert does not adequately allege that the absence of such a plan was a proximate cause of plaintiff's injuries.

treatment or the alternatives to such treatment.<sup>16</sup> See Chan v. Toothsavers Dental Care, Inc., 125 AD3d at 714.

Finally, the moving defendants are not entitled to summary judgment dismissing plaintiff's claim for punitive damages, as an issue of fact exists as to whether punitive damages are appropriate in light of evidence that Toothsavers allowed Perez, who was not licensed as a dentist, to perform various dental procedures on plaintiff. See Garber v. Lynn, 79 AD3d 401, 403 (1<sup>st</sup> Dept 2010)(question of punitive damages was properly submitted to jury based on evidence that Toothsavers allowed "the unlicensed Perez to place, adjust and remove plaintiff's temporary bridge"). In this connection, the First Department has written "[t]he unlicensed practice of dentistry is a crime, and there was ample evidence from which a jury could conclude that Toothsavers was callous in its indifference to such illegality by having Perez repeatedly conduct these complicated procedures. By having Perez fabricate, place and adjust plaintiff's temporary bridge, Toothsavers was engaging in exactly the sort of willful or wanton negligence or recklessness that evinces a gross indifference to patient care, warranting deterrence, and supporting submission of the issue of punitive damages to the jury." Id. Accordingly, that part of the moving defendants' seeking to dismiss the request for punitive damages is denied.

### Conclusion

In view of the above, it is

ORDERED that the motions for summary judgment by Winegarden and Toothsavers are

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<sup>16</sup>In addition, plaintiff's expert opines that it is "not clear there was any discussion as there was no treatment plan [including] for treating the periodontium (the tissues surrounding and supporting the teeth)" (Marshall Aff. ¶ 13). In addition, he states "there was no discussion about replacing missing teeth with implants and no discussion of the lack of bone support [or] treatment plan." (Id).

denied, except insofar as the court finds that the alleged departure relating to the absence of a treatment plan does not provide a basis for a claim of dental malpractice against defendants; and it is further

ORDERED that the parties shall appear on December 14, 2017, at 11:20 am for a pre-trial conference in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: October 24, 2017

  
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HON. JOAN A. MADDEN  
J.S.C.