

Fanning v Hudson Val. Oral Surgery, PLLC
2021 NY Slip Op 33343(U)
July 26, 2021
Supreme Court, Westchester County
Docket Number: Index No. 59863/2019
Judge: Linda S. Jamieson
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To commence the statutory time period for appeal of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp _____ Dec x Seq. No. 3 Type SJ

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X

JULIA FANNING,

Index No. 59863/2019

Plaintiff,

DECISION AND ORDER

-against-

HUDSON VALLEY ORAL SURGERY, PLLC and
RANDALL G. WISTON, D.M.D.,

Defendants.

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The following papers numbered 1 to 8 were read on this motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmations and Exhibits	1
Memorandum of Law	2
Statement of Material Facts	3
Affidavits, Affirmation and Exhibits in Opposition	4
Memorandum of Law and Exhibit in Opposition	5
Affirmation in Reply	6

Defendants bring their motion for summary judgment seeking to dismiss this dental malpractice action arising out of defendants' treatment of the then-19 year old plaintiff.

Many of the facts are in dispute. What is not is in dispute is that plaintiff went, by herself, in January 2018 to see defendant after having been referred by her dentist because her wisdom teeth were impacted. Defendant testified at his

deposition that the bottom wisdom teeth were angled towards the other teeth. The parties dispute whether plaintiff had any discomfort at that time, with plaintiff stating that she had not had any pain. The parties also dispute sharply the level of informed consent, if any, that defendant gave plaintiff at that visit.

What is not in dispute is that plaintiff returned on March 5, 2018, to have these wisdom teeth removed. The parties again dispute the level of informed consent that defendant gave plaintiff and her mother. Again, it is not in dispute that plaintiff signed an informed consent form. This form had various potential risks listed, and defendant checked which ones applied to this particular procedure. It included a line, which was checked, and which plaintiff initialed, stating that "Injury to the nerve underlying the teeth resulting in numbness or tingling of the lip, chin, gums, cheek, teeth and/or tongue on the operated side; this may persist for several weeks, months or, in remote instances, permanently." There is no dispute that the risk of loss of taste is not listed on the form. Plaintiff initialed next to each checked line. Plaintiff also signed a statement indicating that she understood the disclosure form.

Thereafter, defendant performed the oral surgery. Although the surgery itself was unremarkable, plaintiff called defendant afterwards to complain of certain numbness on the right side of

her tongue. Defendant told plaintiff to return in May 2018, when she had finished her semester of college. In May 2018, plaintiff saw defendant again. Plaintiff testified at her deposition that she told defendant that she could not taste on the right side of her tongue, and that the numbness was still there. She then saw defendant again in July 2018, at which point defendant gave her a referral to a microsurgeon. Plaintiff instead saw a different microsurgeon, who treated her.

The complaint contains three causes of action: for malpractice, lack of informed consent, and common law negligence, based on defendant's alleged failure to reveal findings to plaintiff, as well as his alleged failure "to ask basic questions about her taste and about her numbness;" and his alleged failure "to test her ability to taste and adequately test her numbness."

Analysis

"In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. Summary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues. Generally, the elements of a cause of action sounding in negligence are: (1) the existence of a duty on the

defendant's part as to the plaintiff; (2) a breach of this duty; and (3) an injury to the plaintiff as a result thereof. In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries." *Stukas v. Streiter*, 83 A.D.3d 18, 22-23, 918 N.Y.S.2d 176, 180 (2d Dept. 2011).

Here, defendants have established their prima facie burden. *Keesler v. Small*, 140 A.D.3d 1021, 1023, 35 N.Y.S.3d 356, 359 (2d Dept. 2016) ("In an action sounding in medical malpractice, a defendant moving for summary judgment must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the patient's injuries."). Their expert, Dr. Linsky,¹ establishes,

¹Plaintiff attempts to persuade the Court that Dr. Linsky is not an appropriate expert because he did not "refer to his personal experience, studies, or literature to support his opinions" and that he "failed to specifically prove that he possesses the training, education, knowledge or experience to render reliable opinions in support of defendants' motion for summary judgment" since he did not detail his experience with lower impacted wisdom teeth. The Court disagrees. Not only does he state in his affirmation that he is "fully familiar with the dental/oral and maxillofacial surgical procedures at issue in this case," but Dr. Linsky - who is not only a dental surgeon, but also a medical doctor - also states that he "performed residency training in general surgery and oral and maxillofacial surgery at Mount Sinai Hospital," is "board-certified in oral and maxillofacial surgery," and has "been on the surgical and teaching staffs of Mount Sinai Hospital" and "practices oral and maxillofacial surgery in the State of New York." Plaintiff's expert does not contend that removing impacted lower wisdom teeth is outside the bailiwick of a board-certified oral and maxillofacial surgeon.

prima facie, that defendants "acted well within the standard of care throughout the treatment of the plaintiff. The defendants did a proper work-up and evaluation, including proper use of radiographs, the defendants properly obtained informed consent from the plaintiff prior to the subject extractions of her lower wisdom teeth; the defendants properly performed the extractions of the two lower jaw wisdom teeth; and the post-operative management, including the making of a timely referral to a nerve repair specialist, was proper."

With respect to the claim for lack of informed consent, Dr. Linsky states that defendants did provide plaintiff with a proper informed consent because it provided her "with information about the proposed procedure(s), the benefits of the procedure(s), the reasonably foreseeable risks, and viable alternatives, if any. There is no requirement for any written document, signed or not, associated with this process. However, a written form signed by the patient (and perhaps the doctor and/or other witness) serves as an objective memorialization that the informed consent process took place."

"Once this showing has been made, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the defendant's prima facie showing, but only as to those elements on which the defendant met the prima facie burden." *Uchitel v.*

Fleischer, 137 A.D.3d 1111, 1112, 27 N.Y.S.3d 668, 669 (2d Dept. 2016). Plaintiff's expert states that defendants committed malpractice "by having a treatment plan that required the removal of Julia Fanning's lower wisdom teeth when Julia was not in pain, there was no obvious disease process in the lower wisdom teeth, and . . . [it] was not an emergency." The expert also takes issue with the fact that defendant did not do a three-dimensional x-ray, as well as the way in which he performed the procedure, stating that "A surgeon must always take steps to avoid and prevent contact with the possible locations of the lingual nerve." The expert also takes issue with, among other things, the lack of informed consent, because the form did not mention that there was a one to three percent chance of permanent nerve damage and entirely omits loss of taste as a potential side effect. The expert also finds fault with the way in which defendants gave plaintiff the purported informed consent. There are other allegations of malpractice, which the Court need not recount.

As the Second Department has held, "That the experts disagreed presented a credibility battle between the parties' experts, and issues of credibility are properly left to a jury for its resolution." *B.G. v. Cabbad*, 172 A.D.3d 686, 688, 99 N.Y.S.3d 391, 393 (2d Dept. 2019). It is not for the Court to decide which of the experts is correct. "Summary judgment is not

appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." *Sandmann v. Shapiro*, 53 A.D.3d 537, 538, 861 N.Y.S.2d 760, 761 (2d Dept. 2008). Accordingly, the Court denies the motion for summary judgment on the liability and informed consent causes of action.

With respect to the claim for negligence, plaintiff contends that defendants' failure to "communicate significant findings about the damage he caused to her right lingual nerve and right chorda tympani" is an appropriate basis for negligence. The cases that she cites in support of this proposition are inapposite, however, because in both of them, the negligence at issue was the failure of the non-treating doctor - with whom there was no doctor-patient relationship - to communicate test results to the patient or the patient's treating doctor. That is not the case here.

The Second Department has explained that "the distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts. Contrary to the plaintiffs' assertion, a lay jury would not be able to assess whether the manipulations performed on the plaintiff by Dr. Zolan were proper and necessary

under the circumstances without the help of expert orthopedic witnesses." *Evangelista v. Zolan*, 247 A.D.2d 508, 509, 669 N.Y.S.2d 325, 326 (2d Dept. 1998). Stated differently, "The critical question in determining whether an action sounds in medical malpractice or simple negligence is the nature of the duty to the plaintiff which the defendant is alleged to have breached. When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence." *Wesolowski v. St. Francis Hosp.*, 175 A.D.3d 1461, 1463, 108 N.Y.S.3d 180, 182 (2d Dept. 2019).

In this case, plaintiff contends that the negligence was defendants' failure to communicate "significant findings" to plaintiff. Putting aside the fact that defendants disagree that there were "significant findings" to communicate, the reality is that the failure alleged here was not a simple communication omission, something that could have been undertaken by, for example, a secretary or high school student intern. Instead, what plaintiff alleges is that defendant realized that he had flubbed the surgical procedure, and then failed to inform plaintiff thereof. This alleged "duty arises from the physician-patient relationship or is substantially related to medical treatment," and thus squarely fits in the definition of

medical malpractice. The Court thus dismisses the claim for negligence.

The parties are directed to appear for a Settlement Conference in the Settlement Conference Part, at a time to be scheduled by that Part.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
July 26, 2021



HON. LINDA S. JAMIESON
Justice of the Supreme Court

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