

<b>Hopkins v Columbia Dental Assoc., P.C.</b>
2021 NY Slip Op 33554(U)
May 21, 2021
Supreme Court, Columbia County
Docket Number: Index No. E012019014130
Judge: Henry F. Zwack
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF COLUMBIA

LYNELLE HOPKINS,

Plaintiff,

-against-

COLUMBIA DENTAL ASSOCIATES, P.C.,  
and VITALIYA PHILLIPS, DDS,

Defendants.

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All Purpose Term  
Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding  
Index No. E012019014130

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**DECISION/ORDER****Zwack, J.:**

In this action alleging dental malpractice, the defendant Columbia Dental Associates, P.C. ("Columbia Dental") moves for partial summary judgment ("Motion #1"). The defendant Vitaliya Phillips, DDS ("Dr. Phillips") cross moves also for partial summary judgment ("Motion #2"). The plaintiff Lynelle Hopkins ("Hopkins") opposes.

In Motion #1, Columbia Dental seeks partial summary judgment and/or dismissal of the claim of malpractice and/or negligence against it that is not based on vicarious liability for the acts or omissions of Dr. Phillips, including any claim, for "negligent supervision," and dismissal of Hopkins' Second Cause of Action alleging lack of informed consent; and for an order pursuant to CPLR 3126 precluding Hopkins from offering any expert proof at trial regarding the alleged independent (non-vicarious) malpractice or negligence of Columbia Dental, including any claim for "negligent supervision" or that such "negligent supervision" was a proximate cause of Hopkins requiring 16 crowns, or, in the alternative, for an Order pursuant to CPLR 3124 compelling Hopkins to further supplement her expert disclosure regarding any basis or grounds for the opinion that Columbia Dental "negligently supervised" Dr. Phillips, or the

opinion that such alleged “negligent supervision” proximately caused Hopkins to require 16 crowns.

In Motion #2, Dr. Phillips cross-moves in support of and joinder with Motion #1, and for an Order pursuant to CPLR 3212 granting partial summary judgment dismissing Hopkins’ Second Cause of Action based upon the lack of informed consent, and dismissal of any claim for work billed but not done.

According to the Complaint, Hopkins was a patient of Columbia Dental beginning August 2013 through April of 2018, and received negligent dental care, treatment, and services from its employees and in particular Dr. Phillips. As a result of this treatment, Hopkins suffered personal injuries, pain, discomfort and suffering and /or aggravation of injuries and conditions, including mental anguish. The Complaint alleges negligence and dental malpractice, lack of informed consent, negligent supervision, and vicarious liability.

According to the facts — as stated by the parties and also determined by the Court’s own review of the record — Columbia Dental is owned by Dr. Miriam Schneider (“Dr. Schneider”). Columbia Dental hired Dr. Phillips on August 1, 2012 as an associate and after Dr. Phillips completed her residency at St. Peter’s Hospital Dental Clinic. When hired by Columbia

Dental, Dr. Phillips was licensed by New York State — which according to Dr. Schneider meant that she was trained, competent and qualified to practice dentistry in the State, and even open her own practice and examine, diagnose and treat patients without supervision by another dentist. During the beginning of her employment at Columbia Dental, Dr. Phillips performed routine cleanings and Dr. Schneider reviewed some treatment notes/charts and participated in differential diagnoses for some cases. Hopkins became a patient of Columbia Dental on August 14, 2013, and before that had not seen a dentist for over three years. From February 2014 until October 2016 Hopkins did not see any dentist as she had cancelled her appointments with Columbia Dental. Dr. Phillips was the only *dentist* who treated Hopkins while she was a patient at Columbia Dental — however, cleanings and x-rays were performed on Hopkins by other dental professionals in the Columbia Dental practice. Dr. Schneider received no complaints regarding Dr. Phillips until after Hopkins left Columbia Dental and began treating with a new dentist, Dr. Christopher Lyons (“Dr. Lyons”). Dr. Phillips left the Columbia Dental practice in June 2018 after a disagreement with Dr. Schneider about practice policies, and also because she was not planning on renewing her contract with Columbia Dental anyway when it was up that September. Dr. Phillips treated

Hopkins teeth #2, #11, #13, #14,#15,#18, #19, #20 and #31. Hopkins remembers nothing of her visits at Columbia Dental or her interactions with Dr. Phillips — with the exception only of her last visit to Columbia Dental, which occurred on April 14, 2018.

Beginning on May 1, 2018, and after her last visit to Columbia Dental, Hopkins began treating with Dr. Lyons. Hopkins' dental care was covered by dental insurance provided by Delta Dental. Delta Dental and Dr. Lyon's office provided a ledger of the billings and what was paid during his July 30, 2020 examination before trial. Dr. Lyons testified that Hopkins' dental crowns were not paid for in full and that her dental insurance had a yearly limit for reimbursement, and he completed 16 crowns in two years. On Hopkins' second visit to Dr. Lyons, he noted rampant decay resulting from poor work and poor hygiene. Dr. Lyons called Dr. Schneider to report that her associate had billed two teeth as four surface fillings (which he said only two had been done) and had done no work on another tooth, tooth #31. Dr. Lyons did concede that there was in fact work done on tooth #31, and that the notations of what were done could have been a billing error. Dr. Lyons also stated that if a filling he did touched another tooth surface, then he billed for two surfaces. Dr. Lyons testified that because of the rampant decay, he did not have a

treatment plan, and his plan was to correct the worst and work from there. In all, he performed 16 crowns, at the patient's request for crowns so that all her teeth were uniform looking. In his examination before trial testimony, he did not attribute the need for the crowns and the overall dental decay to Dr. Phillips, who he stated may not have had enough time before Hopkins left Columbia Dental to perform all the necessary work. Dr. Lyons was adamant that Dr. Phillips did negligent work on only three of Plaintiff's teeth, #31, #14 and #15, which were incorrectly billed.<sup>11</sup> Dr. Lyons also clarified that he gives patients the option of a large filling or a crown on some teeth, and #14 had a large filling — which was Hopkins only tooth he treated that required a root canal. As to teeth #2, 4, 5, 12, 13, 18, 19, 20, 28, 29 and 30, which he crowned, Dr. Lyons testified that he was not saying those were negligently done by Dr. Phillips, he had no opinion on what she saw or did with those teeth, and any negligent work was done by Hopkins' prior dentists (Dr. Gallivan or Hudson Valley Dental) (Lyons transcript pgs.46-47).

For the reasons that follow, the Court grants the relief sought in both Motion #1 and Motion #2.

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<sup>11</sup>At the time of his deposition, Dr. Lyons testified that he had not be hired as Plaintiff's expert. He has since been identified as Plaintiff's expert for trial.

Summary judgment is a drastic remedy which should not be granted unless it is clear that there are no triable issues of fact (*Andre v Pomeroy*, 35 NY2d 361, 364[1974], and the court's focus should be on issue identification rather than issue determination (*Sternbach v Cornell University*, 162 AD2d 923 [3d Dept 1990]). [T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact"(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]. Only once the movant has satisfied its entitlement to judgment as a matter of law — by affirmatively demonstrating the merits of its claim (*Velasquez v Gomez*, 44 AD3d 649, 650-651 [3d Dept 2007]) — does the burden then shift to the opponent of the motion to establish, by admissible proof, the existence of a triable issue of fact (*Lockwood v Layton*, 79 AD2d 1342, 1342-1343 [3d Dept 2010]). The Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable doubt, and determine whether there is any triable issue of fact outstanding (*Matter of Suffolk DSS v. James M.*, 83 NY2d 178; *Boyce v. Vasquez*, 249 AD2d 724 [3<sup>rd</sup> Dept., 1998]). Simply stated, the Court must deny summary

judgment “without making any credibility determinations...if there is any doubt as to whether a material factual issue exists or if such an issue is even arguable” (*Black v Kohl’s Dept. Stores, Inc.*, 80 AD3d 958, 959 [3d Dept 2011]).

“In a dental malpractice action, the requisite elements of proof are a deviation or departure from accepted standards of dental practice, and that such departure was a proximate cause of the plaintiff’s injuries...(and a defendant moving for summary judgment has the initial burden of establishing that he or she did not depart from good and accepted practice, or if there was such a departure, that it was not a proximate cause of the plaintiff’s injuries...(and to) sustain this burden, the defendant must address and rebut any specific allegations of malpractice as set forth in the plaintiff’s bill of particulars. To defeat summary judgment, the nonmoving party need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party’s prima facie showing” (*Nelson v Lighter*, 179 AD3d 933, 934 [2d Dept 2020], internal quotations and citations omitted).

A plaintiff’s “mere conclusory allegations of malpractice, unsupported by competent evidence tending to establish the elements of the claim at issue, are insufficient to defeat summary judgment...(and in) order to not

to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying specifically cited evidence in the record" (*Many v Lossef*, 190 Ad3d 721, 722 [2d Dept 2021], internal quotations and citations omitted). Stated differently, merely submitting an expert affidavit to rebut a prima facie showing does not raise a question of fact for the plaintiff where the affidavit is "generalized, conclusory and insufficient to establish the elements of ... (dental) malpractice or raise a question of fact on her claim that ... (the defendant) deviated from accepted ...(dental) practice in treating her, thereby injuring her" (*Snyder v Simon*, 49 AD3d 954, 956 [3d Dept 2008], citations omitted).

"Lack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence" (*Xiao Yan Ye v Din Lam*, 191 AD3d 827, 829 [2d Dept 2021]). Here, Hopkins must make a showing that the defendants failed to inform her of the "reasonably foreseeable risks and benefits associated with the treatment, the alternatives thereto, that a reasonable (dentist) would have disclosed under similar circumstances, (and) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, (and) that the lack of informed consent is

a proximate cause of the injury (*Xiao*, at 929; (*Shussheim v Barazani*, 136 AD3d 787, 789 [2d Dept 2016])).

On this record, Columbia Dental has established its prima facie entitlement to summary judgment on the issue of lack of informed consent. Here, the Court notes the very little testimony on this issue, and that all three dentists testified that a patient is examined and then advised of the proposed procedures. Dr. Phillips testified that she explained the treatment she proposed to Hopkins, and it was her practice to perform the least invasive measure possible to avoid tooth loss. Dr. Schneider's affidavit addresses what informed consent means in the dental setting, and that "the standard of care does not require that a dentist tell patient the consequences of negligent or improper treatment. The standard of care presumes proper performance of treatment and requires that the dentist inform the patient of the risks against the potential benefits of treatment."

Faced with a prima facie showing that Hopkins was advised of her treatment options and the benefits and risks, in opposition she simply failed to set forth proof in evidentiary form raising a question of fact on this issue. Particularly, Hopkins' expert, Dr. Lyons, in his expert affidavit directly contradicts his own deposition testimony (and also the expert disclosure). However viewed expert opinion "must be based on the facts in

the record or personally known to the witness” (*Hambusch v New York City Tr. Auth.*, 63 NY2d 723, 726 [1984], quotation and citations omitted). At his deposition, Dr. Lyons identified three teeth he attributed to Dr. Phillip’s negligence. He attributed the overall poor condition of Hopkins’s mouth to her treatment by previous dentists, as well as poor oral hygiene over the course of years, and admitted that he had not reviewed her previous dental records prior to her treatment at Columbia Dental. Dr. Lyons also noted at his deposition that it was likely that Columbia Dental did not have enough time to fix all of Hopkins’s issues before she left the practice. In his expert affidavit, however, he opines that “Defendant’s independent and collective failure to diagnose Plaintiff’s obvious dental conditions, fraudulently billing her for work that was not performed and then what work was done was performed being negligently done is a gross deviation from the general standard of care we as dentists afford our patients” and “that the dental work performed by the Defendants was very poor and contributed, if not was the sole reason, for the rampant decay that consumed her mouth.” An affidavit from an expert which contradicts his prior deposition testimony, and which was obviously prepared in support of litigation is insufficient to defeat a motion for summary judgment (*Matos v Cheftiz*, 126 AD3d 536, 537 [1<sup>st</sup> Dept. 2015]). This finding is solidified by

Dr. Lyons own admission at the time of his deposition that he had not been obtained as an expert and did not know why he had been called to testify.

The Court also disregards Dr. Lyons after-the-fact concerns that Columbia Dental's chart contained no "notation" that a treatment plan was prepared and therefore consent was not obtained — particularly as Columbia Dental's chart reveals dental x-rays were obtained, areas where work needed to be done were identified, teeth to "watch" were noted, and follow-up appointments scheduled. Hopkins remembers none of her treatment with Dr. Phillips, while her patient chart contains sufficient evidence to demonstrate that there was a treatment plan for her teeth and she was informed of that plan. Given that Hopkins has no recall of any of her treatment, and disregarding Dr. Lyons affidavit, Hopkins has failed to raise a question of fact as to lack of informed consent. Hopkins is unable to say that Dr. Phillips failed to inform her of the reasonably foreseeable risks and benefits associated with the treatment, and the alternatives and that she would not have undergone the treatment if she had been informed, or that the lack of informed consent is the proximate cause of the injury.

To state a cause of action for negligent supervision, a necessary element is that the employer knew or should have known, had it conducted

an adequate hiring procedure, of the employees's propensity for conduct which caused the injury (*Doe v Chenango Valley Central School*, 92 AD3d 1016 [3d Dept 2012]; *Earnest L. v. Charlton School*, 30 AD3d 649 [3d Dept. 2006]). Dismissal of a negligent supervision claim is required if the actions complained of fall within the scope of the defendant's employment (*Segal v St. John's University*, 69 AD3d 702 [2<sup>nd</sup> Dept., 2010]).

Here, Columbia has also established its prima facie entitlement to summary judgment on the issue of negligent supervision and negligence/malpractice. Clearly, Dr. Phillips was an employee of Columbia Dental, precluding the theory of negligent supervision. Further, Dr. Schneider's testimony, as well as her affidavit in support of the motion, that Plaintiff was qualified to practice dental medicine after the completion of her residency at St. Peter's was un rebutted. According to both Drs. Schneider and Phillips, no one ever complained about Dr. Phillips during the six years she worked at Columbia Dental. While Dr. Schneider reviewed charts when Hopkins initially began working for Columbia Dental, it was not on any systematic basis and did not involve all of Dr. Phillips' charts. Albeit Hopkins attempts to raise an issue that Dr. Schneider had not properly vetted Dr. Phillips (or even seen her dental license prior to hiring her) or that she actively supervised Phillips work on a daily basis,

this is simply conjecture and hope, not substantiated by the type of proof in evidentiary form raising a question of fact. Again, Dr. Lyons after-the-fact affidavit in which he avers, as the owner of a dental practice, that he would ensure he is properly billing his patients clearly denotes an effort to avoid his own deposition testimony. At his deposition, he testified that whoever does the work in his office fills out the chart — its either him or the hygienist — and gives it to the billing manager. This is the same manner as billing is done at Columbia Dental.

A determination that a physician is guilty of fraud requires proof of either intentional misrepresentation or concealment of a known fact with the specific intent to mislead (*Prado v. Novello*, 301 AD2d 692 [3d Dept 2003]). The Amended Bill of Particulars describes the negligence/malpractice in this action as including “fraudulent billing” which is “not good and accepted dental practice” and “contributed, if not being the sole reason, for the rampant decay that consumed her mouth.” Dr. Phillips testified that she learned at a CLE that any surface touched by a filling could be billed for, and that her billing was not improper. In his deposition testimony, Dr. Lyons related that if a filling touches another surface, he bills for the additional surface. Dr. Phillips also testified filling #14 was a large filling, and as such it could eventually require a root canal

or crown. She did fill tooth #31 on February 18, 2014. Phillips' testimony created a prima facie entitlement to summary judgment on the issue of fraudulent billing, and it became incumbent upon Hopkins to produce proof in documentary form that would raise not only a question of fact that this practice was fraud, but that this fraud was the proximate cause of Hopkins' injuries in those three teeth. At his examination before trial, Dr. Lyons testified that tooth #31, a tooth he initially identified as being billed for "but no work was done" – was in fact worked on. His affidavit describes how he had to *do repair work* on tooth #31. Further, after reviewing Columbia Dental's x-rays of Hopkins, Dr. Lyons concluded that two surfaces were filled, and that the billing could have been in error. Other than mere speculation and conclusory statements, Hopkins has simply failed to establish that the billing was fraud, intentionally misleading, or the proximate cause of the problems encountered with teeth #31, 14, and 15.<sup>2</sup>

Given the above, the motions for further expert disclosure are academic.

Accordingly, it is hereby:

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<sup>2</sup>Columbia Dental's counsel submitted in Reply the results of the Office of Professional Discipline's investigation of Dr. Phillips, which found no impropriety.

**ORDERED**, that any claim of the plaintiff as against the defendant Columbia Dental Associates, PC, for malpractice or negligence that is not based upon vicarious liability, including any claim for “negligent supervision,” is dismissed, and it is further

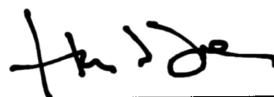
**ORDERED**, that the plaintiff’s second cause of action for lack of informed consent is dismissed, and it is further

**ORDERED**, that any claims of the plaintiff for negligent supervision against the defendant Columbia Dental Associates, PC are dismissed, and it is further

**ORDERED**, that all of the plaintiff’s claims based upon fraudulent billing, or for work billed for but not done, are dismissed.

This constitutes the Decision and Order of the Court. This original Decision and Order is filed by the Court onto NYSCEF, which shall constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: May 21, 2021  
Troy, New York



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Henry F. Zwack  
Acting Supreme Court Justice

Papers Considered, as filed on NYSCEF:

1. Documents #8 through #29; #31;
2. Documents #32 through #34;
3. Documents #38 through #62;
4. Documents #63 through #64;
5. Documents #65 through #68.