SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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A. MANNY ALICANDRO,

Plaintiff,

- v -

ROBERT CONVISSAR, D.D.S., and CONVISSAR & GOLDSTEIN DENTAL CARE, LLP,

Defendants.

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INDEX NO. 805224/2022

MOTION DATE 10/10/2025

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95

were read on this motion to/for SUMMARY JUDGMENT.

In this action to recover damages for dental malpractice based on alleged departures from good and accepted practice and lack of informed consent, the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the motion. The motion is granted only to the extent that the defendants are awarded summary judgment dismissing so much of the lack of informed consent cause of action as was premised upon the defendants' alleged failure timely to diagnose the plaintiff with an infection or an abscess. The motion is otherwise denied.

The crux of the plaintiff's claim is that, between March 2, 2021 and May 28, 2021, while he was under the care of the defendant dentist Robert Convissar, D.D.S, and his professional limited liability partnership, Convissar & Goldstein Dental Care, LLP (the LLP), Convissar negligently treated one of the plaintiff's teeth in preparation for the replacement of a crown, but either failed to observe or caused an abscess to develop in the gums under that tooth, causing severe pain and the need for further treatment to address the abscess and rectify the problem.

In his complaint, the plaintiff alleged that he first presented to the defendants for dental services on March 2, 2021 to discuss the replacement of two crowns, including one over tooth #31, a bottom back right molar, and that, during this appointment, Convissar took x-rays of his mouth and teeth, and determined that only tooth #31 required a crown replacement. He asserted that Convissar informed the plaintiff that the preparatory work would be performed that same day. According to the plaintiff, to replace the crown on that tooth, Convissar explained that he had to first drill into the tooth and remove the inlay that previously had been placed on the tooth. The plaintiff asserted that Convissar did so on that day, instructing him to return approximately two weeks later to complete the crown installation.

The plaintiff also averred in his complaint that he had a documented, pre-existing sensitivity to epinephrine and, therefore, was typically administered Novocain as an anesthetic during dental procedures, which he characterized as a "notably weaker substitute." He asserted that, consequently, when he returned to Convissar for the completion of the crown installation, he required multiple Novocain injections to anesthetize the tooth in an effective manner, but that, despite the administration those injections, he nonetheless experienced a great deal of pain throughout the entirety of the procedure, particularly when Convissar drilled into the inlay. The plaintiff contended that Convissar informed him that the pain was normal and would likely subside over the next few days, but that, instead, he experienced increasingly excruciating pain. The plaintiff stated in his complaint that, on or about May 28, 2021, he discovered a large cyst between tooth #31 and his gums and that, due to the extreme level of the pain, he was caused to make an emergency appointment with a dentist at Apex Family Dental, P.C. (Apex), in lower Manhattan, who performed an oral examination, and purportedly explained to the plaintiff that an abscess was present. In addition, the plaintiff alleged that, on or about June 2, 2021, a dentist employed by City Dental, P.C. (City), informed him that the tooth was severely rotted and needed to be extracted, after which an oral surgeon removed the tooth, and "cleaned out" the

infection and resulting abscess. The plaintiff asserted that another dentist from a different office then installed a new dental implant and a new crown over that implant.

In his bills of particulars, the plaintiff asserted that Convissar treated him on March 2, 2021, March 9, 2021, and March 25, 2021, and that he remained Convissar's patient in connection with the subject teeth up until June 2, 2021. He asserted that Convissar negligently assessed him after drilling into the subject tooth by failing to perform tests, examinations, and evaluations to determine the extent and nature of his condition, both preoperatively, intraoperatively, and postoperatively. The plaintiff further alleged that Convissar failed to obtain his complete medical and dental history, and did not maintain appropriate records. The plaintiff also asserted that Convissar negligently performed the subject procedure, which included inlay removal, a crown installation, and a tooth extraction, thus causing him to sustain an infection both during and following the procedure. In this respect, the plaintiff alleged that Convissar failed to take adequate precautions preoperatively, intraoperatively, and postoperatively to prevent surgical site infection, and negligently removed and implanted certain hardware. He further faulted Convissar for failing properly to evaluate the surgical wound postoperatively, despite his complaints of severe postoperative pain. The plaintiff further alleged that Convissar failed to diagnose him with an infected tooth, due to his failure properly to evaluate the surgical site, thus permitting the tooth to remain untreated and improperly managed. In addition, the plaintiff asserted that Convissar improperly prescribed and administered anesthetics, and failed timely to prescribe appropriate antibiotics to treat the abscess in his mouth. Moreover, the plaintiff asserted that Convissar departed from good and accepted practice by failing to refer him to a skilled oral surgeon. He also averred that Convissar failed properly to instruct various healthcare providers as to the requirements for his ongoing treatment, and failed to furnish the LLP with necessary equipment, apparatus, expertise, and/or facilities for the testing, diagnosis, treatment, and management of his dental health. The plaintiff further alleged in his bill of particulars that he would be relying on the doctrine of res ipsa loquitur.

In addition, the plaintiff alleged that Convissar failed properly to advise him as to the nature and extent of the procedure that was performed and the anesthetics and medications that he administered, the possible complications arising therefrom, the benefits thereof, or the alternatives thereto, thus failing to obtain his fully informed consent to the procedure.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Flanders v Goodfellow,* _____NY3d_____, 2025 NY Slip Op 02261, *1 [Apr. 17, 2025]; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]; *see Haymon v Pettit*, 9 NY3d 324, 327 n [2007]). Once the movant meets that burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.; Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.,* 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet the burden of affirmatively establishing

entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case, but must affirmatively demonstrate the merit of his or her defense (*see Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

"To sustain a cause of action for medical or dental malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury" (*Frye v Montefiore Med. Ctr*., 70 AD3d 15, 24 [1st Dept 2009]; *see Foster-Sturrup v Long,* 95 AD3d 726, 727 [1st Dept 2012]; *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp*., 10 AD3d 521, 522 [1st Dept 2004]). Moreover, where a healthcare provider fails properly to diagnose a patient's condition, thus providing less than optimal treatment or delaying appropriate treatment, and the insufficiency of or delay in treatment proximately causes injury, he or she will be deemed to have departed from good and accepted medical practice (*see Perez v Fitzgerald,* 115 AD3d 177, 178 [1st Dept 2014]; *Perlin v King*, 36 AD3d 495, 495 [1st Dept 2007]; *see generally Zabary v North Shore Hosp. in Plainview,* 190 AD3d 790, 795 [2d Dept 2021]; *Lewis v Rutkovsky*, 153 AD3d 450, 451 [1st Dept 2017]; *Monzon v Chiaramonte*, 140 AD3d 1126, 1128 [2d Dept 2016] ["(c)ases . . . which allege medical malpractice for failure to diagnose a condition . . . pertain to the level or standard of care expected of a physician in the community"]; *O'Sullivan v Presbyterian Hosp. at Columbia Presbyterian Med. Ctr.*, 217 AD2d 98, 101 [1st Dept 1995]).

To make a prima facie showing of entitlement to judgment as a matter of law, a defendant dentist moving for summary judgment must establish the absence of a triable issue of fact as to his or her alleged departure from accepted standards of dental practice (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]; *Barry v Lee*, 180 AD3d 103, 107 [1st Dept 2019]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24) or establish that the plaintiff was not injured by such treatment (*see Pullman v Silverman,* 28 NY3d 1060, 1063 [2016]; *McGuigan v Centereach*

Mgt. Group, Inc., 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]). To satisfy this burden, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d at 206; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and, in any event, the opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital,* 69 AD3d 403, 404 [1st Dept 2010]). Stated another way, the defendant's expert's opinion must "explain 'what defendant did and why'" (*id.*, quoting *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Moreover, as noted, to satisfy the burden on a summary judgment motion, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 572 [2d Dept 2007]).

Once satisfied by the defendant, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical or dental practice and/or opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Luu v Paskowski*, 57 AD3d 856, 857 [2d Dept 2008]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a matter of law, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that contains "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*Alvarez v Prospect Hosp.,* 68 NY2d at 325; *see also Pancila v Romanzi,* 140 AD3d 516, 516

[1st Dept 2016]; *Callistro ex rel. Rivera v Bebbington*, 94 AD3d 408, 410 [1st Dept 2012], *affd sub nom. Callistro v Bebbington*, 20 NY3d 945 [2012]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry, medical, or dental standards is sufficient to preclude an award of summary judgment in a defendant's favor (*see Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24).

In support of their motion, the defendants submitted the pleadings, the plaintiff's bills of particulars, relevant dental records, transcripts of the parties' deposition testimony, a statement of allegedly undisputed material facts, an attorney's affirmation, and the expert affirmation of dentist Howard Atlas, D.D.S., who opined that the defendants did not depart from good and accepted dental practice in treating the plaintiff, and that nothing that they did or did not do caused or contributed to the plaintiff's injuries.

Dr. Atlas first recounted the plaintiff's history of treatment with Convissar, noting that the plaintiff's first visit to Convissar's office occurred on March 2, 2021 for the purpose of a consultation. He stated that the plaintiff's prior examining dentist had informed the plaintiff of the need for new full coverage crowns on teeth #18, #19 and #31, and had recommended that the plaintiff consult with a periodontist before teeth #18 and #19 were treated. According to Dr. Atlas, that dentist's x-rays were emailed to Convissar's LLP. He asserted that the plaintiff had a history of taking medications to treat gastroesophageal reflux disease and restasis, commonly known as dry eye syndrome, and was receiving exogenous testosterone supplements. Moreover, the plaintiff evinced an allergy to latex and a sensitivity to epinephrine. As Dr. Atlas interpreted Convissar's chart, the latter's clinical examination of the plaintiff revealed grossly open contacts between teeth #30 and #31 and poor contours on crowns #18 and #19, with pocketing. He explained that one periapical and one bitewing x-ray image of the plaintiff's lower left quadrant confirmed periodontal problems and poor contours on teeth #18 and #19. Convissar formulated a plan to replace the inlay of tooth #31, and to defer treatment of teeth

#18 and #19 after a periodontal consultation that Convissar instructed the plaintiff to undergo prior to the treatment of the lower left quadrant.

On March 9, 2021, the plaintiff returned to Convissar for the removal of the existing inlay on tooth #31. According to Dr. Atlas, Convissar fashioned a mold in order to shape the permanent crown that would ultimately be installed. He asserted that, to anesthetize the plaintiff, Convissar administered one carpule of carbocaine to the plaintiff's mouth, via an inferior alveolar nerve block. Dr. Atlas asserted that Convissar then proceeded to commence the removal of the existing inlay on that tooth, and that, during the removal procedure, Convissar observed a small fracture under the inlay, running from the mesial to the distal side of the tooth. He stated that Convissar excavated the crack, bonded the composite core, and completed the preparation of a crown placement by taking an impression and via temporization. According to Dr. Atlas, Convissar informed the plaintiff that he should consult an endodontist in connection with the fracture. In this respect, Convissar testified at his deposition that his office was not equipped with a cone beam computed tomography (CBCT) scanner, which he explained was needed to determine the depth of the fracture, and whether or not root canal therapy was necessary. Dr. Atlas opined that, as a practitioner in general dentistry, Convissar was not obligated to maintain such equipment in his office, and that his recommendation of endodontic care was within the applicable standard of care.

On March 25, 2021, the plaintiff returned to see Convissar, and, according to Dr. Atlas, reported that, inasmuch as he was asymptomatic, he elected not to see an endodontist, to which Convissar responded he would not permanently cement tooth #31 until the plaintiff had a consultation with an endodontist to discuss root canal therapy. Dr. Atlas asserted that, although Convissar placed the permanent crown, he did so with temporary cement, and oriented it slightly out of occlusion to avoid traumatizing the pulp. Convissar purportedly planned to fabricate a new crown after the plaintiff had consulted with an endodontist in connection with proposed root canal therapy. Dr. Altas then reiterated Convissar's deposition testimony, to the

effect that a permanent crown would better protect the tooth until the root canal consultation. He noted that the March 25, 2021 appointment was the plaintiff's final visit with Convissar.

On May 29, 2021, the plaintiff presented to Apex, complaining of an abscess that needed to be drained, and was examined there by Jing Chen, D.D.S., to whom the plaintiff purportedly described Convissar's March 2021 treatment and explained that he began to experience pain from the abscess on May 27, 2021. In Apex's chart, Dr. Chen reported the presence of a buccal abscess at tooth #31, with an "overhang" crown and necrotic pulp, as well as apical periodontitis. She advised the plaintiff to continue taking the antibiotics that Convissar had prescribed to him in March 2021, and to keep an appointment that he had previously scheduled with City. According to Dr. Atlas, this was the plaintiff's only appointment at Apex. On June 2, 2021, the plaintiff presented to City, and reported his reason for the visit as a "toothache/abscess," identifying Convissar as his prior treating dentist. At City, Val Atsen, D.D.S., examined the plaintiff, wrote in the relevant chart that the plaintiff had presented to him for evaluation of tooth #31, and, after examining the plaintiff and taking x-rays, reported that this tooth evinced mobility, apical periodontitis, furcation, and radiolucency. As Dr. Atlas described it, Dr. Atsen determined that the long-term prognosis for tooth #31 was "hopeless," and, thus, had informed the plaintiff that extraction, bone graft, an implant, and restoration constituted an appropriate treatment option. Although Dr. Atsen's notes indicated that he would extract tooth #31 at the plaintiff's next visit to City, the plaintiff instead presented on June 7, 2021 to Leading Edge Oral Surgery (LEOS), where he was seen by Doron Kalman, D.D.S., complaining of pain and swelling subsequent to the March 2021 placement of the crown on tooth #31. Imaging at LEOS purportedly revealed a buccal abscess at the crest ridge and possible distal root fracture at that site. Dr. Kalman, as did Dr. Atsen, determined that the tooth could not be restored, and formulated a plan for the extraction of tooth #31 and performance of a socket preservation graft.

On June 14, 2021, the plaintiff returned to LEOS, where tooth #31 was extracted and

a cortico-cancellous graft was placed. On September 20, 2021, he again returned to LEOS, at which time the implant was placed. LEOS's chart reported that, at an October 18, 2021 postoperative visit, the implant was healing well.

On November 10, 2021, the plaintiff presented to Central Park Dental (CPD) for a consultation with Kareem Fatouh, D.D.S., who noted that the plaintiff wished to have tooth #31 restored when it became integrated. On November 16, 2021, he returned to CPD for prophylaxis, which consisted of cleaning. On November 29, 2021, he returned to LEOS, whose dentists determined that the tooth was ready for restoration, and referred him back to Dr. Fatouh for the restoration. On March 9, 2022, he again returned to CPD, where an implant crown impression was taken by Ian Rosengarten, D.D.S. On April 22, 2022, the plaintiff once more returned to CPD, where an abutment and crown were installed at the tooth #31 site. On September 24, 2022, he returned to CPD for a follow-up examination with Rizvan Moosvi, D.D.S., who reported moderate bleeding, tartar, and food impaction, and ordered a cleaning. On October 27, 2022, the plaintiff was examined at CPD by Valorem Tinaj, D.D.S., with respect to issues unrelated to tooth #31.

Dr. Atlas asserted that Convissar's examinations uncovered the results of preexisting periodontal disease, and that Convissar properly instructed the plaintiff to consult and treat with specialists in those fields. He concluded that Convissar appropriately referred the plaintiff to an endodontist after identifying a fracture in tooth #31 on March 9, 2021. Dr. Atlas explained that it would be up to an endodontist to determine whether the tooth was salvageable via root canal therapy, and whether an extraction was necessary, based upon the depth of the fracture. Dr. Atlas averred that it was appropriate for Convissar temporarily to have placed a crown over tooth #31, since such a crown would serve to protect the tooth while the plaintiff awaited consultation with an endodontist. He noted that, in any event, a permanent crown nonetheless would have to be placed after treatment with an endodontist, and explained that taking an impression for a crown is a simple, five-minute procedure, involving the placement and removal

of a putty-like substance that would not inflict any pain upon a dental patient. Dr. Atlas asserted that another impression could easily have been taken, if necessary, after the plaintiff had been seen by an endodontist. He opined that Convissar's evaluation, diagnosis, and treatment of, and recommendations to, the plaintiff thus satisfied the standard of care on March 9, 2021.

Dr. Atlas asserted that the plaintiff failed to comply with Convissar's March 9, 2021 instructions to consult with an endodontist. Nonetheless, he concluded that Convissar's March 25, 2021 decision to place a permanent crown over tooth #31 with temporary cement was within the parameters of professional discretion, and met the standard of care. He explained that a permeant crown is stronger, more durable, more comfortable, more temperature resistant, and less likely to fall out than a temporary crown, thus affording the plaintiff's tooth a sufficiently greater level of protection until the plaintiff could be seen by an endodontist. Dr. Atlas asserted that Convissar fully advised the plaintiff of this plan, and once again instructed the plaintiff to see an endodontist. Although Dr. Atlas conceded that the permanent crown placed on March 25, 2021 was ill-fitting, since Convissar planned to take a new impression after the plaintiff had been examined the endodontist, he opined that the temporary placement of the crown under those circumstances was not a departure from the standard of care, inasmuch as even an ill-fitting crown offered more protection for a tooth than a temporary crown. As Dr. Atlas explained it, this conclusion is warranted because a temporary crown is made of plastic, which easily breaks and will often fall out. Hence, he concluded that Convissar's evaluation, diagnosis, treatment, and recommendations on March 25, 2021 met the standard of care.

Dr. Atlas expressly opined that Convissar's treatment did not cause or contribute to an infection to tooth #31 or the area proximate to it. Rather, Dr. Atlas attributed the infection to the fact that, after Convissar discovered the fracture described above, and the plaintiff failed promptly to consult with an endodontist, the untreated fracture became a breeding ground for bacteria that entered the fracture and thereupon traveled to the pulp, thus causing infection to spread to the apex of the tooth, which, in turn, infected the bone. Dr. Atlas further explained

that, inasmuch as the plaintiff did not complain to any healthcare or dental provider about an abscess for more than two months after his last visit with Convissar, the development of that abscess could not be attributed to the treatment that Convissar rendered to the plaintiff. He asserted that the necrotic pulp with apical periodontitis, that is, the inflammation of tooth pulp, which was diagnosed on May 29, 2021, is usually the outcome of an untreated fracture, but that there was "no evidence whatsoever" that the plaintiff exhibited any signs or symptoms of such an infection during any of his three visits with Convissar. Consequently, Dr. Atlas opined that there also was no evidence that Convissar failed to diagnose the plaintiff with an infection.

Dr. Atlas expressly rejected the plaintiff's allegation that Convissar employed permanent cement to affix the crown on March 25, 2021, inasmuch as Convissar explicitly testified at his deposition that he used temporary cement, while the chart revealed no evidence whatsoever that he used temporary cement. In this respect, Dr. Atlas explained that the subsequent imaging studies performed by Drs. Chen and Atsen could not determine whether the cement employed was permanent or temporary, since the only way determine if the cement used is temporary or permanent would have been to remove the crown, which neither of those two dentists attempted to do. He further challenged the plaintiff's allegation that Convissar departed from the standard of care by repeatedly administering anesthetic injections during the March 25, 2021 visit. According to Dr. Atlas, to numb the area to be treated, more than one injection of anesthetic may be required, and it thus was within the standard of care for Convissar to have administered more than one injection of anesthetic, as it became necessary. He asserted, moreover, that the position of tooth #31, in the lower back of the mouth, made it challenging to work on. As he explained it, "no dentist would attempt to render treatment to that area to a patient in pain, as a patient in pain is unlikely to remain still, not allowing the dentist to accomplish treatment in that area," while it also was "unlikely" that a patient would voluntarily return to a dentist who had ignored the patient's complaints of pain during the procedure.

Ultimately, Dr. Atlas concluded that it was "undisputed" that the plaintiff presented to Convissar with a preexisting fractured tooth, and opined that Convissar appropriately identified the fracture and repeatedly advised the plaintiff to consult with an endodontist with regard to the fractured tooth, but that the plaintiff nonetheless repeatedly failed to follow these instructions. He opined that, consequently, the untreated fracture led to infection, causing the need for the subsequent extraction and bone graft. Dr. Atlas thus asserted that Convissar did not negligently install the crown at issue, did not cause an infection, and did not fail to diagnose and treat the infection that subsequently developed. In turn, Dr. Atlas thus concluded that the dental treatment that Convissar rendered to the plaintiff was not the proximate cause of the plaintiff's alleged injuries.

In opposition to the defendants' motion, the plaintiff relied on many of the same documents that the defendants submitted. He also submitted a counter statement of material facts, an attorney's affirmation, and the expert affirmation of dentist Mehran Morovati D.D.S., who opined that the defendants did, in fact, deviate from accepted dental practice, and that their deviations caused or contributed to the plaintiff's injuries.

Initially, Dr. Morovati asserted that Dr. Atlas's affirmation contained a number of factual errors that materially affected the latter's dental opinions and conclusions. He contested Dr. Atlas's statement that Convissar's treatment plan was to replace the inlay of tooth #31, asserting that Convissar's plan actually was to place a crown on tooth #31, not to replace the inlay of that tooth. Dr. Morovati further challenged Dr. Atlas's characterization of the plaintiff's intent in returning to Convissar as being "for the removal of the existing inlay on tooth #31," when, according to Dr. Morovati, the purpose of that visit was to prepare for the placement of a crown. Moreover, he faulted Dr. Atlas for referring to the procedure at Convissar's as one for "the removal of the existing inlay," since the work actually performed at the subject appointment was to prepare for a crown. Dr. Morovati characterized, as "misleading," Dr. Atlas's conclusion that Convissar had "uncovered the results of pre-existing periodontal disease that were causing

both periodontal and endodontic issues," since the plaintiff's periodontal disease actually was located at and affected teeth #18 and #19, which was irrelevant to tooth #31.

In connection with the plaintiff's appointment with Convissoar on March 9, 2021, Dr. Morovati asserted that Convissar prepared tooth #31 for a crown at that time and that, according to both Convissar's notes and deposition testimony, Convissar noticed a crack mesiodistally, that is, from the tooth in front to the back. He explained that Convissar nonetheless continued to prepare the tooth for the crown, took an impression, fabricated a temporary crown, and sent the impression to a dental laboratory to fabricate a permanent crown. Although Dr. Morovati conceded that Convissar advised the plaintiff to consult with an endodontist to evaluate tooth #31, and, if recommended by an endodontist, to undergo root canal therapy on that tooth prior to the crown insertion appointment scheduled for March 25, 2021, Convissar nonetheless "continually and repeatedly injected anesthetic and continued working." As Dr. Morovati explained it,

> "[i]n accordance with good and accepted dental practice, when a situation such as this arises and when the operating dentist notices a pulpal exposure or similarly a 'crack' at the center of the tooth, he must temporize the tooth and look into, evaluate, or consult an endodontist before continuing to order or fabricate a permanent restoration such as a crown.
>
> "The reason for this protocol is that when and if a root canal treatment is performed, the tooth structure must be rebuilt and the tooth must be prepared again, and a new impression taken to order a crown or permanent restoration.
>
> "This is also done for the health and comfort of the patient and to avoid an infection or causing other related health problems."

Dr. Morovati opined that Convissar's actions during the March 9, 2021 encounter with the plaintiff "were therefore departures from the standard of care and from good and accepted dental practice," and that "[t]hose departures were also a substantial causative factor in [the plaintiff's] pain and suffering."

Dr. Morovati asserted that, on March 25, 2021, the plaintiff presented to Convissar and reported that he was still in pain, while Convissar's chart indicated that the plaintiff did not see

an endodontist because the tooth was asymptomatic, and that, therefore, Convissar determined to insert an otherwise permanent crown with a temporary cement. Dr. Morovati, however, adverted to the charts referable the plaintiff's subsequent visits to Apex and City, on May 29, 2021 and June 2, 2021, respectively, which he asserted actually contradicted Convissar's notes, since they both reported that the crown had in fact been permanently cemented, constituting a "final" crown insertion. As he framed the issue, otherwise, Dr. Chen would have removed the purportedly "temporarily placed" crown on #31 and performed a pulpotomy, that is, she would have removed the pulp portion of the nerve to expedite the subsidence of pain and swelling. Dr. Morovati further rejected Dr. Atlas's opinion that the "only way determine if the cement used is temporary or permanent is to remove the crown, which neither doctor did." Dr. Morovati noted that the x-ray reports generated at Apex and City revealed that the crown on tooth #31 had "[g]ross overhang" and "[o]pen margins" all around, and was ill-fitting. Since the crown placed by Convissar evinced such characteristics, Dr. Morovati asserted that the purportedly "temporary cement" would not have lasted for two months. Hence, he concluded that, contrary to Dr. Atlas's contention, the crown that Convissar placed over tooth #31 was intended to be, and was, in fact, installed permanently with permanent cement, and that this conclusion was supported by the notes authored by Dr. Chen on May 29, 2021 and Dr. Atsen on June 2, 2021.

Dr. Morovati opined that, in accordance with good and accepted dental practice, an ill-fitting crown---or an improperly made crown for that matter---should not be inserted onto a patient's tooth, whether permanently or temporarily, but must be returned to the fabrication laboratory to be remade, since "delivery and insertion of such a crown will have other health risks." Dr. Morovati asserted that a dentist is the last line of quality control against bad workmanship by a laboratory and whichever technician was involved in the fabrication of a crown. He thus concluded that Convissar's insertion of the ill-fitting crown on a permanent basis was a departure from the standard of care. Dr. Morovati implied that, while Dr. Atlas attempted to shift the blame onto the plaintiff for deferring a consultation with an endodontist, it was, in

fact, Convissar's obligation to defer the placement of any type of crown until he was assured that an endodontist had cleared the plaintiff for such a placement.

Dr. Morovati reiterated Dr. Atlas's description of Convissar's treatment of the plaintiff, in which Dr. Atlas explained that Convissar had placed what was supposed to have been a permanent crown over tooth #31, but affixed it with temporary cement so that the crown over that tooth was slightly out of occlusion and, thus, would not make contact with the opposing tooth when the plaintiff bit down. Contrary to Dr. Atlas's opinion, however, Dr. Morovati concluded that this approach was indeed a departure from the applicable standard of care, specifically, that it was a departure from good practice for a dentist to place a permanent crown with temporary cement or intentionally place an ill-fitting crown on a patient's tooth, whether temporarily or permanently. With respect to the fit, Dr. Morovati explained that a dentist cannot feasibly place a crown out of occlusion, unless he or she shaves down the porcelain or zirconium material of the crown, but that there was no testimony or documentation that this occurred. He asserted that, otherwise, there was no explanation as to how Convissar could have placed the crown out of occlusion. He further averred that no competent dentist would ever ruin a new crown solely to place it temporarily over a patient's tooth. Dr. Morovati explicitly gainsaid Dr. Atlas's opinion that an ill-fitting crown offers more protection for a tooth than a temporary crown, asserting that there was "no medical evidence that this is true," and that Dr. Atlas cited none in his affirmation.

Dr. Morovati, who himself had rendered dental treatment to the plaintiff from February 25, 1998, to February 17, 2021, and during one visit on April 8, 2022, summarized Convissar's departures as the misdiagnosis of the etiology of the plaintiff's pain during and after the procedures as "transient," inasmuch as tooth #31 manifested a crack at its center and was previously asymptomatic, the negligent insertion of a crown on a tooth that a had a crack and possible pulpal exposure, thereby causing pain and undue suffering, the negligent delivery of a crown that he knew was defective, the placement of a crown prior to approval by an

endodontist, and the placement of a crown with overhang and open margins, which he knew or should have known would cause adverse consequences.

With respect to the issue of proximate cause, Dr. Morovati also rejected Dr. Atlas's opinion that there was no evidence that Convissar caused the plaintiff's infection. In this respect, Dr. Morovati asserted that Convissar's failure to diagnose the plaintiff's periapical pathology on the distal root of tooth #31 at the time he placed the crown was a substantive cause of the plaintiff's infection, injury, pain, and suffering. Dr. Morovati ultimately concluded that the omissions for which Convissar was responsible caused the plaintiff such a "significant amount of pain" that the plaintiff was compelled to obtain emergency dental treatment on May 29, 2021, and June 2, 2021, which, he noted, was less than two months after Convissar's insertion of the crown. Moreover, he asserted that the need for surgical intervention to remove the tooth, and replace it with an implant, further exacerbated and contributed to the pain cycle, damage, and trauma to that area, which he characterized as "rapidly progressing" at that time.

In reply, the defendants submitted an attorney's affirmation, in which counsel contended that Dr. Morovati's opinions were conclusory, speculative, and unsupported by the relevant dental records and testimony. They further submitted an expert reply affirmation from Dr. Atlas, who characterized Dr. Morovati's opinions as constituting an attempt to "confuse the court with inaccuracies [and] confusing and misleading assertions and statements." Dr. Atlas expressly disagreed with Dr. Morovati that Dr. Chen could only have performed a pulpotomy on May 29, 2021 if the crown that Convissar had placed were indeed only temporary, since Dr. Atlas concluded that pulpotomies can be performed even through a permanent crown. Dr. Atlas again placed the blame on the plaintiff himself for deferring an appointment with an endodontist, and reiterated his opinion that Convissar did not fail to diagnose the cracked tooth or infection, since the latter condition had yet to develop, and that Convissar did not depart from good practice by proceeding with the placement of a crown prior to an endodontic consultation.

Although the defendants established their prima facie entitlement to judgment as a matter of law with respect to the medical malpractice cause of action as against Convissar with their submissions, including Dr. Atlas's expert affirmation, the court concludes that, contrary to the defendants' contentions, Dr. Morovati's expert affirmation was not conclusory, speculative, or unsupported by the dental records or the parties' testimony. Rather, the opinions of Dr. Atlas and Dr. Morovati presented a sharp dispute and classic battle between experts that cannot be resolved on a motion for summary judgment (*see Severino v Weller*, 148 AD3d 272, 273, 275 [1st Dept 2017]; *Bartholomew v Itzkovitz*, 119 AD3d 411, 415 [1st Dept 2014]). Hence, that branch of the defendants' motion which was for summary judgment dismissing the medical malpractice cause of action insofar as asserted against Convissar must be denied.

Where a healthcare professional working for his or her own professional corporation, limited liability company, or limited liability partnership renders health care to a patient "within the scope of his or her employment" for that corporation, company, or partnership, that entity may be held vicariously liable for the negligence of that healthcare provider (*Petruzzi v Purow*, 180 AD3d 1083, 1084-1085 [2d Dept 2020]; *Yaniv v Taub*, 256 AD2d 273, 274 [1st Dept 1998]; *Connell v Hayden*, 83 AD2d 30, 46 [2d Dept 1981]; Business Corporation Law § 1505[a][i]; Limited Liability Company Law § 1205[a]; Partnership Law § 121-1500[q] *see also Galpern v De Vos & Co., PLLC,* 10-CV-1952 (CBA) (JMA), 2011 US Dist LEXIS 117095 *39 , 2011 WL 4597491, *13 [ED NY, Sep. 30, 2011] [Limited Liability Company Law is simply a reflection of the common-law rule that a member of a professional limited liability company is liable for those torts of the company in which he or she is a participant]; *see generally Brown-Jodoin v Pirrotti,* 2011 NY Slip Op 34223[U], 2011 NY Misc LEXIS 7307 [Sup Ct, Westchester County Aug. 17, 2011] [denying motion to dismiss in legal malpractice action made by attorney and his professional limited liability partnership]). Inasmuch as the LLP was Convissar's professional limited liability partnership, it may be held vicariously liable for Convissar's conduct to the extent

he is found to have committed malpractice. Hence, to the extent that summary judgment is being denied to Convissar, summary judgment also must be denied to the LLP.

The elements of a cause of action to recover for lack of informed consent are

> "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury"

(*Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]; *see Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept. 2013]). For a statutory claim of lack of informed consent to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d[2]). "'[T]his showing of qualitative insufficiency of the consent [is] required to be supported by expert medical testimony'" (*King v Jordan*, 265 AD2d at 260, quoting *Hylick v Halweil*, 112 AD2d 400, 401 [2d Dept 1985]; *see* CPLR 4401-a; *Gardner v Wider*, 32 AD3d 728, 730 [1st Dept 2006]). Hence, where a defendant establishes his or her prima facie entitlement to judgment as a matter of law in connection with a lack of informed consent cause of action by submitting an expert affirmation from a physician, a plaintiff can only raise a triable issue of fact by submitting "an expert affirmation stating with certainty that the information defendant[ ] allegedly provided to plaintiff before the [medical] procedures at issue departed from what a reasonable practitioner would have disclosed" (*Leighton v Lowenberg*, 103 AD3d 530, 530 [1st Dept 2013]). Expert testimony, however, is not necessary with respect to the issue of whether a reasonably prudent person, fully informed, would not have consented to the treatment (*see Gray v Williams*, 108 AD3d 1085, 1086-1087 [4th Dept 2013]; *Hugh v Ofodile*, 87 AD3d 508, 509 [1st Dept 2011]; *Andersen v Delaney*, 269 AD2d 193, 193 [1st Dept 2000]; *Hardt v LaTrenta*, 251 AD2d 174, 174 [1st Dept 1998]; *Osorio v Brauner*, 242 AD2d 511, 511-512 [1st Dept 1997]).

"'The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law'" (*Huichun Feng v. Accord Physicians*, 194 AD3d 795, 797 [2d Dept 2021], quoting *Schussheim v Barazani*, 136 AD3d 787, 789 [2d Dept 2016]). A defendant may still satisfy his or her burden of demonstrating a prima facie entitlement to judgment as a matter of law in connection with such a cause of action where a patient signs a detailed consent form, and there is also evidence that the necessity of the procedure, along with known risks and dangers, was discussed prior to the surgery (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

Nonetheless, "[a] failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that 'involve[s] invasion or disruption of the integrity of the body'" (*Janeczko v Russell*, 46 AD3d 324, 325 [1st Dept 2007], quoting Public Health Law § 2805-d[2][b]; *see Lewis v Rutkovsky*, 153 AD3d at 456), and that invasion or disruption is claimed to have caused the injury.

Here, the defendants did not even address the lack of informed consent cause of action in their summary judgment motion. Consequently, they failed to establish their prima facie entitlement to judgment as a matter of law in connection with that cause of action. Dr. Morovati nonetheless rendered an opinion that Convissar failed to obtain the plaintiff's fully informed consent to the installation of a crown over a cracked tooth, after previously advising him that doing so would not occur until the plaintiff had consulted with an endodontist, since Convissar did not inform the plaintiff of the risks and benefits of the procedure, or the alternatives thereto, and did not even produce a signed consent form. As explained above, however, as a matter of law, the mere failure to diagnose the presence of an infection or abscess in a timely fashion does not give rise to a cause of action to recover for lack of informed consent. Hence, that branch of the defendants' motion seeking summary judgment dismissing the lack of informed consent cause of action is granted only to the extent that they are awarded summary judgment

dismissing so much of that cause of action as was premised upon their alleged failure timely to diagnose an infection or abscess, and that branch of the motion must otherwise be denied.

Accordingly, it is,

ORDERED that the defendants' motion for summary judgment dismissing the complaint is granted only to the extent that they are awarded summary judgment dismissing so much of the lack of informed consent cause of action as was premised upon the defendants' alleged failure timely to diagnose the plaintiff with an infection or an abscess, that claim is dismissed, and the motion is otherwise denied; and it is further,

ORDERED that, on the court's own motion, the attorneys for all of the parties shall appear for an initial pretrial settlement conference before the court, in Room 204 at 71 Thomas Street, New York, New York 10013, on October 30, 2025, at 12 noon, at which time they shall be prepared to discuss resolution of the action and the scheduling of a firm date for the commencement of jury selection.

This constitutes the Decision and Order of the court.

10/10/2025
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE