

Cujcuj v Jayadevan

2020 NY Slip Op 35301(U)

June 9, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 15-601918

Judge: Vincent J. Martorana

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SHORT FORM ORDER

INDEX No. 15-601918

CAL. No. 18-02340MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

P R E S E N T :

Hon. VINCENT J. MARTORANA
Justice of the Supreme Court

MOTION DATE 5-9-19 (002 & 003)
ADJ. DATE 10-3-19
Mot. Seq. # 002 - MotD
003 - MotD

-----X

ALBA CUJCUJ and OSCAR CUJCUJ,

Plaintiffs,

- against -

KRISHNASWAMY JAYADEVAN, DDS, and
GREAT EXPRESSIONS DENTAL OF NEW
YORK, LLP,

Defendants.

-----X

DELL & DEAN
Attorney for Plaintiffs
1225 Franklin Avenue, Suite 450
Garden City, New York 11530

RAWLE & HENDERSON, LLP
Attorney for Defendant Jayadevan
14 Wall Street, 27th Floor
New York New York 10005-2101

CHESNEY, NICHOLAS & BROWER, LLP
Attorney for Defendant Great Expressions
Dental of New York
485 Underhill Blvd., Suite 308
Syosset, New York 11791

Upon the following papers read on these motions for summary judgment : Notice of Motion and supporting papers by defendant Great Expressions Dental, filed April 4, 2019 ; Notice of Motion and supporting papers by defendant Krishnaswamy Jayadevan, filed April 15, 2019 ; Answering Affidavits and supporting papers by plaintiffs, filed August 30, 2019 ; Replying Affidavits and supporting papers by defendant Great Expression Dental, filed September 27, 2019; by defendant Krishnaswamy Jayadevan, filed October 3, 2019 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendant Great Expressions Dental of New York, LLP, and the motion by defendant Krishnaswamy Jayadevan, DDS, are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Great Expressions Dental of New York, LLP, for summary judgment is granted to the extent set forth herein, and is otherwise denied; and it is further

ORDERED that the motion by Krishnaswamy Jayadevan, DDS, incorrectly denominated as a cross motion, for summary judgment is granted to the extent set forth herein, and is otherwise denied.

Plaintiffs in this action seek to recover damages based on dental malpractice, lack of informed consent, and loss of consortium. In their verified complaint, as supplemented by the bill of particulars, plaintiffs allege that plaintiff Alba Cujcuj ("Ms. Cujcuj") suffered injuries from dental treatments performed on April 5, 2011, up to and

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including September 26, 2012, at Great Expressions Dental of New York (“Great Expressions”), a dental facility in Bay Shore, New York.¹ Ms. Cujcuj, claims that defendants Dr. Krishnaswamy Jayadevan, DDS (“Dr. Jayadevan”), and Great Expressions departed from acceptable dental practice during and after a wisdom tooth extraction, causing various injuries. The alleged injuries include iatrogenic injuries to the right inferior alveolar nerve (“IAN”) and right lingual nerve, dysesthesia, nerve dysfunction, permanent chronic pain, excessive salivation, and visible asymmetry of the right side of her face. Ms. Cujcuj also claims that defendants failed to adequately advise her of alternatives to extraction and the reasonably foreseeable risks and complications of such procedure. Finally, plaintiff Oscar Cujcuj, Ms. Cujcuj’s husband, seeks to recover for loss of consortium.

Great Expressions now moves for summary judgment dismissing the negligence claim against it because its treatment of Ms. Cujcuj did not depart from accepted standards of dental care and was not a proximate cause of her injuries. Great Expressions also moves to dismiss the lack of informed consent claim based on insufficient proof of proximate cause and Ms. Cujcuj’s failure to return to the office for follow-up procedures. Finally, Great Expressions asserts a statute of limitations defense for any alleged malpractice occurring before August 26, 2012. Dr. Jayadevan moves for the same relief. In support of these motions, defendants submit copies of the pleadings, plaintiffs’ bill of particulars, supporting affidavits, the transcripts of the parties’ deposition testimony, the plaintiff’s dental records, and expert affidavits and reports.

The requisite elements of proof in a dental malpractice action are a deviation or departure from accepted standards of dental practice and evidence that such departure was a proximate cause of the plaintiff’s injury (*Alongi v Sutter*, 139 AD3d 887, 888, 30 NYS3d 569 [2d Dept 2016]; *Koi Hou Chan v Yeung*, 66 AD3d 642, 642, 887 NYS2d 164 [2d Dept 2009]; *Terranova v Finklea*, 45 AD3d 572, 572, 845 NYS2d 389 [2d Dept 2007]). A plaintiff raising a claim based on lack of informed consent must prove: (1) that the dental professional providing the treatment failed to disclose alternatives to such treatment and failed to inform the plaintiff of the reasonably foreseeable risks of such treatment that a reasonable dental practitioner would have disclosed in the same circumstances; (2) that a reasonably prudent patient in the same situation would not have undergone the treatment had she been fully informed of the risks; and (3) that the lack of informed consent is a proximate cause of the plaintiff’s injuries (*Chan v Toothsavers Dental Care, Inc.*, 125 AD3d 712, 713, 4 NYS3d 59 [2d Dept 2015]; see also Public Health Law § 2805-d).

To prevail on a summary judgment motion, a movant must make a prima facie showing of entitlement to judgment as a matter of law (CPLR 3212[b]; see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). When considering a summary judgment motion, a court must decide whether issues of fact exist, not determine them or resolve credibility matters (see *Roth v Barreto*, 289 AD2d 557, 558, 735 NYS2d 197 [2d Dept 2001]). Therefore, a court must view all evidence in the light most favorable to the nonmoving party (see *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25, 99 NYS3d 734 [2019]; *Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448, 45 NYS3d 864 [2016]). A defendant’s failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad* at 853). If a movant satisfies his or her burden, the burden then shifts to the non-movant to establish the existence of a triable issue of fact by proffering evidentiary facts or materials (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Conclusory allegations unsupported by competent evidence are insufficient to rebut a defendant’s proof (*id.* at 325).

¹ Although Ms. Cujcuj testified at her deposition that her last name is spelled “Cuj Cuj,” the Court will use the spelling adopted by the plaintiff in their papers.

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A defendant moving for summary judgment on a dental malpractice claim has the initial burden of establishing that he or she did not depart from good and accepted practice, or if there was such departure, that it was not a proximate cause of the plaintiff's injuries (see *Kozlowski v Oana*, 102 AD3d 751, 752-753, 959 NYS2d 500 [2d Dept 2013]). To make a prima facie showing, a defendant must address and rebut the specific allegations of malpractice contained in the plaintiffs' bill of particulars (see *Terranova* at 572). Conclusory statements that do not address the allegations in the pleadings are insufficient (see *id.* at 573; *Cregan v Sachs*, 65 AD3d 101, 108, 879 NYS2d 440 [1st Dept 2009]). In a lack of informed consent case, a defendant must establish either that he or she "disclose[d] the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed" or that "a reasonable person in the plaintiff's position, fully informed, would have elected ... to undergo the procedure or treatment" (*Orphan v Pilnik*, 15 NY3d 907, 908, 914 NYS2d 729 [2010]; see *Schussheim v Barazani*, 136 AD3d 787, 789, 24 NYS3d 726 [2d Dept 2016]; *Rivera v Albany Med. Ctr. Hosp.*, 119 AD3d 1135, 1138, 990 NYS2d 310 [3d Dept 2014]).

At his deposition, Dr. Jayadevan testified that on September 4, 2012, he was practicing dentistry at Great Expressions. He previously owned and operated the practice under the name "Suffolk Dental Center" ("Suffolk Dental"), but had sold it that August. From August 12, 2012 to February 13, 2013, he continued to work as an independent contractor at Great Expressions under the terms of the sale but held no shares or partnership interest. Although both Suffolk Dental and Great Expressions employed other dentists, neither practice employed an oral surgeon, referring patients to area surgeons if necessary.

Dr. Joseph Lakshman Dene, DDS, testified that he was affiliated with Suffolk Dental beginning in July of 2012, and maintained his own dental practice, Brookhaven Dental Care, since 1992. He continued to work at Great Expressions once the practice changed owners. He was uncertain if he was considered an employee of Suffolk Dental or Great Expressions but testified that he received a W-2 from the latter. Both businesses compensated him based on a percentage of the billing of procedures he performed when he treated patients.

Based on her dental records, Dr. Jayadevan testified that Ms. Cujcuj presented at Suffolk Dental several times during the spring of 2011 for issues associated with her lower right third molar, tooth number 32 ("wisdom tooth"). Dr. Shah, the plaintiff's regular treating dentist, performed a root canal and installed a crown related to the placement of a partial denture. Dr. Jayadevan briefly consulted regarding the denture, but did not otherwise treat the plaintiff at the time. Dental records suggest Dr. Shah last treated the plaintiff on September 7, 2011. According to Dr. Jayadevan, Dr. Shah left the practice sometime before 2012.

Dr. Dene testified that he first saw the plaintiff on August 29, 2012, when she presented to Great Expressions with complaints of pain on biting on the wisdom tooth. Dr. Dene had no independent recollection of Ms. Cujcuj as a patient. Still, based on a review of her chart, he testified that he adjusted her bite and referred her to Dr. Jayadevan for an endodontic consultation, incorrectly believing that Dr. Jayadevan had performed her root canal.

Dr. Jayadevan examined Ms. Cujcuj on September 4, 2012, and found that she had tenderness to percussion and a widened periodontal ligament, suggesting that she was chewing forcefully and predominately on the wisdom tooth. An X-ray of the wisdom tooth taken that day did not show a crack, but Dr. Jayadevan testified that cracks are not always visible on an X-ray. Given the patient's complaints and the examination, Dr. Jayadevan advised Ms. Cujcuj that the tooth was either cracked or infected. He suggested antibiotic therapy for a week but indicated that extraction could be considered if the pain persisted. Because plaintiff is a Spanish-speaker, Dr. Jayadevan relied on his dental assistant, Iris Lazo, to translate. After leaving the operatory, presumably to pursue the antibiotic

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treatment, Ms. Cujcuj spoke with Ms. Lazo at the reception desk. Afterward, Ms. Lazo informed Dr. Jayadevan that the plaintiff wished to proceed with the extraction immediately.

Ms. Cujcuj signed a "CONSENT FORM FOR EXTRACTION OF TEETH," consenting to extraction before surgery, although the form was entirely in English. The form contained the following language relevant to this case:

Lower roots may be very close to the nerve and surgery may result in pain or numb feeling of the chin, lip, cheek, gums, teeth or tongue lasting for weeks, months or may rarely be permanent.

Ms. Lazo signed the consent form as a witness, but there is no evidence she translated any portion of the form before Ms. Cujcuj signed it. Dr. Jayadevan testified that he would have informed Ms. Cujcuj of the risks of "post-operative infection and bleeding and pain," but could not recall if he discussed the possibility of nerve injury. He could not state that he reviewed the patient's panoramic X-ray, and his records did not show a panoramic taken on September 4. Regardless, based on his clinical experience, Dr. Jayadevan felt it was unnecessary to review a panoramic to determine the location of the IAN in the IAN canal and did not believe there was any significant risk of nerve injury. He had performed many wisdom tooth extractions during his practice, and Ms. Cujcuj's case was not extraordinary. Indeed, her wisdom tooth was fully erupted and easier to manipulate because it was in medullary bone. The tooth roots were short and conical. Dr. Jayadevan testified that if he had noticed any problems with the extraction, he would have made notes and followed-up. The dental record entry for the extraction indicates no complications. After the surgery, Dr. Jayadevan provided appropriate post-operative instructions, and Ms. Cujcuj left without any issues.

Ms. Cujcuj next presented on September 19, 2012, for a routine six-month checkup and was examined by Dr. Dene. He noted that there were no significant changes. Plaintiff presented a week later and was "very angry" that she had a bone protruding from the extraction site that was cutting her tongue and causing discomfort. Dr. Dene could directly visualize an exposed lingual bone or spicule but also took an X-ray of the area. He administered anesthesia and then trimmed the spicule with a high-speed instrument to minimize trauma. After satisfying himself that the spicule was sufficiently trimmed and flush with the bone, he sutured the soft tissue. He denied that the patient exhibited any symptoms of IAN or lingual nerve injury. He could not recall if he discussed any risks associated with using the high-speed instrument with the plaintiff. Dr. Dene testified that although the area of the IAN was observable in the X-ray, the area of the lingual nerve was not. Nonetheless, he testified that both nerves were far from the area of the spicule and rejected that his treatment could have caused trauma to either nerve.

Both defendants submit the affidavit of Dr. John E. Lagner, DMD, in support of their motions. Dr. Lagner affirmed that he is a dentist licensed to practice in New York State. He is a member of the American College of Dentists and New York Dental Society. He has been an Assistant Clinical Professor at SUNY Stony Brook School of Dental Medicine for twenty years. He indicated the records and materials reviewed, upon which he based his opinions.

Dr. Lagner opined that Dr. Jayadevan reviewed diagnostic images and extracted Ms. Cujcuj's wisdom tooth following good and accepted dental practice. He opined that additional pre-operative imaging, such as a CT scan, was unnecessary and not the standard of care for extracting a fully erupted tooth in 2012. He opined that the departures alleged in the plaintiffs' bill of particulars did not and could not have caused the nerve injury and resulting symptoms alleged. According to Dr. Lagner, extraction was a reasonable course of treatment after the plaintiff declined to pursue antibiotics treatment. Dr. Lagner also noted that the informed consent form warned of

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risks related to a nerve injury for extraction. He further opined that the plaintiff's tooth extraction was within the scope of general dentistry practice, especially given Dr. Jayadevan's over thirty years of experience. Finally, Dr. Lagner opined that the extraction did not cause iatrogenic injury because the extraction was uneventful, and there was no evidence of any injury during the post-extraction clinical examination or any documentation of nerve injury on subsequent visits at Great Expressions or any other provider.

Dr. Lagner also concluded that the treatment of Ms. Cujcuj by Dr. Dene was appropriate. Dr. Lagner explained that a spicule is a common finding following the extraction of tooth number 32. Dr. Dene's recontouring of the bone, suturing, and prescription of antibiotics and painkillers were in accordance with good and accepted dental practice.

The Court next considers the plaintiffs' proof. Ms. Cujcuj testified that she, along with her family members, began treating at Suffolk Dental in 2009. According to her, none of the dentists that treated her at Suffolk Dental or Great Expressions spoke Spanish, and if she had questions, a Spanish-speaking employee, "Celeste," would translate. Although Ms. Cujcuj could not recall the name of her usual dentist, she confirmed it was not Dr. Jayadevan. She stated that her dentist explained that a root canal of the wisdom tooth would prevent an existing cavity from getting worse. She denied having any other issue with the tooth before the root canal. After the root canal, her dentist attached a bridge to the tooth.

Ms. Cujcuj returned to Great Expressions several months later—she could not recall the exact time—because her wisdom tooth was painful. She testified that another dentist told her that the tooth had a broken root and needed to be extracted. She agreed to the extraction because of the pain.

Ms. Cujcuj testified further that she recognized her signature on the consent form. However, she could not read the form because it was in English, and no one translated it into Spanish for her. Moreover, she denied that Dr. Jayadevan ever explained to her any potential risks or side effects of extraction and could not remember if anyone explained the procedure to her in Spanish. At her deposition, no one asked her whether Dr. Jayadevan suggested antibiotics as an alternative. After the extraction, she felt pain at the extraction site once the anesthesia wore off and felt the exposed bone cutting her tongue. She testified that she returned to Great Expressions several times and saw a third dentist she had never seen before. Ms. Cujcuj stated this dentist—presumably Dr. Dene—"scratched" the bone with an instrument and stitched up her gum.

Ms. Cujcuj stopped going to Great Expressions shortly thereafter and presented to a new dentist, Dr. Michel Sherman, a few months later for a cleaning and to check the extraction area, which was still painful. Dr. Sherman declined to treat her for complaints concerning the extraction, although did refer her to a specialist. Ms. Cujcuj testified that her mouth became twisted and disfigured after the extraction, causing her embarrassment. She experiences pain three to four days a week, alleviating it with Tylenol. She further complains of excess salivation and can no longer chew on the right side or eat certain types of food.

Plaintiffs submit the unsworn IME report prepared by Allan J. Kucine, DDS, following his examination of Ms. Cujcuj on February 13, 2018, at the behest of defendant Dr. Jayadevan.² Dr. Kucine determined that Ms. Cujcuj

² Since Dr. Kucine's statement is unsworn, the Court considers it only insofar as it informs the opinions of Drs. Lagner and Sirois.

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exhibited the following: (1) Altered sensation of the ophthalmic (V1), maxillary (V2), and mandibular (V3) divisions of the right trigeminal nerve; (2) Altered sense of taste on the right side; and (3) facial flushing of the right infraorbital region. Based on these findings, Dr. Kucine opined, "It is anatomically and physiologically impossible for this cadre of complaints to have resulted from the removal of a mandibular third molar tooth. The only plausible medical explanation is a central phenomenon such as a cerebrovascular accident or a central lesion."

Plaintiffs also submit the affidavit of David A. Sirois, DMD. Dr. Sirois is licensed to practice dentistry in this state, is the Division Head in Reconstructive and Comprehensive Care at the NYU College of Dentistry, and has served on various professional and journal editorial boards. He based his affirmation on a review of the defendants' motion papers and supporting records and reports, and his over 30 years of experience. He opined to a reasonable degree of dental certainty that defendants, including their agents, servants, and employees, departed from good and accepted dental practice in their care and treatment of Alba Cujcuj from August 29, 2012 until October 3, 2012. In Dr. Sirois's professional opinion, Dr. Jayadevan departed from good and accepted dental practice when he extracted Ms. Cujcuj's wisdom tooth without conducting further radiological studies, which were readily available in the defendants' dental practice. Dr. Sirois noted that plaintiff's X-ray showed that the roots of the wisdom tooth were close to the IAN, increasing the plaintiff's risk of permanent nerve injury after extraction.

Furthermore, Dr. Sirois opined that Dr. Jayadevan's decision to extract the tooth was against the applicable standards of care and was the proximate cause of permanent damage to plaintiff's IAN and lingual nerves and subsequent prolonged pain and suffering. In Dr. Sirois's view, the boilerplate consent form was inadequate because there was no discussion of the increased risk for complications. He also noted that the plaintiff was not fluent in English and relied on the Spanish-speaking assistants employed by defendants. Dr. Sirois also faulted Dr. Dene's treatment of the plaintiff on September 26, 2012. Dr. Sirois described the plaintiff's condition not as a spicule but as an exposed bone, indicative of a serious complication. In Dr. Sirois's opinion, Dr. Dene's use of a high-speed drill increased the risk of nerve injury to the plaintiff.

Dr. Sirois opined further that the defendants departed from the acceptable standards of care by failing to refer the plaintiff to a nerve repair specialist at any of her post-operative visits, given her complaints. He also disagreed with Dr. Kucine's conclusion, opining instead that the plaintiff's complaints of altered sensation, altered sense of taste, and facial flushing of the right infraorbital region were consistent with injuries to the IAN and lingual nerve.

Great Expressions submits a supplemental affirmation by Dr. Lagner in response to the affirmation by Dr. Sirois, which Dr. Jayadevan joins. Dr. Lagner refutes Dr. Sirois's opinion that additional imaging was necessary to locate the IAN canal and minimize the risk of nerve damage. Dr. Lagner reiterates that Dr. Jayadevan appropriately evaluated the plaintiff by reviewing an existing X-ray and using clinical judgment. Finally, Dr. Lagner contradicts Dr. Sirois's opinion that the exposed bone was a serious complication.

On these facts, the Court determines that both defendants have established prima facie entitlement to summary judgment dismissing the complaint on the bases that the defendants did not negligently depart from good and accepted standards of dental care and treatment or proximately cause the injuries alleged by the plaintiffs. The deposition testimony by Dr. Jayadevan establishes that he provided Ms. Cujcuj with an alternative to extraction: a course of antibiotic treatment. Based upon his extensive clinical expertise, he proceeded with extraction only at her behest and in a manner consistent with good and acceptable dental standards. Given his deposition testimony, it is also apparent that Dr. Dene removed the spicule consistent with good and acceptable standards. Dr. Lagner's affidavit contains non-conclusory facts that support both Dr. Jayadevan and Dr. Dene's conduct.

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Both defendants have also established prima facie entitlement to summary judgment dismissing the lack of informed consent claim. Neither dentist reasonably believed that the plaintiff was at risk for nerve damage for the respective procedures performed. Furthermore, the plaintiff never presented with any symptoms consistent with nerve damage that would have alerted either dentist to refer her to an oral surgeon or other specialists. Again, the affidavit of Dr. Lagner supports these positions. Therefore, both defendants disclosed the risks, benefits and alternatives to extraction that a reasonable practitioner would have disclosed.

Nevertheless, the plaintiffs have sufficiently rebutted the prima facie evidence presented by both defendants. The Court rejects the defendants' claims that Dr. Sirois's opinions were conclusory or speculative. Dr. Sirois's opinions are based on competent evidence consisting of the plaintiff's dental records, the deposition testimony of the parties, and the affidavit and statements of defendants' experts.

Dr. Sirois's affirmation raises triable issues of fact as to whether Dr. Jayadevan's failure to obtain additional imaging before extracting the plaintiff's wisdom tooth deviated from accepted dental practice and if this deviation proximately caused iatrogenic nerve injury and associated injuries to her. There are also issues of fact surrounding Dr. Jayadevan's and Dr. Dene's alleged failure to assess the plaintiff's complaints post-extraction and refer her to a nerve repair specialist. Drs. Sirois and Lagner are in serious disagreement with one another. On a summary judgment motion, the Court must not determine which expert's opinion is more credible; such a determination is left to the province of the jury (see *Bengston v Wang*, 41 AD3d 625, 626, 839 NYS2d 159 [2d Dept 2007]). The Court must deny a summary judgment motion where, as here, parties to a dental malpractice action present conflicting expert opinions (see *Leto v Feld*, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]; *McKenzie v Clarke*, 77 AD3d 637, 908 NYS2d 370 [2d Dept 2010]).

The Court comes to the same conclusion regarding the plaintiffs' lack of informed consent claim. There is little dispute that Ms. Cujcuj's understanding of English was limited. Dr. Jayadevan used a Spanish-speaking employee to assist him with the plaintiff but could not say whether the employee translated the consent form. Ms. Cujcuj denied that anyone translated the form. Moreover, Dr. Jayadevan could not say if he discussed the risk of nerve injury. Ms. Cujcuj claims that he never explained any risks. Therefore, notwithstanding the signed consent form, there are triable issues of fact as to whether the plaintiff was adequately informed of the risks associated with the extraction and, if so, whether a reasonable person in the plaintiff's position would have consented (see *Schussheim* at 789; *Kozlowski* at 753).

Finally, defendants move to dismiss all claims arising from any treatment of Ms. Cujcuj before August 26, 2012, as time-barred under CPLR 214-a. Plaintiffs respond that the statute of limitations is tolled for such treatments under the continuous treatment doctrine. Nonetheless, plaintiffs do not address any acts of alleged malpractice before April 5, 2011 to August 29, 2012, because they claim that defendants' motions do not seek to dismiss such claims.

Generally, a cause of action alleging dental malpractice accrues on the date of the alleged wrongful act or omission, and the statute of limitations begins running on that date (*Leifer v Parikh*, 292 AD2d 426, 427, 739 NYS2d 415 [2d Dept 2002]). If a patient is undergoing a "continuous course of treatment" with the dentist for the same condition or complaint that gives rise to the action, the statute of limitations does not begin to run until the course of treatment has ended (see *Nykorchuck v Henriques*, 78 NY2d 255, 258, 573 NYS2d 434 [1991]; *Fraumeni v Oakwood Dental Arts, LLC*, 108 AD3d 495, 496, 968 NYS2d 561 [2d Dept 2013]). A defendant alleging a statute of limitations defense has the initial burden of establishing prima facie proof that statutory period to commence the action had expired when the action was brought (see *Massie v Crawford*, 78 NY2d 516, 577 NYS2d 223 [1991]; *Zito v Jastremski*, 58 AD3d 724, 725, 871 NYS2d 717 [2d Dept 2009]). The burden then shifts

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to the plaintiff to raise triable issues of fact concerning whether there was continuous treatment (*id.*). The plaintiff must demonstrate that further treatment was explicitly anticipated and that there was actual treatment or care of the subject condition in the form of "ongoing corrective efforts" by the provider (*Richardson v Orentreich*, 64 NY2d 896, 487 NYS2d 731 [1985]).

Defendants here have established *prima facie* that plaintiffs filed the summons and complaint on February 26, 2015, and that the applicable statutory period time-bars any claim based on acts before August 26, 2012. In response, plaintiffs have failed to establish a triable issue of fact. In their responding papers, plaintiffs allege only in the most conclusory terms that the continuous treatment doctrine applies to acts before August 26, 2012. Indeed, plaintiffs specifically state that they will not address the merit of any of those acts. The Court is left to speculate whether further treatment was explicitly anticipated after the root canal was performed on April 5, 2011. There may have been further treatment related to the placement of the partial bridge, but plaintiffs do not argue such nor does Dr. Sirois render any opinion on the matter. At best, plaintiffs have demonstrated that there was an ongoing dentist-patient relationship, which is insufficient to establish continuous treatment (see *Massie* at 519-520; *Leifer* at 427).

Accordingly, insofar as defendants' motions seek dismissal of any cause of action arising from acts committed before August 26, 2012, those applications are granted.

Dated: Riverhead, New York
June 9, 2020



VINCENT J. MARTORANA, J.S.C.

___ FINAL DISPOSITION NON-FINAL DISPOSITION