



## **STATEMENT FROM PLAINTIFF'S OUT-OF-STATE EXPERT IN THIS DENTAL MALPRACTICE ACTION NOT IN ADMISSIBLE FORM; CPLR 2106 REQUIRES A SWORN AFFIDAVIT FROM A DENTIST LICENSED IN ANOTHER STATE (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined the statement by a New Jersey dentist offered by the plaintiff in this dental malpractice action was not admissible because it was not in the form of a sworn affidavit. Therefore plaintiff did not raise a question of fact in opposition to defendants' motions for summary judgment:

In opposition, the plaintiff submitted, among other things, the unsworn affirmation of Martin, who was licensed to practice dentistry in the State of New Jersey. Consequently, the out-of-state dentist's statement did not constitute admissible evidence in that CPLR 2106 only authorizes attorneys, physicians, osteopaths, or dentists licensed in this state to utilize an affirmation in lieu of a sworn affidavit ... .

While an otherwise qualified expert physician, osteopath, or dentist, who is not licensed in this state, may submit a statement in support of or in opposition to a party's position in a case at bar, that statement must be in the form of a sworn affidavit. CPLR 2106(a), which permits such a statement to be in the form of an affirmation, only applies to attorneys, physicians, osteopaths, and dentists licensed to practice in the State of New York. [Nelson v Lighter, 2020 NY Slip Op 00420, Second Dept 1-22-20](#)

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## **QUESTION OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE APPLIED TO TOLL THE STATUTE OF LIMITATIONS IN THIS DENTAL MALPRACTICE ACTION, DOCTRINE MAY APPLY TO A DENTIST WHO RETIRED BASED ON TREATMENT PROVIDED BY OTHER DENTISTS (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined there was a question of fact whether the continuous treatment doctrine tolled the statute of limitations in this dental malpractice case. The doctrine may apply to one of the dentists (Gold) who retired by imputing to him the continued treatment by other dentists:

"Treatment" does not necessarily terminate upon the last visit, if further care or monitoring of the condition is explicitly anticipated by both physician and patient, as manifested by a regularly scheduled appointment for the near future ... . Thus, "[i]ncluded within the scope of continuous treatment' is a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment" ... . Even the monitoring of an abnormal condition may be sufficient to support the application of the continuous treatment toll ... . The critical inquiry is not whether the defendant failed to make a diagnosis or undertake a course of treatment during the period of limitation, but whether the plaintiff continued to seek treatment for the same or related conditions giving rise to his or her claim of malpractice, during that period... . Accordingly, a defendant cannot defeat the application of the continuous treatment doctrine merely because of a failure to make a correct diagnosis as to the underlying condition, if the defendant treated the plaintiff continuously over the relevant time period for symptoms that are ultimately traced to that condition ... .

Here, the plaintiff does not claim merely that the moving defendant failed to diagnose her condition and treat her for it ... . Rather, she alleged that between 2009 and 2015, she was treated continuously for symptoms ultimately traced to abnormal and severe periodontal disease. Both the plaintiff's affidavit and her expert's affidavit, which referred to numerous specific notations in the plaintiff's dental records, raised triable issues of fact as to whether a course of treatment for periodontal disease was established and therefore the continuous treatment doctrine would apply to toll the statute of limitations ... . [Cohen v Gold, 2018 NY Slip Op 06878, Second Dept 10-17-18](#)

NEGLIGENCE (DENTAL MALPRACTICE, QUESTION OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE APPLIED TO TOLL THE STATUTE OF LIMITATIONS IN THIS DENTAL MALPRACTICE ACTION, DOCTRINE MAY APPLY TO A DENTIST WHO RETIRED BASED ON TREATMENT PROVIDED BY OTHER DENTISTS (SECOND DEPT))/DENTAL MALPRACTICE (QUESTION OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE APPLIED TO TOLL THE STATUTE OF LIMITATIONS IN THIS DENTAL MALPRACTICE ACTION, DOCTRINE MAY APPLY TO A DENTIST WHO RETIRED BASED ON TREATMENT PROVIDED BY OTHER DENTISTS (SECOND DEPT))/CIVIL PROCEDURE (CONTINUOUS TREATMENT DOCTRINE, QUESTION OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE APPLIED TO TOLL THE STATUTE OF LIMITATIONS IN THIS DENTAL MALPRACTICE ACTION, DOCTRINE MAY APPLY TO A DENTIST WHO RETIRED BASED ON TREATMENT PROVIDED BY OTHER DENTISTS (SECOND DEPT))/CONTINUOUS TREATMENT DOCTRINE (DENTAL MALPRACTICE, QUESTION OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE APPLIED TO TOLL THE STATUTE OF LIMITATIONS IN THIS DENTAL MALPRACTICE ACTION, DOCTRINE MAY APPLY TO A DENTIST WHO RETIRED BASED ON TREATMENT PROVIDED BY OTHER DENTISTS (SECOND DEPT))/STATUTE OF LIMITATIONS (DENTAL MALPRACTICE, CONTINUOUS TREATMENT DOCTRINE, QUESTION OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE APPLIED TO TOLL THE STATUTE OF LIMITATIONS IN THIS DENTAL MALPRACTICE ACTION, DOCTRINE MAY APPLY TO A DENTIST WHO RETIRED BASED ON TREATMENT PROVIDED BY



OTHER DENTISTS (SECOND DEPT))

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**DESPITE PLAINTIFF'S SIGNING A CONSENT FORM, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LACK OF INFORMED CONSENT CAUSE OF ACTION PROPERLY DENIED, PLAINTIFF ALLEGED THE WRONG TOOTH WAS EXTRACTED (SECOND DEPT).**

The Second Department, affirming Supreme Court, determined defendants' motions for summary judgment on the lack of informed consent cause of action were properly denied. Plaintiff had signed a consent form but alleged the wrong tooth was extracted:

"[L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence" ... . "To establish a cause of action for malpractice based on lack of informed consent, plaintiff must prove (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" ... . "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" ... .

... Supreme Court properly determined that triable issues of fact precluded an award of summary judgment dismissing the cause of action alleging lack of informed consent insofar as asserted against them. The deposition testimony of the parties and the generic consent form signed by the plaintiff revealed a factual dispute as to whether the plaintiff was adequately informed about the extraction, namely which tooth would be removed... . In addition, each of the expert opinions submitted on the summary judgment motions was in agreement that a root canal was a viable alternative treatment to the extraction of tooth number four. Thus, there were triable issues of fact as to whether a reasonably prudent patient in the plaintiff's position would have undergone the extraction of tooth number four if he or she had been fully informed ... . [Godel v Goldstein, 2017 NY Slip Op 08260, Second Dept 11-22-17](#)

NEGLIGENCE (DENTAL MALPRACTICE, DESPITE PLAINTIFF'S SIGNING A CONSENT FORM, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LACK OF INFORMED CONSENT CAUSE OF ACTION PROPERLY DENIED, PLAINTIFF ALLEGED THE WRONG TOOTH WAS EXTRACTED (SECOND DEPT))/MEDICAL MALPRACTICE (LACK OF INFORMED CONSENT, DENTAL MALPRACTICE, DESPITE PLAINTIFF'S SIGNING A CONSENT FORM, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LACK OF INFORMED CONSENT CAUSE OF ACTION PROPERLY DENIED, PLAINTIFF ALLEGED THE WRONG TOOTH WAS EXTRACTED (SECOND DEPT))/DENTAL MALPRACTICE (LACK OF INFORMED CONSENT, DESPITE PLAINTIFF'S SIGNING A CONSENT FORM, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LACK OF INFORMED CONSENT CAUSE OF ACTION PROPERLY DENIED, PLAINTIFF ALLEGED THE WRONG TOOTH WAS EXTRACTED (SECOND DEPT))/INFORMED CONSENT (DENTAL MALPRACTICE, DESPITE PLAINTIFF'S SIGNING A CONSENT FORM, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LACK OF INFORMED CONSENT CAUSE OF ACTION PROPERLY DENIED, PLAINTIFF ALLEGED THE WRONG TOOTH WAS EXTRACTED (SECOND DEPT))

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**SUPREME COURT SHOULD NOT HAVE RULED PLAINTIFF'S EXPERT WAS NOT QUALIFIED, EXPERT WAS QUALIFIED AND THE ISSUE WAS NOT RAISED BY THE PARTIES, QUESTION OF FACT WHETHER PLAINTIFF GAVE INFORMED CONSENT (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined the dentist who provided an affidavit for plaintiff was an expert, the expert raised a question of fact whether defendant departed from the accepted standard of care, and a question of fact was raised about whether plaintiff gave informed consent to the procedure. The court noted that plaintiff's expert's qualifications were not questioned in defendant's reply papers. Therefore, the court should not have raised the issue on its own and used the issue to support granting summary judgment to the defendant. With regard to informed consent, the court wrote:



“A cause of action predicated on a lack of informed consent is meant to redress a failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical . . . practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation”... .. To establish a cause of action to recover damages for malpractice based on lack of informed consent, a plaintiff must prove (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 ... .

Here, the defendant failed to submit proof sufficient to establish, prima facie, that he had informed the plaintiff of the reasonably foreseeable risks associated with the treatment, and, in any event, that a reasonably prudent patient in the same position would have undergone the treatment if he or she had been fully informed ... . [Dyckes v Stabile, 2017 NY Slip Op 06252, Second Dept 8-23-17](#)

NEGLIGENCE (DENTAL MALPRACTICE, SUPREME COURT SHOULD NOT HAVE RULED PLAINTIFF'S EXPERT WAS NOT QUALIFIED, EXPERT WAS QUALIFIED AND THE ISSUE WAS NOT RAISED BY THE PARTIES, QUESTION OF FACT WHETHER PLAINTIFF GAVE INFORMED CONSENT (SECOND DEPT))/MEDICAL MALPRACTICE (DENTAL MALPRACTICE, SUPREME COURT SHOULD NOT HAVE RULED PLAINTIFF'S EXPERT WAS NOT QUALIFIED, EXPERT WAS QUALIFIED AND THE ISSUE WAS NOT RAISED BY THE PARTIES, QUESTION OF FACT WHETHER PLAINTIFF GAVE INFORMED CONSENT (SECOND DEPT))/DENTAL MALPRACTICE (SUPREME COURT SHOULD NOT HAVE RULED PLAINTIFF'S EXPERT WAS NOT QUALIFIED, EXPERT WAS QUALIFIED AND THE ISSUE WAS NOT RAISED BY THE PARTIES, QUESTION OF FACT WHETHER PLAINTIFF GAVE INFORMED CONSENT (SECOND DEPT))/EXPERT OPINION (DENTAL MALPRACTICE, SUPREME COURT SHOULD NOT HAVE RULED PLAINTIFF'S EXPERT WAS NOT QUALIFIED, EXPERT WAS QUALIFIED AND THE ISSUE WAS NOT RAISED BY THE PARTIES, QUESTION OF FACT WHETHER PLAINTIFF GAVE INFORMED CONSENT (SECOND DEPT))/INFORMED CONSENT (DENTAL MALPRACTICE, SUPREME COURT SHOULD NOT HAVE RULED PLAINTIFF'S EXPERT WAS NOT QUALIFIED, EXPERT WAS QUALIFIED AND THE ISSUE WAS NOT RAISED BY THE PARTIES, QUESTION OF FACT WHETHER PLAINTIFF GAVE INFORMED CONSENT (SECOND DEPT))/CIVIL PROCEDURE (ISSUES NOT RAISED BY THE PARTIES, DENTAL MALPRACTICE, SUPREME COURT SHOULD NOT HAVE RULED PLAINTIFF'S EXPERT WAS NOT QUALIFIED, EXPERT WAS QUALIFIED AND THE ISSUE WAS NOT RAISED BY THE PARTIES, QUESTION OF FACT WHETHER PLAINTIFF GAVE INFORMED CONSENT (SECOND DEPT))/SUMMARY JUDGMENT (ISSUES NOT RAISED BY THE PARTIES, DENTAL MALPRACTICE, SUPREME COURT SHOULD NOT HAVE RULED PLAINTIFF'S EXPERT WAS NOT QUALIFIED, EXPERT WAS QUALIFIED AND THE ISSUE WAS NOT RAISED BY THE PARTIES, QUESTION OF FACT WHETHER PLAINTIFF GAVE INFORMED CONSENT (SECOND DEPT))/EVIDENCE (DENTAL MALPRACTICE, SUPREME COURT SHOULD NOT HAVE RULED PLAINTIFF'S EXPERT WAS NOT QUALIFIED, EXPERT WAS QUALIFIED AND THE ISSUE WAS NOT RAISED BY THE PARTIES, QUESTION OF FACT WHETHER PLAINTIFF GAVE INFORMED CONSENT (SECOND DEPT))

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## **Battery Cause of Action Based Upon the Complete Absence of Consent or Fraudulently Induced Consent Is Not Duplicative of a Dental Malpractice Allegation—Criteria Explained/Questions of Fact Raised Re: the Deceptive Business Practices Cause of Action—Some of the Criteria Explained**

The Fourth Department determined the cause of action for battery was not duplicative of the cause of action for dental malpractice because it was based upon the allegations consent to the procedure was completely absent or was fraudulently induced. In addition, there were questions of fact re: the deceptive business practices cause of action:

...[T]he cause of action asserting the complete absence of consent and/or fraudulently induced consent for treatment is properly treated as one for battery rather than for dental malpractice, and it is not duplicative of the dental malpractice cause of action ... . “It is well settled that a medical professional may be deemed to have committed battery, rather than malpractice, if he or she carries out a procedure or treatment to which the patient has provided no consent at all’ ” ... . The court properly denied that part of the ... defendants’ motion with respect to the battery cause of action, inasmuch as they failed to meet their initial burden of establishing that they “did not intentionally engage in offensive bodily contact without plaintiff’s consent”... ..

A cause of action for deceptive business practices under section 349 “requires proof that the defendant engaged in consumer-oriented conduct that was materially deceptive or misleading, causing injury” ... . Even assuming, arguendo, that the ... defendants met their initial burden by establishing that the underlying transaction was private in nature and the allegedly deceptive acts were not aimed at the public at large ..., we conclude that plaintiff’s submissions raised issues of fact concerning whether the ... defendants engaged in a scheme to place profits before patient care, which allegedly included fraudulent practices that impacted consumers at large beyond a particular dentist’s treatment of an individual patient ... . [Matter of Smiles, 2015 NY Slip Op 01362, 4th Dept 2-13-15](#)



## **QUESTIONS OF FACT WHETHER DENTIST WAS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR AND WHETHER PLAINTIFF GAVE INFORMED CONSENT (THIRD DEPT).**

After finding there was a question of fact whether the dentist (Weiss) who treated plaintiff was an employee of defendant-Toothsavers or an independent contractor, the Second Department determined there was a question of fact about whether plaintiff gave informed consent to the procedure:

“The Toothsavers defendants contend that because Weiss was an independent contractor, not an employee, they cannot be vicariously liable for Weiss’s malpractice. The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor’s negligent acts” ... . “The determination of whether an employer-employee relationship exists turns on whether the alleged employer exercises control over the results produced or, more importantly, the means used to achieve the results” ... . . .

“To establish a cause of action [to recover damages] for malpractice based on lack of informed consent, [a] plaintiff must prove (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” ... . [Chan v Toothsavers Dental Care Inc, 2015 NY Slip Op 01236, 2nd Dept 2-11-15](#)

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## **Corporate Integrity Documents Privileged Under Education Law 6527 (3)**

The Fourth Department determined corporate integrity documents sought by plaintiffs in a fraud and dental malpractice action were privileged under the Education Law and did not have to be disclosed:

We conclude that the court erred in determining that the requested corporate integrity documents were not privileged under Education Law § 6527 (3). [Defendant] met its burden of establishing that the corporate integrity documents sought by plaintiffs were related to the “performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program” ... . Specifically, [defendant] established that the corporate integrity documents were prepared pursuant to state and federal corporate integrity agreements, which set forth procedures for the review and monitoring of the quality of care of the dental clinics. Thus, [defendant] established “that it has a review procedure and that the [corporate integrity documents] for which the [privilege] is claimed [were] obtained or maintained in accordance with that review procedure’ ” ... . Contrary to plaintiffs’ contention, there is nothing in the language of section 6527 (3) limiting applicability of the privilege to agencies located in New York or records prepared in the state... . [Matter of Small Smiles Litig, 2014 NY Slip Op 03080, 4th Dept 5-2-14](#)