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## 2018 NEW YORK SUPER LAWYER

**Robert A. Fitch** has been named a **2018 New York Metro Super Lawyer**. *Super Lawyers*, a service of Thomson Reuters, selects attorneys each year for recognition through a rigorous nomination process that includes peer review by practice area and independent research on candidates. Only the top 5% of the lawyers in the New York metro area are chosen annually for this honor. Bob was also selected as a **Super Lawyer** in 2013, 2014, 2015, 2016 and 2017. He is the resident partner in our New York City office and is a member of the Firm's Executive Committee. Bob concentrates his practice in the defense of architects and engineers, construction, medical and oral surgery malpractice claims, and commercial motor vehicle litigation. He received his undergraduate degree from Syracuse University and his J.D. from Syracuse University College of Law. He is admitted to practice in New York since 1974, as well as in federal courts in Southern, Eastern and Northern Districts of New York and the Second Circuit Court of Appeals. He has tried over 100 cases to verdict and is a member of the Defense Research Institute, Federal Bar Council, PIAA and Trucking Industry Defense Association. He has a peer review rating by Martindale-Hubbell of AV (the highest).



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## NEW YORK APPELLATE

### Dismissal of Dental Malpractice Case Affirmed

The Appellate Division, First Department, unanimously affirmed an Order of the Supreme Court, Bronx County, dismissing plaintiff's complaint against our client, a general dentist. Plaintiff's attorney is an experienced litigator who concentrates in dental malpractice cases and he is also a retired dentist.

Claims of dental malpractice and lack of informed consent were alleged in the Complaint against our client. Plaintiff, a 46-year-old female, presented to our client to obtain a second opinion regarding dental treatment options following a consultation she had with oral surgeons at an university hospital in the New York City area. The oral surgeons recommended a surgical course of treatment which included dental implant surgery involving three separate procedures over the course of six months, including bilateral sinus lifts with infused bone grafting material, placement of five implants, and a



**Sylvia E. Lee**

third procedure to uncover the implants. This was to be followed by the final metal-ceramic restorative procedures, including the placement of five implant crowns and five implant abutments. Plaintiff was scheduled to undergo the dental implant surgery.

Following her consultation with the oral surgeons, plaintiff presented to our client for a general checkup and to obtain a second opinion regarding her treatment options. Plaintiff expressed to our client, among other things, her fear of surgery. Prior to placing the bridges, our client advised plaintiff of his opinion that dental implant surgery proposed by the oral surgeons carries with it certain risks, and offered her a conservative dental treatment plan which involved placement of bridges.

Notably, plaintiff was still wearing the bridges that were placed by our client at the time her deposition was taken, and also at the time our expert performed her independent dental examination, which was a year and a half after she was last treated by our client. Plaintiff testified at her deposition that she never underwent periodontal treatment and she was never diagnosed with periodontal disease.

As a result of the claimed dental malpractice alleged against our client, plaintiff claimed, among other injuries, she suffered from periodontal breakdown and bone loss, future loss of tooth vitality and loss of tooth structure. Plaintiff also claimed lack of informed consent in that our client purportedly misrepresented the risks of implant surgery proposed by the oral surgeons to convince her to proceed with his proposed conservative treatment of dental bridges.

We moved for summary judgment seeking dismissal of plaintiff's claims of dental malpractice and lack of informed

consent against our client. In support of our motion, in addition to the dental records and the deposition testimony of the parties, we submitted an Affirmation by our expert general dentist who opined that our client met the standard of care in all respects in the dental treatment provided to plaintiff, and that no act or omission on the part of our client was a proximate cause of any of plaintiff's alleged injuries or damages.

Justice Stanley B. Green of the Supreme Court, Bronx County, dismissed all of plaintiff's claims based on her failure to raise an issue of fact after our client established his entitlement to judgment by submitting evidence showing that he did not depart from good and accepted dental practices, and based on our client fully informing plaintiff of the risks and benefits of his conservative treatment versus implant surgery.

An appeal of that decision and order was brought by plaintiff. In opposition to plaintiff's appeal, we argued that the Affidavit of plaintiff's expert was conclusory and lacked evidentiary foundation as her opinions were completely unsupported by the records, and, therefore failed to establish that our client's treatment proximately caused plaintiff's alleged injuries.

The Appellate Division, First Department (155 A.D.3d 560), unanimously affirmed the dismissal of all claims against our client by affirming the lower court's decision. The Appellate Division found that our client established his *prima facie* entitlement to judgment as a matter of law by submitting evidence showing that he did not depart from good and accepted dental practices, and that he fully informed plaintiff of the risks and benefits of his conservative treatment and the implant surgery, and that plaintiff had failed to raise any issues of fact.

**Sylvia E. Lee** is Of Counsel to the firm in our New York City office. She concentrates her practice in the defense of medical and dental professionals, hospitals, nursing homes, product liability, premises liability, toxic tort including asbestos litigation, auto liability, and commercial litigation. In addition, she has an extensive appellate law practice. Sylvia graduated with a B.S. degree from the State University of New York at Stony Brook. She then attended New York Law School and earned her Juris Doctorate degree. She is admitted to practice in New York and the U.S. District Court for the Southern District of New York.

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# NEW YORK APPELLATE

## Protective Order Limiting Further Deposition of Oral Surgeon Client Affirmed



**Sylvia E. Lee**

The Appellate Division, First Department unanimously affirmed the Protective Order issued by the Supreme Court, New York County which limited plaintiff's counsel to one more deposition session of Rawle & Henderson LLP's client, an oral surgeon, and limited the scope of inquiry concerning the co-defendant's plastic surgical procedure which was performed

solely by the co-defendant.

This is a dental and medical malpractice action filed by plaintiff following multiple surgical procedures separately performed, first by our doctor, and then by the co-defendant, a plastic surgeon. After having undergone prior orthognathic surgery by another surgeon, plaintiff had complaints of lower lip ptosis (droopy lip) and numbness. Our client, an oral and maxillofacial surgeon, first performed his oral and maxillofacial surgery, consisting of resuspension of the mentalis surgery and placement of a chin implant. This was then followed by performance of fascia lata sling surgery and other plastic surgical procedures by the co-defendant plastic surgeon. While the surgical procedures were done in the same operating room, the procedures were not done at the same time. Each respective surgeon separately performed his own aspect of the surgical procedures, and neither participated in the other's surgery.

The co-defendant testified very clearly at his deposition that he was the only one who performed his aspect of the plastic surgical procedures. The co-defendant also testified at deposition that while our client would address the mentalis muscle and perform the maxillofacial procedures, the

co-defendant would elevate the facial soft tissues by performing the fascia lata sling procedure. The co-defendant testified extensively about how he explained to plaintiff the risks, benefits and alternatives to the fascia lata sling surgery prior to the procedure.



**Robert A. Fitch**

After plaintiff's counsel conducted two sessions of the co-defendant physician's deposition, our client was produced for his deposition at two separate sessions, totaling over nine hours. Our client testified at his deposition that he did not have the training or specific expertise in fascia lata sling surgery, that this surgery would be performed solely by the co-defendant plastic surgeon, and that he was not performing any aspect of the co-defendant's surgeries. Our client also testified at his deposition that although he had seen fascia lata sling surgery performed by neurosurgeons and plastic surgeons, he personally had never performed this surgical technique.

During the course of the two sessions of our client's deposition, plaintiff's counsel had devoted his questioning of the doctor concerning his education, training and history of performing aesthetic surgery of the chin, and whether he thought certain medical literature about resuspension of the mentalis muscle to treat the lower lip was authoritative. Although our client clearly testified that he was not trained in the procedure performed by the co-defendant plastic surgeon, plaintiff's counsel questioned the doctor about the fascia lata muscle and its physiological function. Plaintiff's counsel had also asked our client his opinion as to whether plaintiff needed the fascia lata sling surgery to improve her

lip ptosis condition. However, despite defense counsel's objections, this did not prevent plaintiff's counsel from obtaining responsive testimony from our client.

Despite spending over nine hours to depose our client, plaintiff's counsel had devoted the majority of his questioning concerning the care and treatment that was proposed and rendered by co-defendant plastic surgeon rather than by our client. Plaintiff's counsel had barely questioned our client concerning his own dental chart and his substantive treatment of the patient during the two deposition sessions. Due to plaintiff's counsel's inability to complete our client's deposition in nine hours over the course of two days, our client was required to appear for a third deposition session.

After making several unsuccessful attempts to obtain plaintiff's counsel agreement that the third deposition session would be our client's final session, we had no choice but to make a motion in the lower Court seeking a Protective Order against plaintiff's counsel's never-ending and abusive discovery tactics. Plaintiff's counsel, a seasoned trial attorney who specializes in dental malpractice cases, is well known among the defense malpractice bar for taking multiple and repeated deposition sessions of defendant doctors.

Justice Alice Schlesinger of the Supreme Court, New York County, granted our client's motion and issued a Protective Order limiting the duration to one more session and limiting the scope of questioning of his deposition, with no further questions about the plastic surgical procedures performed by co-defendant.

An appeal of that decision and order was brought by plaintiff. The Appellate Division, First Department unanimously affirmed that the lower Court did not improvidently exercise its discretion in limiting our client's further deposition to one day, which was in addition to the two previous days he had been deposed, and in limiting the scope of inquiry concerning the surgical procedure performed by co-defendant plastic surgeon. The Appellate Division pointed out that the plastic surgical procedure was performed solely by the co-defendant plastic surgeon; that our client, who is an oral surgeon, was not trained in this procedure; and that he did not assist the co-defendant with the plastic surgery on the date in question. The Appellate Division found that plaintiff failed to show that the limitations of questioning of our client deprived her of any relevant deposition testimony or material necessary for preparation of trial.

**Robert A. Fitch** is the resident partner in our New York City office. He concentrates his practice on the defense of architects and engineers, construction, medical and oral surgery malpractice claims, and commercial motor vehicle litigation. He received his undergraduate degree from Syracuse University and his J.D. from Syracuse University College of Law. He is admitted to practice in New York since 1974, as well as in Federal Courts in Southern, Eastern and Northern Districts of New York and the Second Circuit Court of Appeals. Bob has tried over 100 cases to verdict and is a member of the Defense Research Institute, Federal Bar Council, PIAA and Trucking Industry Defense Association. Bob was named a New York Metro Super Lawyer in 2013, 2014, 2015, 2016, 2017 and 2018. He has a peer review rating by Martindale-Hubbell of AV (the highest). Bob is a member of Rawle & Henderson LLP's Executive Committee.

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