SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

Kelly Varano, as parent and natural guardian of infant JEREMY BOHN; SHANNON FROIO, as parent and natural guardian of infant SHAWN DARLING; BRENDA FORTINO, as parent and natural guardian of infant JULIE FORTINO; MARIE MARTIN, as parent and natural guardian of infant KENNETH KENYON; JENNY LYNN COWHER, as parent and natural guardian of infant WILLIAM MARTIN; HOLLAN CRIPPEN, as parent and natural guardian of infant DEVAN MATHEWS; JESSICA RECORE, as parent and natural guardian of infant SAMANTHA McLOUGHLIN; LAURIE and DOMINICK RIZZO, as legal custodians of infant JACOB McMAHON; JASON MONTANYE, as parent and natural guardian of infant KADEM MONTANYE; and FRANCES SHELLINGS, as parent and natural guardian of infant RAYNE SHELLINGS,

Index No. 2011-2128
RJI No. 33-11-1413

Plaintiffs,

v

FORBA Holdings, LLC n/k/a/ Church Street Health Management, LLC; FORBA, N.Y., LLC; FORBA, LLC n/k/a LICSAD, LLC; FORBA NY, LLC n/k/a LICSAC NY, LLC; DD Marketing, Inc.; DeRose Management, LLC; Small Smiles Dentistry of Albany, LLC; Albany Access Dentistry, PLLC; Small Smiles Dentistry of Syracuse, LLC; Daniel E. DeRose; Michael A. DeRose, D.D.S.; Edward J. DeRose, D.D.S.; Adolph R. Padula, D.D.S.; William A. Mueller, D.D.S.; Michael W. Roumph; Maziar Izadi, D.D.S.; Laura Kroner, D.D.S.; Judith Mori, D.D.S.; Lissette Bernal, D.D.S.; Edmise Forestal, D.D.S.; Evan Goldstein, D.D.S.; Keerthi Golla, D.D.S.; Nassef Lancen, D.D.S.; Wadia Hanna, D.D.S.; Bernice Little-Mundle, D.D.S.; Naveed Aman, D.D.S.; Koury Bonds, D.D.S.; Tarek Elsafty, D.D.S.; Dimitri Filostrat, D.D.S.; Yaqoob Khan, D.D.S.; Delia Morales, D.D.S., Janine Randazzo, D.D.S.; Loc Vin Vuu, D.D.S. and Grace Yaghmai, D.D.S.

Defendants.

DECISION

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KARALUNAS, J.:

This constitutes the court's decision concerning the five summary judgment motions of defendants. The motions were argued during the court's July 10, 2013 motion calendar.

I. Background

Jeremy Bohn was three years old when he first visited Small Smiles Dentistry of Syracuse on May 23, 2006. At that time, defendant dentist Dr. Koury Bonds completed a treatment plan for the child calling for eight fillings and two tooth extractions or pulpotomies (also called "baby root canals"). On May 23, 2006, Jeremy was placed in a restraint and given nitrous oxide gas while Dr. Bonds extracted two of his teeth.

Jeremy returned to the Syracuse clinic on August 31, 2006. During that visit, Dr. Naveed Aman performed four baby root canals and installed stainless steel crowns on the affected teeth. Jeremy returned to the clinic on October 11, 2006. At that time, Dr. Bonds drilled and filled three of Jeremy's teeth without anesthesia. Jeremy received a total of four fillings. Jeremy, who had just turned four years old, was restrained in an immobilizer (also called a "papoose").

Jeremy returned to the Syracuse clinic on October 23, 2006. At that time, Dr. Bonds drilled and filled two of Jeremy's teeth with three fillings without anesthesia. On March 22, 2007, Dr. Aman drilled and filled another tooth. This time, Jeremy received nitrous oxide gas. On November 27, 2007, Dr. Yagoob Khan placed another stainless steel crown on one of Jeremy's baby teeth. On January 21, 2008, Dr. Khan drilled one of Jeremy's teeth and filled it with two fillings, again with no anesthesia. Jeremy stopped going to the Small Smiles clinic in March

2008.

The Small Smiles clinic in Syracuse opened on October 11, 2004. It was one of about 50 Small Smiles dental clinics throughout the United States. The Small Smiles business began in 2001 and primarily saw patients who were children receiving Medicaid. For the purposes of this decision, the initial owners of Small Smiles are called "Old Forba" and include the following defendants: FORBA LLC, FORBA NY LLC, DD Marketing, Inc. and DeRose Management, LLC. The following individuals (the "Individual Defendants") were founders, owners, officers and board members of Old Forba: Danny DeRose, Dr. Edward DeRose, Dr. Michael DeRose, Dr. Adolph Padula, Dr. William Mueller and Michael Roumph. In September 2006, Old Forba sold the business to a distinct entity called, for the purposes of this decision, "New Forba" for $435 million. The New Forba defendants are FORBA Holdings LLC and FORBA NY LLC.

By supplemental summons filed April 7, 2011, Kelly Varano, as parent and natural guardian of infant Jeremy Bohn, joined nine other plaintiffs in suing Old Forba, New Forba, the Individual Defendants, Small Smiles Dentistry of Syracuse, LLC, and the specific dentists who treated their children at the Syracuse Small Smiles clinic. The complaint contains seven causes of action for fraud, battery, breach of fiduciary duty, negligence, malpractice, lack of informed consent and violation of Sections 349 and 350 of New York's General Business Law. In a decision and order filed October 4, 2012, Justice John C. Cherundolo denied defendants' pre-answer motions to dismiss the various causes of action in the complaint. Appeal of the rulings is pending. Trial of Jeremy Bohn's claims is scheduled for September 16, 2013 in Onondaga County.

II. Discussion

A. Malpractice claims

Dr. Aman, Dr. Bonds and Dr. Khan contend that they are entitled to summary judgment on plaintiff's dental malpractice cause of action because they exercised their best medical judgment to provide treatment within accepted standards of dentistry practices. The dentists also claim that it was normal that Jeremy was swollen, in pain, crying, visibly shaken, upset and afraid of the dentist after they treated him. Aman Aff. ¶ 18; Bonds Aff. ¶¶ 22, 28, 33. Dr. Bonds, who twice placed Jeremy in a restraint because the child was "out of control" and "uncooperative," contends that act was not part of his dental treatment. Bonds Aff. ¶¶ 14, 19, 24. Each defendant dentist submitted his own affidavit and the affidavit of expert Leslie Seldin DDS in support of his position.

In order to prove medical or dental malpractice, plaintiff must show that an alleged injury was caused by defendant's violation of one of three duties: "(1) the duty to possess the requisite skill and knowledge as is possessed by the average member of the medical profession in the community in which he practices; (2) the duty to exercise ordinary and reasonable care in the application of that professional knowledge and skill; or (3) the duty to use his best judgment in the application of his knowledge and skill." Monahan v. Weichert, 82 A.D.2d 102, 105-06 (4th Dep't 1981). The narrow "error in judgment rule" applies only where "there is evidence that the defendant physician considered and chose among several medically acceptable treatment alternatives." Wulbrecht v. Jehle, 89 A.D.3d 1470 (4th Dep't 2011) (citations and quotation marks omitted).

Defendants on a summary judgment motion have the burden to rebut plaintiff's claim of malpractice with factual proof. Suib v. Keller, 6 A.D.3d 805, 806 (3d Dep't 2004). "Plaintiffs must then rebut defendant's showing by demonstrating, typically through expert medical opinion, a deviation from accepted practice and that the deviation was a proximate cause of the injury." Id.

Assuming only for the purposes of this motion that defendants met their initial burden, plaintiff raised multiple issues of fact through the opinion of his expert. With respect to Dr. Bonds, the expert provided evidence that he violated the relevant standard of care by (1) preparing and recommending a treatment plan without clinical justification, Pl. Expert Aff. ¶¶ 51-58; (2) unnecessarily restraining Jeremy with a papoose, Pl. Expert Aff. ¶¶ 59-62, 81-83; (3) representing that there were no known risks to the use of a restraint, Pl. Expert Aff. ¶¶ 63-67, 84; (4) failing to refer Jeremy to a dentist who could appropriately diagnose and manage his behavior, Pl. Expert Aff. ¶¶ 68-69; (5) extracting two teeth without clinical justification, Pl. Expert Aff. ¶¶ 70-72; (6) failing to use local anesthetics, Pl. Expert Aff. ¶¶ 85-86, 92; and (7) filling four teeth without clinical justification, Pl. Expert Aff. ¶¶ 87-89, 93-95. With respect to Dr. Aman, the expert provided evidence that he violated the relevant standard of care by (1) altering Jeremy's treatment plan, Pl. Expert Aff. ¶¶ 74-76; (2) performing four medically unnecessary baby root canals and crowns, Pl. Expert Aff. ¶¶ 77-78; and (3) failing to use local anesthetics, Pl. Expert Aff. ¶¶ 96-97. With respect to Dr. Khan, the expert provided evidence that he violated the relevant standard of care by failing to use local anesthetics, Pl. Expert Aff. ¶¶ 99-100.

Plaintiff's expert also provided evidence that the error in judgment rule cannot apply to the facts of this case because none of the defendant dentists was choosing among several medically

acceptable treatment alternatives in providing treatment to Jeremy. Pl. Expert Aff. ¶¶ 157-60. The expert provided evidence that the dentists' substandard treatment caused plaintiff pain and suffering. Pl. Expert Aff. ¶ 152. Defendants' reply that pain is merely subjective is no response to this evidence, and only underscores that a jury must resolve the issues of fact. Witz Reply Aff. (Aman) ¶ 31; Witz Reply Aff. (Bonds) ¶ 31; Witz Reply Aff. (Khan) ¶ 31.

Summary judgment is denied with respect to the malpractice claims. Plaintiff withdrew his malpractice claims against Old Forba, New Forba and the Individual Defendants. Pl. Mem. at 16 n.52.

B. Lack of informed consent claims

Plaintiff limited his malpractice cause of action regarding lack of informed consent to defendant Dr. Bonds, alleging that the dentist failed to obtain his parents' informed consent before using a restraint. Dr. Bonds contends that he is entitled to summary judgment because Jeremy's mother signed a proper consent form and use of the restraint was not part of his dental treatment of Jeremy.

The elements of a cause of action for malpractice based on 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 she or he had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury." Foote v. Rajadhyax, 268 A.D.2d 745 (3d Dep't

2000).

The "Consent for Protective Immobilization" form that Jeremy's mother signed stated that "there are no known risks to the immobilization procedure." Def. Jt. Ex. Y. During his deposition, Dr. Bonds stated that he generally explained to parents that immobilization carried risks of marks or bruises on the child. Bonds Dep. at 391, 398. In their affidavits, Dr. Bonds and his expert characterized any risks as rare or minimal. Bonds Aff. ¶ 17; Seldin Aff. ¶ 14. Plaintiff provided expert opinion to the contrary, creating an issue of fact. Pl. Expert Aff. ¶¶ 64-67.

Dr. Bonds also contends that use of the restraint was not part of Jeremy's dental treatment even though the Small Smiles consent form called it a procedure to facilitate the delivery of quality dental treatment and notes about immobilization were part of every Small Smiles "operative procedures" chart. Def. Jt. Ex. Y. Nonetheless, plaintiff's expert provided evidence that use of the restraint is "an integral part of treatment when used." Pl. Expert Aff. ¶ 33. Use of the restraint easily falls within the New York Public Health Law definition of a "diagnostic procedure which involved invasion or disruption of the integrity of the body." N.Y. Pub. Health L. § 2805-d(2)(b).

As to the other elements of the cause of action, plaintiff raised issues of fact through submission of the affidavits of Kelly Varano and his expert. Summary judgment is denied to Dr. Bonds.

C. Fraud claims

Plaintiff brought a cause of action sounding in fraud against all defendants. Defendants contend that they are entitled to summary judgment on this claim because (1) the fraud cause of

action duplicates the malpractice causes of action; (2) damages sought in the fraud cause of action are identical to the damages sought in the malpractice causes of action; (3) profit motive is insufficient evidence of fraudulent intent; (4) a violation of Limited Liability Company Law Section 1203 is insufficient evidence of fraudulent intent; and (5) there is no evidence that the individual dentists acted in bad faith in rendering dental treatment to Jeremy.

As noted above, plaintiff has named only individual dentists in his malpractice causes of action. Therefore, allegations of fraud against the remaining defendants cannot be duplicative. Moreover, Justice Cherundolo ruled on October 4, 2012 that the fraud and malpractice causes of action were properly pleaded in the alternative. Decision at 14. In making this determination, Justice Cherundolo interpreted Simcuski v. Saeli, 44 N.Y.2d 442 (1978) and other precedent. Defendants urge this court to revisit the legal issue. While the court is cognizant of the difference between a pre-answer motion to dismiss and a summary judgment motion, the "doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding." Brownrigg v. New York City Hous. Auth., 29 A.D.3d 721, 722 (2d Dep't 2006). "The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision." Id.

Justice Cherundolo made a legal determination that Simcuski permitted plaintiffs to pursue an intentional fraud claim that was more than another aspect of the negligence-based malpractice theory. Decision at 13-14. He also rejected the contention of the individual dentists that the alleged fraud must occur after the malpractice. Decision at 17. These holdings are the law of the case. Justice Cherundolo noted that the intentional fraud claim involved more than

malpractice because it concerned a corporate scheme "created to take advantage of children in poorer families so that defendants could defraud the U.S. and several state governments of as much Medicaid monies as possible." Decision at 14. The theory plaintiff advances is similar to that described in Mitschele v. Schultz, where the First Department held that accounting malpractice and fraud claims were distinct: "defendants are alleged to have perpetuated a fraud on plaintiff from the time they were retained to provide [dental] services, in failing to disclose their concern with protecting the interests of another entity, namely [their] employer." Mitschele v. Schultz, 36 A.D.3d 249, 254 (1st Dep't 2006).

With respect to damages, Justice Cherundolo made a legal determination that Simcuski did not require the malpractice damages and fraud damages to be different, but they must be distinguishable from one another. Decision at 15. The Court of Appeals acknowledged that, based on the evidence, plaintiff may sustain "little or no damages in consequence of the alleged fraud." Simcuski, 44 N.Y.2d at 454. The necessary distinction is present because "if plaintiffs can prove that the intentional misconduct resulted in improper treatment, they are eligible to receive damages based on fraud [but] if the conduct is shown to be negligent rather than intentional, the damages flow from the alternative malpractice claim." Decision at 15-16. One trial court described the "parallel nature of the damages" in a case where, as here, "plaintiff's fraud cause of action is not merely a malpractice claim with a claim for concealment of malpractice superimposed on it." New York State Workers' Compensation Bd. v. SGRisk LLC, 2013 WL 842527 *9 (Albany Co. March 1, 2013). Like another trial judge, Justice Cherundolo noted that the availability of punitive damages on the fraud claim supplied another distinction.

Decision at 16. See Vici Vidi Vini, Inc. v. Buchanan Ingersoll, PC, 2008 WL 3819714 (New York Co. August 8, 2008). These legal determinations are the law of the case.

"A cause of action for fraud may arise when one misrepresents a material fact, knowing it is false, which another relies on to its injury." Graubard Mollen Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112, 122 (1995). Defendants' remaining arguments concern whether there are facts to support the elements of knowing misrepresentation or nondisclosure of material facts. Plaintiff on a summary judgment motion must tender evidence to support the fraud claim by clear and convincing evidence. Simcuski, 44 N.Y.2d at 453.

Plaintiff satisfied his burden. It is a matter of record that the United States Department of Justice and various New York State agencies, including the New York State Attorney General, investigated the Forba network of clinics beginning in 2007 and received millions of dollars for reimbursement of fraudulent Medicaid billings. Higgins Aff. ¶¶ 7-10. There also is ample evidence from which a jury could conclude that defendants perpetuated a fraud on plaintiff by treating him and other Small Smiles patients not to meet his medical needs but as a means to maximize profits for the dentists, corporations and Individual Defendants.

Email correspondence among Old Forba officers and dentists demonstrates the overriding emphasis on profits. In an April 19, 2006 email concerning the Albany clinic, Individual Defendant Michael Roumph advised the clinic's lead dentist of her daily production goals in terms of dollars and the clinic shortfall. Pl. Ex. 71. The email stated that "[p]roduction per patient needs to improve." Id. In a March 10, 2006 email concerning the Rochester clinic, Roumph advised of the daily production dollar goals and stated that "[b]iggest problem continues

to be production per patient and Rochester is lowest in the company so far in the month of March." Pl. Ex. 91. The same email seeks to analyze production by dentist. Id. That per-dentist income data was provided in an April 13, 2006 email. Pl. Ex. 92. A June 20, 2006 email from Roumph requests a "daily production average of 'production by provider'" for each dentist in the Albany, Syracuse and Rochester clinics. Pl. Ex. 93. See also Pl. Ex. 101 (10/3/05 email containing per Syracuse clinic dentist production analysis).

In a March 22, 2006 email from Roumph to the lead dentist in the Albany clinic, he advises "Maybe we talk to docs about doing 1 more procedure per visit. Then next month we do the same thing, 1 more procedure per visit." Pl. Ex. 95. The next month, Roumph updated the Rochester clinic income, noting "[a]s we have discussed, best way to reach that [budget goal] is improving production per patient." Pl. Ex. 381. See also Pl. Ex. 101 (6/12/05 email from Roumph regarding Syracuse clinic production stating: "The good news is we have all the patients we need, the bad news is we haven't been able to do much with them.").

Once New Forba acquired the Small Smiles clinics in September 2006, regional officers provided weekly reports focused on maximizing profits. For example, the January 31, 2007 report stated that in Rochester "per patient production and # of cases over $500 SUCKS" and in Syracuse "# of cases over $500 is weak . . . will discuss treatment planning." Pl. Ex. 150. The May 30, 2007 report criticized the Syracuse clinic for "poor PPP [production per patient], noting that "hygiene conversions are terrible." Pl. Ex. 152. In the September 10, 2007 weekly report, the New Forba employee noted his intention to visit the Albany clinic, where "ppp will be a major item of discussion." Pl. Ex. 154. See also Pl. Ex. 168 (September 14, 2007 report stating with

respect to the Syracuse clinic's income that "ppp is magic!"). The weekly reports continued to monitor the three clinics' "hygiene conversions," "daily production," and "PPP." Pl. Exs. 574, 576, 578.

Plaintiff also provided evidence tending to show that defendants violated Section 1203 of New York's Limited Liability Corporation Law as additional support for the fraud theory. Section 1203 requires each member of a limited liability company providing dental services to be a dentist licensed to practice in New York State. N.Y. Ltd. Liab. Law § 1203(a). This requirement is designed to prevent a "money-making corporation" from practicing dentistry or hiring dentists to act for it. Matter of Co-operative Law Co., 198 N.Y. 479, 484 (1910).

Although both Old Forba and New Forba complied with this requirement on its face, plaintiff contends that the true owners of the Small Smiles clinics in Albany, Syracuse and Rochester were the corporations. In addition to the evidence cited above indicating that the corporations controlled the practices, the Old Forba company strategy explicitly states that it controls, among other things, "specific dental procedures and how they should be performed." Pl. Ex. 511. The nominal owner of the clinics under both Old Forba and New Forba testified that the corporations received all clinic profits and assumed all business risks. Padula Dep. at 111-114. He testified that his only reason for acquiring a dental license in New York was to allow Old Forba to open clinics in the state. Padula Dep. at 64-65. Another nominal owner of the clinics under New Forba testified that his job was "not clinical dentistry" but management of the clinics for the corporation. Knott Dep. at 236. Contrary to defendants' contention, a jury could infer that defendants violated Section 1203 as part of the scheme to prioritize corporate profits over patient

care.

As noted above, there are issues of fact whether the individual dentists deviated from accepted practice in providing treatment to Jeremy. Moreover, there is ample evidence from which a jury could infer that the individual dentists knowingly participated in or were influenced by the corporate scheme. For example, Dr. Aman's December 7, 2005 semi-annual performance review stated that he "needs to improve production by ↑ efficiency & # of procedures." Pl. Ex. 46. In a February 10, 2006 email, Syracuse dentist Dr. Janine Randazzo reports to corporate that "I keep urging the docs to do as much as you can do on each pt. [patient]." Pl. Ex. 97. In a December 15, 2004 email about the Syracuse clinic, Individual Defendant Daniel DeRose wrote: "Syracuse has issues. They think 8k is acceptable. I do not know how they were infected but they are." Pl. Ex. 101. In a May 31, 2006 email Dr. Khan reported to corporate that he met with his dentists to discuss their performance in terms of revenue. Pl. Ex. 101.

An internal communication between Daniel DeRose and Dr. Robert Andrus (who worked for both Old Forba and New Forba) shows the extent to which the corporation trained individual dentists in the profit-driven model. In a description of dentists' orientation, Dr. Andrus wrote, "We need to get all of the crying and restraint and basic pedo restraint issues taken care of up front first thing and let [dentists] know that they will need to decide to do it our way or go find another place to work. I don't need ass holes trying to reinvent the wheel." Pl. Ex. 59. In an unsigned letter to clinics' lead dentists, the company stated, "All dentists need to know that the more work that they can get done in one hour the more money they drive to the bottom line of daily production and the grater [sic] the overall success of the clinic will be. Once you hit the

bonus you will be rewarded for sure and you will be addicted to that extra income." Id.

After New Forba purchased the Small Smiles clinics, it sponsored national contests among its clinics for achieving production goals. The contests had "Super Bowl," "March Madness" and Stanley Cup themes. Pl. Exs. 683, 684, 685. The dentist supervising operations for New Forba in the Northeast indicated in a December 17, 2007 email that "I have found (in my limited travels) that there are a number of doctors who simply do not buy into the treatment philosophy. . . .As clinicians, we are formally trained to think much differently than the typical Small Smiles approach. Therefore, we must formally train to flip-flop our thinking." Pl. Ex. 147. All of this evidence goes to the issue of the dentists' involvement in the alleged scheme.

Finally, defendants argue that a general profit motive is insufficient evidence of fraudulent intent. Based on the record outlined above, a jury could infer – by clear and convincing evidence – that the Forba corporation and its participants were not merely making a living or maximizing corporate efficiencies. A jury could infer that defendants, from the time they were engaged to provide dental treatment, failed to disclose their primary and overriding concern with protecting their economic interests.

Summary judgment is denied on the fraud cause of action.

D. Breach of fiduciary duty claims

Plaintiff brought a cause of action for breach of fiduciary duty against all defendants. Defendants contend that they are entitled to summary judgment on this claim because (1) the cause of action duplicates the malpractice causes of action; (2) damages sought in the breach of fiduciary duty cause of action are identical to the damages sought in the malpractice causes of

action; (3) plaintiff does not allege a fiduciary relationship beyond the dentists' exercise of their professional skills; and (4) there is no evidence that the individual dentists acted in bad faith in rendering dental treatment to Jeremy.

Justice Cherundolo ruled on October 4, 2012 that the breach of fiduciary duty and malpractice causes of action were properly pleaded in the alternative because the former concerns intentional misconduct and the latter concerns negligence. Decision at 25-26. This is consistent with the elements of a cause of action for breach of fiduciary duty: "the existence of a fiduciary duty, misconduct by the defendant[s] and damages that were directly caused by the defendant[s'] misconduct." McGuire v. Huntress, 83 A.D.3d 1418, 1420 (4th Dep't 2011). Justice Cherundolo also noted that the intentional claim would permit distinct damages in the form of punitive damages. Decision at 25. These legal determinations are the law of the case. Brownrigg, 29 A.D.3d at 722. The Fourth Department has allowed both breach of fiduciary duty and malpractice claims based on a doctor's same conduct to survive a summary judgment motion. Padilla v. Verczky-Porter, 66 A.D.3d 1481, 1483 (4th Dep't 2009).

As detailed above, there is evidence from which a jury could infer that defendants intentionally pursued a scheme to maximize corporate profits at the expense of dental care or the dentist-patient relationship. If credited by a jury, this evidence shows that the alleged misconduct of the dentists went beyond the confines of their practice of dentistry. Cf. Aufrichtig v. Lowell, 85 N.Y.2d 540, 546-47 (1995) (holding that in addition to duty to provide competent medical treatment to patient, doctor has "distinct yet related duty" to provide truthful information about patient). There are multiple issues of fact concerning not only the propriety of the dentists'

treatment but their related conduct and motivations. Summary judgment is denied on the breach of fiduciary duty claims.

E. Battery claims

Plaintiff brought a battery cause of action against Old Forba, New Forba, the Individual Defendants and Dr. Bonds. Plaintiff contends that Dr. Bonds fraudulently obtained his mother's consent to restrain him and perform invasive dental procedures, while the other defendants put the system in place to facilitate Dr. Bonds' alleged battery. Defendants contend that they are entitled to summary judgment on this claim because (1) Jeremy's mother signed consent forms; (2) the cause of action duplicates the malpractice causes of action; (3) damages sought in the battery cause of action are identical to the damages sought in the malpractice causes of action; and (4) there is no evidence that Dr. Bonds acted in bad faith in rendering dental treatment to Jeremy.

Justice Cherundolo ruled on October 4, 2012 that the battery and malpractice causes of action were properly pleaded in the alternative because the former concerns intentional misconduct and the latter concerns negligence. Decision at 19-21. The same acts may establish either negligence or battery based upon the intent of the actor, with damages flowing from the jury's finding with respect to intent. Yasuna v. Big V Supermarkets, Inc., 282 A.D.2d 744, 745 (2d Dep't 2001). Justice Cherundolo also held that the intentional claim would permit distinct damages, including punitive damages. Decision at 21-22. These legal determinations are the law of the case. Brownrigg, 29 A.D.3d at 722.

"One is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other . . . and (b) a harmful contact with the person of

the other directly or indirectly results." Dries v. Gregor, 72 A.D.2d 231, 235 (4th Dep't 1980) (citation and quotation marks omitted). Normally the failure of a doctor to obtain informed consent from his patient is negligence, but his conduct may become a battery if the doctor obtained the consent by fraud. Spinosa v. Weinstein, 168 A.D.2d 32, 41 (2d Dep't 1991). In such cases, plaintiff must overcome the social presumption that a doctor "in good faith intends to confer a benefit on the patient" rather than is "one who acts antisocially." Dries, 72 A.D.2d at 235.

Defendants met their initial burden of showing that plaintiff provided written consent to use of the restraints. See VanBrocklen v. Erie County Med. Ctr., 96 A.D.3d 1394, 1394-95 (4th Dep't 2012). However, plaintiff submitted evidence raising an issue of fact whether defendants obtained the consent by fraudulently representing that "there are no known risks to the immobilization procedure." Def. Jt. Ex. Y. As detailed above, there is conflicting evidence whether Dr. Bonds knew of risks even though he had Jeremy's mother sign a form to the contrary. There is no dispute that the corporate defendants and Individual Defendants were responsible for producing the form. As noted above, there is ample evidence from which a jury could infer that the alleged fraudulent consent form was part of defendants' overall scheme to maximize production per patient because it allowed dentists to treat children at a Small Smiles clinic and to treat them more quickly. A jury also could conclude that use of the restraint was "harmful or offensive contact" to Jeremy.

Summary judgment on the battery cause of action is denied to Old Forba, New Forba, the Individual Defendants and Dr. Bonds.

F. Section 349 of New York General Business Law

Plaintiff alleges that all defendants violated Section 349 of New York General Business Law. Plaintiff withdrew his claim pursuant to N.Y. Gen. Bus. Law § 350. Defendants contend that they are entitled to summary judgment because there is no evidence of consumer-oriented conduct. Defendants argue that every Small Smiles patient was treated differently within the context of a specific patient-dentist relationship.

In order to prevail on a Section 349 claim, plaintiff must show "that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." City of New York v. Smokes-Spirits.Com, Inc., 12 N.Y.3d 616, 621 (2009). The element of consumer-oriented conduct does not require plaintiff to show that defendant committed the deceptive acts repeatedly to plaintiff or other consumers. Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 25 (1995). Plaintiff "instead must demonstrate that the acts or practices have a broader impact on consumers at large." Id. Section 349 applies to providers of medical services or products. Karlin v. IVF America, 93 N.Y.2d 282, 291-92 (1999).

In the context of the pre-answer motion to dismiss, Justice Cherundolo ruled that plaintiff established consumer-oriented conduct by his allegation that defendants, including the individual dentists, treated all patients within the context of their alleged fraudulent scheme and "treated the plaintiffs as any other potential dental patient walking through their doors seeking treatment." Decision at 29. On this motion for summary judgment, plaintiff provided evidence from which a jury could infer that defendants' practices went beyond a particular dentist's treatment of a

particular patient to impact consumers at large.

As detailed above, a jury could infer that Old Forba, New Forba, the Individual Defendants and the individual dentists uniformly acted to maximize profits by increasing production per patient, hygiene conversions, and providing medically unnecessary treatment. After reviewing more than 70 charts of patients in the New York Small Smiles clinics, plaintiff's expert discerned a pattern of conduct that impacted not just Jeremy but virtually all of the Small Smiles patients. Pl. Expert Aff. ¶¶ 154-55. The evidence raises issues of fact regarding consumer-oriented conduct, and summary judgment is denied.

G. Negligence claim and theory of negligence per se

In the amended complaint, plaintiff's sixth cause of action is for negligence and contains several allegations against Old Forba, New Forba, the Syracuse clinic and the Individual Defendants. On this motion for summary judgment, plaintiff limits his negligence claim to one of negligence per se based on the allegation that Old Forba, New Forba and the Individual Defendants violated Section 1203 of New York's Limited Liability Law. Pl. Mem. at 43. Although Justice Cherundolo addressed the negligence per se claim in his October 4, 2012 decision, it was in the context of addressing arguments raised by the individual dentist defendants. Decision at 34-37.

Old Forba, New Forba and the Individual Defendants contend that they are entitled to summary judgment on the negligence claim because Section 1203 provides no private right of action and any alleged violation did not cause plaintiff's injuries. Importantly, they argue that even if a Section 1203 violation was negligence per se, no recovery is available to plaintiff

because his injuries stemmed from negligent dental treatment. New Forba Mem. at 16-17; Old Forba Mem. at 22-23. In a similar vein, Old Forba and the Individual Defendants contend that Section 1203 cannot form the basis for a negligence per se cause of action because the statute does not define a standard of care or specific duty. Old Forba Reply Mem. at 6-7.

The court disagrees. As noted above, the purpose of Section 1203 is to prevent a "money-making corporation" from practicing dentistry or hiring dentists to act for it. Matter of Co-operative Law Co., 198 N.Y. at 484. After construing the allegations of the complaint in the light most favorable to plaintiff, Justice Cherundolo made the legal determination that Section 1203 could support a negligence per se claim because "plaintiffs suffered the harm [this] statute[was] intended to prevent" in that they were "subjected to inappropriate dental treatment resulting from the emphasis placed on Forba's profit interests above the interests of the patients." Decision at 37. This is the law of the case. Brownrigg, 29 A.D.3d at 722. Contrary to defendants' contention, a jury could conclude that Jeremy's injuries flowed from more than negligent dental treatment. It is the role of the jury to evaluate the evidence to determine whether defendants violated Section 1203, whether that violation was part of the overall alleged scheme, and what part, if any, that violation played in harming plaintiff.

Summary judgment is denied to Old Forba, New Forba, the Syracuse clinic and the Individual Defendants with respect to the negligence per se claim as limited herein.

H. Punitive damages and other issues

(1) Punitive damages

Plaintiff seeks punitive damages against all defendants, and defendants contend that the

evidence in the record does not support the claim.

Punitive damages only may be awarded in "exceptional cases." Marinaccio v. Town of Clarence, 20 N.Y.3d 506, 511 (2013). The award requires a defendant to "manifest evil or malicious conduct beyond any breach of professional duty." Dupree v. Giugliano, 20 N.Y.3d 921, 924 (2012). "There must be aggravation or outrage, such as spite or malice or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton." Id. (citations and quotation marks omitted).

The record contains evidence that, if credited by a jury, would support an award of punitive damages. Defendants' alleged conduct goes well beyond breaches of professional duty to encompass a far-reaching scheme to intentionally disregard the well-being of children, forcing them to undergo unnecessary and painful dental treatment in order to maximize profits in the form of Medicaid payments. If the finder of fact credits plaintiff's evidence, this is one of the exceptional cases that would support an award of punitive damages.

New Forba is the debtor in a pending bankruptcy proceeding in Tennessee. New Forba on this motion renews its argument that plaintiff waived punitive damages when he obtained relief from the automatic stay provisions of the federal bankruptcy code. As this court previously ruled, the plain language of the stipulation does not support New Forba's interpretation. See Order on New Forba's Motion to Reargue and Renew dated May 13, 2013.

Summary judgment with respect to punitive damages is denied.

(2) Concerted action

Defendants contend that the court must dismiss plaintiff's allegation of concerted action because there is no evidence that the defendants acted jointly in a way that they knew would harm plaintiff. According to defendants, the evidence shows that each dentist provided individualized treatment.

The theory of concerted action "provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in a common plan or design to commit a tortious act." Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 506 (1989) (citation and quotation marks omitted). As discussed at length above, there is evidence from which a jury could conclude that defendants participated in a common scheme or plan to commit, among other things, fraud, breach of fiduciary duty and/or battery. Summary judgment is denied.

(3) Liability of Individual Defendants

The Individual Defendants contend that they are entitled to summary judgment because there is insufficient evidence to pierce the corporate veil and hold them liable in their personal capacities. The question of piercing the corporate veil is irrelevant, however, because the record contains issues of fact concerning the direct participation of the Individual Defendants in the alleged fraudulent scheme. Corporate officers who participate in or have knowledge of fraud may be held individually liable. Pludeman v. Northern Leasing Sys., Inc., 10 N.Y.3d 486, 491 (2008). Summary judgment is denied to the Individual Defendants.

(4) Other issues

Plaintiff withdrew his claim of successor liability against New Forba. Higgins Aff. ¶ 47 n.

16. He also withdrew any liability claims against DeRose Management LLC, which is one of the Old Forba defendants. Id. Any other concessions are discussed above.

III. Conclusion

For the foregoing reasons, the summary judgment motions are DENIED except as follows: (1) all claims against DeRose Management LLC are dismissed; (2) any claims of successor liability against New Forba are dismissed; (3) the cause of action pursuant to New York General Business Law Section 350 is dismissed; (4) any malpractice claims against Old Forba, New Forba and the Individual Defendants are dismissed; (5) any lack of informed consent claims are dismissed except as to Dr. Bonds; (6) battery claims against Dr. Aman and Dr. Khan are dismissed; and (7) negligence claims except for negligence per se against Old Forba, New Forba, the Syracuse clinic and the Individual Defendants are dismissed.

Counsel for plaintiff is directed to prepare an order consistent with this decision to be submitted to the court on notice within 10 days. The order shall attach a copy of this decision and incorporate it therein.

Dated: August 14, 2013
Syracuse, New York

HON. DEBORAH H. KARALUNAS
SUPREME COURT JUSTICE