STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN RE: **SMALL SMILES LITIGATION**

MEMORANDUM OF LAW

Index No.: 2011-6084
Index No.: 2011-2128
Index No.: 2011-6223

Hon. John C. Cherundolo
LCP Case No.: 011/2011

PRELIMINARY STATEMENT

This Memorandum of Law is submitted on behalf of defendants, FORBA Holdings, LLC n/k/a Church Street Health Management, LLC; FORBA NY, LLC; Small Smiles Dentistry of Albany, LLC; Albany Access Dentistry, PLLC; Small Smiles Dentistry of Rochester, LLC; and Small Smiles Dentistry of Syracuse, LLC (collectively referred to as the "New FORBA" defendants), in the above-Indexed matter. New FORBA moves to dismiss, pursuant to CPLR §§ 3211(a)(7) and 3016(b), plaintiffs' first cause of action sounding in fraud, second cause of action sounding in battery, and third cause of action sounding in breach of fiduciary duty on the grounds that they fail to state a cause of action and should be dismissed as a matter of law with prejudice.

Despite plaintiffs' references to an alleged "scheme" by the defendants, their causes of action continually return to theories of dental malpractice and deviations from dental standards of care. Plaintiffs' causes of action sounding in fraud, battery, and breach of fiduciary duty all derive from the care and treatment rendered by the defendant-dentists to the infant-plaintiffs. Each infant-plaintiff seeks recovery for damages arising from the alleged dental malpractice. No separate and

distinct damages are identified or alleged. The parents and legal custodians seek no separate damages.

STATEMENT OF FACTS

For a complete recitation of the facts, this Court is respectfully referred to the affidavit of Kevin E. Hulslander, Esq.

ARGUMENT

POINT I

PLAINTIFFS' FIRST CAUSE OF ACTION SOUNDING IN FRAUD SHOULD BE DISMISSED AS A MATTER OF LAW BECAUSE PLAINTIFFS FAIL TO PLEAD FRAUD WITH SPECIFICITY AS REQUIRED BY CPLR § 3016(b)

New York's Civil Practice Law and Rules § 3016(b) requires "where a cause of action . . . is based on misrepresentation [or] fraud, . . . the circumstances constituting the wrong shall be stated in detail." *Maki v. Bassett Healthcare,* 85 A.D.3d 1366 (3d Dept. 2011). A prima facie case of fraud requires a plaintiff to plead the misrepresentation of a material existing fact, falsity, scienter, deception, and injury. *See Fremont Investment & Loan v. Edwardsen,* 20 Misc.3d 1114(A) (Sup. Ct. Richmond Co. 2008).

Here, plaintiffs allege, in conclusory fashion, that the defendant-dentists and Small Smiles clinics misrepresented the dental clinics were authorized to provide dentistry services under New York law; that treatment provided to each infant-plaintiff was appropriate; that the defendant-dentists were qualified to perform advanced behavior techniques; that restraints were appropriate; and that the defendants concealed their revenue generation plan. **Exhibit A** ¶¶ 170-173, 178; **Exhibits B & C** ¶ 178-181, 186.

Plaintiffs do not particularize these broad claims with details concerning the "circumstances constituting the wrong." *See* CPLR § 3016(b). Plaintiffs specifically fail to allege the "falsity" of the malpresentations alleged by the plaintiffs. In particular, plaintiffs do not allege with specificity any details to support their claim that the defendant-dentists rendered inappropriate treatment. Plaintiffs also do not allege any facts to support their conclusory allegations that the defendants misrepresented they were qualified to perform advanced behavior techniques. They also do not provide details as to how, or why, the use of restraints was inappropriate. Finally, plaintiffs fail to identify: (i) the particular statements or misrepresentations; (ii) the identities of any person(s) who made these misrepresentations; (iii) the approximate date(s) when each misrepresentation was made; (iv) the manner and/or context in which these misrepresentations were made; or (v) the names of any person(s) to whom these misrepresentations were made.

As discussed in more detail in Point II, plaintiffs' broad and non-specific allegations are similar to those alleged in their causes of action sounding in malpractice and lack of informed consent. Plaintiffs, therefore, have failed to allege those facts sufficient to state a cause of action for fraud under CPLR § 3016(b).

POINT II

PLAINTIFFS' FIRST CAUSE OF ACTION SOUNDING IN FRAUD SHOULD BE DISMISSED AS A MATTER OF LAW BECAUSE PLAINTIFFS' FRAUD CLAIMS FAIL TO ALLEGE DAMAGES WHICH ARE SEPARATE AND DISTINCT FROM THE ALLEGED DENTAL MALPRACTICE

New York's Court of Appeals has held that "concealment by a physician or failure to disclose his own malpractice does not give rise to a cause of action in fraud or deceit separate and different from the customary malpractice action." *Simcuski v. Saeli,* 44 N.Y.2d 442, 452 (1978). It has since become settled law that where a fraud claim gives rise to damages which are *not* separate

and distinct from those flowing from an alleged medical malpractice cause of action, the claim for fraud must be dismissed. See, *e.g.*, *Abraham v. Kosinski,* 305 A.D.2d 1091 (4th Dept. 2003); *Haga v. Pyke,* 19 A.D.3d 1053 (4th Dept. 2005); *Gianetto v. Knee,* 82 A.D.3d 1043 (2d Dept. Mar. 22, 2011); *Addorisio v. Schwartz,* 7 Misc.3d 1026(A) (Sup. Ct. Bronx Co. 2005); *Spinosa v. Weinstein,* 168 A.D.2d 32 (2d Dept. 1991).

In *Gianetto,* plaintiff alleged dental malpractice and fraud against her dentist and the dental group. *Gianetto,* 82 A.D.3d at 1044. Even though plaintiff alleged her dentist recognized his malpractice and concealed it by misrepresenting the extent of damage to her tooth, the Second Department dismissed her fraud claim because she did not allege that she suffered any damages from the dentist's fraud which were separate and distinct from those caused by his alleged malpractice. *Id.* at 1045. The Supreme Court also dismissed the causes of action alleging fraud against the dental practice. *Id.*

In *Addorisio,* plaintiff alleged malpractice and fraud against her dentist for failing to detect and disclose a metallic object in plaintiff's mouth. *Addorisio,* 7 Misc.3d at *1. Plaintiff failed to show any fraud on the part of the dentist because "[f]ailure by a physician or dentist to disclose his malpractice is insufficient *alone* to raise fraud independent of a medical or dental malpractice claim." *Id.* at *3 (emphasis added). Plaintiff also failed to show damages which were separate and distinct from her claim for malpractice and her cause of action sounding in fraud was dismissed as a matter of law. *Id.*

In *Spinosa,* plaintiff alleged podiatric malpractice, lack of informed consent and fraud on the basis that fragmented bunion removal surgery caused serious and permanent damages to her feet. *Spinosa,* 168 A.D.2d at 35-36. As a basis for her fraud claim, plaintiff alleged that she relied on the representations from her podiatrist that she would have "beautiful" feet after her surgery. *Id.* Plaintiff

alleged she suffered permanent scarring and disfigurement from the surgery. *Id.* The Second Department declined to find a distinction between plaintiff's claims of fraud and lack of informed consent because the injuries suffered by plaintiff under her claim for fraud *and* lack of informed consent "flow from her claim that she was induced to undergo *unnecessary* surgery." *Id.* at 42 (emphasis added). Plaintiff's fraud claim, therefore, did not allege damages which were separate and distinct and it was dismissed as a matter of law. *Id.*

In this case, plaintiffs' allegations of fraud do not articulate damages which are separate and distinct from their lack of informed consent or dental malpractice claims. Instead, plaintiffs only allege that, as a result of the defendants' misrepresentations and fraudulent concealment, they consented to "inappropriate" treatment. **Exhibit A** ¶¶ 171-174; **Exhibits B & C** ¶¶ 179-184. The question of appropriateness of treatment turns on the medical necessity and decision-making from each dentist; this language is similarly alleged and incorporated in plaintiffs' malpractice cause of action, alleging that the dental care and treatment was "unnecessary," "improper," and "without any justification". **Exhibit A** ¶¶ 149, 152; **Exhibit B** ¶¶ 155, 160; **Exhibit C** ¶¶ 157, 160. Plaintiffs' cause of action for lack of informed consent also calls into question the medical necessity of the dental procedures, alleging that the infant-plaintiffs "would not have undergone or allowed treatment rendered if such person was fully informed, and such lack of informed consent was the proximate cause of the injuries and damages for which recovery is sought." **Exhibit A** ¶ 230; **Exhibits B & C** ¶¶ 238.

As in *Spinosa,* the allegations that the infant-plaintiffs here were fraudulently induced to undergo "unnecessary" or inappropriate dental procedures and advanced behavioral management techniques flow from the same set of facts which form the basis for their malpractice and lack of informed consent claims. *See Spinosa,* 168 A.D.2d at 35-36, 42. Plaintiffs fail to identify, or even

allege, those damages which are particular to the defendants' alleged misrepresentations and fraudulent concealment. Plaintiffs' first cause of action sounding in fraud should, therefore, be dismissed as a matter of law.

POINT III

PLAINTIFFS' SECOND CAUSE OF ACTION SOUNDING IN BATTERY SHOULD BE DISMISSED AS A MATTER OF LAW BECAUSE THE DEFENDANT-DENTISTS' INTENTIONAL CONTACT WITH THE INFANT-PLAINTIFFS OCCURRED, AT ALL TIMES, WITHIN THE CONTEXT OF A DENTIST-PATIENT RELATIONSHIP

"Medical treatment beyond the scope of a patient's consent should not be considered as an intentional tort or species of assault and battery . . . ." *Dries v. Gregor,* 72 A.D.2d 231 (4th Dept. 1980). The Third and Fourth Departments have dismissed claims alleging common-law battery in the context of an action also alleging malpractice and lack of informed consent. *Dries,* 72 A.D.2d 231; *Ponholzer v. Simmons,* 78 A.D.3d 1495 (4th Dept. 2010); *Romatowski v. Hitzig,* 227 A.D.2d 870 (3d Dept. 1996). These Courts have declined to elevate an alleged lack of informed consent to the intentional tort of battery; and they further decline to interpret a physician's lack of informed consent as one's intent to inflict injury. They further recognize that "the physician in a malpractice case is ordinarily not an actor who intends to inflict an injury on his or her patient and any legal theory that presumes that intent appears to be based upon an erroneous supposition." *Ponholzer,* 227 A.D.2d at 1496; *Dries,* 72 A.D.2d at 236.

In *Dries,* the plaintiff unsuccessfully alleged an intentional tort theory after her physician performed a "partial mastectomy" that was allegedly beyond the scope of her consent. *Id.* at 234.

In *Ponholzer,* the Fourth Department declined to transform plaintiff's medical malpractice claim to a claim for battery after plaintiff alleged her physician exceeded the scope of her consent to

cervical fusion surgery by taking the necessary bone graft from her hip rather than a donor cadaver. *Ponholzer,* 78 A.D.3d at 1495.

In *Romatowski,* plaintiff alleged battery against his physician following unsuccessful results from a scalp reduction procedure. *Romatowski,* 227 A.D.2d at 870.

In the present case, plaintiffs allege as the basis for their second cause of action that the defendant-dentists "*intentionally touched* the infant plaintiffs without consent and caused a harmful or offensive bodily contact." **Exhibit A** ¶ 189; **Exhibits B & C** ¶ 197 (emphasis added). Plaintiffs do not provide any other details concerning particular facts or circumstances of any "intentional touch[ing]." However, to the extent there was any "intentional touch[ing]", this could only have occurred during the care and treatment rendered to each infant-plaintiff in the context of a dentist-patient relationship.

It cannot be disputed that plaintiffs scheduled multiple appointments and dental procedures for the infant-plaintiffs; they brought their children to the Small Smiles clinics for dental examinations, cleanings, x-rays, and treatment; and they waited during the course of these appointments while the defendant-dentists performed dental procedures on the infant-plaintiffs. Plaintiffs' conduct, *at a minimum,* shows consent for the defendant-dentists to provide dental care and treatment to the infant-plaintiffs. Plaintiffs' theory of damages does not allege any "intentional touch[ing]" that occurred *outside* the dentist-patient relationship. Instead, plaintiffs continually allege damages from dental procedures, and the use of "advanced behavioral management techniques" to assist in performing these procedures. Plaintiffs merely allege these procedures were "inappropriate," "unnecessary," "improper," and "without any justification." **Exhibit A** ¶¶ 171-174, 149, 152; **Exhibit B** ¶¶ 179-184, 155, 160; **Exhibit C** ¶¶ 179-184, 157, 160.

Plaintiffs consented to the provision of dental care and treatment by the defendant-dentists; therefore, any alleged injuries from other "intentional touch[ing]" would exceed the scope of plaintiffs' consent and should be evaluated under negligence principles for lack of informed consent, as opposed to an intentional tort analysis. *See Dries,* 72 A.D.2d 231; *Ponholzer,* 78 A.D.3d 1495; *Romatowski,* 227 A.D.2d 870. Plaintiffs' second cause of action sounding in battery should therefore be dismissed.

POINT IV

PLAINTIFFS' THIRD CAUSE OF ACTION SOUNDING IN BREACH OF FIDUCIARY DUTY SHOULD BE DISMISSED AS A MATTER OF LAW BECAUSE IT IS OTHERWISE DUPLICATIVE OF THEIR MALPRACTICE CLAIMS

A fiduciary relationship is "rooted in trust and confidence to trigger *super-contractual* fiduciary duties." See, *e.g., Reuben H. Donnelly Corporation v. Mark I Marketing Corporation,* 893 F.Supp. 285 (S.D.N.Y. 1995) (emphasis added). Although New York recognizes a fiduciary relationship among physicians and patients, this has traditionally been limited to the context of the fiduciary duty of confidentiality. *Tighe v. Ginsberg,* 146 A.D.2d 268 (4th Dept. 1989); *Burton v. Matteliano,* 81 A.D.3d 1272 (4th Dept. 2011); *Randi A.J. v. Long Island Surgi-Center,* 46 A.D.3d 74 (2d Dept. 2007).

Tighe is one of New York's first decisions to acknowledge that a fiduciary relationship exists among a physician and patient. *Tighe,* 146 A.D.2d 268. In that case, plaintiff alleged breach of fiduciary duty and malpractice against a physician who turned over the findings of plaintiff's hearing exam to plaintiff's employer. *Id.* at 270. The Fourth Department distinguished plaintiff's claim for breach of fiduciary duty from his medical malpractice claim, stating "[d]efendant's alleged breach of this duty *did not* arise during the process in which [the doctor] was utilizing skills which he had been

taught in examining, diagnosing, treating or caring for the plaintiff as his patient." *Id* (emphasis added).

New York has not extended a physician's fiduciary responsibility into the setting of patient care and treatment. Instead, the cause of action sounding in medical malpractice imposes the following duties on physicians relative to standards of care in "examining, diagnosing, treating or caring for" a patient: (i) the duty to possess the requisite knowledge and skill such as is possessed by the average member of the medical profession; (ii) a duty to exercise ordinary and reasonable care in the application of such professional knowledge and skill; and (iii) the duty to use his/her best judgment in the application of this knowledge and skill. *See Twitchell v. Mackay,* 78 A.D.2d 125 (4th Dept. 1980); *Hale v. State of New York,* 53 A.D.2d 1025 (4th Dept. 1976); *Padilla v. M. Verczky-Porter,* 66 A.D.3d 1481 (4th Dept. 2009) [dismissing a breach of fiduciary duty claim against the hospital defendants as duplicative of the medical malpractice and negligent hiring and supervision claims].

Here, plaintiffs' third cause of action sounding in a breach of fiduciary duties derives from the same set of facts as their claims alleging malpractice and lack of informed consent. Plaintiffs' allege as the basis of their third cause of action that "these defendants were required to make *truthful and complete disclosures* to the parent or custodian of each infant plaintiff and were forbidden from gaining an improper advantage at the infant plaintiff's expense." **Exhibit A** ¶ 197; **Exhibits B & C** ¶ 205 (emphasis added). Plaintiffs fail to specify those "truthful and complete disclosures." However, they state such disclosures "related to [the infant-plaintiffs'] *dental care*," and "matters related to *dental health*." **Exhibit A** ¶ 195; **Exhibits B & C** ¶ 203 (emphasis added). Such disclosures are related to dental care and treatment provided by the defendant-dentists, and any failure to make such disclosures should therefore be measured under the standards of ordinary and reasonable care

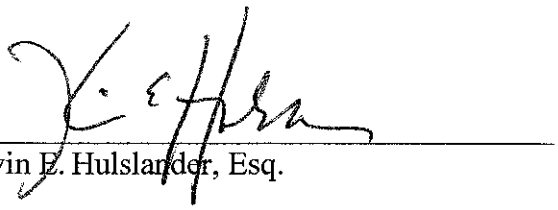
imposed on these defendant-dentists under theories of malpractice and lack of informed consent. *See Twitchell,* 78 A.D.2d 125. Unlike *Tighe,* plaintiffs have not alleged any breach of confidentiality by the defendant-dentists or any other facts which are separate and distinct from plaintiffs' claims alleging malpractice or lack of informed consent. Plaintiffs' third cause of action sounding in breach of fiduciary duty should therefore be dismissed as a matter of law.

CONCLUSION

Based upon the foregoing, New FORBA respectfully requests dismissal of plaintiffs' first, second, and third causes of action with prejudice.

Dated: December 15, 2011

SMITH, SOVIK, KENDRICK & SUGNET, P.C.

By: 

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