

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

996

**CA 12-01911**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ.

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IN THE MATTER OF SMALL SMILES LITIGATION  
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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 RIZZO 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, PLAINTIFFS-RESPONDENTS,

MEMORANDUM AND ORDER

V

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA NY, LLC, FORBA, LLC, NOW KNOWN AS LICSAAC LLC, FORBA NY, LLC, NOW KNOWN AS LICSAAC NY, LLC, DD MARKETING, INC., DEROSE MANAGEMENT, LLC, 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, NAVEED AMAN, D.D.S., KOURY BONDS, D.D.S., TAREK ELSAFTY, D.D.S., YAQOOB KHAN, D.D.S., JANINE RANDAZZO, D.D.S., LOC VINH VUU, D.D.S., DEFENDANTS-APPELLANTS;  
ET AL., DEFENDANTS.  
(ACTION NO. 1.)

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SHANTEL JOHNSON, AS PARENT AND NATURAL GUARDIAN OF INFANT KEVIN BUTLER, VERONICA ROBINSON, AS PARENT AND NATURAL GUARDIAN OF INFANT ARIANA FLORES, DEMITA GARRETT, AS PARENT AND NATURAL GUARDIAN OF INFANT I'YANA GARCIA SANTOS, KATHRYN JUSTICE, AS PARENT AND NATURAL GUARDIAN OF INFANT BREYONNA HOWARD, ELIZABETH LORRAINE, AS PARENT AND NATURAL GUARDIAN OF INFANT SHILOH LORRAINE, JR., LAPORSHA SHAW, AS PARENT AND

NATURAL GUARDIAN OF INFANT ALEXIS PARKER, ROBERT RALSTON, AS PARENT AND NATURAL GUARDIAN OF INFANT BRANDIE RALSTON, KATRICE MARSHALL, AS PARENT AND NATURAL GUARDIAN OF INFANT LESANA ROSS, TIFFANY HENTON, AS PARENT AND NATURAL GUARDIAN OF INFANT COREY SMITH AND JANET TABER, AS PARENT AND NATURAL GUARDIAN OF INFANT JON TABER,  
PLAINTIFFS-RESPONDENTS,

V

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA NY, LLC, FORBA, LLC, NOW KNOWN AS LICSAAC, LLC, FORBA NY, LLC, NOW KNOWN AS LICSAAC NY LLC, DD MARKETING, INC., DEROSE MANAGEMENT, LLC, SMALL SMILES DENTISTRY OF ROCHESTER, 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, SHILPA AGADI, D.D.S., KOURY BONDS, D.D.S., ISMATU KAMARA, D.D.S., KEIVAN ZOUFAN, D.D.S., SONNY KHANNA, D.D.S., KIM PHAM, D.D.S., LAWANA FUQUAY, D.D.S., DEFENDANTS-APPELLANTS;  
ET AL., DEFENDANTS.  
(ACTION NO. 2.)

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TIMOTHY ANGUS, AS PARENT AND NATURAL GUARDIAN OF INFANT JACOB ANGUS, JESSALYN PURCELL, AS PARENT AND NATURAL GUARDIAN OF INFANT ISAIAH BERG, BRIAN CARTER, AS PARENT AND NATURAL GUARDIAN OF INFANT BRIANA CARTER, APRIL FERGUSON, AS PARENT AND NATURAL GUARDIAN OF INFANT JOSEPH FERGUSON, SHERAIN RIVERA, AS PARENT AND NATURAL GUARDIAN OF INFANT SHADAYA GILMORE, TONYA POTTER, AS PARENT AND NATURAL GUARDIAN OF INFANT DESIRAE HAGER, NANCY WARD, AS LEGAL CUSTODIAN OF INFANT AALYIAROSE LABOMBARD-BLACK, NANCY WARD, AS LEGAL CUSTODIAN OF INFANT MANUEL LABORDE, JR., JENNIFER BACON, AS PARENT AND NATURAL GUARDIAN OF INFANT ASHLEY PARKER AND COURTNEY CONRAD, AS PARENT AND NATURAL GUARDIAN OF INFANT ZAKARY WILSON,  
PLAINTIFFS-RESPONDENTS,

V

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA NY, LLC, FORBA, LLC, NOW KNOWN AS LICSAAC, LLC, FORBA NY, LLC, NOW KNOWN AS LICSAAC NY LLC, DD MARKETING, INC., DEROSE MANAGEMENT, LLC, SMALL SMILES DENTISTRY OF ALBANY, LLC, ALBANY ACCESS DENTISTRY, PLLC, 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., 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., DEFENDANTS-APPELLANTS;  
ET AL., DEFENDANTS.  
(ACTION NO. 3.)

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SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KEVIN E. HULSLANDER OF COUNSEL), FOR DEFENDANTS-APPELLANTS FORBA HOLDINGS, LLC, NOW KNOWN AS 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.

O'CONNOR, O'CONNOR, BRESEE & FIRST, P.C., ALBANY (DANIELLE N. MEYERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS FORBA, LLC, NOW KNOWN AS LICSAAC, LLC, FORBA NY, LLC, NOW KNOWN AS LICSAAC NY LLC, DD MARKETING, INC., DEROSE MANAGEMENT, 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. AND MICHAEL W. ROUMPH.

WILSON ELSER MOZKOWITZ EDELMAN & DICKER LLP, ALBANY (MELISSA A. MURPHY-PETROS OF COUNSEL), FOR DEFENDANTS-APPELLANTS MAZIAR IZADI, D.D.S., JUDITH MORI, D.D.S., EDMISE FORESTAL, D.D.S., EVAN GOLDSTEIN, D.D.S., KEERTHI GOLLA, D.D.S., NASSEF LANCEN, D.D.S., NAVEED AMAN, D.D.S., TAREK ELSAFTY, D.D.S., YAQOOB KHAN, D.D.S., SHILPA AGADI, D.D.S., KOURY BONDS, D.D.S., KIM PHAM, D.D.S., ISMATU KAMARA, D.D.S. AND SONNY KHANNA, D.D.S.

HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR DEFENDANTS-APPELLANTS KEIVAN ZOUFAN, D.D.S., LAWANA FUQUAY, D.D.S., LOC VINH VUU, D.D.S., JANINE RANDAZZO, D.D.S. AND LISSETTE BERNAL, D.D.S.

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeals from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered October 4, 2012. The order, inter alia, denied the motions of defendants-appellants to dismiss certain causes of action in the amended complaints.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motions in part and dismissing the first and third causes of action of the amended complaints against defendants-appellants and dismissing the fourth cause of action of the amended complaints insofar as it alleges a violation of General Business Law § 350 against the individual defendants-appellants with the exception of 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., and Michael W. Roumph, and as modified the order is affirmed without costs.

Memorandum: These three actions were commenced by various

plaintiffs asserting causes of action for fraud, battery, breach of fiduciary duty, breach of General Business Law §§ 349 and 350, malpractice, negligence, and failure to obtain informed consent based on dental treatment provided to the subject children. These actions have been coordinated for purposes of discovery pursuant to 22 NYCRR 202.69 in Onondaga County Supreme Court. Defendants-appellants moved to dismiss certain causes of action in the amended complaints, which the court denied in their entirety. On this consolidated appeal, there are four groups of defendants-appellants: Forba, LLC, now known as LICSAAC, LLC, et al. (Old FORBA); Forba Holdings, LLC, now known as Church Street Health Management, LLC, et al. (New FORBA); Keivan Zoufan, D.D.S., et al. (Five Dentists); and Maziar Izadi, D.D.S., et al. (Fourteen Dentists) (collectively, defendants).

We agree with defendants that the court erred in denying those parts of their respective motions seeking dismissal of the fraud and breach of fiduciary duty causes of action, and we therefore modify the order by dismissing the first and third causes of action of the amended complaints against defendants. "Dismissal of a fraud cause of action is required '[w]here [it] gives rise to damages which are not separate and distinct from those flowing from an alleged [dental] malpractice cause of action' " (*Abraham v Kosinski*, 251 AD2d 967, 967-968; see *Giannetto v Knee*, 82 AD3d 1043, 1045; *Haga v Pyke*, 19 AD3d 1053, 1055). Inasmuch as the damages sought by plaintiffs, including punitive damages, are the same for the fraud and dental malpractice causes of action, we conclude that the fraud cause of action must be dismissed. We further conclude that the breach of fiduciary duty cause of action must be dismissed because it is duplicative of the malpractice cause of action (see *Padilla v Verczky-Porter*, 66 AD3d 1481, 1484; see generally *Adamski v Lama*, 56 AD3d 1071, 1072-1073; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271). Both the breach of fiduciary duty cause of action and dental malpractice cause of action are based on the same facts and seek identical relief (*cf. Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 9).

We reject the contention of the Fourteen Dentists that the General Business Law § 349 claim is duplicative of other causes of action in the amended complaints (see generally *Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 343-344; *Karlin v IVF Am.*, 93 NY2d 282, 290-294, *rearg denied* 93 NY2d 989), and we also reject the contention of the Five Dentists and the Fourteen Dentists that plaintiffs failed to state a cause of action with respect to the General Business Law § 349 claim (see generally *Stutman v Chemical Bank*, 95 NY2d 24, 29; *Gaidon*, 94 NY2d at 344). Plaintiffs alleged a scheme whereby the individual dentists made fraudulent misrepresentations to parents and custodians to induce consent for dental procedures, resulting in harm to the subject children. With respect to the General Business Law § 350 claim, however, we agree with the Five Dentists and the Fourteen Dentists that the claim should be dismissed against them, and we therefore further modify the order accordingly. Section 350 prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service . . ." Inasmuch as the amended complaints do not allege that those individual dentists were involved

in any false advertising, that claim must be dismissed against them.

We reject the contention of Old FORBA, New FORBA, and the Five Dentists that the battery cause of action should be dismissed. A battery cause of action may be maintained where the allegation is that the dental professional did not obtain consent for the procedure or treatment (see *VanBrocklen v Erie County Med. Ctr.*, 96 AD3d 1394, 1394). Here, plaintiffs alleged that consent was obtained by fraud, which is the equivalent of no consent at all (see generally *Darrah v Kite*, 32 AD2d 208, 210-211).

We have considered the remaining contentions raised by the parties and conclude that they are without merit.

Entered: September 27, 2013

Frances E. Cafarell  
Clerk of the Court