SCC File No.: 39849

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

BRODY FLORENCE, COLE FLORENCE AND TAYLOR FLORENCE, BY THEIR LITIGATION GUARDIAN, DANA FLORENCE

APPLICANTS
(Appellants)

-and-

DR. SUSAN BENZAQUEN

RESPONDENT
(Respondent)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Motion Judge and the Majority of the Court of Appeal correctly dismissed the Applicants' claims because they are not viable. They are not viable for multiple reasons of law and policy. The question proposed by the Applicants on this appeal is not novel and it is flawed for all of the following reasons, each of which is a bar to the appeal:

   (a) The duty proposed by the Applicants is not even pleaded. The Amended Statement of Claim contains no pleading of a duty of care owed by Dr. Benzaquen to the Applicants in any capacity.[1] The pleading only alleges a duty of care owed to their mother;

   (b) As the Motion Judge and the Majority of the Court of Appeal correctly identified, the proposed duty conflates standard of care with duty of care and is fundamentally misconceived. The suggestion that a duty to the Applicants exists because the duty to their mother was breached misunderstands the law of negligence;

   (c) A physician's duty is owed to the patient alone. This is a fundamental principle of medicine and of law, which requires physicians not to weigh their patient's interests against those of an unascertained class of unconceived plaintiffs;

   (d) Patient care would not be improved by throwing a physician's undivided duty to her patient into doubt. Equally, the public interest would not be served by upsetting the established duty of care consensus where the claimed justification for doing so requires the court to undermine the duty analysis itself, collapsing the distinction between duty and standard. The public does not need this Court to clarify the Applicants' conceptual misunderstanding;

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[1] Amended Statement of Claim [LTA Tab 3A]; *Florence v. Benzaquen*, 2021 ONCA 523 at para. 52 ["OCA Decision"] [LTA Tab 1C].

(e) While the Applicants insist that their interests prior to conception aligned with those of their mother, the submission overlooks the fact that they would not have come into existence but for the prescription of medication which is alleged to have been contraindicated. The fertility medication at issue (Serophene) did not cause the Applicants' disability. It caused their conception. If the Applicants had an interest in coming into existence, then their interest favoured prescribing the fertility drug;

(f) The proposed duty will create a conflict for any physician discussing abortion or selective fetal reduction. In this case, the plaintiff discussed the option of selective fetal reduction with her obstetrician.[2] If a duty of care was recognized to an unconceived future fetus, a physician could not properly counsel their female patient regarding the availability of abortion or selective fetal reduction should a medically compromised fetus become conceived. A physician's advice regarding a mother's singular interests, including about abortion should not be undermined; and

(g) Courts across the country and around the world have also barred the claims made by the Applicants on the basis that damages cannot be assessed for a claim that a plaintiff should not have been born. The Applicants rely heavily on the select few states in the United States that have permitted claims of "wrongful life" and ignore the vast majority of jurisdictions elsewhere in that country and indeed around the world that bar them. The claims of the Applicants are barred in most American states, the United Kingdom, Northern Ireland, Australia, South Africa, France, Germany, Italy, Austria, Portugal, Serbia, Hungary, and Israel—the American cases relied on by the Applicants are the global outliers.

2. The Applicants submit that a full trial is required to explore the relevant facts. This is not correct. The Motion Judge assumed the truth of the Applicants' claims as pleaded (and at their highest) when determining that no duty could exist, and the claims must be struck. There can be no further material facts that may emerge at trial which could alter this legal

[2] Statement of Defence at para. 15 [Response Tab 2A]

reality. Further, and in any event, the Amended Statement of Claim does not even plead the duty they suggest they need to explore at trial.

3. There is no controversy over the question proposed by the Applicants. Our courts have decided it and re-affirmed it multiple times, including in a case with indistinguishable facts.[3] This Honourable Court has previously refused applications for leave to appeal on this very same issue.[4] It should do so again here as there is no issue of public importance.

4. In addition, a five-member panel of the Ontario Court of Appeal answered the same question now proposed by the Applicants:

> Both *Bovingdon* and *Paxton* hold that there is no duty of care to a future child if the alleged negligence by a healthcare provider took place prior to conception.[5]

5. These pronouncements are founded on bedrock principles of medical ethics and endorsed resoundingly around the world.

6. The Applicants attempt to distinguish their claims in order to avoid the consequence of these definitive medical and legal principles by incorrectly suggesting that:

   (a) the duty they allege is somehow novel because it is a duty to both them and their mother not to prescribe medication that is contraindicated;

   (b) the Court of Appeal for Ontario has expressly left open the possibility that the duty of care that they assert may exist; and

   (c) courts in other jurisdictions have recognized the existence of the duty of care that they now seek to establish before this Honourable Court.

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[3] *Bovingdon (Litigation Guardian of) v. Hergott*, 2008 ONCA 2, leave to appeal refused [2008] S.C.C.A. No. 92 ["*Bovingdon*"]; *Paxton v. Ramji*, 2008 ONCA 697, leave to appeal refused [2008] S.C.C.A. No. 508 ["*Paxton*"]; *Liebig v. Guelph General Hospital*, 2010 ONCA 450 ["*Liebig*"].

[4] [2008] S.C.C.A. No. 92; [2008] S.C.C.A. No. 508; [2001] S.C.C.A. No. 477.

[5] *Liebig* at para. 11; OCA Decision at para. 52 [LTA Tab 1C].

7. In response to the Applicants' primary arguments:

   (a) there is nothing novel to the Applicants' allegation – it is only novel because it is inconsistent with the governing analytical framework of negligence law. As the Motion Judge and the Majority of the Court of Appeal held, the distinction conflates the analysis regarding the standard of care with the duty of care. The existence of a duty of care cannot depend on whether or not the standard has been breached;

   (b) the Ontario Court of Appeal's decisions are consistent with the vast majority of courts around the world, which have definitively ruled out the existence of the precise duty that the Applicants now try to establish; and

   (c) their parents are already advancing duplicative claims for the Applicants' past and future care costs.

B. Procedural History

8. The Plaintiffs, Dana Florence ("**Ms. Florence**") and Jared Florence ("**Mr. Florence**"), are the parents of the triplet Plaintiffs, Brody, Cole, and Taylor Florence (collectively the "**Applicants**" or "**Minor Plaintiffs**").

9. These five individually named Plaintiffs originally commenced this action against two physicians: Dr. Susan Benzaquen and Dr. Jon Barrett.

10. Dr. Benzaquen is an obstetrician/gynecologist. Dr. Benzaquen was involved in Ms. Florence's care from 2004-2007, before the conception of the Applicants. Dr. Barrett was the obstetrician who managed Ms. Florence's pregnancy after conception.

11. The Applicants were properly plaintiffs in the claim against Dr. Barrett as they were conceived and in utero at the time of his care and treatment. The Applicants were not properly plaintiffs in the claim against Dr. Benzaquen since they did not exist at all at the time of her involvement.

12. On June 4, 2018, the action was dismissed on consent as against Dr. Barrett, leaving only Dr. Benzaquen as the remaining defendant.[6]

13. In December 2018, Dr. Benzaquen delivered a motion to strike the Applicants' claims. The claims of Ms. Florence and Mr. Florence were not challenged.

14. The Motion Judge and the Majority of the Court of Appeal reviewed the pleadings and correctly determined that the Applicants' claims were not recognized at law. Both courts relied on well-settled law that a physician does not owe a duty of care to a not-yet-conceived fetus.

C. The Claim

15. In the Amended Statement of Claim, the Plaintiffs allege that Dr. Benzaquen failed to take a proper history before prescribing a fertility medication, Serophene, to Ms. Florence on July 9, 2007. The Plaintiffs claim that Ms. Florence did not provide informed consent, and that had she been aware of the risks associated with multiple births she would not have taken Serophene.[7] Dr. Benzaquen maintains that a proper history was obtained, informed consent was provided and the prescription of Serophene was appropriate.[8]

16. Subsequent to July 9, 2007, Dr. Benzaquen had no further involvement in Ms. Florence's obstetrical care.[9]

17. By July 30, 2007, Ms. Florence was pregnant.[10] She gave birth prematurely to the Applicants on January 1, 2008.[11] The Applicants were subsequently diagnosed with cerebral palsy.[12]

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[6] Endorsement of the Honourable Justice Darla Wilson dated June 4, 2018. [Response Tab 2B]

[7] Amended Statement of Claim at para 21 [LTA Tab 3A]; Endorsement of the Honourable Justice Darla Wilson dated March 11, 2020 at paras. 1-2 & 35 ["Motion Judge Reasons"] [LTA Tab 1A]

[8] Statement of Defence. [Response Tab 2A]

[9] Statement of Defence at para 13. [Response Tab 2A]

[10] Amended Statement of Claim at para 23. [LTA Tab 3A]

[11] Amended Statement of Claim at para 28. [LTA Tab 3A]

[12] Amended Statement of Claim at para 29. [LTA Tab 3A]

18. The Amended Statement of Claim contains no pleading of a duty of care owed by Dr. Benzaquen to the Applicants in any capacity.[13] The pleading only alleges a duty of care owed to Ms. Florence.

19. Serophene did not cause the Applicants' disability; it caused Ms. Florence to conceive and to conceive multiple fetuses (rather than a singleton). Serophene caused Ms. Florence to conceive the Applicants; the multiple pregnancy caused Ms. Florence to deliver the Applicants prematurely, and the premature birth caused the Applicants' disability.

20. This is not a case where, but for the medication, the Applicants would have been born healthy. This is a case where, but for the medication, the Applicants would not have been conceived at all.

21. The Motion Judge found, and there is no dispute, that Ms. Florence has a viable pleading against Dr. Benzaquen based both on alleged negligence in providing the prescription of Serophene and an alleged lack of informed consent.[14]

22. The Applicants, however, were each named as plaintiffs in this action, and claimed damages in their own right. Their claim was that, but for the negligence of Dr. Benzaquen in prescribing Serophene to their mother, they would not have been born and should be awarded damages on that basis.

D. The Motion to Strike

23. In reasons dated March 11, 2020, the Motion Judge granted Dr. Benzaquen's motion and struck the claims of the Applicants without granting leave to amend.

24. The Motion Judge found that the Amended Statement of Claim failed to disclose a duty of care and/or any specific claims for damages on behalf of the Applicants:

> [37] The allegations of negligence against Dr. Benzaquen all relate to her care and treatment of the mother of the triplets. There is no

[13] Amended Statement of Claim [LTA Tab 3A]; OCA Decision at para. 21. [LTA Tab 1C]

[14] Motion Judge Reasons at para 38. [LTA Tab 1B]

> pleading of a duty owed to the triplets by the Defendant Dr. Benzaquen in any capacity.
>
> […]
>
> [39] While it is alleged that the ability of the minor Plaintiffs to perform daily tasks and earn a living has been impaired, there are no specific claims of damages sustained by the triplets pleaded in the amended Statement of Claim.[15]

25. This alone disposes of any need for this Court to hear this pleadings motion. The duty asserted by the Applicants in their Leave Application is not even pleaded.

26. In any event, the Motion Judge correctly found that, to the extent that any claim on behalf of the Minor Plaintiffs was pleaded, it was predicated on an allegation of negligence against Dr. Benzaquen and that they would not have been born absent that alleged negligence.[16]

27. The Motion Judge reviewed existing case law which holds that a defendant cannot owe a duty of care to an as-yet unconceived child when the alleged negligence occurred prior to conception.[17]

28. The Motion Judge also rejected the Plaintiffs' position that the motion to strike ought to have been heard at the outset of trial.[18]

29. The Motion Judge's determination on this point follows the principles underlying pleadings motions and trial fairness. The Motion Judge properly considered the purpose of pleadings motions in uncluttering proceedings and ensuring that litigants can effectively and efficiently focus their effort on viable claims.[19] Further, parties are entitled to

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[15] Motion Judge Reasons at paras 37 & 39 [LTA Tab 1B]

[16] Motion Judge Reasons at para 42. [LTA Tab 1B]

[17] Motion Judge Reasons at para 60. [LTA Tab 1B]

[18] Motion Judge Reasons at paras 7-14. [T LTA ab 1B]

[19] *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 ("R v Imperial"); see also *Hunt v Carey Canada Inc*, 1990 2 SCR 959 at para 33; *Anger v Berkshire Investment Group Inc*, 2001 OJ No 379 at para 15.

understand the parameters of the case to meet at trial as a basic matter of procedural fairness.[20]

30. The Applicants' claims were accepted as true and taken at their highest. The Motion Judge found that the claims must be struck because:

(a) no duty could be owed to the Applicants; and

(b) damages cannot be assessed on the basis of life versus no life.

E. The Court of Appeal's Reasons

31. On July 22, 2021, the Court of Appeal released its decision upholding the Motion Judge's decision and dismissing the Applicants' appeal. Justices Gillese and MacPherson represented the Majority, while Fairburn ACJO dissented.

32. The Majority carefully reviewed the pleading and considered the Applicants' claim against the basic analytical framework of the law of negligence. The Majority identified fundamental flaws in the Applicants' claims against Dr. Benzaquen and correctly determined they cannot succeed.

33. The Majority held that the duty of care owed by Dr. Benzaquen to her patient, Ms. Florence, could not be conflated with Dr. Benzaquen's obligation to meet the standard of care:

> It is trite law that for a claim in negligence against a doctor to succeed, the plaintiff must establish that: the doctor owed the plaintiff a duty of care; the doctor breached the standard of care; and, the plaintiff suffered damages as a consequence of the breach.[21]

34. The only thing novel about the Applicants' argument was the submission that the standard of care is relevant to determining the existence of a duty of care.

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[20] Motion Judge Reasons at paras 7-14. [LTA Tab 1B]

[21] OCA Decision at paras. 59-62. [LTA Tab 1C]

35. The Majority also carefully reviewed its prior decisions in *Bovingdon*, *Paxton* and *Liebig*, and rejected the Applicants' submission that there was any material difference between the facts of this case and those prior decisions.

PART II – STATEMENT OF QUESTIONS IN ISSUE

36. This Application asks this Court to hear the appeal of a pleadings motion regarding a duty not even pleaded in the Amended Statement of Claim. Further, there is no public importance requiring this Court to revisit a physician's undivided duty to their patient.

37. To the contrary, it is important to the public that a physician's commitment to her patient not be questioned by granting leave on this well settled issue.

PART III – STATEMENT OF ARGUMENT

A. The Existence of a Duty Cannot Depend on Whether the Standard was Breached

38. Whether or not Dr. Benzaquen breached the standard of care in prescribing the fertility medication to Ms. Florence is not relevant to whether or not Dr. Benzaquen owed a duty of care to the Applicants – who were not conceived at the time.

39. The distinction between duty of care and standard of care is an important one. The elements required to succeed in a claim for negligence against a doctor are, in the Majority's words, "trite law" and the public does not require this Court to confirm them.[22]

40. The Majority set out the facts and issues in each of its prior unanimous decisions in *Bovingdon*, *Paxton* and *Hergott*. The similarities between Ms. Florence's allegations and those of the Plaintiffs in *Bovingdon* are striking. The proposed duty of care is in fact precisely the same, and that proposed duty was rejected, with leave to this Court denied:

> Nor are the similarities between this case and *Bovingdon* and *Paxton* superficial. In all three, the proposed duty of care was precisely the same: at the time that the doctor prescribed the medication to the

[22] OCA Decision at para. 59. [LTA Tab 1C]

> mother, did the doctor owe the unconceived baby or babies a duty of care?[23]

41. Respectfully, the distinction that the Minority decision attempted to draw between these cases is, as the Majority put it, "a distinction without a difference".[24] The Minority's discussion of the meaning of the word "contraindicated" has no bearing on the analysis as to whether or not a duty of care is owed in the first place.

42. To suggest otherwise creates a new analytical framework for the law of negligence that renders the existence of a duty dependent on whether and how the standard of care is alleged to have been breached.

B. There is No Public Interest in Deciding an Issue that is Well-Settled Around the World

43. It is a matter of accepted judicial policy around the world that damages cannot be assessed and should not be assessed for non-existence.

44. No jurisdiction in Canada recognizes the cause of action pleaded by the Applicants. For good reason, this well-settled law is echoed throughout other Commonwealth jurisdictions, including Australia, the United Kingdom, and the United States.[25]

45. The Applicants rely heavily on the select few states in the United States that have permitted claims of "wrongful life" and ignore the vast majority of jurisdictions elsewhere in that country and indeed around the world that bar them. The claims of the Applicants are barred in most American states, the United Kingdom, Northern Ireland, Australia, South Africa, France, Germany, Italy, Austria, Portugal, Serbia, and Hungary. Israel allowed wrongful

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[23] OCA Decision at para. 69. [LTA Tab 1C]

[24] OCA Decision at para. 68. [LTA Tab 1C]

[25] See, e.g., *McKay v Essex Area Health Authority*, 1982 QB 1166 (Eng CA) ("*McKay*"); *Harriton v Stevens*, 2004 NSWA 93 (Australia) ("*Harriton*"); *Waller v James*, 2006 HCA 16 (Australia); *Becker v Schwartz*, 386 NE 2d 807 (NY App 1987) ("Becker"); *Gleitman v Cosgrove*, 227 A.2d 689 (US NJ Sup Ct); *Jones v Rostvig*, 1999 BCJ No 647; *Lacroix*, 2001 MBCA 122; *Bosard v Davey*, 2005 MJ No 85; *Zhang v Kan*, 2003 BCJ No 164.

life claims until 2012 but no longer does. The Netherlands and three isolated American states—New Jersey, California, and Washington—are the global exceptions.

46. In cases such as this, child plaintiffs are ultimately arguing that the doctor's discharge of the alleged duty of care would have resulted in the child not being born at all. An assessment of damages in that context is impossible.[26] The Motion Judge accepted these conceptual flaws, as reflected in *Bovingdon*:

> How can the child be compensated for being born? How can a court give damages that measure the value of life versus a damaged life? And from a metaphysical point of view, does it make sense to allow such an action, given that if the child had not been born, he or she would not have been able to bring the action at all?[27]

47. The conceptual difficulties recognized by our courts reflect a refusal to compare a life, with a disability, to no life at all. Our courts, and courts across the Commonwealth, have refused to make this comparison.

48. In *Paxton*, the Court of Appeal for Ontario cited the English Court of Appeal in *McKay v Essex Area Health Authority* on this point:

> To my mind, the most compelling reason to reject this cause of action is the intolerable and insoluble problem it would create in the assessment of damage. […] In a claim for wrongful life how does the court begin to make an assessment? The plaintiff does not say, 'but for your negligence I would have been born uninjured'; the plaintiff says, 'but for your negligence I would never have been born'. The court then has to compare the state of the plaintiff with non-existence, of which the court can know nothing; this I regard as an impossible task.[28]

49. The Court of Appeals for the State of New York likewise rejected claims for the "wrongful causation of life" in *Becker v Schwartz*:

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[26] *Lacroix*, at para 33, 37 & 41; *McKay*; Motion Judge's Reasons at para 19 & 23. [LTA Tab 1B]

[27] *Bovingdon* at para 37; Motion Judge's Reasons at para 27. [LTA Tab 1B]

[28] *Paxton* at para 44, citing *McKay* at 790.

> […] even as a pure question of law, unencumbered by unresolved issues of fact, the weighing of the validity of a cause of action seeking compensation for the wrongful causation of life itself casts an almost Orwellian shadow, premised as it is upon concepts of genetic predictability once foreign to the evolutionary process.[29]

50. The Australian High Court echoed this refusal to assess the value of non-existence:

> There is no present field of human learning or discourse, including philosophy and theology, which would allow a person experiential access to non-existence, whether it is called pre-existence or afterlife. There is no practical possibility of a court (or jury) ever apprehending or evaluating, or receiving proof of, the actual loss or damage.[30]

51. In that decision, the Austrian High Court further reasoned that the acceptance of a tort for wrongful life devalues the lives of the disabled, a concept it refused to endorse:

> It is odious and repugnant to devalue the life of a disabled person by suggesting that such a person would have been better off not to have been born into a life with disabilities.
>
> In the eyes of the common law of Australia all human beings are valuable in, and to, our community, irrespective of any disability or perceived imperfection. […] It involves no denial of the particular pain and suffering of those with disabilities to note that while alive, between birth and death, human beings share biological needs, social needs and intellectual needs and every human life, within its circumstances and limitations, is characterised by an enigmatic and ever-changing mixture of pain and pleasure related to such needs.[31]

52. The inability to assess damages for the Applicants' claims is an independent bar to their claims, and another legal issue about which there is no controversy. Courts around the country and the Commonwealth are consistent and clear. This is not a case requiring this Court's input.

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[29] *Becker* at 408.

[30] *Harriton* at para 253.

[31] *Harriton* at paras. 258–259.

C. A Physician's Duty is to the Patient Alone

53. The proposed issue is foreclosed by existing pronouncements from this Honourable Court and those of the courts below. There is no controversy or confusion. The policy is sound and the law is clear.

54. In *Syl Apps Secure Treatment Centre v BD*, a young child ("RD") had been apprehended by the Children's Aid Society, placed in a foster home, and later transferred to a treatment centre. RD's family later sought damages against the treatment centre claiming that by not returning RD to her family, it deprived the family of a relationship with her. This Court held that the treatment centre (including a doctor employed there) did not owe a duty of care to RD's family, but owed a duty only to RD herself.

55. This Court reviewed the jurisprudence at length and held that "numerous courts have recognized that a doctor does not owe a duty of care to the parent of his or her patient because that would create a situation of conflicting duties."[32]

56. This Court further held that:

> In an environment like a secure treatment centre, different professionals, including doctors and social workers, may be involved in a child's therapeutic care. In the present case, both the social worker, Mr. Baptiste, and Dr. Meen were responsible for treating R.D. Mr. Baptiste was, in fact, appointed by Dr. Meen. It is very difficult to see how these professionals could all effectively work together if some of them owed a duty other than to the child/patient."[33]

57. This Court's holdings are grounded in bedrock health policy, and our courts have had no difficulty in applying them in other cases, including those that have the same facts as this case.

58. *Bovingdon* involved material facts identical to this case.

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[32] *Syl Apps Secure Treatment Centre v BD*, 2007 SCC 38 at para. 54.

[33] *Syl Apps Secure Treatment Centre v BD*, 2007 SCC 38 at para. 56.

59. In *Bovingdon*, the defendant physician prescribed a fertility drug to a woman who then conceived twins. The twins were born premature with cerebral palsy. The Court of Appeal for Ontario found that the prescribing doctor owed no duty of care to the unconceived fetus. The children had no right to advance a claim.[34] This Court refused leave to appeal. It should do so here too.

60. In *Paxton*, the defendant physician prescribed the acne drug Accutane to a mother who ultimately became pregnant and gave birth to a child with severe disabilities. On appeal, the Court of Appeal for Ontario found that there is no duty of care between a doctor and an unconceived fetus because there is no proximity; a physician cannot have a "close and direct" relationship with something that does not yet exist.[35]

61. In *Liebig*, the alleged negligence was not before conception, but after conception. An infant suffered injuries during childbirth resulting in disabilities. A unanimous five-member panel of the Court of Appeal for Ontario found that a duty of care existed in that case because there is an established duty of care owed by health care providers to an infant, born alive, during childbirth.

62. In reaching that determination, the unanimous five-member panel of the Court of Appeal distinguished claims arising from conduct that was before conception from claims arising after conception:

> [10] Both *Bovingdon* and *Paxton* dealt with the situation of a doctor prescribing drugs to a woman who was not pregnant at the time. In *Bovingdon*, the drug was a fertility drug that increased the likelihood of bearing twins and, by extension, the risk of complications associated with the birth of twins. In *Paxton*, the drug was intended to treat the woman's acne, but could harm a foetus if conception were to occur while it was being taken. Both the doctor and the woman believed that the woman could not become pregnant because her husband had undergone a vasectomy years earlier.
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> [11] Cases in the vein of *Bovingdon* and *Paxton*, which involve claims made by infants yet to be conceived at the time the alleged

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[34] *Bovingdon* at paras 73-74.

[35] *Paxton* at paras 64 & 71.

> negligence occurred, have been characterized as and rejected by other courts for "wrongful life": see *Lacroix (Litigation Guardian of) v. Dominique* (2001), 202 D.L.R. (4th) 121 (Man. C.A.) leave to appeal denied (2002), [2001] S.C.C.A. No. 477 (S.C.C.); *McKay v. Essex Area Health Authority,* [1982] Q.B. 1166 (Eng. C.A.). In *Bovingdon* and *Paxton*, however, this court held that the "wrongful life" approach ought not to be used. The court proceeded not be determining whether to recognize a claim for "wrongful life", but by conducting an analysis of whether a doctor owed a separate duty of care to a future child. **Both *Bovingdon* and *Paxton* hold that there is no duty of care to a future child if the alleged negligence by a health care provider took place prior to conception.**[36] [Emphasis added].

63. As the above passage makes clear, the Applicants' claim is settled by *Bovingdon* and *Paxton*. Unlike in *Liebig*, the Applicants have not pleaded a claim regarding an injury they suffered in utero. Conception had not taken place at the time of the alleged negligence. Similarly, they make no claim that the medication itself caused any birth defects. Rather, the claim is "that they would not have been born had the negligence not occurred."[37]

D. The Policy Considerations that Underlie the Decisions Should not be Revisited

64. The well-settled and well-understood principle that a physician's duty to her patient is not divided between the patient and a not-conceived future person is well-grounded in important public policy.

65. Imposing a duty of care would create a conflict between a physician's duty to her patient and an as-yet unconceived person and would undermine women's autonomy.

66. The Motion Judge correctly acknowledged this irreconcilable conflict flowing from imposing parallel duties to the mother and an unconceived future child.[38] It is not possible

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[36] *Liebig* at paras 10-11.

[37] Motion Judge Reasons at paras 41-42. [LTA Tab 1B]

[38] Motion Judge Reasons at para 19 [LTA Tab 1B]; *Lacroix* at para 33; *McKay*.

to establish the parameters of a doctor's duty of care to protect a future child from harm where their duty is to act in the best interests of the mother.[39]

67. On a public policy level, imposing a duty of care to an unconceived fetus would have a deleterious effect on women's autonomy. In *Paxton*, the Court of Appeal for Ontario recognized that such a duty could create instances where physicians would be required to treat an unconceived fetus to the detriment of its mother, thereby depriving a mother of her decision to become pregnant:

> Thus, imposing a duty of care on a doctor to a patient's future child in addition to the existing duty to the female patient creates a conflict of duties that could prompt doctors to offer treatment to some female patients in a way that might deprive them of their autonomy and freedom of informed choice in their medical care.[40]

68. Our courts have emphasized that the guiding policy is maternal autonomy over medical decisions, and the corresponding exclusivity of the physician's duty to the mother as patient.[41] The creation of a duty of care to an as-yet unconceived fetus risks disincentivizing physicians from prescribing fertility medications thereby denying "women the choice of taking fertility drugs to assist them in becoming pregnant and having children".[42] Indeed:

> Another implication for society as a whole is that, until a child is born alive, a doctor must act in the best interests of the mother. This obligation is consistent with society's recognition of the need to preserve a woman's 'bodily integrity, privacy and autonomy rights'.[43]

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[39] *Paxton* at para 79; Motion Judge Reasons at paras 53-54. [LTA Tab 1B]

[40] *Paxton* at para 68.

[41] *Paxton* at paras 72-73.

[42] *Paxton* at para 69.

[43] *Paxton* at para 79.

E. The Consequences of Striking these Claims

69. The Applicants try to suggest that the Majority's decision will "exempt physicians from negligence claims."[44] They suggest that this will leave the Applicants remedy-less.[45]

70. There is no merit to these submissions.

71. All of the heads of damages that would have been advanced by the Applicants are being advanced by their parents. Mr. Florence and Ms. Florence claim damages for the past and future cost of care of the Applicants.

72. Dr. Benzaquen is not exempt from a negligence claim; the Plaintiffs are advancing a negligence claim, and there are no remedies that are no longer available now that the Applicants' claims have been struck.

73. The Applicants also point to the cost to provincial health authorities to justify recognition of a new duty of care. The implications for the public healthcare system are properly the domain of the Legislatures and should not be addressed indirectly through contorting a physician's duty to their patient.

74. The Majority's decision protects sound policy and does so without prejudicing the Applicants at all.

F. There Are No Broader Implications to this Case Beyond the Prescription of Fertility Medication

75. Finally, the Applicants attempt to suggest that the Majority's decision poses wide-ranging problems to various affected groups. It does not.

76. None of the alleged societal problems which are painted by the Applicants as looming spectres occurred after the decision in *Bovingdon*, which was decided over a decade ago.

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[44] Applicants' Memorandum of Argument, paras. 48-52.

[45] Applicants' Memorandum of Argument, para. 48.

Like *Bovingdon*, the Majority's decision here has implications for the prescription of fertility medication and nothing more.

77. Moreover, the Applicants fail to identify a compelling public interest in upsetting the established consensus—rooted in principles of maternal autonomy—solely to carve out a "silo" of duty cases involving contraindicated fertility drugs. The Applicants have not established that the benefits of carving out this silo of cases would outweigh the cost of undermining the foundational public policy on which the existing consensus relies.

PART IV – SUBMISSION ON COSTS

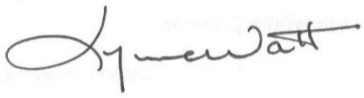
78. The Respondent requests her costs of responding to the Application.

PART V – ORDER SOUGHT

79. The Respondent submits that the Application for Leave to Appeal ought to be dismissed, with costs to the Respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Toronto, Province of Ontario this 22nd day of November, 2021.



for:

_____

J. Thomas Curry
Matthew B. Lerner
Brendan F. Morrison
Sean M. Blakeley

Counsel for the Respondent

PART VI – TABLE OF AUTHORITIES

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Court File No. CV-11-423023

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JARED FLORENCE, DANA FLORENCE, BRODY FLORENCE, COLE FLORENCE and TAYLOR FLORENCE, by their Litigation Guardian, DANA FLORENCE

Plaintiffs

and

DR. SUSAN BENZAQUEN and DR. JON FENTON ROY BARRETT

Defendants

STATEMENT OF DEFENCE OF DR. SUSAN BENZAQUEN AND DR. JON FENTON ROY BARRETT

1. The defendants, Dr. Susan Benzaquen ("Dr. Benzaquen") and Dr. Jon Fenton Roy Barrett ("Dr. Barrett") (together "the Defendant Physicians") admit the allegation contained in paragraph 6 of the Statement of Claim.

2. Save as hereinafter expressly pleaded, the Defendant Physicians deny each and every other allegation contained in the Statement of Claim and put the plaintiffs to the strict proof thereof.

3. Dr. Benzaquen is a physician duly qualified to practise medicine in the Province of Ontario and specializes in obstetrics and gynecology. Contrary to the allegation in paragraph 5 of the Statement of Claim, Dr. Benzaquen was at no time involved with the obstetrical care of the plaintiff, Dana Florence ("Mrs. Florence").

4. Dr. Barrett is a physician duly qualified to practise medicine in the Province of Ontario and specializes in fetal maternal medicine.

Dr. Benzaquen's Care of Mrs. Florence

5. Mrs. Florence was first referred to Dr. Benzaquen by her family physician in July, 2004 for consultation subsequent to an abnormal pap smear that revealed atypical squamous cells of undetermined significance.

6. Dr. Benzaquen first saw Mrs. Florence on July 26, 2004. Mrs. Florence requested that Dr. Benzaquen perform a colposcopy. The colposcopy revealed an abnormality that was visualised, biopsied and diagnosed. The biopsy result confirmed a low-grade intraepithelial lesion with human papilloma virus effect.

7. Mrs. Florence was next seen by Dr. Benzaquen on February 25, 2005. Dr. Benzaquen ordered a repeat pap smear which was again abnormal and a further colposcopy was performed on July 7, 2005.

8. After a discussion of the material risks and benefits and alternative treatment options, Mrs. Florence provided her informed consent to undergo a loop electrosurgical excision procedure on the cervix ("LEEP") which was performed without complication on February 7, 2006.

9. Mrs. Florence was followed post-operatively and seen on May 15 and August 22, 2006. On August 22, 2006, Mrs. Florence advised Dr. Benzaquen that she had ceased using contraception since her last appointment.

10. Mrs. Florence attended again on July 9, 2007 wherein she complained of an inability to conceive for approximately the past year. Mrs. Florence also advised of a history of irregular menstrual periods and that she was on the third day of her menstrual cycle. On this visit Dr. Benzaquen offered treatment by a fertility medication called Serophene.

11. Dr. Benzaquen discussed all material risks and benefits of Serophene treatment with Mrs. Florence, including the risk of multiple pregnancy, prematurity and the complications that may arise from such pregnancies. Mrs. Florence received thorough counselling on how to use Serophene and was further provided with documents describing how to use the medication and further documenting risks and benefits. Dr. Benzaquen reviewed these documents with Mrs. Florence in detail. After that discussion, Mrs. Florence provided her informed consent to commence treatment with Serophene.

12. Dr. Benzaquen ordered a serum progesterone level to be completed by Mrs. Florence on the 21st day of her menstrual cycle which was in fact done on July 27, 2007.

13. Mrs. Florence was advised to book a follow-up appointment with Dr. Benzaquen between the 30th and 35th day of her menstrual cycle to review her status and blood work and to discuss the presence of any side effects from the medication. Mrs. Florence did not return for her scheduled follow-up visit as requested.

Dr. Barrett's Care of Mrs. Florence

14. Mrs. Florence was referred to see Dr. Barrett at Sunnybrook Health Sciences Centre, Women's College Hospital site ("the Hospital") after she was diagnosed with a triplets pregnancy.

15. Mrs. Florence was first seen by Dr. Barrett on October 2, 2007. Dr. Barrett advised her of the risks and possible complications associated with a triplet pregnancy, particularly the risk and consequences of pre-term birth and the risk of developmental delay that may occur as a result of prematurity, including cerebral palsy. Dr. Barrett discussed the manner in which Mrs. Florence's pregnancy would be monitored and managed. Mrs. Florence was advised of material possible complications, to stop work at 20 weeks gestation and of the availability of fetal reduction, including associated risks and benefits.

16. Mrs. Florence was seen routinely from October 2 through and until November 27, 2007 with serial assessments, including ultrasound measurement and monitoring of the cervix.

17. On or about December 2, 2007, Mrs. Florence reported to the emergency triage department of the Hospital whereupon she was admitted with complaints of spotting. Mrs. Florence was assessed again in Hospital on December 3, 2007 and an ultrasound measurement of the cervix was performed that revealed cervical shortening without incompetence. A repeat ultrasound measurement of the cervix was performed on December 5, 2007 which revealed further shortening.

18. After a complete discussion of all material risks and benefits and after obtaining Mrs. Florence's informed consent, Dr. Barrett placed a cervical suture (or cerclage) on December 5, 2007. Mrs. Florence was prescribed medication to prevent infection and inhibit contractions and was kept on bedrest and observation in Hospital. On December 10, 2007 Ms. Florence was discharged home on bedrest with instructions to follow-up with Dr. Barrett in one week's time.

19. Mrs. Florence was seen again by Dr. Barrett in his clinic at the Hospital on December 18 and 24, 2007.

20. Mrs. Florence went into pre-term labour on December 31, 2007 and the plaintiffs, Brody, Cole and Taylor Florence were delivered by caesarian section on January 1, 2008. The Defendant Physicians were not involved with the labour and delivery care.

21. The Defendant Physicians state that the care and treatment provided by them was careful, competent and in accordance with the appropriate standard of care and they deny that they were negligent or in breach of any contract or duty in the manner alleged in the Statement of Claim or in any other manner whatsoever. Nothing done or not done by the Defendant Physicians caused the plaintiffs' loss, as alleged.

22. The Defendant Physicians deny that the plaintiffs have sustained the injuries and damages as alleged in the Statement of Claim and put the plaintiffs to the strict proof thereof. The said damages and injuries are, in any event, excessive and too remote.

23. If the plaintiffs have sustained any damages and injuries as alleged in the Statement of Claim, which is denied, those injuries and damages are not attributable in whole or in part to any actionable act or omission on the part of the Defendant Physicians. The diagnoses made and the treatment plans developed by the Defendant Physicians were both correct and appropriate and met the standard of care.

24. The Defendant Physicians plead and rely upon the provisions of the *Negligence Act*, R.S.O. 1990, c. N.1.

25. The Defendant Physicians plead and rely upon the provisions of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

26. The Defendant Physicians ask that this action be dismissed with costs.

May 21, 2013

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Plaintiffs

-and-

DR. SUSAN BENZAQUEN et al.
Defendants

Court File No. CV-11-423023

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

STATEMENT OF DEFENCE

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JARED FLORENCE et al.
Plaintiffs

-and-

DR. SUSAN BENZAQUEN et al.
Defendants

Apr 27, 2018 (J)

Court File No. CV-11-423023

4 June 2018

It is in the best interests of the minor Pls that the action be dismissed without costs against the Def. D. Barrett. Approval is granted pursuant to R 7. Order to issue.

D.A. Wilson J.

Madam Justice
Darla A. Wilson

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

FILED / DÉPOSÉ
APR 27 2018
AT / À

MOTION RECORD
(Pursuant to Rule 7 of the *Rules of Civil Procedure*)

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RCP-E 4C (May 1, 2016)

Court File No. CV-11-423023

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE Madam Justice)
) THE 4
JUSTICE Darla A. Wilson) DAY OF June, 2018

BETWEEN:

JARED FLORENCE, DANA FLORENCE, BRODY FLORENCE, COLE FLORENCE and TAYLOR FLORENCE, by their Litigation Guardian, Dana Florence

Plaintiffs

and

DR. SUSAN BENZAQUEN and DR. JON FENTON ROY BARRETT

Defendants

ORDER

THIS MOTION, made by the Plaintiffs, for an Order dismissing all claims as against the Defendant, Dr. Jon Fenton Roy Barrett, was read this day at the court house, 393 University Avenue, Toronto, Ontario, M5G 1E6.

ON READING the Motion Record, including the Affidavit of Duncan Embury, sworn April 9, 2018, the Affidavit of Dana Florence, sworn April 17, 2018, and the Consent of the lawyers for the parties.

1. **THIS COURT ORDERS** that all claims as against the Defendant, Dr. Jon Fenton Roy Barrett are hereby dismissed on a without costs basis.

2. **THIS COURT FURTHER ORDERS** that the dismissal of the within action as against the Defendant, Dr. Jon Fenton Roy Barrett, in respect of the incapable parties, Brody Florence, Cole Florence and Taylor Florence, be and the same are hereby approved, pursuant to the Rule 7.07.1 to the *Rules of Civil Procedure*.

3. **THIS COURT FURTHER ORDERS** that the Plaintiffs' claims as against the remaining Defendant, Dr. Susan Benzaquen will hereby continue.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JUN 08 2018

PER / PAR:

R.A. Wilson J.

(Signature of Judge)

JARED FLORENCE et al.
Plaintiffs

-and- DR. SUSAN BENZAQUEN et al.
Defendants

Court File No. CV-11-423023

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

ORDER

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RCP-E 4C (May 1, 2016)

S.C.C. File No. 39849

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

BRODY FLORENCE, COLE FLORENCE AND TAYLOR FLORENCE, BY THEIR LITIGATION GUARDIAN, DANA FLORENCE

APPLICANTS
Appellants

and

DR. SUSAN BENZAQUEN

RESPONDENT
Respondent

REPLY TO THE RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL (BRODY FLORENCE, COLE FLORENCE AND TAYLOR FLORENCE, BY THEIR LITIGATION GUARDIAN, DANA FLORENCE, APPLICANTS)

(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

1

Significant issues of public importance

1. This case is about a novel duty of care. The Applicants ask this Honourable Court to determine whether a physician *may* have a duty of care to the potential future children of her patient where that physician has prescribed a contraindicated medication.

2. Leave is sought because the Majority's decision creates a situation where, regardless of how a wrong is inflicted, there can be no remedy or protection for the persons injured as a direct result of that wrong if they are affected by a physician's negligence occurring prior to their conception. By granting Leave, this Honourable Court can decide whether, as a matter of public policy, it is appropriate to definitively rule out such claims.

3. Contrary to the Respondent's submission, the clear conflict between the Majority and Dissenting reasons herein do not preclude all "reasonable doubt"[1] that the Applicants' claim could succeed if allowed to proceed to a trial. For example, in *Toombes v Dr Philip Mitchell*,[2] the High Court of Justice, Queen's Bench Division in London, UK determined that a healthcare professional can be found liable for negligent pre-conception advice which results in the birth of a child with a serious health condition.[3]

4. Further, as recently affirmed by the Ontario Superior Court of Justice in *Dixon et al. v. Barwin*, the fundamental questions raised by this Application for Leave remain open and unsettled. For example, whereas Justice MacLeod described the "extreme difficulty" associated with establishing this species of claim (i.e. claims made by individuals not conceived at the time the tortious conduct occurred), he could not rule out the possibility that such a claim *could* establish a physician owed a duty to a yet un-conceived child when treating the child's mother.[4]

5. The Applicants' position is that theirs is that case. Unlike previous cases involving the pre-conceived considered in Ontario and elsewhere, such as *Bovingdon v. Hergott*[5] and *Paxton v.*

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[1] *Hunt v. Carey Canada Inc.,* (1990) 2 SCR 959 at para. 32.
[2] *Toombes v. Dr Philip Mitchell* [2020] EWHC 3506 at para. 59.
[3] Affirmed in [2021] EWHC 3234 (QB) on December 1, 2021.
[4] *Dixon et al. v. Barwin*, 2021 ONSC 7257 at para. 15.
[5] *Bovingdon v. Hergott*, 2008 ONCA 2 (CanLII).

Ramji,[6] the medication prescribed here is alleged to be contraindicated for Ms. Florence, meaning that it never should have been offered. This key distinction means that both the patient (Ms. Florence) and her future children (the Applicants herein) are aligned in interest. There is no conflicting duty for the physician, and no possible impact on the choice of the mother. By granting Leave in this case, this Honourable Court could definitively address whether a negligent act which takes place *prior* to a plaintiff's conception, and which results in harm, can be actionable.

What is the scope of a physician's duty of care in the obstetrical context?

6. The Respondent misstates the law governing the duties owed by Canadian physicians. In the alternative, the Respondent's description raises a fundamental question for this Honourable Court's consideration – namely, what is the scope of a physician's duty of care in the obstetrical context? Contrary to the Respondent's categorical approach, it is well established that a physician owes a simultaneous duty of care to both the expectant mother and her fetus (once born alive) for actions or omissions that occur during a pregnancy, or during labour and delivery.[7] There are also well-established authorities holding that, in some circumstances, a doctor can owe a duty to a third party where harm is foreseeable.[8]

7. Typically, the law resolves any potential for conflict in the obstetric context, including any potential conflicts that may arise from a mother wanting an abortion, by requiring that the physician's duty to the mother is paramount. However, what makes the Applicants' case so different (and, therefore, valuable from a public policy standpoint) is that the interests of the mother and children herein were totally aligned when the negligent acts are alleged to have occurred. So, in a scenario in which the negligent act (i.e. prescribing contraindicated medication) has a deleterious impact for both, why should the children be precluded from making a claim against the physician?

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[6] *Paxton v. Ramji*, 2008 ONCA 697.
[7] Gerald Robertson & Ellen Picard, *Legal Liability of Doctors and Hospitals in Canada 5th Ed.* (Toronto: Thomson Reuter, 2017), p. 425-426; *Cherry v. Borsman*, 1992 CanLII 1545 (BC CA) at pp. 28-29; *Liebeg (Litigation Guardian of) v. Guelph General Hospital*, 2010 ONCA 450.
[8] *MacPhail v. Desrosiers*, 1998 NSCA 159 (CanLII); *Ahmed v. Stefaniu*, 2006 CanLII 34973 (ON CA); *Pittman Estate v. Bain*, 1994 CanLII 7489 (ON SC); and *Toms v. Foster*, 1994 CanLII 517 (ON CA).

Addressing policy questions & concerns

8. Contrary to the Respondent's submission, recognition of the duty of care asserted by the Applicants would not create any conflict for a physician discussing abortion or 'selective fetal reduction'. As noted above, physicians *already* have a dual duty of care in that circumstance.

9. Recognition of a duty of care in this context would not, in any way, alter those well-recognized principles, and would not affect a women's right to an abortion, selective reduction, or her bodily autonomy. To the contrary, by granting Leave herein, this Honourable Court could offer Canadian women greater certainty in the area of reproductive healthcare, by clarifying the scope of a physician's duty of care when prescribing fertility medications.

Is 'existence' a predicate at Canadian law?

10. The Respondent now asserts that, but for Serophene, the Applicants could not have been conceived. This misses the point entirely. For example, in *Cherry*, the Court observed that the infant plaintiff was not "submitting…she would have been better off dead, but rather that she suffered injuries as a result of the defendant's negligence."[9] This approach was subsequently affirmed by the BCCA.[10]

11. Similarly, the Applicants do not seek to challenge their own existence. Rather, they allege that the Respondent knew, or ought to have known, that prescribing Serophene could cause harm not only to Ms. Florence but also to them.[11] If Serophene was not clinically indicated, as alleged, the Applicants say it was below the standard of care to offer or prescribe this medication. Can there be no basis for recovery in that circumstance?

12. As a matter of fundamental legal significance, the decision of the Court of Appeal below applies a strict, categorical approach to this question. Instead of conducting an individual assessment of the facts and circumstances of the Applicants' claim, the Majority's decision (endorsed by the Respondent herein) would effectively bar not just the Applicants' claim, but

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[9] *Cherry v. Borsman* (1990), 75 D.L.R. (4th) 668, 5 C.C.L.T. (2d) 243 (BC SC) at p. 8.
[10] *Cherry v. Borsman* (1992), 94 D.L.R. (4th) 487, [1992] 6 W.W.R. 701 137 at p. 26.
[11] Amended Statement of Claim, filed April 2, 2013. [TAB 3]

any future claim brought on behalf of an individual who was not conceived at the time an allegedly negligent act occurred.

13. As Fairburn A.C.J.O determined below, this issue has not been definitively resolved and is "worth a closer look".[12] Leave is sought to provide this Honourable Court an opportunity to take that 'closer look' and to determine whether the categorical approach set out by the Court of Appeal *should* be the law for Canada.

Has the Majority sidestepped "proximity"?

14. When determining whether or not an alleged duty of care is owed, Canadian courts typically consider the context in which that duty is said to arise, and the particular "act" or circumstances that link the parties.[13] However, this is not a typical case. The Majority below sidestepped the fundamental question of "proximity", relying instead on a categorical rejection of the Applicants' claims in negligence. For the Majority below, the only question was whether the Applicants' claims fit a particular category or profile of claims against physicians, labelled by the Respondent as "wrongful life" claims.

15. Leave is sought to re-affirm that negligence analyses cannot determine whether a duty of care exists between parties without also considering the specific acts or omissions at issue (here, the negligent prescription of contraindicated medications). The alleged act or omission, including policy considerations relevant to the act or omission, are key features of the proximity analysis necessary to evaluate whether or not a duty of care exists at all. This in no way conflates the duty and standard of care, but rather recognizes the importance of analyzing the circumstances in which the duty is alleged to arise. This 'bedrock' requirement stretches all the way back to *Donoghue v. Stevenson*.[14]

16. The question for consideration here is (or should be) whether the harm to the Applicants was a "reasonably foreseeable" consequence of the Respondent's conduct, and whether there is

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[12] *Florence v. Benzaquen*, 2021 ONCA 523 (CanLII) at para. 155.
[13] *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII) at para. 16.
[14] *Donoghue v. Stevenson*, 1932 CanLII 536 (FOREP) at pp. 580-581.

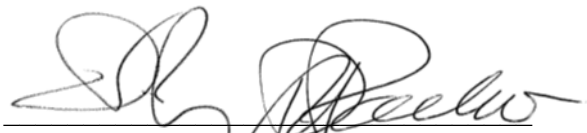
"a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff".[15]

Setting the record straight: negligence was plead

17. The Applicants plead that the Respondent owed them a duty of care. In the Notice of Action, the Applicants indicated their action is brought "in their own right"[16] for "damages and losses for negligent provision of medical care, breach of fiduciary duty and breach of contract arising out of the medical care provided to the Plaintiff Dana Florence by [the Respondent]".[17]

18. Further, in the Amended Statement of the Claim, the Applicants further particularize their claim, alleging the Respondent "negligently prescribed Serophene when it was contraindicated and/or unnecessary to do so."[18]

ALL OF WHICH IS RESPECTIFULLY SUBMITTED this December 1, 2021.



Duncan Embury & Daniela M. Pacheco
Counsel for the Applicants

[15] *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 at para. 18.
[16] Notice of Action, dated March 25, 2011. [Emphasis added]. [TAB 2]
[17] Notice of Action, dated March 25, 2011. [Emphasis added]. [TAB 2]
[18] Amended Statement of Claim, at para. 35(a)(xi). [TAB 3]

6

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Court File No. CV-11-423023

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

(Court Seal)

JARED FLORENCE, DANA FLORENCE, BRODY FLORENCE, COLE FLORENCE and TAYLOR FLORENCE, by their Litigation Guardian, DANA FLORENCE

Plaintiffs

-and-

DR. SUSAN BENZAQUEN and DR. JON FENTON ROY BARRETT

Defendants

NOTICE OF ACTION

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the Statement of Claim served with this Notice of Action.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Notice of Action is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date March 25/2011 Issued by

Local Registrar

Address of
court office: 393 University Avenue
10th Floor
Toronto, Ontario M5G 1E6

TO: **DR. SUSAN BENZAQUEN**
Suite 208
7330 Yonge Streeet
Thornhill, Ontario L4J 7Y7

AND TO: **DR. JON FENTON ROY BARRETT**
Sunnybrook Health Sciences Centre
Aubrey and Marla Dan Program
Room M4 172
2075 Bayview Avenue
Toronto, Ontario M4N 3M5

CLAIM

The Plaintiffs seek damages and losses for negligent provision of medical care, breach of fiduciary duty and breach of contract arising out of the medical care provided to the Plaintiff Dana Florence by the Defendants.

The Plaintiff Jared Florence is the spouse of Dana Florence and brings this action pursuant to the provisions of the Family Law Act, R.S.O. 1990 c.F-3 as amended.

The Plaintiffs Brody Florence, Cole Florence and Taylor Florence, by their Litigation Guardian, Dana Florence, are Jared Florence and Dana Florence's children and bring this action in their own right and pursuant to the provisions of the *Family Law Act*, R.S.O. 1990, c.F-3, as amended;

The Defendants Dr. Susan Benzaquen and Dr. Jon Barrett are physicians practicing medicine in the Province of Ontario. At all material times they were responsible for the medical and obstetrical treatment and care of Dana Florence.

The Plaintiffs allege that Dr. Susan Benzaquen prescribed a fertility agent, Clomid, to Dana Florence in or about July, 2007. The Plaintiffs allege that this prescription was inappropriate and unnecessary in all of the circumstances and caused or contributed to Dana Florence conceiving triplets and thereby exposing herself and her unborn children to an increased risk of prematurity, cerebral palsy and other birth related complications. The Plaintiffs allege that it is the direct result of the actions of Dr. Benzaquen that the Infant Plaintiffs were born with significant disabilities and will require extraordinary care and assistance throughout the lifetimes.

The Plaintiffs allege that Dr. Jon Barrett was responsible for the obstetrical treatment and care of Dana Florence throughout her pregnancy with the Infant Plaintiffs. The Plaintiffs allege that Dr. Barrett failed to take all appropriate steps to extend Dana Florence's labour as fully as possible and thereby reduce the risk associated with a premature delivery. The Plaintiffs further allege that Dr. Barrett failed to take any or all appropriate steps to protect the Infant Plaintiffs from the effects of premature delivery.

(Date of issue) March 25/2011

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Lawyers for the Plaintiffs

JARED FLORENCE ET AL.
Plaintiffs

-and-

DR. SUSAN BENZAQUEN ET AL.
Defendants

Court File No CV-11-423023

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF ACTION

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RCP-E 4C (July 1, 2007)

10

Court File No. CV-11-423023

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JARED FLORENCE, DANA FLORENCE, BRODY FLORENCE, COLE FLORENCE and TAYLOR FLORENCE, by their Litigation Guardian, DANA FLORENCE

Plaintiffs

-and-

DR. SUSAN BENZAQUEN and DR. JON FENTON ROY BARRETT

Defendants

AMENDED STATEMENT OF CLAIM
(Notice of Action issued on March 25, 2011)

1. The Plaintiffs claim:

(a) General damages in the amount of $2,500,000.00;

(b) Special damages in the amount of $30,000,000.00;

(c) Prejudgment interest in accordance with section 128 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, as amended;

(d) Postjudgment interest in accordance with section 129 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, as amended;

(e) The costs of this proceeding on a substantial indemnity scale, together with all applicable taxes; and,

(f) Such further and other Relief as to this Honourable Court may seem just.

THE PARTIES

2. The Plaintiff, Dana Florence ("Dana") resides in North York, in the City of Toronto, in the Province of Ontario. Prior to the events giving rise to this action Dana was a healthy and active young woman of approximately 25 years of age. As a direct result of the negligence of the Defendants, Dana suffered unnecessary complications in the conception and neonatal development of her children, resulting in the conception of multiple children during one pregnancy, the pre-term birth of those children, and the subsequent extensive and permanent brain damage and developmental delay of her children.

3. The Plaintiff Jared Florence ("Jared") is Dana's husband. Jared resides with Dana, and their three children, in North York, in the City of Toronto, in the Province of Ontario. At all material times, Jared and Dana shared a close and loving relationship.

4. The Plaintiffs Brody Florence ("Brody"), Cole Florence ("Cole"), and Taylor Florence ("Taylor") are Dana and Jared's children. Brody, Cole and Taylor are triplets, and were all born on January 1, 2008. As minor Plaintiffs, Brody, Cole, and Taylor bring their claims by way of their Litigation Guardian and mother, Dana Florence. As a result of the negligence of the Defendants, Brody, Cole and Taylor will require extraordinary care and services including assistance with all activities of daily living.

5. The Defendant Dr. Susan Benzaquen ("Dr. Benzaquen") is a doctor practising in the field of obstetrics and gynaecology in Thornhill, Ontario. At all material times Dr. Benzaquen was

one of the physicians responsible for the obstetrical and gynaecological care and treatment of Dana.

6. The Defendant Dr. Jon Fenton Roy Barrett ("Dr. Barrett") is a doctor practising in the field of obstetrics and gynaecology in Toronto, Ontario. At all material times Dr. Barrett was one of the physicians responsible for the obstetrical and gynaecological care and treatment of Dana.

THE FACTS GIVING RISE TO THE CLAIM

Colposcopy and Cone Biopsy

7. On June 21, 2004, Dana was referred to Dr. Benzaquen for gynecologic care following an abnormal Pap smear which had been reported as atypical squamous cells of undetermined significance (ASCUS). ASCUS is the most common type of abnormal Pap smear result. It is considered mildly abnormal. There is no immediate cervical cancer risk in an ASCUS Pap smear result. The pathologist reporting the ASCUS recommended a repeat Pap smear in 6 months.

8. On July 26, 2004, Dr. Benzaquen first saw Dana. At this point Dr. Benzaquen became the most responsible physician for Dana's routine gynaecologic care.

9. At this visit, Dr. Benzaquen, rather than following the recommendation of the pathologist, performed a colposcopy. A colposcopy is an exam that allows the doctor to examine the cervix under magnification. At the same time, Dr. Benzaquen also performed a further Pap smear which was reported as negative on August 19, 2004. Dr. Benzaquen did not give Dana the option of following up using Pap smears alone.

10. Dr. Benzaquen next saw Mrs. Florence on February 25, 2005. At that time, her plan of management was to perform a repeat Pap smear and further colposcopy. Dr. Benzaquen recommended surgical treatment if the cervical lesion persisted or progressed.

11. On July 7, 2005, Dana returned to see Dr. Benzaquen for follow-up. At this appointment Dr. Benzaquen obtained a further pap smear and performed another colposcopy. However, before receiving the result of the Pap smear, Dr. Benzaquen told the patient that she had a lesion and recommended to Dana that she undergo surgery, known as a loop electrosurgical excision procedure ("LEEP") which cuts away cervical tissue. Dr. Benzaquen did not take a biopsy of the suspect lesion. No other options, including expectant management, were considered or discussed and there was no discussion of any risks associated with the procedure proposed by Dr. Benzaquen. In particular, the fact that LEEP increases the risk of premature birth was not discussed at any time. Dana, believing the procedures were necessary, and not being advised of the alternatives involving less risk, agreed to the surgery.

12. The pap smear obtained on July 7, 2005 was subsequently reviewed by a pathologist and was reported as normal. Dana was not advised of this result.

13. On February 7, 2006, Dr. Benzaquen performed the LEEP. The surgical pathology from the LEEP was benign and consistent with a common lesion which would more likely than not have resolved on its own without any treatment.

Clomid Prescription

14. In or around the Spring of 2007, when Dana was approximately 25 years old, Dana and Jared decided to start a family. In order to ensure that she would have a healthy conception and

pregnancy, Dana sought the professional advice of her family physician, and her obstetrician/gynaecologist at the time, Dr. Benzaquen.

15. On or around May 18, 2007, Dana attended at her family physician's office to discuss her plans for beginning a family. Dana advised her physician that her last menstrual period occurred on May 1, 2007. Near or around this time, Dana made an appointment to speak with Dr. Benzaquen for early July, 2007.

16. On or around June 26, 2007, Dana re-attended at her family physician's office and advised her physician that a home pregnancy test taken on June 24, 2007, was negative for conception.

17. On or around July 5, 2007, Dana started her menstrual period. ~~Shortly thereafter,~~ Dana attended at Dr. Benzaquen's office on approximately July 9, 2007 for her previously scheduled appointment. Dana advised Dr. Benzaquen of her menstrual history, and advised her of the fact that she was menstruating at the time of the appointment. Despite not having performed a physical, conducted any blood work, or any other appropriate diagnostic tests, Dr. Benzaquen diagnosed Dana as having an anovulatory cycle. An anovulatory cycle is a condition wherein a woman fails to ovulate during her menstrual cycle despite the presence of menstruation.

18. Subsequent to advising Dana of her having an anovulatory cycle, Dr. Benzaquen proceeded to recommend and prescribe Serophene (also known as "Clomid"). Dr. Benzaquen ~~proscribed~~ prescribed two cycles of Serophene, the first of which was to be commenced on day five (5) of her cycle. Dana was never advised of the percentage of the risk of multiple births, nor was she ever advised of the risks of carrying multiple foetuses, such as pre-mature birth of the

foetuses, developmental delay of the foetuses, cerebral palsy, or other risks. Dana was advised to return after the date of her next expected menstruation.

19. The Plaintiffs state and the fact is that Dr. Benzaquen was negligent in her diagnosis and treatment of Dana, in that she failed to conduct any and/or appropriate tests, examinations, or other diagnostic evaluations to determine whether or not Dana in fact had anovulatory cycles, or any other conditions that may have caused concern regarding her intended conception. Additionally, Dr. Benzaquen's recommendation and prescription of Serophene was contra-indicated under the circumstances, and failed to take into account Dana's age, the very short time that Dana and Jared had been attempting to conceive, and other indicators present in Dana's clinical condition which suggested that the use of Serophene was unreasonable under the circumstances.

20. The Plaintiffs further state that Dr. Benzaquen breached her professional responsibilities to Dana in failing to provide her with all of the information necessary to make a considered and informed decision regarding the use of Serophene, when she knew or ought to have known that information regarding the risks of Serophene use existed. Specifically, the Plaintiffs assert that Dr. Benzaquen failed to advise Dana of the significant increase in the risk of conceiving multiples, and the inherent and extreme risks of carrying multiple children during one pregnancy especially after having had cervical surgery, including, but not limited to, an increase in the risk of pre-mature birth and the resulting potential for significant neurological and developmental injuries to the child/children.

21. The Plaintiffs further plead that if Dana had been aware of the significant risks associated with multiple births she would not have taken Serophene.

22. Dana began taking the first cycle of Serophene that had been prescribed by Dr. Benzaquen on or about July 9, 2007.

23. On or around late July of 2007, Dana was made aware of her pregnancy. Her pregnancy was confirmed with a blood-test on or around July 30, 2007.

24. During and around her tenth week of gestation, Dana began to experience some spotting. Dana was referred for an urgent ultrasound wherein it was discovered that Dana was pregnant with triplets. Dana was referred to a "multiples" specialist, Dr. Jon Barrett at Sunnybrook Health Sciences Centre – Women's College Hospital.

25. Upon her attendance at Dr. Barrett's office, Dana was advised of the risks of carrying multiple children, including the risk of pre-term labour. Although Dr. Barrett advised of the risks of pre-term birth for the triplets, Dr. Barrett failed to advise Dana and Jared of the risk of severe developmental delay that may occur as a result of pre-term labour and delivery.

26. In or around December of 2007, it was noted that Dana's cervix was shortening. On or around December 5, 2007, Dana underwent a cerclage procedure under the care of Dr. Barrett, in order to ensure the continued closure of the cervix, and prevent or reduce the risk of pre-term labour. Subsequently, Dana was placed on bed rest. On or around December 31, 2007, while approximately 25 weeks gestation, Dana went into pre-term labour.

27. The Plaintiffs state and the fact is that Dr. Barrett failed to take any and/or all reasonable care of Dana to prevent the occurrence of pre-term labour, such that he failed to monitor Dana's cervix issues, failed to prescribe the appropriate level of activity for Dana, and failed to ensure

that all reasonable measures were taken to reduce the risk of pre-term labour in Dana's particular circumstances.

28. On or around January 1, 2008, with the advice and recommendation of the staff physicians at Sunnybrook Health Sciences Centre – Women's College Hospital, and at 25 weeks gestation, Dana underwent an emergency caesarean section. All of Brody, Cole, and Taylor were born extremely pre-mature, with conditions including, but not limited to, bronchopulmonary dysplasia, retinopathy of prematurity, and subpendymal hemorrhage, among others. Additionally, Taylor, Brody, and Cole were born with a patent ductus arteriosus; Taylor and Brody required surgical intervention. Brody also suffered thrombosis, severe to profound hearing loss, and a urinary tract infection. At the time of Brody, Cole, and Taylor's births, Dana and Jared were advised that they would suffer some developmental delay, but that much of the delay demonstrated by the triplets at birth would be resolved in time.

29. In or around April, 2009, Dana and Jared were informed that the developmental delay experienced by their children was permanent and severe. They were advised that their children likely have cerebral palsy. Although their children were not yet old enough for a confirmed diagnosis of cerebral palsy, Dana and Jared were advised that their children were currently experiencing or will likely experience any and all of the following on a permanent basis:

(a) Very low tone in the trunk (core of the body);

(b) Inability to support their heads or trunk;

(c) Significantly increased tone or spasticity with intention and movement of their extremities;

(d) Quadriplegia;

(e) A failure to pull to standing, sit with assistance, crawl, babble, respond to their own names;

(f) Delays and continued disability in the acquisition of cognitive, language, and fine and gross motor skills;

(g) Hearing loss,

(h) Such further and other particulars as may be provided prior to trial.

30. As a result of the negligent diagnosis, care and treatment of Dana by the Defendants, the Plaintiffs have suffered and will continue to suffer a loss of care, guidance, and companionship. Additionally, Dana and Jared have suffered, and will continue to suffer, extensive economic losses.

Request for records

31. On February 22, 2011, counsel for Dana wrote to Dr. Benzaquen requesting: "all clinical notes and records in [her] possession relating to [Dana's] treatment, including any electronic records and audit trail associated with those records."

32. On February 24, 2011, on specific instructions from Dr. Benzaquen, Dr. Benzaquen's assistant contacted Dana's counsel in an attempt to dissuade and generally obstruct Dana's access to the medical information in her records. Despite these efforts, Dana through her counsel reiterated her demand for "ALL of the records, including handwritten clinical notes."

33. On March 1, 2011, Dr. Benzaquen responded to the request for all medical records by providing 4 pages of records together with an invoice. These records cover only three appointments. No records have been provided regarding the prescription of Serophene. The failure to provide these records has prevented the Plaintiffs from adequately investigating their potential claim as against Dr. Benzaquen.

34. Dr. Benzaquen's deliberate actions in obstructing and denying Dana's access to the medical information in Dr. Benzaquen's possession and control constitutes an on-going breach of Dr. Benzaquen's fiduciary obligations.

35. The Plaintiffs state that their damages were caused or contributed to by the negligence of the Defendants the particulars of which include but are not limited to:

(a) **As against Dr. Benzaquen:**

(i) She failed to properly diagnose, care for and treat Dana;

(ii) She failed to adhere to proper procedures in the diagnosis, care and treatment of Dana;

(iii) She failed to read or appreciate available information which demonstrated the true nature of Dana's condition;

(iv) She failed to consult with appropriate specialists in order to properly diagnose and treat Dana;

(v) She performed unnecessary colposcopies when equally effective and less invasive methods of assessing cervical cell abnormalities were available;

(vi) She performed a LEEP procedure with cone biopsy on February 7, 2006 which was not indicated and not necessary;

(vii) She failed to provide Dana with a realistic appreciation of the options available to her prior to recommending the LEEP procedure with cone biopsy, including expectant management;

(viii) She failed to obtain a fully informed consent from Dana prior to performing the LEEP procedure with cone biopsy on February 7, 2006;

(ix) She failed to advise Dana of the known risks involved in taking Serophene when she knew, or ought to have known, that those risks were relevant to Dana's informed consent;

(x) She failed to advise Dana of the risk of pre-term delivery with multiple pregnancies in an individual who has had previous cervical surgery;

(xi) She negligently prescribed Serophene when it was contra-indicated and/or completely unnecessary to do so; and

(xii) Such further and other particulars as may be advised prior to trial.

(b) **As against Dr. Barrett:**

(i) He failed to properly diagnose, care for and treat Dana;

(ii) He failed to adhere to proper procedures in the diagnosis, care and treatment of Dana;

(iii) He failed to read or appreciate available information which demonstrated the true nature of Dana's condition;

(iv) He failed to consult with appropriate specialists in order to properly diagnose and treat Dana;

(v) He failed to advise Dana of the extensive risks in carrying triplets, and the resulting risk of permanent developmental delay, including cerebral palsy;

(vi) He negligently performed and/or executed Dana's cerclage surgery of December 5, 2007;

(vii) He failed to provide appropriate consultation, care, and treatment to Dana prior to and following the cerclage surgery of December 5, 2007;

(viii) Such further and other particulars as may be advised prior to trial.

36. The Plaintiffs plead and the fact is that the physician Defendants breached their contractual and fiduciary obligations to exercise all reasonable care and skill in the diagnosis, care and treatment of Dana.

DAMAGES

37. The minor Plaintiffs' injuries have had an extensive impact on the lives of the Plaintiffs, and have impacted all aspects of daily living. Additionally, Dana and Jared have had to incur, and will continue to incur, extra-ordinary costs for the care and treatment of Brody, Cole, and Taylor, who require constant and demanding 24 hour care. It is unknown what additional therapies will be necessary in the future, but it is known that the ability of the minor Plaintiffs to

perform the usual tasks of daily living and earn a livelihood has been and remains impaired. Particulars of these past and future care costs will be provided prior to trial.

38. Dana has been unable to work in any capacity, as she continues to provide the necessary care to her children. Particulars of economic losses, including but not limited to present and future income loss will be provided prior to trial.

39. The Plaintiffs plead and rely on the *Limitations Act, 2002*, S.O. 2002, C. 24.

The Plaintiffs propose that this action be tried at Toronto, Ontario.

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JARED FLORENCE, et al.
Plaintiffs

-and- DR. SUSAN BENZAQUEN~~, et al.~~
Defendants

Court File No. CV-11-423023

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PROCEEDING COMMENCED AT
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AMENDED STATEMENT OF CLAIM

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RCP-E 4C (July 1, 2007)

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Bhuvi Rishi

From: Bhuvi Rishi
Sent: Friday, December 10, 2021 2:54 PM
To: Dana Geall
Cc: FlorenceDanaZ2607400@projects.filevine.com
Subject: Florence- 15072- Correspondence from Daniela Pacheco
Attachments: Client 23 - Encl Response Reply.pdf

Good afternoon Dana,

Kindly find the attached correspondence from Daniela Pacheco.

Thanks,

NEINSTEIN

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