

Form 78.05

2012

Hfx No. 390420

Supreme Court of Nova Scotia

Between:

BEVERLY MOORE and MARY SCHINOLD

Court Administration

MAR 04 2016

Halifax, N.S.

PLAINTIFFS



and

CAPITAL DISTRICT HEALTH AUTHORITY, a body corporate and
KATHARINE ZINCK LAWRENCE

DEFENDANTS

Proceeding under the *Class Proceedings Act*, SNS 2007, c 28

Consent Order for Certification

Before the Honourable Justice Peter P. Rosinski, in chambers.

THIS MOTION is made by the Plaintiffs for an Order for Certification of the action as a class proceeding;

UPON READING the Notice of Motion, the Affidavits of Jeremy P. Smith, Beverly Moore, and Mary Schinold, the attached Litigation Plan, and the submissions of counsel;

AND UPON IT APPEARING that all parties to this Action have consented to this Order;

AND UPON IT APPEARING that it is appropriate to certify the proceeding as a class proceeding in that:

- a. the pleadings disclose a cause of action;
- b. there is an identifiable class of two or more persons;
- c. the claims raise common issues;
- d. a class proceeding is the preferable procedure; and
- e. there are Representative Plaintiffs who would fairly represent the Class, have produced a workable Litigation Plan, and have no interests in conflict with the interests of other Class Members;

NOW UPON MOTION, IT IS HEREBY ORDERED:


1. That the Action in question be certified as a Class Proceeding pursuant to sections 4(3) and 7 of the *Class Proceedings Act*, SNS 2007, c. 28;
2. That the Plaintiffs Mary Schinold and Beverly Moore are appointed as Representative Plaintiffs for the sub-classes with Mary Schinold being the Representative Plaintiff for the Family Class and Beverly Moore being the Representative Plaintiff for the Non- Family Class;
3. That the Class is divided into two sub-classes, defined as:
 - 1) All living persons, who are related by blood or marriage to Katharine Zinck Lawrence, and who were sent letters from the Capital District Health Authority advising them that their personal health information had been inappropriately accessed by Katharine Zinck Lawrence between the years 2005 and 2012 (the "Family Class"); and,
 - 2) All living persons, who are not related by blood or marriage to Katharine Zinck Lawrence, and who were sent letters from the Capital District Health Authority advising them that their personal health information had been inappropriately accessed by Katharine Zinck Lawrence between the years 2005 and 2012 (the "Non-Family Class").
4. That the common issues in the Class Proceeding are:
 - 1) Is the tort of intrusion upon seclusion recognized as an independent tort in Nova Scotia? If so:
 - i. What are its parameters and constituent elements?
 - ii. Is it subject to a cap on damages?
 - iii. What defences are available?
 - 2) If the tort of intrusion upon seclusion is recognized in Nova Scotia, can an employer be vicariously liable for the commission of this tort by an employee?
 - 3) If so, and if the tort of intrusion upon seclusion is ultimately established by any of the Class Members, having regard to any

defences which may be available, would the CDHA be vicariously liable for this tort in the circumstances of this case?


- 4) Did Katharine Zinck Lawrence, over the course of her employment with CDHA, intentionally access the medical records of the Family Class Members without a valid purpose?
 - 5) Did Katharine Zinck Lawrence, over the course of her employment with CDHA, intentionally access the medical records of the Non-Family Class Members without a valid purpose?
 - 6) Did CDHA owe a duty of care to the Class Members to protect the privacy of their personal health information?
 - 7) If so, did CDHA breach the standard of care as pleaded by the Plaintiffs in the Further Amended Statement of Claim?
5. That the pleadings are amended as set forth in Appendix A to this Order, being the Further Amended Statement of Claim.
 6. That the claims to be determined and the relief being sought are as per the Further Amended Statement of Claim (Appendix A to this Order).
 7. That the Defendant CDHA will send by pre-paid post to each of the Class members (both the Family Class and the Non-Family Class):
 - a. A cover letter in a form agreed to among the Parties explaining:
 - i. That a class proceeding has been commenced against the Defendants;
 - ii. That the named recipient of the letter is a Class Member unless opting out;
 - iii. That the author of the cover letter (Stewart McKelvey) is legal counsel to the Defendant CDHA and not to the Class Member;
 - iv. That the Class Member has a right to opt out of the proceeding by signing and returning the enclosed Opt-Out form;


- v. That if further consultation is desired, the Class member may contact either Patterson Law or Wagners for further advice on a "no charge" basis.
 - b. A copy of this Order;
 - c. An Opt-Out form identical to the form attached and forming part of the Litigation Plan and attached as Appendix B to this Order along with a self-addressed envelope to Stewart McKelvey for the return of the Opt-Out form;
 - d. A "clean copy" of the Further Amended Statement of Claim.
8. That the Defendant CDHA shall provide a list of persons who have opted out to the Plaintiffs and to the Defendant Zinck Lawrence.
 9. That the Litigation Plan attached as Appendix B is a workable method of advancing the proceedings subject to clarification and amendment if required.
 10. That there shall be document production on all the common issues.
 11. That the Defendants shall deliver their statements of defence no later than 45 days following the issuance of this Order.
 12. That the Plaintiffs shall pay the reasonable costs and disbursements of CDHA to provide notice of the class proceeding as described in paragraph 7, above.
 13. That each party shall bear its own costs for this Motion.


Issued ^{March} ~~February~~ 4, 2016



Prothonotary
LORRAINE LUNN
Deputy Prothonotary

Consented to by:


Robert H. Pineo,
Counsel to the Plaintiffs


For Raymond Wagner, Q.C.,
Counsel to the Plaintiffs

fel

Nancy G. Rubin, Q.C.,
Counsel to the Defendant,
Capital District Health Authority

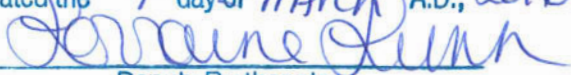

Tia Silver,
Counsel to the Defendant,
Katharine Zinck-Lawrence

SCOTT R. CAMPBELL
A Barrister of the Supreme
Court of Nova Scotia

IN THE SUPREME COURT OF NOVA SCOTIA

I hereby certify that the foregoing document,
identified by the Seal of the Court, is a true
copy of the original document on file herein.

Dated the *4th* day of *March* A.D., *2016*


Deputy Prothonotary

LORRAINE LUNN
Deputy Prothonotary

Appendix A

Statement of Claim Amended: May 12, 2014

Statement of Claim Further Amended: February 18, 2016

Proceeding under the *Class Proceedings Act*, S.N.S. 2007, c. 28

I — OVERVIEW

1. — An individual's privacy interest is a fundamental value that warrants protection. Hospital patients have a right to the informational privacy. A patient's medical records contain information of an inherently private and personal nature.

2. — For many years, an employee of the Capital District Health Authority intentionally intruded on the private medical records of hospital patients. The Plaintiffs are victims of this breach of privacy. They bring this action on behalf of themselves and other victims of the privacy breach seeking redress for this highly offensive invasion of privacy.

II REPRESENTATIVE PLAINTIFFS AND CLASS

3. 1. The Plaintiff, Beverly Moore ("Ms. Moore"), currently resides at 17 Green Acres Road, Halifax, Nova Scotia.

4. 2. The Plaintiff, Mary Schinold ("Ms. Schinold"), is a resident of Falmouth, Hants County, Nova Scotia.

5. 3. The Plaintiffs have long been patients of the Defendant, Capital District Health Authority ("CDHA"). CDHA is in possession of their medical records. These records contain private information, concerning, but not limited to, their personal health, their employment, their

social insurance number, their health card number, as well as their family member's employment, social insurance number and health card number.

6. 4. The Plaintiffs seek to certify this action as a Class Proceeding and pleads the *Class Proceedings Act*, S-N-S- 2007, c. 28, as providing the basis for such certification. The Plaintiffs, as the Representative Plaintiffs, do not have any interest adverse to any of the members of the proposed Class. The Plaintiffs state that there is an identifiable class that would be fairly and adequately represented by them; that the Plaintiff's claims raise common issues; and that a Class Proceeding would be the preferable procedure for the resolution of such common issues.

7. 5. The Plaintiffs propose to bring a Class Proceeding on behalf of themselves and a Class of other Canadian residents whose medical records were inappropriately accessed by the Defendant's employee, the Defendant ~~Katherine~~ Katharine Zinck Lawrence. ~~The proposed Class will be further defined in the Motion for Certification.~~ The Class is divided into two sub-classes, defined as follows:

- a. All living persons, who are related by blood or marriage to Katharine Zinck Lawrence, and who were sent letters from the Capital District Health Authority advising them that their personal health information had been inappropriately accessed by Katharine Zinck Lawrence between the years 2005 and 2012 (the "Family Class"); and,
- b. All living persons, who are not related by blood or marriage to Katharine Zinck Lawrence, and who were sent letters from the Capital District Health Authority advising them that their personal health information had been inappropriately accessed by Katharine Zinck Lawrence between the years 2005 and 2012 (the

"Non-Family Class").

III THE DEFENDANTS

8. 6. The Defendant, CDHA, is a body corporate, incorporated under the Health Authorities Act, S.N.S. 2000, c. 6. CDHA was in possession of the private information contained in the medical records of the Plaintiffs and Class Members.

9. 7. At all material times, CDHA was responsible for the protection of the private information contained in the medical records of the Plaintiffs and Class Members.

10. 8. The Defendant, Katharine Zinck Lawrence ("Ms. Zinck Lawrence"), is a resident of Falmouth, Hants County, Nova Scotia and was at the times material to this proceeding, an employee of CDHA.

IVIII THE BREACH OF PRIVACY

11. 9. CDHA stores patient medical records electronically on a patient information system. In 2005, CDHA instituted an audit log system, which was capable of tracking and detecting when patient records are accessed by its employees. Prior to 2005, CDHA did not track such access.

12. 10. Ms. Zinck Lawrence held several positions within CDHA since approximately 2001.

13. 11. On October 3, 2011, CDHA received information about possible inappropriate accessing of patient information systems. CDHA conducted an audit which revealed that CDHA's employee, Ms. Zinck Lawrence, over the course of her employment, had accessed the personal information of many patients without a valid medical or hospital purpose.

~~14.~~ 12. On February 10, 2012, Ms. Moore received correspondence from the Defendant, advising that her personal information has been inappropriately accessed by one of its employees.

~~15.~~ 13. Ms. Moore suffered distress, humiliation and anguish over the breach of privacy.

~~16.~~ 14. On or about January 1, 2012, Ms. Zinck Lawrence informed Ms. Schinold that she had intentionally accessed Ms. Schinold's private medical files.

~~17.~~ 15. On or about January 3, 2012, CDHA informed Ms. Schinold that her private medical records had been improperly accessed by an employee of CDHA.

~~18.~~ 16. The Plaintiffs have subsequently learned that their health information has been disclosed to third parties by Ms. Zinck Lawrence.

~~19.~~ 17. The Plaintiffs plead that their health records have been accessed by Ms. Zinck Lawrence on numerous occasions and over the span of several years without a medical purpose or lawful justification.

~~20.~~ 18. The systematic privacy breaches dated back to at least 2005. The audit could not determine whether the Defendant's employee had inappropriately accessed the medical records of patients prior to 2005.

~~21.~~ 19. Ms. Zinck Lawrence intentionally intruded on the seclusion of the Plaintiffs' and Class Members' private medical records. Ms. Zinck Lawrence did not have a medical purpose or lawful justification for accessing these private medical records.

~~22.~~ 20. The invasion of privacy is highly offensive to a reasonable person.

IV LIABILITY

23. 21. Ms. Zinck Lawrence, without valid reason, intentionally intruded on the seclusion of the Plaintiffs' and Class Members' private medical records in the course of her employment.

24. 22. The Plaintiffs plead that the CDHA by virtue of providing medical services to the Plaintiffs and holding the Plaintiffs' medical records, owed a duty of care to the Plaintiffs to protect the private information contained in those records. The Plaintiffs plead that the conduct of CDHA, by not having in place appropriate management and operational procedures that would reasonably have prevented or detected the privacy breaches in a timely fashion, breached the required standard of care.

25. 23. The Plaintiffs repeat the foregoing and plead and rely upon ~~on~~ the tort of intrusion upon seclusion following causes of action as against Ms. Zinck Lawrence,:

- (a) ~~breach of fiduciary duty;~~
- (b) ~~the tort of intrusion upon seclusion;~~ and
- (c) ~~the tort of intentional infliction of mental suffering.~~

26. 24. ~~The Plaintiffs plead that CDHA is in a fiduciary relationship with the Plaintiffs, and Ms. Lawrence, as an employee of CDHA, was in a fiduciary relationship with the Plaintiffs. The~~ Plaintiffs repeat the foregoing and plead and rely upon the tort of negligence as against CDHA

27. 25. The Plaintiffs plead the doctrine of *respondeat superior* and state that CDHA is vicariously liable for the actions of Ms. Zinck Lawrence.

VI — NEGLIGENCE

~~28.~~ — Further, the Plaintiffs plead that the conduct of CDHA constitutes negligence, by not having in place management and operations procedures that would reasonably have prevented or detected the privacy breaches in a timely fashion.

VII DAMAGES

~~29.~~ 26. The wrongs committed against the Plaintiffs have had a detrimental effect on the Plaintiffs' health, welfare, social, business and/or financial position.

~~30.~~ 27. The Plaintiffs and Class Members have suffered injuries and damages that were caused by the Defendants. The invasion of their privacy is was highly offensive causing distress, humiliation and/or anguish.

VIII AGGRAVATED, PUNITIVE AND EXEMPLARY DAMAGES

~~31.~~ 28. The Plaintiffs state that the conduct of Ms. Zinck Lawrence, ~~for which CDHA is vicariously liable,~~ was willful, arrogant, callous, and highhanded and constituted a gross violation of the privacy rights of the Plaintiffs and Class Members. The Plaintiffs respectfully submit that this is an appropriate case for punitive, aggravated and/or exemplary damages as against the Defendant Ms. Zinck Lawrence.

~~IX~~ VII RELIEF SOUGHT

~~32.~~ 29. The Plaintiffs repeat the foregoing paragraphs and seeks the following relief:

- (a) an Order certifying this proceeding as a Class Proceeding and appointing the Plaintiffs as the Representative Plaintiffs for the Class or Classes;
- (b) a declaration that Ms. Zinck Lawrence committed the tort of intrusion upon seclusion as against the Plaintiffs;
- (c) a declaration that CDHA is vicariously liable for the actions of Ms. Zinck Lawrence;
- (d) damages for the breach of privacy and negligence;
- (e) aggravated, punitive and/or exemplary damages as against Ms. Zinck Lawrence;
- (f) interest pursuant to the *Judicature Act*;
- (g) costs; and
- (h) such further and other relief as this Honourable Court deems just.

PLACE OF TRIAL: Halifax, Nova Scotia

AMENDED at Halifax, Nova Scotia this 12th day of May, 2014.

FURTHER AMENDED at Halifax, Nova Scotia this 18 day of February, 2016.

M. Carter

For

RAYMOND D. WAGNER, Q.C.

Wagners

Counsel for the Plaintiffs

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Appendix B

Supreme Court of Nova Scotia

Between:

BEVERLY MOORE and MARY SCHINOLD

PLAINTIFFS

and

CAPITAL DISTRICT HEALTH AUTHORITY, a body corporate and
KATHARINE ZINCK LAWRENCE

DEFENDANTS

Proceeding under the Class Proceedings Act, SNS 2007, c 28

LITIGATION PLAN

This plan is filed pursuant to s. 7(1)(e)(ii) of the *Class Proceedings Act*, SNS 2007, c 28.

Definitions

1. The following definitions apply for the purposes of this litigation plan:
 - a. "Class" and "Class Members" mean those persons belonging to either the Family Class or the Non-Family Class, defined as follows:

"Family Class" means: All living persons, who are related by blood or marriage to Katharine Zinck Lawrence, and who were sent letters from the Capital District Health Authority advising them that their personal health information had been inappropriately accessed by Katharine Zinck Lawrence between the years 2005 and 2012;

"Non-Family Class" means: All living persons, who are not related by blood or marriage to Katharine Zinck Lawrence, and who were sent letters from the Capital District Health Authority advising them that their personal health information had been inappropriately accessed by Katharine Zinck Lawrence between the years 2005 and 2012.
 - b. "Class Counsel" refers to the law firms of Patterson Law and Wagners;

- c. The "Act" means the *Class Proceedings Act*, SNS 2007, c 28.

Identifying Class Members, Notice and Opt-Out

2. It is believed that the Class is a discrete group consisting of approximately 120 people.
3. Class Counsel has identified class members who through media stories and word-of-mouth, as the Plaintiffs are for the most part geographically concentrated in and around the Windsor and Halifax, Nova Scotia area. Many of the Class Members are friends or family.
4. Class Counsel has set up a website detailing the Class Proceeding. This website will serve as a means of communication with members of the class, and also as a means for Class Members to come forward and contact Class Counsel. This website contains a toll-free phone number, as well as an email address for Class Counsel. The website address is:

<http://pattersonlaw.ca/CapitalDistrictHealthAuthority/tabid/980/Default.aspx>.

5. The Defendant, Capital District Health Authority, is aware of the identity of the Class Members. The Parties have agreed that upon certification, the Defendant CDHA will send a letter with to each of the Class Members (both the Family Class and the Non-Family Class) containing:
 - a. A cover letter in a form agreed to among the Parties explaining:
 - i. That a class proceeding has been commenced against the Defendants;
 - ii. That the named recipient of the letter is a Class Member unless opting out;
 - iii. That the author of the cover letter (Stewart McKelvey) is legal counsel to the Defendant CDHA and not to the Class Member;
 - iv. That the Class Member has a right to opt out of the proceeding by signing and returning the enclosed Opt-Out form;
 - v. That if further consultation is desired, the Class member may contact either Patterson Law or Wagners for further advice on a "no charge" basis.
 - b. A copy of the Certification Order;

- c. An Opt-Out form identical to the form attached and forming part of this Litigation Plan attached as Appendix A hereto, along with a self-addressed envelope to Stewart McKelvey for the return of the Opt-Out form;
 - d. A "clean copy" of the Further Amended Statement of Claim;
6. That the Plaintiffs shall pay the reasonable costs and disbursements of CDHA to provide notice of the class proceeding as described in paragraph 5.

Requirements of Class Counsel

7. Class Counsel anticipates that this Proceeding will require:
 - a. Reading, organizing, profiling, scanning, managing and analyzing hundreds of documents;
 - b. The analysis of complex legal issues; and,
 - c. Expert evidence.
8. Class Counsel has the necessary expertise, experience, personnel and financial resources to properly conduct this Proceeding.

Communication with the Class

9. The website has been created by Class Counsel with a "Contact" section, which lists a toll-free telephone number, as well as an email address through which members of the proposed class can communicate readily with counsel.
10. Class Counsel employs full-time information-technology staff, who are available at all times to capably manage the website.
11. Both prior to and since this class proceeding was commenced, Class Counsel has been in communication with proposed Class Members who wish to be included in the proposed class proceeding. Class Counsel and their staff have responded to and will continue to respond to each inquiry as appropriate.
12. Class Counsel is maintaining a database of all identified Class Members. With respect to each inquiry, the individual's name, address, phone number and e-mail address are added to the database. Copies of pertinent documents will be scanned and added to the database where appropriate.

13. In addition to responding to individual inquiries, Class Counsel will continue to update the webpage dedicated to the class proceeding. The toll-free phone number and email contact provided on the webpage will remain in effect until the class proceeding is finally resolved.

Timelines

14. The Certification Motion will be held as soon as convenient to the Parties and the Court, and, if this proceeding is certified, the Defendants must file their Statements of Defence within 45 days of the issuance of the Order of Certification in accordance with the *Class Proceedings Act*, SNS 2007, c 28.
15. The Representative Plaintiffs will initiate a Case Management Conference before Justice Rosinski within 60 days of the filing of the Statements of Defence, at which the Parties will request a schedule for all procedural deadlines for the Common Issues Trial, including:
 - a. The document production and delivery of affidavits of documents by the Parties;
 - b. Examinations for discovery;
 - c. The filing of experts' reports; and,
 - d. The scheduling of the Common Issues Trial.
16. The Parties may request that the litigation schedule may be amended from time to time as required.

Settlement

17. The Plaintiffs are willing to participate in mediation or non-binding dispute resolution efforts at any stage of this proceeding.

Clarification of Common Issues

18. Following the completion of the examinations for discovery and the exchange of expert reports but well before the trial of the common issues, the Plaintiffs may ask the Court for an order to clarify and/or redefine the common issues.

Funding

19. The Plaintiffs' legal fees are to be paid on a contingency basis, as provided for in the *Class Proceedings Act*, SNS 2007, c 28, and are subject to the Court's approval. Class


Counsel has funded the disbursements incurred to date, and will continue to do so, to prosecute this Proceeding to a final and successful conclusion.

20. The Plaintiffs reserve the right to seek litigation funding to provide bridge financing for legal fees, disbursements or expert's fees.

Review of the Litigation Plan

21. This plan will be reconsidered and may be revised under the continuing case management authority of the Court.

PROPOSED this 18th day of February, 2016.



Robert H. Pineo,
Counsel to the Plaintiffs

Appendix A

2012

Hfx No. 390420

Supreme Court of Nova Scotia

Between:

BEVERLY MOORE and MARY SCHINOLD

PLAINTIFFS

and

**CAPITAL DISTRICT HEALTH AUTHORITY, a body corporate and
KATHARINE ZINCK LAWRENCE**

DEFENDANTS

Proceeding under the Class Proceedings Act, SNS 2007, c 28

OPT-OUT FORM

**To be returned to Stewart McKelvey, Counsel for CDHA before Deadline of June 30,
2016**

I, _____ of _____, do not wish to be included as a Member of the Class in the above proceeding concerning the alleged violations of my privacy and personal information by Ms. Zinck Lawrence while in the employ of the Capital District Health Authority, of which I was notified by CDHA. I understand that by opting-out of these proceedings that I waive any entitlement I may have to any settlement or compensation resulting from this Class Action.

Address: _____

Signature: _____ Date: _____, 2016