IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,	)	CASE NO. CV-2016-09-3928
	)	
Plaintiffs,	)	JUDGE ALISON BREAUX
	)	
v.	)	
	)	**REPLY BRIEF IN SUPPORT OF**
KISLING, NESTICO & REDICK, LLC, et al.,	)	**DEFENDANTS ALBERTO R. NESTICO AND ROBERT W. REDICK'S MOTION FOR JUDGMENT ON THE PLEADINGS REGARDING PLAINTIFFS' SECOND AMENDED COMPLAINT**
Defendants.	)	

I. INTRODUCTION

As set forth in their Answers, Defendants deny the baseless allegations in the Second Amended Complaint and the loose interpretation of those allegations in Plaintiffs' Brief in Opposition. Moreover, these frivolous allegations do not satisfy the Ohio pleading standards for Plaintiffs' fraud, breach of fiduciary duty, unjust enrichment, and OCSPA claims to survive Defendants' Motion for Judgment on the Pleadings. On the pivotal issues of Defendants arguments to each of these claims, Plaintiffs simply rely on unsupported conclusions rather than facts. In addition, as for the OCSPA claims, Plaintiffs completely misinterpret Ohio law. Accordingly, Defendants Motion for Judgment on the Pleadings should be granted and the claims (1, 3-12) dismissed with prejudice.

II. LEGAL ANALYSIS AND ARGUMENT

A. The fraud and unjust enrichment claims were dismissed with prejudice.

Plaintiffs cannot dispute that the fraud and unjust enrichment claims against Nestico were already dismissed with prejudice. Plaintiffs ignore that none of the Courts' subsequent decisions overturned or reversed the dismissal with prejudice. It is still a valid order and judgment entry. Under the law of the case principles, this decision should not be reconsidered and reversed. *See, e.g., State v. Reese*, 7th Dist. Mahoning No. 99 CA 67, 2000-Ohio-2601,

2000 Ohio App. LEXIS 5246, *4 (Nov. 13, 2000) ("The law of the case doctrine has been extended to include a lower court's adherence to its own prior decisions.") (citation omitted).

Furthermore, by allowing the Second Amended Complaint, the Court never rejected Defendants' arguments on the fraud and unjust enrichment claims against Nestico. Indeed, the Court left the dismissal order standing and binding. Accordingly, the fraud and unjust enrichment claims should be dismissed again with prejudice.

B. Nestico and Redick never had the opportunity to make a false statement or withhold information.

To allege a fraud claim, Williams and Johnson must show that: (1) Nestico and Redick personally made the false statement (or withheld information), (2) they personally knew that it was a false statement, (3) they personally intended for Williams and Johnson to act in reliance upon it, and (4) Williams and Johnson in fact acted and were injured. *See Cincinnati Bible Seminary v. Griffiths*, 1st Dist. Hamilton No. C-830867, 1984 Ohio App. LEXIS 11028, *6 (citing *Centennial Ins. Co. v. Vic Tanny Int'l of Toledo, Inc.*, 46 Ohio App. 2d 137, 142, 346 N.E.2d 330 (6th Dist. 1975)). As they did in their Second Amended Complaint, Williams and Johnson's Brief in Opposition completely ignores the first element. (Brief in Opp., pp. 5-6; Plaintiffs do not recite the first element of fraud.)

For their fraud claim to even remotely have some validity, they would have had to allege that there were interactions between Plaintiffs and Nestico and Redick where there would have been an opportunity to make a misstatement or withhold information. *See Medscan Diagnostics & Imaging, Inc. v. Diversified Corp.*, 11th Dist. Lake No. 2002-L-013, 2004-Ohio-383, ¶14 ("[C]orporate officers may be found personally liable for fraud even though the corporation has also been found liable, if it is concluded that **the officers actively participated**.") (emphasis added). But as Williams and Johnson concede, Nestico and Redick never had such interaction with Plaintiffs. There was simply no opportunity for Nestico or Redick to make a misstatement or withhold information. Without these facts, Williams and Johnson cannot satisfy the first prong

of a fraud claim or the Rule 9 specificity requirements of who, when, and where regarding the alleged fraud. *See Toledo Trust Co. v. Justen*, 6th Dist. Lucas No. L-85-318, 1986 Ohio App. LEXIS 6864, *5 (May 23, 1986).

Instead of facts, Williams and Johnson rely on unsupported conclusions that there is allegedly fraud. For example, Plaintiffs contend that Nestico and Redick somehow individually required Williams to sign the settlement memorandum. (Brief in Opp., p. 7.) Nestico and Redick never required Williams to do anything, as they never spoke with Williams. In addition, Plaintiffs assert that Defendants are receiving kickbacks from Liberty Capital. (*Id.*, p. 11.) There are no facts to support this legal conclusion. Based on the *Capots* decision, unsupported conclusions in a complaint are not to be considered. *See State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 324, 544 N.E.2d 639 (1989) (unsupported conclusions can be disregarded).[1]

C. Plaintiffs have alleged no facts that Nestico and Redick were in a fiduciary relationship.

Plaintiffs have also asserted that Nestico and Redick had a fiduciary duty to Plaintiffs based on: (1) the attorney-client relationship; and (2) a de facto fiduciary relationship. (Brief in Opp., pp. 13-15.) Neither applies in this case.

1. There is no attorney-client relationship between Plaintiffs and Nestico and Redick.

There is no attorney-client relationship because there was no interaction between Plaintiffs and Nestico and Redick to create one. Nestico and Redick never met Plaintiffs or discussed their cases with them. Plaintiffs do not contest this. Instead, they simply conclude that Plaintiffs were clients of Nestico and Redick. (Brief in Opp., p. 13.) In addition, Plaintiffs argue that because Nestico and Redick's names are in the firm name and they purportedly had

[1] Plaintiffs rely on *State ex rel. Cordray v. Evergreen Land Dev., Ltd.*, 7th Dist. Mahoning Nos. 15-MA-0115, 15-MA-0116, 2016-Ohio-7038, ¶ 33 that "circumstantial evidence has the same probative value as direct evidence." That case, however, analyzed evidence at trial, rather than deciding a motion for judgment on the pleadings where there are unsupported conclusions in the complaint, which is the case here. Therefore, *Evergreen* is immaterial to Defendants' Motion for Judgment on the Pleadings.

control over the firm there is an attorney-client relationship. (*Id*., p. 14.) These arguments are without merit.

Plaintiffs cite to no case law to support either position. Furthermore, Plaintiffs had no knowledge of whether Nestico and Redick controlled or owned KNR. Also, there are no facts to buttress the legal conclusion that Plaintiffs were clients of Nestico and Redick. Therefore, none of these allegations support a finding of an attorney-client relationship to create a fiduciary duty.

Finally, Plaintiffs misinterpret *Mays v. Dunaway*, 2nd Dist. Montgomery No. 20717, 2005-Ohio-1592 in arguing that there can be an implied attorney-client relationship where there was no direct communication between the parties. In that case the issue was whether the attorney represented both the purchaser and seller in a zoning matter. Because the attorney held himself out at as both the purchaser and seller's attorney and represented both before the Board of Zoning Appeal, including a verified complaint filed on behalf of both the purchaser and seller by the attorney, the court found an attorney-client relationship. Obviously, these are not the facts of this case. Nestico and Redick did nothing on behalf of Plaintiffs and did not hold themselves out to the public as counsel for Plaintiffs. There can be no attorney-client relationship in this case, and thus no fiduciary duty.

2. Plaintiffs have not alleged a de facto fiduciary relationship.

A similar conclusion is required for Plaintiffs' de facto fiduciary relationship argument. To have a de facto fiduciary relationship, there must be a mutual understanding from both parties that a special trust and confidence has been reposed. *Umbaugh Pole Bldg. Co. v. Scott*, 58 Ohio St.2d 282, 286, 390 N.E.2d 320 (1979) ("A fiduciary relationship may be created out of an informal relationship, but this is done only when both parties understand that a special trust or confidence has been reposed.") (emphasis added). Here, the Second Amended Complaint and the Brief in Opposition are completely silent on whether Nestico and Redick had this understanding that Plaintiffs reposed a special trust and confidence in them. There is a good reason for that – Nestico and Redick never had that understanding, as they never interacted

with Plaintiffs. Even for Plaintiffs with their baseless allegations, this was too tenuous of an allegation to make.

In glossing over this mutual understanding requirement, Plaintiffs rely on unsupported conclusions (e.g., "Nestico and Redick owed all KNR clients a fiduciary duty"; "KNR's clients reposed a special trust in Defendants"). (Brief in Opp., p. 14-15.) The Supreme Court has clearly held that unsupported conclusions should be disregarded. *See Capots*, 45 Ohio St.3d at 324. There are simply no facts to support a fiduciary relationship. With Ohio courts reluctant to find de facto fiduciary relationships, Plaintiffs' fiduciary duty claims should be dismissed with prejudice.[2]

D. <u>The unjust enrichment claims are based on unsupported conclusions</u>.

Plaintiffs rely on the following unsupported conclusions to support their unjust enrichment claims: (1) funds will end up in Nestico and Redick's pocket; (2) enriching KNR is enriching Nestico and Redick; and (3) Nestico and Redick have an ownership or financial interest in Liberty Capital. (Brief in Opp., pp. 10-11.) There are simply no facts to support these conclusions, and without any facts, Plaintiffs' unjust enrichment claims should be dismissed with prejudice. *See Capots*, 45 Ohio St.3d at 324.

Plaintiffs also mistakenly contend that the lien on Wright's case establishes the unjust enrichment claim. (*Id*., p. 12.) Plaintiffs, however, do not cite to one Ohio case to support this baseless proposition. In addition, it is disingenuous for Plaintiffs' counsel to make this argument because, as they know, the lien is not on Wright's share of any future recovery, but rather on

[2] Plaintiffs request a fourth bite at the apple by seeking leave to bring in the attorneys that actually represented them. (Brief in Opp., p. 16.) Plaintiffs should not have another crack at trying to sue individual attorneys. After three tries, if Plaintiffs cannot get it right, then there is good reason for it – there is no basis for these claims. Plaintiffs' request for leave should be denied.

her new attorney's share. Therefore, asserting the lien cannot be a basis for Wright's unjust enrichment claim.[3]

E. Ohio law does not recognize OCSPA claims against attorneys and law firms.

Ohio law is crystal clear that the OCSPA does not apply to transactions involving attorneys and their clients. *See* O.R.C. 1345.01(A); *Patton v. Diemer*, 35 Ohio St. 3d 68, 70, 518 N.E.2d 941 (1988) ("R.C. 1345.01(A) specifically excludes the attorney-client relationship…."); *Reynolds v. Kubyn*, 11th Dist. Geauga No. 96-G-1977, 1997 Ohio App. LEXIS 1784, *5-6 (May 2, 1997) ("R.C. 1345.01(A) specifically provides that a transaction between a lawyer and his or her client is not a consumer transaction."); *Burke v. Gammarino*, 108 Ohio App. 3d 138, 142, 670 N.E.2d 295 (1st Dist. 1995) ("This act [OCSPA], however, does not apply to transactions between attorneys and their clients, and Gammarino's reliance on it was completely misplaced."); *Lee v. Traci*, 8th Dist. Cuyahoga No. 65368, 1994 Ohio App. LEXIS 2384, *20-21 (June 2, 1994) ("[I]t is clear that transactions between attorneys and their clients, which is the basis for the claim at issue, are not actionable under the [OCSPA] by virtue of the specific exclusion of attorney-client transactions from the definition of a deceptive act or practice in connection with a consumer transaction."). *See also*, *Reuss v. First Fin. Collection Co.*, Case No. 1:08-cv-697, 2009 U.S. Dist. LEXIS 115624, *8 (S.D. Ohio Dec. 11, 2009) ("Ohio courts routinely hold that both an attorney and a law firm of attorneys are exempt from the OCSPA."). Plaintiffs wish this was not the law, but it is.

Instead, they argue that this attorney-exception to the OCSPA does not apply to attorneys' conduct in which the attorneys were not practicing law. (Brief in Opp., pp. 17-19.) Plaintiffs specifically contend that the conduct at issue is Defendants' alleged marketing and advertising, which purportedly is not the practice of law. (*Id*.) But Plaintiffs' problem is two-fold. First, there is not one Ohio case law that supports this proposition. Rather, as outlined above,

[3] Furthermore, Wright and Johnson terminated KNR and neither has paid any fees or expenses to KNR in order for them to have unjust enrichment claims.

the attorney-exception to the OCSPA does not have any exceptions or clarifications. The law is that the OCSPA does not apply to attorneys in their transactions with clients. Again, Plaintiffs wish this was not the law, but it is.

Second, Defendants were engaged in the practice of law. Because the Ohio Rules of Professional Conduct govern marketing and advertising (e.g., Rule 7.1-7.3), the Ohio Supreme Court has concluded that marketing is part of the practice of law. And so is the use of investigators to assist the lawyer in representing the client throughout the case. Furthermore, the practice of law involves obtaining from chiropractors and other medical care providers summary reports that may be used as expert reports or in settlement discussions. In addition, the practice of law includes the assisting of clients in obtaining pre-settlement loans.

Finally, Plaintiffs' continued reliance on *Elder v. Fischer*, 129 Ohio App. 3d 209, 717 N.E.2d 730 (1st Dist. 1998) and *Summa Health Sys. v. Viningre*, 140 Ohio App. 3d 780, 749 N.E.2d 344 (9th Dist. 2000) is misplaced. These cases do not create exceptions to the fact that doctors are exempt from the OCSPA. Instead, the courts concluded that a health care provider (*Summa Health*) and the billing practices of a residential care facility (*Elder*) are not exempt from the OCSPA. These cases are completely inapposite to this case involving transactions with attorneys.[4]

III. CONCLUSION

As set forth above and in Defendants' Motion for Judgment on the Pleadings, Plaintiffs' Second Amended Complaint is not supported by the requisite facts or law to assert claims against Nestico and Redick for fraud, breach of fiduciary duty, unjust enrichment, and violation of the OCSPA. Therefore, Plaintiffs' claims against Nestico and Redick should be dismissed with prejudice.[5]

[4] This argument and analysis regarding the OCSPA also applies to the OCSPA claim against KNR. That claim likewise should be dismissed with prejudice.

[5] The OCSPA claim against KNR should also be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief in Support of Defendants Alberto R. Nestico and Robert Redick's Motion for Judgment on the Pleadings Regarding Plaintiffs' Second Amended Complaint was filed electronically with the Court on this 29th day of August, 2017. The parties may access this document through the Court's electronic docket system.

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