

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,)	Case No. 2016 09 3928
)	
Plaintiffs,)	Judge James Brogan
)	
v.)	
)	<u>DEFENDANTS' MOTION TO STRIKE</u>
KISLING, NESTICO & REDICK, LLC, et al.,)	<u>SUPPLEMENT TO PLAINTIFFS MOTION</u>
)	<u>FOR LEAVE TO FILE FOURTH</u>
Defendants.)	<u>AMENDED COMPLAINT</u>
)	
)	

Now come Defendants, Kisling, Nestico & Redick, LLC and attorneys Rob Nestico and Robert Redick (collectively “KNR”), by and through counsel, and hereby move to strike Plaintiffs’ “supplement” to their motion for leave to file a fourth amended complaint. The “supplement” is a **different** fourth amended complaint than that originally submitted for the Court’s consideration, and remarkably contains different claims against different parties. KNR must be entitled to respond separately to what is actually a motion for leave to file a **fifth** amended complaint.

Plaintiffs filed a motion for leave to file a fourth amended complaint on September 6, 2018, seeking among other things to add a claim against Dr. Ghoumbrial related to his prescription of a TENs unit to proposed Plaintiff Norris. KNR, Dr. Floros, and Dr. Ghoumbrial objected and the issue was briefed by the respective parties. The Court conducted a telephone conference to discuss this motion and Plaintiffs’ motion to extend the time allotted for class discovery. During this conference it was revealed that proposed plaintiff Norris did not, in fact, treat with Dr. Ghoumbrial and would, therefore, have no standing to sue him. Dr. Ghoumbrial subsequently submitted records to the Court proving this fact. During the conference, Plaintiffs’ counsel responded by stating he had another Plaintiff to replace Norris – proposed Plaintiff Harbour – and that he would replace or add Harbour as a claimant in an effort to remedy his failure to obtain Norris’s records prior to submitting his motion for leave to file the fourth

amended complaint. The Court withheld ruling on the motion for leave to file the fourth amended complaint.

Plaintiffs' counsel has now submitted a purported "supplement" to the motion for leave to file the fourth amended complaint which does seek to add Harbour as a plaintiff on the TENS unit claim against Ghoubril. However, the "supplement" also adds an entirely new allegation and four claims which KNR has not had an opportunity to address in briefing the proposed amendment. Plaintiffs now allege that Dr. Ghoubril provided injections to his patients without consent and that he, and somehow KNR, profited from the treatments. Therefore, the "supplement" is not a supplement at all, but rather constitutes a different complaint entirely. The "supplement" adds four new claims against KNR which were not alleged in the fourth amended complaint. Plaintiffs' counsel is effectively using a "supplement" to circumvent KNR's right to brief and oppose a proposed amendment to add these new claims against them.

The Court has not yet granted permission for Plaintiffs to file the fourth amended complaint. The Civil Rules do not permit Plaintiff to "supplement" a pleading that has not been filed. Even if the court grants Plaintiffs' motion to file their fourth amended complaint, Civ.R. 15 does not permit supplementation of that pleading adding new claims and parties.

Under Civ.R. 15(E), a supplemental pleading is a mere addition to or continuation of the original complaint and cannot be used to raise new and different causes of action. *Rose v. Cochran*, 4th Dist. Ross No. 14CA3445, 2014-Ohio-4979, ¶ 19; *Gilson v. Windows and Doors Showcase, LLC*, 6th Dist. Fulton Nos. F-05-017 and F-05-024, 2006-Ohio-2921, ¶ 26; *Mork v. Waltco Truck Equipment Co.*, 70 Ohio App.3d 458, 461, 591 N.E.2d 379 (9th Dist.1990), citing *State ex rel. Dickman v. Defenbacher*, 151 Ohio St. 391, 394, 86 N.E.2d 5 (1949) ("A new and different cause of action cannot be raised by a supplemental pleading"); *Peoples Bank of Point Pleasant v. Yeager*, 4th Dist. Gallia No. 91CA34, 1993 Ohio App. LEXIS 1364, 1993 WL 63458 (Mar. 2, 1993), *5 ("an **amended pleading** is designed to include matters occurring before the filing of the complaint but [were] either overlooked or not known at the time, whereas

a **supplemental pleading is designed to cover matters subsequently occurring** but pertaining to the original cause") (emphasis added).

The "supplement" must be struck. It is not designed to cover matters subsequently occurring but pertaining to the original cause. If Plaintiffs intend to withdraw their motion for leave to file the fourth amended complaint, and instead seek leave to file this new and different amended complaint, they are required to submit a **motion seeking leave to file that complaint** so that KNR and the other Defendants can respond appropriately. A party cannot supplement a pleading they have not been granted permission to file, and certainly cannot add new claims and parties by filing a supplement. (See, cases cited herein). KNR has a valid basis to oppose an amendment to add these new claims because the amendment fails to state a cause of action against KNR, is untimely, contains inflammatory statements and allegations unrelated to any claim in the case, and is unduly prejudicial to fair and timely adjudication of the existing claims.

For the reasons stated herein, Defendants respectfully request that the Court strike the "supplement" to Plaintiffs' Motion for Leave to File Fourth Amended Complaint.

Respectfully submitted,

/s/ James M. Popson

James M. Popson (0072773)

Sutter O'Connell

1301 East 9th Street

3600 Erieview Tower

Cleveland, OH 44114

(216) 928-2200 phone

(216) 928-4400 facsimile

jpopson@sutter-law.com

Counsel for Defendants Kisling, Nestico &
Redick, LLC, Alberto R. Nestico, and Robert
Redick

CERTIFICATE OF SERVICE

Pursuant to Civ.R. 5(B)(2)(f), the undersigned certifies that a copy of the foregoing *DEFENDANTS' MOTION TO STRIKE SUPPLEMENT TO PLAINTIFFS MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT* was filed electronically with the Court on this 5th day of October, 2018. The parties, through counsel, may access this document through the Court's electronic docket system.

/s/ James M. Popson

James M. Popson (0072773)