IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,	)	Case No. 2016 09 3928
	)	
Plaintiffs,	)	Judge James Brogan
	)	
v.	)	
	)	
KISLING, NESTICO & REDICK, LLC, et al.,	)	**DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE FIFTH AMENDED COMPLAINT**
	)	
Defendants.	)	
	)	
	)	

I. INTRODUCTION

Plaintiffs have filed a Motion for Leave to Amend their Complaint **for a fifth time.** The proposed Fifth Amended Complaint seeks Court approval to: (1) deem movant Harbour as an "additional" class representative for two classes alleged in Plaintiffs' Fourth Amended Complaint; (2) permit Movant Harbour to act as representative of yet another class of individuals who allegedly received injections for pain relief from Defendant Dr. Ghoubrial; and (3) allow Movant Norris to substitute for Plaintiff Johnson as the representative for Class C (The Liberty Capital class).

The motion should be denied because it seeks to add a sham cause of action on behalf of a new "class" of individuals with Movant Harbour as the class representative. The cause of action is a sham because it is supported by demonstrably false allegations which are known by Movant Harbour and Plaintiffs' counsel to be false and as Defendants will demonstrate below. Movant Harbour does not have a good faith basis to bring any action against the KNR Defendants or Dr. Ghoubrial as it relates to his medical treatment because he has testified under oath that he was satisfied with Dr. Ghoubrial's treatment of him and executed a settlement memorandum approving of the charges disbursed to Dr. Ghoubrial and the fee taken by KNR. (See Exhibits 1, 2, and 3). Furthermore, there is no cause of action in Ohio for being "overcharged" for medical services when the services were performed with the consent of the

patient and the charges known and accepted by the patient. Likewise, there is no basis in Ohio law for a client to hold a lawyer responsible for those same charges.

Even if such a cause of action existed (which it doesn't), no "class" could exist because on the face of the complaint individual issues would necessarily predominate. Movant Harbour's individual claim for $3,900 (concerning two separate auto accidents) should be litigated on its own – if at all – and not as part of any "class," much less another class attached to the instant matter. The proposed Fifth Amended Complaint is further riddled with salacious allegations unrelated to the actual claims made by Movant Harbour solely for purposes of attempting to embarrass, harass, and intimidate defendants.

The proposed amendment to add Movant Harbour (and Movant Norris as a representative for Class C) would be futile because, regardless of the facts alleged, any claim by these Movants against any Defendant in this case is barred by the statute of limitations. Finally, the proposed amendment is untimely and unduly prejudicial to Defendants because the case is two years old with multiple prior amendments to Plaintiffs' Complaint, and the new claims alleged do not arise out of the same operative facts as any other claim in the case. The motion should be denied.

II. BACKGROUND

The history of Plaintiffs' counsel's never ending litany of pleadings and amendments was set forth in opposition to Plaintiffs' Motion for Leave to file a Fourth Amended Complaint several weeks ago. This is now the fifth time Plaintiffs' counsel has sought to amend his Complaint – and on ***not one*** of these amendments has the Court required Plaintiffs to make a ***prima facie showing of support*** for the new matter they seek to add. *Wilmington Steel Products, Inc. v. Clev. Elec. Illum. Co.* (1991), 60 Ohio St.3d 120, 573 N.E.2d 622, at syllabus; *State ex rel. N. Ohio Chptr. & Contrs., Inc. v. Barberton City School Bd. of Edn.*, 188 Ohio App.3d 395, 2010-Ohio-1826, 935 N.E.2d 861, ¶ 28 (9th Dist.). A *prima facie* showing of support warrants particular scrutiny when a plaintiff seeks to add new claims based upon facts separate and

distinct from the claims existing in the lawsuit, thereby altering the nature of the case. *State ex rel. N. Ohio Chptr. & Contrs., Inc. v. Barberton City School Bd. of Edn.*, 188 Ohio App.3d 395, 2010-Ohio-1826, 935 N.E.2d 861, ¶ 28 (9th Dist.), citing *Marx v. Ohio State Univ. College of Dentistry* (Feb. 27, 1996), 10th Dist. No. 95APE07-872, 1996 Ohio App. LEXIS 798, at *10. Defendants ask this Court to require that Plaintiffs follow the Rules of Civil Procedure. This case should not be a repository for every person Plaintiffs' counsel can recruit who has a disagreement with KNR for any reason under the sun.

III. LAW AND ARGUMENT

The decision to grant or deny leave to amend a pleading under Civ.R. 15(A) is within the discretion of the trial court. *See Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 99, 1999-Ohio-207, 706 N.E.2d 1261 (1999). "While Civ.R. 15(A) allows for liberal amendment, the trial court does not abuse its discretion if it denies a motion to amend pleadings if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party." *Wagoner v. Obert*, 180 Ohio App.3d 387, 2008-Ohio-4041, ¶ 111, 905 N.E.2d 694 (5th Dist.), citing *Hoover v. Sumlin*, 12 Ohio St.3d 1, 465 N.E.2d 377 (1984), paragraph two of the syllabus. Additionally, "[w]here a plaintiff fails to make a *prima facie* showing of support for new matters sought to be pleaded, a trial court acts within its discretion to deny a motion to amend the pleading." *Wilmington Steel Products, Inc. v. Cleveland Electric Illuminating Co.*, 60 Ohio St.3d 120, 573 N.E.2d 622 (1991), syllabus. Thus, it is also within the full discretion of a trial court to deny leave to amend a pleading where the amendment would be futile. *See, e.g. Hensley v. Durrani*, 1st Dist. Hamilton No. C-130005, 2013-Ohio-4711, ¶14; *State ex rel. Brewer-Garrett Co. v. MetroHealth Sys.*, 8th Dist. Cuyahoga No. 87365, 2006-Ohio-5244, ¶17 ("Where an amendment to the complaint would have been futile, the trial court . . . does not abuse its discretion in denying the motion").

A. Plaintiffs have made no evidentiary showing to support the proposed amendment.

The requirement that a plaintiff make a *prima facie* showing to support the proposed amendment should not be ignored – particularly when litigation has been ongoing for more than two years. In *Williams v. W. Res. Transit Auth.*, 7th Dist. Mahoning No. 06-MA-137, 2007-Ohio-4747, the court held that was not an abuse of discretion to deny a motion to amend the pleadings where the motion to amend is unsupported by evidence. Relying on the Ohio Supreme Court decision in *Wilmington Steel Products* and other precedent, the court stated:

> Despite the liberal amendment policy that governs the amendment proceedings, [plaintiff] failed to comply with the minimal amendment requirements as set forth in *Solowitch v. Bennett* (1982), 8 Ohio App.3d 115, 117, 8 OBR 169, 456 N.E.2d 562. [Plaintiff] **failed to introduce any evidence to the trial court of the new matters sought to be pleaded.** [Plaintiff's] motion to amend the pleadings is barren of such evidence.
>
> ********
>
> [Plaintiff] offered no argument whatsoever to **show that he could support his new claim.** *Wilmington Steel Products, Inc.*, 60 Ohio St.3d at 123, 573 N.E.2d 622.

Williams v. W. Res. Transit Auth., 7th Dist. Mahoning No. 06-MA-137, 2007-Ohio-4747, ¶ 40 (emphasis added).

Here, Plaintiffs have failed to submit any evidence in support of their new claim regarding pain relief injections, and the evidence presented by Defendants establishes that many of the allegations in the proposed Fifth Amended Complaint are demonstrably false.

At paragraph 19 of the proposed Amended Complaint, Plaintiffs allege "Plaintiff Richard Harbour is a Rittman, Ohio resident and another former KNR client who was directed by the firm to treat with Defendant Ghoubrial, and to whom Ghoubrial administered and overcharged for several trigger-point injections." This is false. Mr. Harbour was deposed in the second of the two cases wherein he treated with Dr. Ghoubrial. Mr. Harbour testified:

> Q. Now, who referred you to Dr. Ghobrial?
> **A. Dr. Auck did.**
> Q. Why?
> A. Because I was having, you know, pain, he felt pain management would also be appropriate care to go along with his care.

> Q. Pain management meaning give you medications?
> A. If need be, yes.
> Q. Did you tell him you had a primary care physician that could do that?
> A. Yes, I did, but I also told him my primary care physician had verbalized to me that he did not like to get involved with motor vehicle accidents.

(Deposition of Richard Harbour, 101:4-101:16; attached as Ex. 1.) Plaintiffs have submitted no evidence to support their contention that KNR referred Movant Harbour to Dr. Ghoubrial, and the only evidence before the Court is that KNR did not do so.

At paragraph 86 of the proposed Fifth Amended Complaint, Plaintiffs allege "Ghoubrial routinely pressured and coerced KNR clients into accepting these injections, including by threatening to withhold a prescription for pills if the client would not accept the injections," and that "Ghoubrial would also frequently administer these injections against the clients' will, sneaking the needle into the client's back without warning." However, Mr. Harbour testified:

> Q. So what did Dr. Ghoubrial do for you?
> A. He examined me, determined that I did have some tenderness and pain in my low back area, and that my neck was, you know, stiff, I believe. I can't recall his exact words at the time of, you know, his first examination. He prescribed a muscle relaxer, Flexril, to take as needed. He then also would give me, I believe, cortisone shots in my low back area.
> Q. And did that treatment provide you relief?
> A. **The cortisone shots did, yes.**

(Deposition of Richard Harbour, 101:21-102:6; attached as Ex. 1.). Movant Harbour's testimony directly contradicts the allegations in the Complaint. The cortisone shots were beneficial and provided relief to Movant Harbour. This testimony further demonstrates that Movant Harbour was prescribed an oral medication before receiving a cortisone injection, contrary to Plaintiffs' claim that Dr. Ghoubrial withheld prescriptions unless and until such injections were accepted by patients.

Paragraph 87 of the Complaint wildly alleges that racial prejudice plays a role in administration of pain relief injections. If Plaintiffs' counsel has ever met his purported client, he

is well aware that Movant Harbour is Caucasian. He could not possibly have a claim that his injections were given to him based upon his race. These false allegations are put in the Complaint solely to harass and embarrass Defendants. Similarly, paragraph 90 of the proposed Fifth Amended Complaint alleges "representatives from Nationwide Insurance Company repeatedly informed KNR attorneys that they refused to pay anything for Ghoubrial's treatment." There is no allegation that any of Movant Harbour's claims involved Nationwide Insurance Company, because they did not. Plaintiff was represented by KNR attorneys in four different motor vehicle accidents and Nationwide was not the insurance carrier for any of these accidents. The allegation has no bearing on any claim that could possibly be made by Movant Harbour.

A *prima facie* showing to support a motion to amend is particularly necessary in this case given the numerous delays caused by Plaintiffs' repeated amendments to add **new claims** with **no common facts**. Each of the Plaintiffs and the purported "classes" have distinct and separate claims. Different people with different claims against KNR are not entitled to have all of their cases lumped together merely because they were all recruited to sue KNR by Plaintiffs' counsel Pattakos. The net effect is highly prejudicial to Defendants. Plaintiffs' failure to support their motion with evidence warrants denial of the motion to amend. *Wilmington Steel Products, Inc. v. Cleveland Electric Illuminating Co.*, 60 Ohio St.3d 120, 573 N.E.2d 622 (1991), syllabus.

B. Plaintiffs' Motion should be denied as futile.

Where the purported amendment fails to allege a set of facts that, if true, would establish the appellees' liability, the purported amendment is properly denied as futile. *Demmings v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 98958, 2013-Ohio-499, ¶ 11. Here, the facts alleged in the new claim of Movant Harbour do not state a claim. There is no precedent in Ohio for a tort based upon an allegation that a doctor charges too much for his services – much less that his attorney can somehow be responsible for the doctor's charges. Medical bills produced under Ohio Revised Code § 2317.421 are prima facie evidence of the reasonableness of medical bills

that include charges and fees stated therein for medication and prosthetic devices furnished and medical services rendered.

Movant Harbour's attempt to couch his claim as "fraud" or "breach of fiduciary" notwithstanding, his claim against Dr. Ghoubrial arises out of the doctor-patient relationship and is therefore a medical malpractice claim. The claims against the KNR Defendants arise out the legal representation of Movants Harbour and Norris and are, therefore, legal malpractice claims. *Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.*, 10th Dist. Franklin No. 10AP-290, 2010-Ohio-5872, ¶ 15. Each claim has a one year statute of limitations and the medical claim requires an affidavit of merit for each claim by each patient. (Civ.R. 10(D)(2); see also Brief in Opposition filed by Dr. Ghoubrial). Movant Harbour executed a Settlement Memorandum for each of his two cases referenced in the proposed fifth amended complaint, and agreed to payment of his medical services on April 25, 2012, and July 29, 2015, respectively. (Ex. 2 and Ex. 3; attached to Plaintiffs' proposed Fifth Amended Complaint as Ex. E). Now, more than 6 years (and 3 years) later, he seeks to add claims against his doctor and lawyer to the existing lawsuit. The same is true for Movant Norris's claim for return of interest paid on a loan from Liberty Capital. Norris executed her Settlement Memorandum on May 25, 2014, more than four years prior to the instant motion. (Ex. 4; attached to Plaintiffs' proposed Fifth Amended Complaint as Ex. D).

The statute of limitations is long expired. Movants Harbour and Norris cannot hide behind an assertion of the "discovery rule" to evade application of the statute under these circumstances. Movant Harbour knew exactly what treatment he received (or didn't receive) and how much he was charged when he accepted those charges at the time he executed the settlement memorandum. Movant Norris knew exactly the amount she repaid on her loan at the time she executed her settlement memorandum. Courts have uniformly rejected extension of the "discovery rule" beyond the date such charges were incurred. This is true because the

asserted date of actual knowledge is not controlling – **constructive knowledge** is the benchmark. *Flowers v. Walker*, 63 Ohio St.3d 546, 549, 589 N.E.2d 1284 (1992).

Estate of Greenawalt v. Estate of Freed, 10th Dist. Franklin No. 17AP-62, 2018-Ohio-2603, is instructive. In *Greenawalt*, plaintiffs alleged that fraudulent disbursements and excessive attorney fees were paid out of an estate. In finding that the one year statute of limitations for legal malpractice barred plaintiffs' claims, the court stated:

> [U]nder Ohio law, "constructive knowledge of facts, rather than actual knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule." (Emphasis sic.) *Flowers v. Walker*, 63 Ohio St.3d 546, 549, 589 N.E.2d 1284 (1992).
>
> ******
>
> Appellants also had full knowledge of (and consented to) all the fees which they now claim were excessive. Appellants' discovery, years later, that the fees were allegedly excessive under the probate statute ***based on information from another attorney is not sufficient to delay the statute of limitations***. *Lynch v. Dial Fin. Co.*, 101 Ohio App.3d 742, 748, 656 N.E.2d 714 (8th Dist.1995). (plaintiffs knew or should have known about itemized charges on documents they signed; "[w]hat plaintiffs 'discovered' seventeen years later ***is that their lawyer told them*** that these charges allegedly violated R.C. 1321.57," but such discovery "cannot be used to circumvent the statute of limitations").

Estate of Greenawalt v. Estate of Freed, 10th Dist. Franklin No. 17AP-62, 2018-Ohio-2603, ¶ 30, 31 (emphasis added).

The same is true here. Movants Harbour and Norris had full knowledge (and consented to) all the fees they now claim were excessive. They knew or should have known about the itemized charges on their settlement memorandum in 2012, 2014 and 2015. Movants only "discovered" what Plaintiffs' counsel told them in 2018 – that these charges were allegedly illegal or excessive. Such "discovery" does not circumvent the statute of limitations here – just as it did not in the cases cited above. For this reason alone, the proposed amendment is futile because any claims by Movants Harbour and Norris are barred by the statute of limitations.

Finally, it should be noted that Movants Harbour and Norris did not name as a defendant any attorney that represented them in the two lawsuits referenced in the Complaint.

Movants' proposed claims against KNR are legal malpractice actions because they arise out their legal representation. They must name as a defendant the attorney(s) who represented them. Law firms do not practice law – attorneys do; and any suit for legal malpractice – regardless of how it is pled, must be made against the attorney who represented the plaintiff. *Natl. Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, syllabus (a law firm does not engage in the practice of law and, therefore, cannot directly commit legal malpractice; a law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice). *Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.*, 10th Dist. Franklin No. 10AP-290, 2010-Ohio-5872 (because the client had not filed suit against the individual attorneys within the statute of limitations set forth in R.C. 2305.11(A), the attorneys could not be found liable for malpractice; and the law firm could not be held vicariously liable for malpractice because none of its principals or employees were liable for malpractice or had been named as defendants).

Note that a prior ruling exists in this case determining that Defendants Nestico and Redick did not have an attorney client relationship with Plaintiffs. (Order of September 28, 2017, p.7, attached as Ex. 5). The proposed Fifth Amended Complaint likewise fails to allege facts demonstrating an attorney client relationship between any Plaintiff and Nestico or Redick. Plaintiffs have failed to name as defendants any of the attorneys who represented them.

The application of *Wuerth* and its progeny lends further support to the conclusion that the purported "class" allegations fail to state a claim under Civ.R. 23. Each member of the purported class would have been represented by a different attorney employed by KNR. Any claim a purported class member may have must first be pled against the individual attorney who represented the purported class member. In short – there can never be a class certified on these allegations of legal malpractice – regardless of Plaintiffs' counsel's attempts to plead around it. All of the allegations against the KNR defendants arise out of the legal representation

of the plaintiff. Therefore, they are legal malpractice claims as a matter of law regardless of how counsel pleads them:

> Claims arising out of an attorney's representation, regardless of their phrasing or framing, constitute legal malpractice claims that are subject to the one-year statute of limitations set forth in R.C. 2305.11(A). *Hillman v. Edwards*, 10th Dist. No. 08AP-1063, 2009 Ohio 5087, ¶19, citing *Sprouse v. Eisenman*, 10th Dist. No. 04AP-416, 2005 Ohio 463, ¶8; see also *Muir v. Hadler Real Estate Mgt. Co.* (1982), 4 Ohio App.3d 89, 90, 4 Ohio B. 170, 446 N.E.2d 820; see also *White v. Stotts*, 3d Dist. No. 1-10-44, 2010 Ohio 4827, ¶25-26. When the gist of a complaint sounds in malpractice, other duplicative claims are subsumed within the legal malpractice claim. *Pierson v. Rion*, 2d Dist. No. CA23498, 2010 Ohio 1793, ¶14; see also *Polivka v. Cox*, 10th Dist. No. 01AP-1023, 2002 Ohio 2420, ¶2, fn. 1. Indeed, "[m]alpractice by any other name still constitutes malpractice." *Muir* at 90.

Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., L.P.A., 10th Dist. Franklin No. 10AP-290, 2010-Ohio-5872, ¶ 15. *See also Kravitz, Brown & Dortch, LLC v. Klein*, 10th Dist. Franklin No. 16AP-200, 2016-Ohio-5594, ¶¶ 12-24 (finding breach of contract, unjust enrichment, and vicarious liability counterclaims involved adequacy and costs of legal services and were legal malpractice claims). Movant Harbour's claim, to the extent he ever had one, is long barred by the statute of limitations as is any claim by Norris. Despite the voluminous pleading to the contrary, all of the claims are subsumed in a claim for legal malpractice which only exists against the lawyer(s) who represented them – not the law firm who employed the attorneys. Movants have no viable claim as a matter of law. Accordingly, the proposed amendment to add any claim by Movants Harbour or Norris is futile. *Demmings v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 98958, 2013-Ohio-499, ¶ 11.

C. Plaintiffs' Motion is Untimely, Made in Bad Faith, and Will Cause Undue Prejudice to Defendants.

Ohio courts have routinely denied leave to amend pleadings resulting from the moving party's undue delay and resulting prejudice. *See, e.g. Wells v. Bowie*, 87 Ohio App.3d 730, 735, 622 N.E.2d 1170 (5th Dist. 1993) (affirming denial of leave where appellant waited "nearly two years" to seek to amend her complaint); *Leo v. Burge Wrecking, LLC*, 6th Dist. Lucas No. L-16-

1163, 2017-Ohio-2690, ¶ 15, 89 N.E.3d 1268 (affirming denial of leave on account of substantial delay of moving party without explanation); *St. Marys v. Dayton Power & Light Co.*, 79 Ohio App.3d 526, 535-536, 607 N.E.2d 881 (3rd Dist. 1992) (affirming denial of leave to amend complaint due to moving party's delay and prejudice to the defendant due to upcoming hearing); *Woomer v. Kitta*, 8th Dist. Cuyahoga Nos. 70863 and 71049, 1997 Ohio App. LEXIS 1515 (April 17, 1997) (affirming denial of leave to amend complaint for delay and potential prejudice to defendant).

Plaintiffs' bad faith in seeking this amendment is evidenced by the numerous assertions of "fact" in the Complaint which are demonstrably false, or otherwise unnecessary and wholly unrelated to any claim of Movant Harbour. Plaintiffs' counsel wants to tell a story of grand conspiracy, racism, and unwanted medical treatment while none of these allegations have anything to do with the purported claim of his client – that he was overcharged for medical treatment. The motion is untimely because there have been four prior amendments and this case is over two years old with no motion to certify a class on the record.

Defendants are obviously prejudiced by the addition of multiple unrelated claims against them under the umbrella of one case. The amount charged for an investigator has nothing to do with litigation loans and nothing to do with Dr. Ghoubrial or the amount charged for a report by a chiropractor. It is highly prejudicial to the KNR defendants to permit Plaintiffs' counsel to continue adding new claims by new individuals simply because the claims are against KNR. This no different than allowing joinder of a plaintiff with a slip and fall claim against Walmart with a claim by a separate plaintiff who had an accident with a Walmart truck, and a third plaintiff who claims he was wrongfully terminated by Walmart. The prejudice to the defendant is obvious. Plaintiffs' counsel is engaged in a litigation assault on KNR's business. That does not entitle him to house all of his claims under one case number. The motion should also be denied because it is made in bad faith, untimely, and highly prejudicial to Defendants.

IV. CONCLUSION

Based upon the foregoing, Defendants respectfully request that the Court deny Plaintiffs' Motion for Leave to File Fifth 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' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE FIFTH AMENDED COMPLAINT* was filed electronically with the Court on this 5th day of November, 2018. The parties, through counsel, may access this document through the Court's electronic docket system.

/s/ James M. Popson
James M. Popson (0072773)

IN THE COURT OF COMMON PLEAS

SUMMIT COUNTY, OHIO

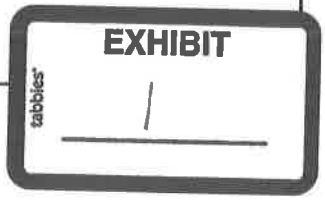
- - -

RICHARD A. HARBOUR,)
Plaintiff,)
vs.) Case No. 2014-03-1254
THOMAS J. FISCHER,)
et al.,)
Defendants.

- - -

Deposition of RICHARD HARBOUR, a Plaintiff herein, called by the Defendants for cross-examination pursuant to the Ohio Rules of Civil Procedure, taken before me, the undersigned, Heidi Tsimpiris, an RPR and Notary Public in and for the State of Ohio, at the offices of Kisling, Nestico & Redick, 3412 West Market Street, Akron, Ohio, on Thursday, the 12th day of March, 2015, at 11:04 a.m.

Trisha Beban Yost, RPR
1940 Crystal Drive
Akron, Ohio 44312
(330) 699-6152
Fax: (330) 699-4089
e-mail: trisha.yost@gmail.com



Hospital.
Q. We'll get to those in one second.
A. Okay.
Q. Now, who referred you to Dr. Ghobrial?
A. Dr. Auck did.
Q. Why?
A. Because I was having, you know, pain, he felt pain management would also be appropriate care to go along with his care.
Q. Pain management meaning give you medications?
A. If need be, yes.
Q. Did you tell him you had a primary care physician that could do that?
A. Yes, I did, but I also told him my primary care physician had verbalized to me that he did not like to get involved with motor vehicle accidents.
Q. But, I mean, in all fairness, Dr. Heim was involved in this case already for your headaches, wasn't he?
A. Correct.
Q. So what did Dr. Ghobrial do for you?
A. He examined me, determined that I did have some tenderness and pain in my low back area, and that my neck was, you know, stiff, I believe. I can't recall his exact words at the time of, you know,

his first examination. He prescribed a muscle relaxer, Flexril, to take as needed. He then also would give me, I believe, cortisone shots in my low back area.

Q. And did that treatment provide you relief?

A. The cortisone shots did, yes.

Q. How many times did you see Dr. Ghobrial?

A. To the best of my knowledge, half a dozen times.

Q. Where did you go?

A. His office on Brown Street is, I believe, where he is located at.

Q. Well, he's got one in Wadsworth. You didn't go out to Wadsworth, did you?

A. No, sir. I was in the city of Akron.

Q. Again, our records reflect that you saw Dr. Ghobrial three times, okay, with the last visit being June 20th of 2012.

A. Okay.

Q. Do you think you saw him more than that?

A. I can't recall, but I gave you an estimate to the best of my --

Q. And I understand that. What I'm trying to figure out is what we're missing, what records we don't have, okay? So if you think that you may have seen him since June 20th of 2012, we need to go

4/25/2012

214858 / Richard A Harbour

Settlement Memorandum

Recovery:

REC	Erie Insurance	$ 20,000.00
		$ 20,000.00

DEDUCT AND RETAIN TO PAY:

Kisling, Nestico & Redick, LLC

Akron General Medical Center **;	$ 31.23
Akron General Medical Center **; Records/KN	$ 34.38
AMC Investigations;	$ 50.00
Clearwater Billing Services, LLC;	$ 50.00
Akron General Health System;	$ 1.50
Total Due	$ 167.11

DEDUCT AND RETAIN TO PAY TO OTHERS:

Akron General Medical Center **	RAH	$ 2,470.00
Akron General Medical Center **	RAH	$ 342.00
General Emergency Medical Specialists, Inc.*	RAH	$ 130.00
Ghoubrial, M.D., Dr. Sam N.		$ 2,000.00
Kisling, Nestico & Redick, LLC		$ 4,700.00
Rolling Acres Chiropractic Inc		$ 3,700.00
Total Due Others		$ 13,342.00

Total Deductions	$ 13,509.11
Total Amount Due to Client	$ 6,490.89

I hereby approve the above settlement and distribution of proceeds. I have reviewed the above information and I acknowledge that it accurately reflects all outstanding expenses associated with my injury claim. I further understand that the itemized bills listed above will be deducted and paid from the gross amount of my settlement except as otherwise indicated. Finally, I understand that any bills not listed above, including but not limited to Health Insurance or Medical Payments Subrogation and/or those initialed by me to indicate that they are not being paid from the settlement are my responsibility and not the responsibility of Kisling, Nestico & Redick, LLC.

Date: X 4/25/12

Name: X RAH
Richard A Harbour

Firm:
Kisling, Nestico & Redick, LLC

EXHIBIT
tabbies
2

7/27/2015

221620 / Richard Harbour

Settlement Memorandum

Recovery:

MP	Progressive Insurance*	$ 5,000.00
REC	Erie Insurance	$ 17,500.00
		$ 22,500.00

DEDUCT AND RETAIN TO PAY:

Kisling, Nestico & Redick, LLC	
AMC Investigations;	$ 40.00
Clearwater Billing Services, LLC;	$ 50.00
First Healthcare**; dd	$ 12.00
HealthPort; dd	$ 48.23
Kisling, Nestico & Redick, LLC; Filing Fee/rjk	$ 386.25
Professional Receivables Control, Inc.*;	$ 16.00
Trisha Beban Yost, RPR; #6018/depo of Fischer	$ 55.00
Akron General Health System*;	$ 2.50
Total Due	$ 609.98

DEDUCT AND RETAIN TO PAY TO OTHERS:

Bath Fire Department	$ 450.00
Clearwater Billing Services, LLC	$ 1,900.00
Kisling, Nestico & Redick, LLC	$ 6,388.33
Progressive Insurance*	$ 3,335.00
Radiology & Imaging Services	$ 38.00
Radiology & Imaging Services	$ 47.01
Rolling Acres Chiropractic Inc	$ 3,331.68
Total Due Others	$ 15,490.02

Total Deductions	$ 16,100.00
Total Amount Due to Client	$ 6,400.00
Less Previously Paid to Client	$ 0.00
Net Amount Due to Client	$ 6,400.00

EXHIBIT 3 tabbies

I hereby approve the above settlement and distribution of proceeds. I have reviewed the above information and I acknowledge that it accurately reflects all outstanding expenses associated with my injury claim. I further understand that the itemized bills listed above will be deducted and paid from the gross amount of my settlement except as otherwise indicated. Finally, I understand that any bills not listed above, including but not limited to Health Insurance or Medical Payments Subrogation and/or those initialed by me to indicate that they are not being paid from the settlement are my responsibility and not the responsibility of Kisling, Nestico & Redick, LLC.

Date: 7/29/15

Name: Richard Harbour

Firm: Kisling, Nestico & Redick, LLC

232154 / Monique Norris

Settlement Memorandum

Recovery:

REC	Motorists Mutual Insurance Company	$ 250.00
MP	Motorists Insurance Group	$ 1,000.00
REC	Nationwide Insurance*	$ 4,982.55
REC	Liberty Capital Funding LLC	$ 500.00
		$ 6,732.55

DEDUCT AND RETAIN TO PAY:

Kisling, Nestico & Redick, LLC		
Akron General Medical Center	$ 6.00	
Clearwater Billing Services, LLC	$ 50.00	
First Healthcare	$ 12.00	
Floros, Dr. Minas	$ 200.00	
Mercy Health Partners	$ 15.00	
MRS Investigations, Inc.	$ 50.00	
Professional Receivables Control, Inc.	$ 16.00	
Akron General Medical Center	$ 40.89	
Total Due	$ 389.89	

DEDUCT AND RETAIN TO PAY TO OTHERS:

Akron Square Chiropractic	$ 500.00	
Clearwater Billing Services, LLC	$ 600.00	
CNS Center for Neuro and Spine	$ 260.00	
Kisling, Nestico & Redick, LLC	($2,077.51) $ 1,750.00	
Liberty Capital Funding LLC	$ 800.00	
National Diagnostic Imaging Consultants	$ 80.00	
Ohio Tort Recovery Unit*	$ 506.75	
Total Due Others	$ 4,496.75	

Total Deductions	$ 4,886.64
Total Amount Due to Client	$ 1,845.91
Less Previously Paid to Client	$ 1,500.00
Net Amount Due to Client	$ 345.91

I hereby approve the above settlement and distribution of proceeds. I have reviewed the above information and I acknowledge that it accurately reflects all outstanding expenses associated with my injury claim. I further understand that the itemized bills listed above will be deducted and paid from the gross amount of my settlement except as otherwise indicated. Finally, I understand that any bills not listed above, including but not limited to Health Insurance or Medical Payments Subrogation and/or those initialed by me to indicate that they are not being paid from the settlement are my responsibility and not the responsibility of Kisling, Nestico & Redick, LLC.

Date: 5/25/14

Name: Monique Norris

Firm: Kisling, Nestico & Redick, LLC

EXHIBIT 4 tabbies

EXHIBIT D

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

MEMBER WILLIAMS, *et al.*,

Plaintiffs,

-vs-

KISLING, NESTICO & REDICK, LLC, et al.

Defendants;

CASE NO.: CV-2016-09-3928

JUDGE ALISON BREAUX

ORDER
(Granting in part and Denying in part Defendants', Alberto R. Nestico and Robert W. Redick, Motion for Judgment on the Pleadings on Plaintiffs' Second Amended Complaint)

***

This matter comes before the Court on Defendants Alberto R. Nestico (Nestico) and Robert W. Redick's (Redick) Motion for Judgment on the Pleadings Regarding Plaintiffs' Second Amended Complaint, filed August 3, 2017. Plaintiffs Member Williams, Naomi Wright, and Matthew Johnson (Plaintiffs) filed their Opposition to Defendants' Motion for Judgment on the Pleadings Regarding the Second Amended Complaint on August 16, 2017. Defendants filed their Reply Brief in Support of Defendants Alberto R. Nestico and Robert W. Redick's Motion for Judgment on the Pleadings Regarding Plaintiffs' Second Amended Complaint on August 29, 2017. This Court has previously denied Plaintiffs' Motion for Leave to File *Instanter* a Sur-Reply in Opposition to Defendants' Motion for Judgment on the Pleadings on Plaintiffs' Second Amended Complaint on September 15, 2017, and ordered same to be stricken from the record on September 28, 2017. The matter has been fully briefed and is ripe for consideration.

Upon due consideration of the evidence presented, the facts of this case, Civil Rules 9(B) and 12(C), and applicable law, this Court finds that Defendants' motion is well-taken as to Johnson's fraud claim and Plaintiffs' claims under the OCSPA and must be GRANTED. This Court finds Defendants' motion is not well-taken with respect to the remaining claims and must be DENIED.

ANALYSIS

A. FACTS AND ARGUMENTS PRESENTED

Plaintiffs' allegations are divided into three classes. The first class (the "Investigation Fees Class") alleges Defendants, Kisling, Nestico & Redick (KNR), Alberto R. Nestico (Nestico), and Robert W. Redick (Redick) have engaged, and continue to engage, in a deliberate scheme to defraud their clients by charging them expenses for investigations that are never actually performed. Plaintiff Member Williams (Williams) is the class representative. Williams has asserted claims of fraud, breach of fiduciary duty, unjust enrichment, and alleged violation of the Ohio Consumer Sales Practices Act ("OCSPA") against Nestico and Redick. Specifically, Williams contends she entered into a contingency fee agreement with KNR allowing KNR to "deduct only reasonable expenses from a client's share of" a settlement or judgment. *Second Amended Complaint*, ¶¶ 9 and 85. During the course of representation, KNR obtained a settlement for Plaintiff. According to Plaintiff, she signed a Settlement Memorandum outlining the settlement amount along with the fees and expenses that were deducted from that amount to be paid to KNR, with the remainder paid to Plaintiff. *Id.* Included in the fees and expenses to be paid to KNR was a $50.00 fee paid to MRS Investigations, Inc. *Id.* at ¶ 85. Plaintiff asserts KNR never advised her of the purpose of the charge to MRS Investigations, Inc. and never obtained her consent to same. Plaintiff contends "[n]o services were ever provided to Plaintiff in connection with the $50 payment to MRS Investigations, Inc." *Id.*

The second class (the "Chiropractor Class") alleges KNR, Nestico and Redick have engaged, and continue to engage, in a quid pro quo relationship with Akron Square Chiropractic (ASC). The alleged quid pro quo relationship involves: 1) KNR will refer its clients to ASC for treatment and ASC will, in turn, refer its clients to KNR for legal representation; 2) KNR pressures its clients to treat with ASC rather than elsewhere, regardless of client preference; 3) KNR's failure to negotiate lower rates and fees for ASC; and 4) clients paying ASC narrative fees for purportedly drafting worthless reports. Plaintiff Naomi Wright (Wright) is the class representative. Wright has asserted claims for breach of fiduciary duty, unjust enrichment, and an alleged violation or violations of the OCSPA against Nestico and Redick. *Id*, ¶ 124(B), Claims5-6; 12. Specifically, Wright contends Nestico and Redick

unlawfully solicited her through ASC and persuaded her to accept conflicting legal representation and unwanted medical care via deception and coercion. *Id.* at ¶ 10.

The third class (the "Liberty Class") alleges KNR recommends its clients take out loans with Liberty Capital Funding, LLC (Liberty) at exorbitant interest rates in order to receive some immediate recovery. *Id.* at ¶¶ 98-120. Plaintiff Matthew Johnson (Johnson) is the class representative. Johnson has asserted claims for fraud, breach of fiduciary duty, unjust enrichment, and alleged violations of the OSCPA against Nestico and Redick. Specifically, Johnson contends KNR counseled him to take out a loan with Liberty at an annual interest rate of 49%. *Id.* at ¶ 107. This loan included a $50.00 delivery fee and a $20.00 processing fee that also accrued interest at 49%. *Id.* Johnson further contends Nestico and Redick were instrumental in the formation of, and retained interest in, Liberty. *Id.* at ¶¶ 119-120.

Defendants Nestico and Redick assert: 1) This Court has already dismissed Williams' fraud and unjust enrichment claims in regard to Defendant Nestico; 2) Williams and Johnson have asserted no factual allegations in their Second Amended Complaint to support their claims that Nestico and Redick personally committed fraud; 3) Nestico and Redick do not individually owe Plaintiffs a fiduciary duty; 4) Plaintiffs have asserted no facts that Nestico and Redick were unjustly enriched; and 5) The OCSPA does not apply to attorneys and law firms. *Defs.' Mot.*, ¶¶ 5-10.

B. Civ. R. 12(C) Standard

Civ. R. 12(C) deals with whether or not a party is entitled to judgment as a matter of law. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 166, 297 N.E.2d 113, 1973 Ohio LEXIS 364 (9th Dist., 1973). "Under Civ. R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the Complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *Id.* See also, *Whaley v. Franklin County Bd. of Comm'rs*, 92 Ohio St.3d 574, 2001 Ohio 1287, 752 N.E.2d 267, 2001 Ohio LEXIS 2152 (Ohio, 2001); *Smith v. Nagel*, 2007 Ohio 2894, 2007 Ohio App. LEXIS 3678 (Ohio, 2007). The Court must grant a motion for judgment on the pleadings if, after taking the factual allegations in the complaint as true and disregarding unsupported conclusions, it finds Plaintiff can prove no set of facts that would justify granting relief. *King*

v. Semi Valley Sound, LLC, 2011 Ohio 3567, 2011 Ohio App. LEXIS 3014 (9th Dist., 2011); *Traylor v. Timber Top, Inc.*, 2016-Ohio-283, 2016 Ohio App. LEXIS 246 (9th Dist., 2016); *Sacksteder v. Senney*, 2012-Ohio-4452, 2012 Ohio App. LEXIS 3914, (2nd Dist., 2012).

C. PRIOR ORDER OF COURT

On March 16, 2017, this Court granted Nestico's Motion for Judgment on the Pleadings Regarding Plaintiff's First Amended Complaint and dismissed Plaintiff's claims of fraud and unjust enrichment against Nestico with prejudice. On April 5, 2017, following a hearing in which the parties argued their respective positions, this Court granted Plaintiff's renewed Motion for Leave to Plead Second Amended Complaint. After a stay was issued on May 12, 2017 and the case was reactivated on June 29, 2017, this Court again granted Plaintiff's Renewed Motion for Leave to Plead Second Amended Complaint. Further, this Court denied Plaintiff's Motion for Reconsideration of the Court's March 16, 2017 Order Regarding Dismissal of Claims Against Defendant Nestico as moot, as the Court had granted Plaintiff's Motion for Leave to Plead Second Amended Complaint. Plaintiffs correctly state that the Court's intention, by denying Plaintiff's Motion for reconsideration "as moot" rather than on the merits, was to provide Plaintiffs the opportunity to amend their fraud and unjust enrichment claims in their Second Amended Complaint. Therefore, this Court **VACATES** its prior order dismissing the fraud and unjust enrichment claims against Nestico, and will proceed to address these claims as amended, below.

D. PLAINTIFFS' FRAUD CLAIM AGAINST DEFENDANT NESTICO AND DEFENDANT REDICK

Plaintiffs Williams and Johnson assert Nestico and Redick should be personally liable for KNR's purported fraud. Williams' claim relates to the Investigation Fees Class and Johnson's claim relates to the Liberty Class.

1. WILLIAMS' FRAUD CLAIM REGARDING THE INVESTIGATION FEES

Williams' argument rests on her assertion that Nestico and Redick: 1) knew the investigation fee was not a legitimate fee; 2) knew each client's settlement statement itemizing the investigation fee was false; 3) intended for the investigation fee to be added to settlement

statements their clients would be required to execute; and 4) intended Williams and similarly situated clients would rely upon these misrepresentations and be damaged as a result. Nestico and Redick assert they are not personally responsible for the liability of KNR under Civ. R. 9(B). Nestico and Redick argue there is nothing in the Second Amended Complaint that demonstrates they personally made a fraudulent representation or withheld information.

Civ.R. 9(B) provides in pertinent part:

> **Fraud, mistake, condition of the mind.** In all averments of fraud or mistake, **the circumstances constituting fraud or mistake shall be stated with particularity**. Malice, intent, knowledge, and other condition of mind of a person may be averred generally. (Emphasis added).
>
> * * *

Both Plaintiff and Defendant Nestico rely upon the holding in *Centennial Ins. Co. v. Vic Tanny Int'l of Toledo, Inc.*, 46 Ohio App. 2d 137, 142 (6th Dist. 1975). In *Centennial*, the 6th District Court of Appeals held that for an officer of a corporation to be held personally liable for the same conduct for which his corporate principal is liable, the officer must have "intentionally or inadvertently [bound] himself as an individual." *Id.* Ohio Courts have long been reluctant to disregard a corporate entity in favor of holding an officer personally liable. *North v. Higbee Co.*, 131 Ohio St. 507, 3 N.E.2d 391, (Ohio, 1936); *E.S. Preston Associates, Inc. v. Preston*, 24 Ohio St. 3d 7, 492 N.E.2d 441 (Ohio, 1986). Ohio Courts have consistently been willing to disregard the corporate entity "only where the corporation has been used as a cloak for fraud or illegality or where the sole owner has exercised such excessive control over the corporation that it no longer has a separate existence." *E.S. Preston*, at 11, citing *North v. Higbee Co.* The Supreme Court of Ohio has held a corporate entity should not be disregarded unless justice cannot be served otherwise. *Auglaize Box Board Co. v. Hinton*, 100 Ohio St. 505, 518-519, 126 N.E. 881 (Ohio, 1919).

In the case at bar, in order to establish her claim of fraud, Williams must demonstrate that Nestico and Redick: 1) personally made a false statement (or withheld information); 2) they personally knew it was a false statement; 3) they personally intended for Williams to act in reliance upon it; and 4) Williams in fact acted upon it and was injured. *Cincinnati Bible*

Seminary v. Griffiths, 1 Dist. No. C-830867, 1984 Ohio App. LEXIS 11028, *6 (citing *Centennial* at 142.) This Court finds Plaintiffs' Second Amended Complaint asserts specific allegations that: 1) Nestico and Redick were aware the investigation fee was not appropriately charged to some, if not all, clients; *Second Amended Complaint* at ¶¶ 4, 88; 2) Nestico and Redick were personally aware their staff was instructed to engage MRS Investigations, Inc. and AMC Investigations, Inc. to provide "sign-up" services to KNR clients; *Id.* at ¶ 88; 3) Nestico and Redick instructed their staff to seek reimbursement from KNR clients for investigative fees, which were for services that benefitted KNR and not the client; *Id.* at ¶¶ 4, 88; 4) Nestico personally reviewed and approved the investigative fee on Williams' and others' settlement memorandums; *Id.* at ¶¶ 74-75; 5) Nestico intended the inclusion of the investigative fee on Williams' settlement memorandum would result in KNR collecting the fee; *Id.* at ¶¶ 73, 9; 6) Williams was damaged as a consequence of paying a fee for services she did not receive; *Id.* at ¶¶ 140, 145; and 7) Nestico and Redick were personally enriched by Williams paying the investigative fees because their interests align directly with KNR. *Id.* at ¶ 123.

This Court acknowledges these are *allegations* and not *facts*, as Defendants argue, but dismissal under Civ. R. 12(C) is only appropriate if this Court "1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and 2) finds *beyond doubt*, that the Plaintiff[s] could prove *no set of facts* in support of [their] claim that would entitle [them] to relief." *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 664 N.E.2d 931 (1996). (Emphasis added). Based on the forgoing, this Court determines Nestico and Redick's Motion for Judgment on the Pleadings Regarding Plaintiffs' Second Amended Complaint is not well-taken with respect to Williams' fraud claim involving the investigation fees and is hereby denied.

2. JOHNSON'S FRAUD CLAIM REGARDING THE LIBERTY CLASS

Johnson's argument rests on his assertion that Nestico and Redick misrepresented their relationship with Liberty Capital Funding and failed to disclose to Johnson and similarly situated clients their financial interest in Liberty Capital and its loans. Nestico and Redick assert they are not personally responsible for the liability of KNR under Civ. R. 9(B). Nestico and Redick argue there is nothing in the Second Amended Complaint that demonstrates they personally made a fraudulent representation or withheld information. This Court finds the Second Amended Complaint does not plead with particularity the elements of Johnson's fraud

claim so that it meets the standard required by Civ. R. 9(B). While there are references to emails Nestico was copied on and/or authored in which KNR's staff was directed to recommend Liberty Capital Funding, no references to Redick are made at all. This Court finds Johnson has failed to plead with particularity the specific representations Nestico and Redick made, to whom they made said representations, and to what end, in accordance with Civ. R. 9(B). Based on the foregoing, this Court determines Nestico and Redick's Motion for Judgment on the Pleadings Regarding Plaintiffs' Second Amended Complaint is well-taken with respect to Johnson's fraud claim involving the Liberty Class and is hereby granted.

E. PLAINTIFFS' BREACH OF FIDUCIARY DUTY CLAIMS

Plaintiffs assert that Nestico and Redick are the sole equity partners and controlling shareholders of KNR and therefore owed all KNR clients a fiduciary duty, which they breached. Plaintiffs contend an attorney-client relationship existed between themselves and Nestico and Redick, and further, even if no attorney-client relationship existed, Nestico and Redick still owed their firm's clients a fiduciary duty because they exercised complete control and direction of KNR.

1. ATTORNEY-CLIENT RELATIONSHIP BETWEEN PLAINTIFFS AND NESTICO AND REDICK

Plaintiffs' Second Amended Complaint alleges an attorney-client relationship existed between Nestico and Redick and the Plaintiffs, and therefore alleges a fiduciary relationship existed. *Costin v. Wick*, 9th Dist. Lorain, No. 95CA006133, 1996 Ohio App. LEXIS 233, *8 (Ohio Code of Professional Responsibility acknowledges a fiduciary relationship exists between attorney and client). Plaintiffs contend that Nestico and Redick had ultimate control over KNR and used their names in the name of the legal corporation, and therefore it would be reasonable for clients to assume they were represented by KNR *and* Nestico and Redick, personally. This Court finds there exists no evidence in Plaintiffs' Second Amended Complaint to demonstrate an attorney-client relationship existed between Plaintiffs and Nestico and Redick, individually. There are no allegations that Plaintiffs ever directly communicated or otherwise interacted with Nestico and/or Redick before, during, or after their representation by KNR. Based on the foregoing, this Court determines no attorney-client privilege existed between Plaintiffs and Nestico and Redick, individually.

2. NESTICO AND REDICK'S FIDUCIARY DUTY AS THE CONTROLLERS OF KNR

Plaintiffs contend that Nestico and Redick have a fiduciary duty to all of KNR's clients, regardless of whether an attorney-client relationship existed between them individually. Plaintiffs cite to the fact that because Nestico's and Redick's names are contained within the company name, they created an aura of authoritativeness and trustworthiness, implemented regimented policies and procedures within KNR, and "used their domination and manipulation of information available only to them to deceive and defraud their clients." *Plaintiffs' Motion in Opposition*, at 15. This Court reasons that merely engaging a certain company does not automatically trigger an individual relationship with that company's namesake(s), particularly when a company is as large as KNR. However, the existence of a fiduciary duty is a question of fact to be determined during the course of discovery, not at the pleadings stage, and this Court does not find, "beyond doubt, that Plaintiff[s] could prove no set of facts in support of [their] claim." *Thompson v. Cent. Ohio Cellular*, 1996 Ohio App. LEXIS 3670, quoting *Lin v. Gatehouse Constr. Co.* (1992), 84 Ohio App. 3d 96, 99, 616 N.E.2d 519. This Court must apply the standard of review in ruling upon a motion for judgment on the pleadings pursuant to Civ. R. 12(C), consistently upheld by the Supreme Court of Ohio. *See, Calhoun v. Supreme Court of Ohio* (1978), 61 Ohio App.2d 1, 15 Ohio Op. 3d, 399 N.E.2d 559; *Vaught v. Vaught* (1981), 2 Ohio App. 3d 264, 2 Ohio B. Rep. 293, 441 N.E.2d 811; *Peterson v. Teodosio* (1973), 34 Ohio St. 2d 161, 63 Ohio Op. 2d 262, 297 N.E.2d 113. Based on the foregoing, the Court determines the existence of a fiduciary duty between Nestico and Redick and KNR's clients is a question of fact to be determined during the discovery stage.

F. PLAINTIFFS' UNJUST ENRICHMENT CLAIMS AGAINST NESTICO AND REDICK

Plaintiffs assert Nestico and Redick were personally unjustly enriched as a result of their contracts with KNR. In order to prevail on an unjust enrichment claim, the Plaintiffs must show: 1) plaintiff conferred a benefit on defendant; 2) defendant knew of such benefit; and 3) defendant retained the benefit under circumstances where it would be unjust to do so without payment. *Metz v. Am. Elec. Power Co.*, 172 Ohio App. 3d 800, 2007-Ohio-3520 (10th Dist., 2007); *Chestnut v. Progressive Cas. Inc. Co.*, 166 Ohio App.3d 299, 2006-Ohio-2080, (8th Dist., 2006); *Acquisition Services, Inc. v. Zeller*, 2013-Ohio-3455 (2nd Dist., 2013). Plaintiffs contend that as a result of the investigation fee being charged to Williams, KNR's referral of

ASC to Wright, and the referral of Liberty Capital Funds to Johnson, KNR received a benefit; ergo, Nestico and Redick personally received a benefit, conferred on them by Plaintiffs.

1. WILLIAMS' UNJUST ENRICHMENT CLAIM AGAINST NESTICO AND REDICK

Williams alleges the $50.00 which was charged to her was income to KNR it would not have received but for collecting the investigation fee from her. Additionally, Williams alleges Nestico and Redick were well aware of this investigation fee, even when no investigation was performed. This Court reasons if the investigation fee was unjust, so was KNR's retention of it. Construing the claims plead by Williams in the Second Amended Complaint as true, this Court finds Williams has sufficiently pled her claim for unjust enrichment against Nestico and Redick in regards to the investigation fee.

2. WRIGHT'S UNJUST ENRICHMENT CLAIM AGAINST NESTICO AND REDICK

Wright alleges KNR is pursuing her for fees it claims it is owed under their representation contract. Wright contends KNR is seeking to enforce a lien against her which confers a benefit on KNR, and therefore, Nestico and Redick personally. Wright argues the lien is the result of her terminating KNR as counsel on the basis of Defendants' unjust conduct, at issue here, and therefore Defendants' do not have a legal right to the benefit of the lien. This Court reasons Wright's allegations of a quid pro quo relationship between ASC and KNR, if construed as true, amount to a sufficiently pled claim of unjust enrichment against Nestico and Redick in regards to the chiropractic class.

3. JOHNSON'S UNJUST ENRICHMENT CLAIM AGAINST NESTICO AND REDICK

Johnson alleges Nestico and Redick held an interest in Liberty Capital, and funds paid to Liberty Capital are unjustly paid as a result of its unlawful relationship with KNR. As with his fraud claim, Johnson's argument rests on his assertion that Nestico and Redick misrepresented their relationship with Liberty Capital Funding and failed to disclose to Johnson (and similarly situated clients) their financial interest in Liberty Capital and its loans. Specifically, Johnson alleges Liberty Capital made "kickback" payments to KNR for every client KNR referred to Liberty Capital. *SAC* at ¶ 4. Johnson further alleges Nestico and Redick, as the controlling and managing partners of KNR, were aware of this unlawful benefit and directed their staff to continue collecting it, enriching KNR and themselves, individually. Where Johnson's allegations do not meet the particularity requirement of Civ. 9(B) as they pertain to his fraud claim, a claim for unjust enrichment requires no such particularity.

Therefore, Johnson's allegation of a quid pro quo relationship between Liberty Capital Funding and KNR, if construed as true, amount to a sufficiently pled claim of unjust enrichment against Nestico and Redick in regards to the Liberty Capital class.

G. THE OHIO CONSUMER SALES PRACTICES ACT AND NESTICO AND REDICK

Each Plaintiff asserts claims against Nestico and Redick under the Ohio Consumer Sales Practices Act (OCSPA). Defendants contend these claims fail as a matter of law because the statute does not include attorneys and clients in the definition of "consumer transation." O.R.C. §1345.01(A) provides: "Consumer transaction" does not include transactions between **attorneys**, physicians, or dentists and **their clients** or patients." (Emphasis added). The statute specifically excludes transactions between attorneys and clients, and therefore the Court reasons the drafter's intent was for the OCSPA to be inapplicable in the matter at hand. *See, Patton v. Diemer*, 35 Ohio St. 3d 68, 70 (1988) (where legislature chose not to include an exception it must be presumed none was intended, and vice-versa). Plaintiffs' argument rests upon the idea that Nestico and Redick were not "actually engaged in the practice of law" when they engaged in the alleged conduct that gives rise to their claims. However, Plaintiffs have previously argued that an attorney-client relationship *was present* between KNR's clients and Nestico and Redick individually (which this Court has already rejected, above), and, consistent with common sense, any involvement Nestico and Redick had or are alleged to have had with this lawsuit is directly in their capacities as managing partners in a major law firm. To now argue Nestico and Redick were not "actually engaged in the practice of law" is incongruous. Moreover, Ohio courts have consistently held the OCSPA does not apply to attorneys and law firms. *See, e.g., Patton, infra.*; *Burke v. Gammarino*, 108 Ohio App. 3d 138 142 (1st Dist. 1995)(where OCSPA does not apply to transactions between attorneys and their clients); *Bard v. Society Nat'l Bank*, 1998 Ohio App. LEXIS 4187 (10th Dist. 1998) (definition of "consumer transaction" does not include attorneys and their clients); *Lee v. Traci*, 8th Dist. No. 65368, 1994 Ohio App. LEXIS 2384 ("[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."). Based on the following, this Court finds Plaintiffs' claims under the OCSPA fail as a matter of law.

COURT ORDERS

This Court **VACATES** its prior order of March 16, 2017, dismissing the fraud and unjust enrichment claims against Nestico.

Defendants' Motion for Judgment on the Pleadings regarding Williams' fraud claim against Nestico and Redick is not well-taken and must be **DENIED.**

Defendants' Motion for Judgment on the Pleadings regarding Johnson's fraud claim against Nestico and Redick is well-taken and must be **GRANTED.**

Defendants' Motion for Judgment on the Pleadings regarding Plaintiffs' breach of fiduciary duty against Nestico and Redick is not well-taken and must be **DENIED.**

Defendants' Motion for Judgment on the Pleadings regarding Plaintiffs' unjust enrichment claims against Nestico and Redick is not well-taken and must be **DENIED.**

Defendants' Motion for Judgment on the Pleadings regarding Plaintiffs' OCSPA claims against Nestico and Redick is well-taken and must be **GRANTED.**

The **IN-PERSON** status conference of **October 16, 2017 at 1:00 p.m.** is hereby confirmed.

IT IS SO ORDERED

JUDGE ALISON BREAUX

CC: ALL PARTIES OF RECORD