IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, *et al.*, Plaintiffs, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. 2016-CV-09-3928 Judge James A. Brogan **DEFENDANT MINAS FLOROS' MOTION TO DISMISS**

While a physician owes a fiduciary duty to their patient related to diagnosing and treating diseases and illnesses, Ohio courts have held that this duty does not extend beyond the clinical relationship. This means that a physician only has a fiduciary duty to disclose financial referral relationships when it involves the medical diagnosis, treatment, or care of a patient. This also means that Floros, as a chiropractor, had no fiduciary duty to disclose any alleged referral relationship he had with KNR, since this would be unrelated to a patient's chiropractic treatment. Plaintiffs' breach of fiduciary claim, therefore, fails as a matter of law.

Plaintiffs also fail to state a claim for unjust enrichment, which requires these elements: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. As to the first "benefit" element, KNR's payment to Floros to produce a narrative report was based on an agreement between Floros and KNR, not Plaintiffs. And KNR agreed to pay Floros the narrative fee, no matter if KNR settled Plaintiffs' personal injury claim. Plaintiffs, therefore, cannot satisfy the first element because Plaintiffs did not confer the narrative payment to Floros.

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As to the second "knowledge" element, Plaintiffs fail to plead any non-conclusory facts showing that Floros knew that his narrative reports were allegedly worthless. Plaintiffs also fail to plead any facts showing that Floros knew that KNR deducted the narrative fee from Plaintiffs' settlement, since KNR's narrative fee payment to Floros did not hinge on Plaintiffs settling their personal injury claims. Rather, Plaintiffs allege that KNR paid Floros on every referral.

As to the third "unjust" element, Plaintiffs have failed to plead any facts showing that it would be unjust for Floros to retain his fee from KNR for producing a narrative report. Indeed, Floros did not breach any fiduciary duties he owed the client, since any alleged referral relationship with KNR was outside the scope of Floros' clinical relationship. Plaintiffs also knew and agreed with KNR's narrative fee payment to Floros when Plaintiffs signed the settlement memorandum. As a result, Plaintiffs' unjust enrichment claim fails as a matter of law.

For these reasons, elaborated on below, Floros requests that this Court dismiss Plaintiffs' claims against him.

I. Statement of the Case

Plaintiffs have filed putative class claims against Defendant Minas Floros ("Floros") on behalf of Thera Reid and Monique Norris, who claim to represent a sub-class comprising "[a]ll current and former KNR clients who had a narrative fee deducted by KNR from their settlement proceeds to be paid to a chiropractor." *See* Fifth Amended Complaint (FAC), Class B, ¶¶ 217-229.[1] The basis for Plaintiffs claims, as they relate to Floros, is that he had an undisclosed quid pro quo relationship with KNR. *Id*. Plaintiffs allege that KNR would pay Floros to produce a narrative summary report of a client's injuries, which KNR would use in negotiating a settlement

[1] Floros denies Plaintiffs' allegations. By here quoting the allegations to frame the procedural issues raised by this motion, he does not waive the right to disprove the baseless allegations in Plaintiffs' fifth amended complaint.

with the opposing party. *Id.*, ¶ 65. Plaintiffs allege that these narrative reports were worthless and only served a way to generate kickback payments for patient referrals. *Id*. The class claims against Floros rely on two separate theories of liability: breach of fiduciary duty and unjust enrichment. *Id.*

In support of their allegation that narrative reports were of no value to KNR's clients, Plaintiffs rely solely on allegations from a former KNR employee, Gary Petti. *Id.*, ¶¶73-77. According to Plaintiffs' complaint, Petti believed that narrative reports are useful in some cases to "allow a medical professional to explain why the plaintiff's injuries were different or more challenging than they might appear from the contents of the medical records but should not ordered on every case." *Id.*, ¶73. Petti, however, believed that most of the narrative reports KNR received were "essentially worthless, containing no information that was not already apparent from the client's medical records." ¶74.

That said, under KNR's standard fee agreement, Plaintiffs authorized and directed KNR "to deduct from [the client's] share of proceeds and pay, directly to any doctor, hospital, expert or other medical creditor, any unpaid balance due them for [the client's] care and treatment." *Id.*, Ex. B. Plaintiffs also agreed and authorized KNR to "deduct from any proceeds recovered, any expenses which may have been advanced by [KNR] in preparation for settlement and/or trial of Clients case." *Id*. Thus, based on this contract language, Plaintiffs agreed in writing that KNR could deduct from their settlement proceeds any funds that KNR paid in preparation for settlement, which would include narrative fees to Floros. *Id.*

Plaintiffs also signed a settlement memorandum with KNR. The settlement memorandum shows that KNR paid Floros a fee of $200. The settlement memorandum lists this amount under a section titled "Deduct and Retain to Pay: Kisling Nestico & Redick, LLC." The settlement

memorandum also lists Plaintiffs' unpaid bill for chiropractic treatment, which Floros provided through Akron Square Chiropractic. KNR listed this bill under the section "Deduct and Retain to Pay to Others: Akron Square Chiropractic."

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

The settlement memorandum also states that the client approved the settlement and distribution of proceeds. *Id.* And it states that the client reviewed the distribution information and acknowledged that it accurately reflects all outstanding expenses associated with their personal injury claim. *Id.*

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.

Plaintiffs also allege in their complaint that KNR paid the narrative fee to Floros for every referred client. *Id*. ¶¶ 64, 72. This means KNR paid Floros no matter if a client recovered money in their personal injury claim.

II. Law and Argument

A. Civ. R. 12(B)

Ohio Rule of Civil Procedure 12(B)(6) provides that a court may grant a motion to dismiss if the plaintiff has neither alleged nor can prove a set of facts entitling them to recovery. *O'Brien v. Univ. Community Tenants Union, Inc*., 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975), syllabus. To survive a 12(B)(6) motion to dismiss, the complaint "must allege sufficient underlying facts that relate to and support the alleged claim; the complaint may not simply state legal conclusions." *Allstate Ins. Co. v. Electrolux Home Products, Inc.*, 8th Dist. Cuyahoga No. 97065, 2012-Ohio-90, P 9. "The claims in the complaint must be plausible, rather than conceivable," and "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Fink v. Twentieth Century Homes, Inc*., 8th Dist. Cuyahoga No. 94519, 2010-Ohio-5486, P 24, *citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Plaintiff's Complaint fails to do so here.

B. Breach of Fiduciary Duty

Plaintiffs allege that all Defendants, including Floros, breached their fiduciary duty by "charging and collecting a narrative fee from their clients as a kickback reward to referring chiropractors, and in failing to disclose their quid pro quo relationship with one another." Id., ¶¶ 217-224. Plaintiffs allege that the narrative reports were "worthless" and did "not make an opposing party any more likely to settle a client's case," and had "nothing to do with individual clients' needs." *Id*., ¶ 65. The issue for this Court to determine is if Floros, as chiropractor, has a

fiduciary duty beyond his clinical relationship to disclose to his patients any financial incentives he may have with a law firm when referring clients.

1. Floros did not have a fiduciary duty to disclose to his patients any financial dealings or referral relationships he had with the law firm KNR.

A "fiduciary" is "[a] person having duty created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking."*Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216, 527 N.E.2d 1235 (emphasis added). A fiduciary relationship is formed when, "special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *In re Termination of Employment* (1974), 40 Ohio St.2d 107, 115, 321 N.E.2d 603. The rule imposing liability for breach of fiduciary duty only contemplates matters coming within "the scope of the relation." *See* Restatement [Second] of Torts § 874, Comment A.

The elements for a breach of fiduciary duty include "(1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom." *Wells Fargo Bank, N.A. v. Sessley,* 188 Ohio App.3d 213, 2010-Ohio-2902, ¶ 36, 935 N.E.2d 70 (10th Dist.). Where there is no fiduciary relationship between the parties, a breach of fiduciary claim necessarily fails. *Waffen v. Summers*, 6th Dist. No. OT-08-034, 2009-Ohio-2940, ¶ 41.

Although the definition of "fiduciary" seems broad, "[Ohio] courts have been reluctant to characterize relationships between individuals as being fiduciary in nature, with the obvious exception of those relationships that involve statutorily-imposed duties." *Casey v. Reidy*, 180 Ohio App.3d 615, 2009-Ohio-415, 906 N.E.2d 1139 (7th Dist.)(collecting cases); *Valente v. Univ. of Dayton*, 438 F. App'x 381, 387 (6th Cir.2011). Courts have required a showing of "complete dependence by the inferior party" to establish a fiduciary relationship. *Id.*

Ohio courts have not ruled on what (if any) fiduciary duties a chiropractor owes to their patient. Nor are there any "statutory-imposed duties" on chiropractors that are relevant to Plaintiffs' claims. *Id*. Rather, the closest guidance we have on this issue involve cases ruling on licensed physician's fiduciary duty to their patients.

Physician-fiduciary cases, however, provide limited guidance. For instance, in *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, the Ohio Supreme Court refused to extend the same fiduciary duties of a licensed physician to a nurse. *Massien* involved the fiduciary relationship between a medical professional and their employer hospital. The Ohio Supreme Court found that the nurse did not possess the same level of trust that physician has with a hospital, since "the practice of medicine, which includes the diagnosis of an adverse health condition and the prescription of a course of treatment for its management and care, is limited by law to licensed physicians."[2]

Likewise, chiropractors have a different scope of training and expertise than physicians. Chiropractors cannot practice general medicine and instead are limited to chiropractor care, which R.C. 4734.09 defines as "utilization of the relationship between the musculo-skeletal structures of the body, the spinal column and the nervous system, in the restoration and maintenance of health, in connection with which patient care is conducted with due regard for first aid, hygienic, nutritional, and rehabilitative procedures." Chiropractic patients also do not have the same heightened vulnerability to mistakes, since–unlike physicians–chiropractors are not making life altering decisions involving medications, surgery and diagnosing diseases.

[2] Floros is not arguing that *Massien* is analogous to the case here. Rather, it is discussed to show that there is not a blanket heightened duty between all medical professionals.

Instead, chiropractic treatment is mostly therapeutic. A chiropractor, therefore, should not have the same heightened duty of a physician practicing medicine.

That said, even if we analyze this case under the physician-fiduciary standard, Plaintiffs still fail to state a claim. A physician owes a fiduciary duty to their patient with respect to diagnosing and treating diseases and illnesses; this duty does not extend beyond the medical relationship. *N. Ohio Med. Specialists, LLC v. Huston*, 6th Dist. Erie No. E-09-13, 2009-Ohio-5880, ¶ 16 (2009). *See also Otto v. Melman*, 25 Misc.3d 1235(A), 2009 NY Slip Op 52421(U), 906 N.Y.S.2d 774, ¶ 3 (Sup.Ct.)("In the case at bar, [defendant's] service to [plaintiff] as a physician and as a fiduciary did not include the solicitation of the latter for investment in the new drug company. Such solicitation was not one of the " matters within the scope of the relation."); *Thomas v. Archer*, 384 P.3d 791, 797 (Alaska 2016)(" The physician's alleged promise to obtain pre-authorization of medical treatment for purposes of insurance coverage was outside the scope of the physician's fiduciary duty."); *Restatement [Second] of Torts § 874, Comment (a)*. ("A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another **upon matters within the scope of the relation**.")(emphasis added); *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216, 527 N.E.2d 1235 ("[A fiduciary is a] person having duty **created by his undertaking**, to act primarily for another's benefit in **matters connected with such undertaking**.")(emphasis added).

In *Huston*, the plaintiff—whose case had been dismissed on the pleadings—argued on appeal that he had pleaded "sufficient, operative facts to support recovery under his claims that a doctor, . . . [has] a fiduciary duty to submit claims to an insurance company when he promises to do so." *Huston*, 6th Dist. Erie No. E-09-13, 2009-Ohio-5880, ¶ 16 (2009). While recognizing that a physician owes a fiduciary duty to their patients with respect to diagnosing and treating

diseases and injuries, the Sixth District held that this duty does not extend beyond the medical relationship:

> A physician undisputedly owes a fiduciary duty to his or her patient with respect to diagnosing and treating diseases and injuries. **Appellants, however, direct us to no authority that such a duty extends beyond the medical relationship.** Consequently, appellants' claim premised on a fiduciary duty fails as a matter of law.

Id. (citations omitted)(emphasis added).

Likewise, Plaintiffs are claiming that Floros had a fiduciary duty to disclose any self-dealings he had with a law firm. A law firm referral has nothing to do with chiropractic treatment. Just as in *Huston*, Plaintiffs are trying to extend the fiduciary duty beyond the clinical relationship. And as in *Huston*, Plaintiffs cannot point to any cases in Ohio where the courts extended a physician's duties beyond the scope of the medical relationship.[3] For these reasons, Plaintiffs' breach of fiduciary duty claim against Floros fails as a matter of law.

2. If Floros' failure to disclose a financial referral relationship with KNR was in the scope of clinical relations, then Plaintiffs' claim would still fail as a medical claim under R.C. 2305.113.

If Plaintiffs try to make the argument that Floros' financial dealings with a law firm affected the treatment he provided his clients, then Plaintiffs' claim would be considered a "medical claim" under R.C. 2305.113, which states that a medical claim includes "chiropractic claims":

> "Chiropractic claim" means any claim that is asserted in any civil action against a chiropractor, or against any employee or agent of a chiropractor, and that arises out of the chiropractic diagnosis, care, or treatment of any person.

[3] In their complaint, Plaintiffs cite *In re: Binder*, 137 Ohio St. 26 (1940) and *Myer v. Preferred Credit*, 117 Ohio Misc. 2d 8, 9, 2001-Ohio-4190, ¶ 23, 766 N.E.2d 612 (C.P. 2001) in support of their breach of fiduciary duty and unjust enrichment allegations. *In re: Binder* concerned duties owed by a trustee under an express testamentary trust subject to probate court supervision. *Myer* concerned fiduciary duties of a mortgage broker. As discussed above, Floros is a chiropractor and Ohio law imposes on him no fiduciary duty extending beyond his clinical decisions in treating patients.

> "Chiropractic claim" includes derivative claims for relief that arise from the chiropractic diagnosis, care, or treatment of a person.

If this were a medical claim, then Plaintiffs would have to file an affidavit of merit with their complaint under Civ. R. 10(D)(2).[4] Plaintiffs have failed to so here.

Likewise, R.C. 2305.113 provides that medical claims are subject to a one-year statute of limitations, with absolute bar on medical claims more than four-years after the act or omission occurred. As a result, both claims for Plaintiffs Reid (treatment in 2016) and Norris (treatment in 2013-2014) would be time barred. FAC, ¶¶ 23-24, 54, Ex. D.

Thus, even if Floros' failure to disclose a financial referral relationship with KNR was in the scope of clinical relations with Plaintiff, the claim would still fail as a medical claim because it was filed without an affidavit merit and otherwise time barred under R.C. 2305.113.

C. Unjust Enrichment

Plaintiffs' unjust enrichment claim alleges that Plaintiffs "unwittingly" allowed KNR to "deduct and pay a narrative fee" to Floros without knowledge of the quid pro quo relationship he had with KNR. FAC, ¶¶ 253-257. Plaintiffs characterize the narrative fee as a "substantial benefit to Defendant Floros," the retention of which would be "unjust and inequitable." *Id.*, Plaintiffs also allege that KNR paid a "narrative fee' to Floros for every referred client. *Id.*, ¶¶ 64, 72.

A claim for unjust enrichment does not apply to the alleged circumstances here. Unjust enrichment is a quasi-contractual claim, in which each of these elements must be satisfied: "(1) a

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[4] Under Civ. R. 10(D)(2), a party must also file affidavit of merit when they file a medical liability lawsuit in Ohio. The required affidavit must include statements that the affiant: (1) has reviewed all medical records reasonably available, (2) is familiar with the applicable standard of care, and (3) finds that the defendants breached the standard of care and caused the plaintiff's injury.

benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *See Poston on behalf of Poston v. Shelby- Love*, 8th Dist. Cuyahoga No. 104969, 2017-Ohio-6980, ¶ 20. The Ohio Supreme Court has held that the purpose of an unjust enrichment claim "is not to compensate the plaintiff for any loss or damage suffered by him but to compensate him for the benefit he has conferred on the defendant." *Johnson v. Microsoft Corp.,* 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 21; *see also In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litigation*, 684 F. Supp. 2d 942 (N.D.Ohio 2009)("[F]or a plaintiff to confer a benefit on a defendant, an economic transaction must exist between the parties"); *Eisenberg v. Anheuser-Busch, Inc*., N.D.Ohio No. 1:04 CV 1081, 2006 U.S. Dist. LEXIS 4058 (Feb. 1, 2006); *Somasundaram v. Kent State Univ*., 10th Dist. Franklin No. 13AP-785, 2014-Ohio-1029, ¶¶ 15-16; *Robinson v. Vehicle Acceptance Corp.*, 8th Dist. Cuyahoga No. 105006, 2017-Ohio- 6886, ¶¶ 22-23.

In *Johnson*, the Ohio Supreme Court held that a plaintiff who had purchased a personal computer from a retailer could not maintain an unjust enrichment claim against software-maker Microsoft. 106 Ohio St.3d 278, 286. The Ohio Supreme Court first noted "that an indirect purchaser cannot assert a common-law claim for restitution and unjust enrichment against a defendant without establishing that a benefit had been conferred upon that defendant by the purchaser." *Id*. The Ohio Supreme Court thus held that "no economic transaction occurred between Johnson and Microsoft, and, therefore, Johnson cannot establish that Microsoft retained any benefit to which it is not justly entitled." *Id.* (internal quotations omitted).

Plaintiffs' unjust enrichment claim against Floros fails at the first "benefit" element. There is no competent (non-conclusory) allegation to support a claim that Plaintiffs conferred a

benefit on Floros for which they anticipated being compensated. The fees collected by Floros came about because of an agreement with KNR, not the patient. KNR agreed to pay Floros for the narrative report even if KNR did not recover a settlement on their client's cases. FAC ¶¶ 64, 72, Ex. D. The only benefit Floros received is for the narrative fee, which he earned by generating the report under an agreement solely with KNR.

Thus, Plaintiffs do not seek compensation for a benefit they conferred on Floros. They seek forfeiture of the amounts KNR paid him for his reports. And just as in *Johnston*, Plaintiffs here cannot establish a transaction between them and Floros for the narrative fee, since Plaintiffs' agreement to pay the narrative fee was with KNR only.

Plaintiffs' unjust enrichment claim also fails with second "knowledge" element. As mentioned above, Floros received the narrative fee payment from KNR, no matter if a client settled their case with KNR. *Id*. Floros, therefore, was without knowledge of whether KNR deducted the narrative fee from their client's settlement.

Plaintiffs also fail to make any non-conclusory allegations that Floros personally knew that the narrative reports he produced were of no value to KNR's clients. Instead, Plaintiffs rely solely on the allegations of a former attorney for KNR, Gary Petti, who alleged that there are times when narrative reports are useful. *Id*., ¶73. Unlike Petti, Floros is not an attorney. Floros does not negotiate with adjusters. Floros, therefore, should not be expected to know whether his narrative reports were of value to attorneys.

Lastly, Plaintiffs fail with third element on whether it would be unjust for Floros to retain a narrative fee on the reports he produced for KNR. The basis of Plaintiffs' allegation that Floros was unjustly paid a narrative fee is that he breached his fiduciary duty in failing to disclose a kickback relationship he had with KNR. As discussed earlier, Floros does not have a fiduciary

duty to his patients to disclose financial incentives he may have with a law firm, since it outside the scope of his clinical relationship. Floros, therefore, breached no fiduciary duty to his patients. Floros also produce the narrative reports based solely on an agreement between him and KNR, without regard to whether KNR would deduct it from their client's settlement. As a result, any dispute over KNR deducting the narrative fee from their clients' settlement is between KNR and their clients.

In sum, Plaintiffs cannot satisfy any of the elements required to prove an unjust enrichment claim. As a result, Plaintiffs' unjust enrichment claims against Floros fail as a matter of law and should be dismissed.

III. Conclusion

For the reasons stated above, Floros requests that this Court dismiss Plaintiffs' breach of fiduciary claim (Count 5) and unjust enrichment claim (Count 6) against Floros.

Respectfully submitted,

_/s/ Shaun H. Kedir_____________

Shaun H. Kedir (#0082828)
KEDIR LAW OFFICES LLC
1400 Rockefeller Building
614 West Superior Avenue
Cleveland, Ohio 44113
Phone: (216) 696-2852
Fax: (216) 696-3177
shaunkedir@kedirlaw.com
Counsel for Defendant Minas Floros

CERTIFICATE OF SERVICE

Counsel served a copy of Defendant Floros' Motion to Dismiss electronically on this 12th day of December, 2018. The parties will receive notice of this filing Notice of this filing by operation of the Court's electronic filing system.

/s/ Shaun H. Kedir____________
Shaun H. Kedir (#0082828)