IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,

Plaintiffs,

v.

KISLING, NESTICO & REDICK, LLC, et al.,

Defendants.

Case No. CV-2016-09-3928

Judge James Brogan

DR. SAM GHOUBRIAL'S REPLY IN SUPPORT OF HIS MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO CIV.R.12(C)

Plaintiffs' Memorandum in Opposition to Defendant Ghoubrial's Motion for Judgment on the Pleadings ("Plaintiffs' Opposition") demonstrates precisely why Dr. Ghoubrial's Motion for Judgment on the Pleadings should be granted. Despite Plaintiffs' transparent endeavor to spin their medical claims into claims for fraud and breach of fiduciary duty in a desperate attempt to circumvent the applicable statute of limitations for medical claims, Plaintiffs' claims against Dr. Ghoubrial arise out of his care and treatment of Plaintiffs and are therefore "medical claims" under R.C. § 2305.113. Because Plaintiffs' claims against Dr. Ghoubrial were filed over four years after the medical care and treatment was provided, Plaintiffs' claims are time-barred and Dr. Ghoubrial is entitled to judgment as a matter of law.

Plaintiffs correctly state "medical claims" include "any claim that is asserted in any civil claim against a physician… that arises out of the medical diagnosis, care, or treatment of any person." R.C. § 2305.113E(3); *See* Plaintiffs' Opposition, pg. 6. Plaintiffs are also correct in that "medical diagnosis" and "treatment" are terms of art under the statute and "relate to the identification and alleviation of a physical or mental illness, disease or defect." *See* Plaintiffs' Opposition, pg. 6. Likewise, "care" means "the prevention or alleviation of a physical or mental defect or illness." R.C. § 2305.113; *See* Plaintiffs' Opposition, pg. 6. As Dr. Ghoubrial's treatment

of the Plaintiffs fell squarely within these definitions, Plaintiffs' claims against him are clearly "medical claims" that are time-barred.[1]

Plaintiffs rely primarily on *Gaines v. Preterm-Cleveland, Inc*., 33 Ohio St.3d 54, 514 N.E.2d 709 (1987) and its progeny for the proposition their claims herein are separate and distinct from any medical claim. However, Plaintiffs' representation of and reliance upon the holding in *Gains* is misguided at best and intentionally misleading at worst. *Gains*, and the cases that follow it, are distinguishable because all involved situations where the defendant medical provider knowingly lied to the plaintiff patient about medical procedures and/or where the defendant providers took affirmative steps to cover up their own medical malpractice. As no such conduct is alleged by the Plaintiffs herein, Plaintiffs claims are "medical claims" under R.C. § 2305.113 and are time-barred.

In *Gains*, the defendant doctor expressly told the plaintiff patient he had removed her IUD when in fact he had not. *Gains*, 33 Ohio St.3d 54. The Gains Court held "a physician's knowing misrepresentation of a material fact concerning a patient's condition, on which the patient justifiably relies to his determent, may give rise to a cause of action in fraud independent from an action in medical malpractice". *Gains*, supra, at ¶ 1 of the syllabus. The *Gains* Court did not address the physician's charges for the services rendered nor did it even suggest that a physician's alleged omissions could give rise to a cause of action sounding in fraud of breach of fiduciary duty. Tellingly, Plaintiffs have not cited a single Ohio case that even suggests the allegations against Dr. Ghoubrial are anything but medical claims because no such cases exist.

This is not a case where it is alleged that Dr. Ghoubrial made a "knowing misrepresentation of a material fact concerning a patient's condition" as was the case in *Gains*. *See* Plaintiffs'

[1] As Plaintiffs agree that "medical claims" would be time-barred it is no surprise they attempt to circumvent the statute of limitations by arguing the claims actually sound in fraud and/or breach of fiduciary duty.

Opposition at pg. 6. On the contrary, here Plaintiffs allege only that Dr. Ghoubrial breached some non-existent duty to inform Plaintiffs of the charges associated with his care and/or inform them the care was allegedly available elsewhere at a better price. Of course, Plaintiffs do not and cannot cite a single case or legal authority establishing such a duty or supporting their spurious position that violating this non-existent duty gives rise to a cause of action sounding in anything other than malpractice.

The only thing Plaintiffs cite in support of their position that Dr. Ghoubrial had a fiduciary duty to disclose the charges for the medical services rendered in advance of providing those services is a 1999 article included in the Annals of Internal Medicine titled "Selling Products Out of the Office." *See* Plaintiffs' Opposition at pg. 13. However, this one article, in and of itself, does not create a legal duty that otherwise does not exist in Ohio and it certainly is insufficient to convert medical claims arising out of Dr. Ghoubrial's care and treatment of the Plaintiffs into anything other than medical claims. Not surprisingly, all Ohio cases cited by Plaintiffs in support of their fiduciary duty argument relate to non-medical professional relationships. There is no Ohio law that supports their position.[2]

Plaintiffs attempt to square their circular argument by stating they have not alleged a "medical" mistake against Dr. Ghoubrial or alleged that he violated "some professional standard of care". *See* Plaintiffs' Opposition at pp. 1, 5. Plaintiffs' intentional failure to allege a medical mistake or deviation from the applicable standard of care notwithstanding, Plaintiffs cannot run from the fact that the administration of trigger point injections and the prescribing of TENS Units necessarily flows from Dr. Ghoubrial's care and treatment of the Plaintiffs. Both the trigger point injections and

[2] Plaintiffs cite to *Prysock v. Ohio State Univ. Med. Ctr.*, 10th Dist. Franklin No. 01AP-1131, 2002-Ohio-2811 is yet another attempt to mislead this Court. In *Prysock* the issue was the medical provider's failure to protect the patient's confidentiality rights.

the TENS Units were given for the specific purpose of alleviating a physical injury or defect. It was "care" provided by Dr. Ghoubrial as defined in R.C. § 2305.113. As such, Plaintiffs' claims are "medical claims" no matter how Plaintiffs choose to label them.

Finally, Plaintiffs attempt to downplay the impact of the recent Hamilton County case of *Scott v. Durrani*, et al., Case No. A150865 (decided October 30, 2018), as well as the prior *Durrani* cases. However, Plaintiffs cannot run from the impact of the *Durrani* decisions nor can Plaintiffs hide from the fact that the rationale behind the *Durrani* decisions applies squarely in this case. In all of the *Durrani* cases, including the *Scott* case, plaintiffs alleged Dr. Durrani committed fraud by performing numerous unnecessary surgeries while also failing to disclose the use of certain harmful substances in violation of FDA regulations. Despite the allegations in the *Durrani* cases that are clearly more egregious than the allegations levied against Dr. Ghoubrial herein, all of the *Durrani* cases were found to be disguised medical claims that were dismissed on statute of limitations grounds.[3]

Here, Plaintiffs allege Dr. Ghoubrial administered unnecessary trigger point injections and prescribed unnecessary TENS Units while failing to disclose the cost of those treatments, or that those treatments could allegedly be obtained elsewhere at a lower cost. The nature of the allegations, administering unnecessary treatment and failing to disclose information to the patients, are nearly identical to those raised in the *Durrani* cases. As in *Durrani*, the claims herein are poorly disguised medical claims as all allegations directly arise from Dr. Ghoubrial's medical care and treatment of the Plaintiffs. Clever pleading aside, it is the nature of the allegations that controls for statute of limitations purposes. Because the Fifth Amended Complaint was filed more than four years after Dr.

[3] Shockingly, Plaintiffs state the *Durrani* cases out of Hamilton County, Ohio are not binding on this Court while at the same time Plaintiffs continue to rely primarily on cases from states other than Ohio as if those cases are binding. *See* Plaintiffs' Opposition at pg. 9.

Ghoubrial last provided treatment to any of the named Plaintiffs, Plaintiffs' claims are time-barred and Dr. Ghoubrial is entitled to judgment as a matter of law.

Plaintiffs' claims against Dr. Ghoubrial are medical claims by definition. Plaintiffs cannot convert these medical claims into claims for fraud, breach of fiduciary duty, or anything other than medical claims just by saying the claims are not medical claims. If that were the case statutes of limitation would become meaningless and disgruntled patients could sue their medical providers twenty years after the medical treatment at issue. Plaintiffs cannot now be permitted to circumvent their failure to bring these claims within the applicable statute of limitations through the use of deceptive labels. Because Plaintiffs' claims are medical claims that were filed more than four years after the treatment at issue was rendered, Plaintiffs' claims are time-barred and Dr. Ghoubrial's Motion for Judgment on the Pleadings should be granted.

Respectfully Submitted,

/s/ *Bradley J. Barmen*
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CERTIFICATE OF SERVICE

The foregoing Defendant Sam Ghoubrial, M.D.'s Reply in Support of his Motion for Judgment on the Pleadings has been filed on this 11th day of March, 2019 using the Court's electronic filing system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ *Bradley J Barmen*
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