

**IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO**

<p>MEMBER WILLIAMS, <i>et al.</i>,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>KISLING, NESTICO &amp; REDICK, LLC, <i>et al.</i>,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. 2016-CV-09-3928</p> <p>Judge James Brogan</p> <p><b>Plaintiffs’ Motion for Leave to File, <i>Instante</i>, a Sur-reply in Opposition to Defendant Ghoubrial’s Motion for Judgment on the Pleadings</b></p>
---	--

In Defendant Ghoubrial’s reply brief he finally, for the first time, acknowledges The Supreme Court of Ohio’s controlling decision in *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 56, 514 N.E.2d 709 (1987) even though Plaintiffs have cited this case in several related briefs to date. Plaintiffs thus seek leave to file, *instante*, the below sur-reply to briefly address Ghoubrial’s mistreatment of *Gaines*, which holds that a physician’s “knowing misrepresentation of a material fact concerning a patient’s condition ... may give rise to a cause of action in fraud independent from an action in medical malpractice,” where the “misstatement ... [i]s prompted not by medical concerns but by motivations unrelated and even antithetical to [the patient’s] physical well-being.” *Id.* at 56.

On reply, Ghoubrial tries to distinguish *Gaines* by claiming that it only allows for a separate fraud claim in “situations where the defendant medical provider knowingly lied to the plaintiff patient about medical procedures and/or took affirmative steps to cover up their own medical malpractice.” Reply at 2. Thus, Ghoubrial argues, a physician is immune from fraud-based claims under Ohio law where, as alleged here, he intentionally engages in a scheme to enrich himself—by taking advantage of his position of influence over thousands of captive and socioeconomically disadvantaged patients, who were directed by a personal-injury law firm to accept his systematically overpriced treatment, and who were pressured by the law firm and physician to forgo coverage and

scrutiny over such charges that would otherwise have been provided by the patients' health-insurance carriers (Fifth Amended Complaint ¶¶ 61–63, 82–89, 93–102)—as long as the physician didn't make any affirmative misrepresentations to the patients in the process.

Such an inequitable result would be contrary to common sense and Ohio law, including *Gaines*, which, (1) confirms the well-established principle that an affirmative misrepresentation is not necessary to establish a fraud claim where the defendant conceals a material fact that he had a duty to disclose, and (2) expressly “recognize[s] that, due to the special relationship of physician to patient, there would also be a duty to disclose to a patient a known material fact concerning the patient's medical condition.” *Gaines*, 33 Ohio St.3d 54 at 55, 63, fn1. This special relationship would plainly require disclosure of the facts material to the price-gouging scheme alleged here, and, more to the point, that a physician not take part in it in the first place, as confirmed by the well-established prohibition against self-dealing by fiduciaries.

Ghoubrial also misleads the Court by (1) presenting an oversimplified summary of Plaintiffs' “position” as being that Ghoubrial “had a fiduciary duty to disclose the charges for the medical services rendered,” then (2) criticizing Plaintiffs for only citing a single article from a medical journal in support of this “position.” Reply at 3. Plaintiffs' position is not, however, simply that physicians have a general duty to disclose the costs or charges of medical services, not least because in many if not the great majority of instances of treatment a health-insurance provider is responsible for paying the patient's bills at fixed or highly scrutinized rates. The point, rather, is that physicians have a duty to avoid abusing their position of authority to take financial advantage of their patients, and Plaintiffs have cited many cases to support this sound principle. *See* Pls' Opp. at 5–8, 11–13. Here, the alleged failure to disclose his financial interests in the treatment delivered—particularly given the availability of less-expensive modes and sources of treatment, and in the absence of health-insurance coverage—is only part of the larger price-gouging scheme alleged.

Which is to reiterate that this case is not about whether a physician negligently administered treatment, or failed to advise patients of the medical risks involved with it. It is about whether Ghoubrial intentionally sought to take advantage of KNR clients financially by participating in the alleged scheme, “prompted not by medical concerns but by motivations unrelated and even antithetical to appellant’s physical well-being.” *Gaines*, 33 Ohio St.3d 54, 56. *See also Baruno v. Slane*, No. FST-CV- 085008010S, 2013 WL 3958359 at \*2, 2013 Conn. Super. LEXIS 1578, \*5 (Conn App. July 16, 2013) (“Professional negligence implicates a duty of care, while breach of fiduciary duty implicates a duty of loyalty and honesty.”); *Gaines* leaves no doubt as to a physician’s duty to avoid such self-dealing against his patients, as confirmed by the numerous additional authorities relied on by the Plaintiffs, who are entitled to and will prove that Ghoubrial breached this duty in a manner, as alleged in the Fifth Amended Complaint and summarized above, that is inimical to the most basic notions of justice and, accordingly, violates Ohio law.

Respectfully submitted,

/s/ Peter Pattakos

Peter Pattakos (0082884)  
Rachel Hazelet (0097855)  
THE PATTAKOS LAW FIRM LLC  
101 Ghent Road  
Fairlawn, Ohio 44333  
Phone: 330.836.8533  
Fax: 330.836.8536  
peter@pattakoslaw.com  
dwilliams@pattakoslaw.com  
rhazelet@pattakoslaw.com

/s/ Joshua R. Cohen

Joshua R. Cohen (0032368)  
Ellen Kramer (0055552)  
COHEN ROSENTHAL & KRAMER LLP  
The Hoyt Block Building, Suite 400  
Cleveland, Ohio 44113  
Phone: 216.781.7956  
Fax: 216.781.8061  
jcohen@crklaw.com

*Attorneys for Plaintiffs*

### Certificate of Service

The foregoing document was filed on March 15, 2019, using the Court's electronic-filing system, which will serve copies on all necessary parties.

/s/ Peter Pattakos  
*Attorney for Plaintiffs*