

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 Motion for  
Clarification of the April 10, 2019  
Order**

Now comes Defendant Dr. Sam Ghoubrial ("Dr. Ghoubrial"), by and through counsel, and respectfully requests clarification of the Court's April 10, 2019, Order overruling Dr. Ghoubrial's Motion for Judgment on the Pleadings. Considering it is undisputed Plaintiffs are alleging their claims against Dr. Ghoubrial arise from the existence of a patient/physician relationship, yet the Court has determined Plaintiffs' claims are "garden variety fraud," clarification is necessary. Specifically, Dr. Ghoubrial requests clarification as to the Court's language in the Order, which states:

This allegation is not malpractice, this is your everyday, garden variety fraud. (footnote omitted). *See* April 10, 2019, Order, page 5 (attached as Exhibit A).

If Plaintiffs' claims against Dr. Ghoubrial arise by way of common law principles applicable to all business relationships, rather than the physician/patient relationship, as appears to be the determination from this Honorable Court, clarification is necessary in order for Dr. Ghoubrial to proceed in defending this case. In short, if Plaintiffs' claims against Dr. Ghoubrial do not stem from the physician/patient relationship, then no claim for breach of fiduciary duty can exist against Dr. Ghoubrial, as such a claim cannot extend beyond the medical relationship physician/patient. *See N.*

*Ohio Med. Specialists, LLC v. Huston*, 6<sup>th</sup> Dist. Erie No. E-09-13. 2009-Ohio-5880, ¶ 16; *Tracy v. Merrell Dow Pharmaceuticals*, 58 Ohio St.3d 147, 150, 569 N.E. 2d 875 (1991).

Thus, Dr. Ghoubrial respectfully requests clarification whether this case involves a valid medical claim against Dr. Ghoubrial. If the Court determines a valid medical claim exists, Dr. Ghoubrial respectfully requests clarification as to:

- 1) The extent to which such medical claims are barred by the applicable statute of limitations and Plaintiffs' failure to provide required affidavits of merit; and
- 2) Whether the "garden variety" fraud claim arises out of common law principles or through a specific duty owed under Dr. Ghoubrial's physician/patient relationship with the Plaintiffs.

Further, if the Court determines Plaintiffs' claims against Dr. Ghoubrial are based in common law fraud, rather than a fraud case arising out of the medical treatment/care of Plaintiffs, then Dr. Ghoubrial respectfully requests additional clarification on whether the Court:

- (1) intended to hold Plaintiffs' claim for breach of fiduciary duty survives; and
- (2) whether Plaintiffs' fiduciary duty claim exists separate and apart from the physician/patient relationship.

Wherefore, as clarification is necessary in order for Dr. Ghoubrial to continue to defend himself against Plaintiffs' baseless claims, Dr. Ghoubrial respectfully requests this Court provide some clarification as to the language contained in the April 10, 2019, Order denying Dr. Ghoubrial's Motion for Judgment on the Pleadings.

Respectfully Submitted,

/s/Bradley J. Barmen

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing was filed electronically with the Court and sent via email to the below parties on this 18<sup>th</sup> day of April, 2019. The parties, through counsel, may also access this document through the Court's electronic docket system:

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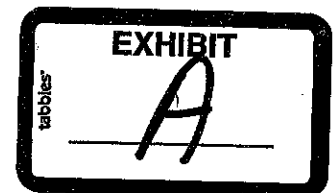
IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT

MEMBER WILLIAMS, et al.	)	CASE NO.: CV-2016-09-3928
	)	
Plaintiffs	)	JUDGE JAMES A. BROGAN
-vs-	)	
	)	
KISLING NESTICO & REDICK LLC, et al.	)	<u>DECISION</u>
	)	
Defendants	)	

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Defendant Sam Ghoubrial, M.D. ("Dr. Ghoubrial") moved the Court for judgment on the pleadings in his favor on Plaintiff's claims against Dr. Ghoubrial pursuant to Civ.R. 12(C) for the following reasons:

- (1) Each of putative Classes D and E's claims against Dr. Ghoubrial arise out of the "medical diagnosis, care, or treatment" Dr. Ghoubrial provided to Plaintiffs and are therefore "medical claims" governed by R.C. 2305.113, thus subject to a one-year statute of limitation. It is undisputed that Dr. Ghoubrial's purported medical treatment of Ms. Norris concluded in 2014. It is likewise undisputed that Dr. Ghoubrial's medical treatment of Mr. Harbour concluded in 2012. Therefore, all medical claims are barred by the applicable statute of limitation.
- (2) Additionally, Plaintiff's medical claims fail as a matter of law, as no Plaintiff has filed an Affidavit of Merit pursuant to Civ.R. 10(D)(2) or a Motion to Extend the time to file such Affidavit of Merit, which is a prerequisite to filing a "medical claim."
- (3) Moreover, putative Classes D and E's claims against Dr. Ghoubrial for breach of fiduciary duty fail as a matter of law because Dr. Ghoubrial had no fiduciary duty to disclose any alleged financial interest in administering such treatment, as a purported financial interest is unrelated to a patient's medical treatment.
- (4) Finally, to the extent that Putative Classes D and E's claims against Dr. Ghoubrial for unjust enrichment and unconscionable contract are not time-barred "medical claims," the claims still fail as a matter of law because both putative classes fail to plead non-conclusory facts that could establish that Dr. Ghoubrial retained any unjust benefit or forced Plaintiffs to enter into an unreasonable contract. Ohio law does not prohibit physicians from profiting from the sale of medical supplies and does not require physicians to inform patients of an average market price for such medical treatment and/or equipment.



Dr. Ghoubrial states his case as follows:

Plaintiffs have filed putative class claims against Dr. Ghoubrial on behalf of Monique Norris and Richard Harbour. Plaintiffs Norris and Harbour claim to represent a sub-class comprising “[a]ll current and former KNR clients who had fees for medical equipment manufactured or distributed by Tritec deducted from their KNR settlement proceeds.” Fifth Amended Complaint, Class D, ¶¶259-288. The basis for putative Class D’s claims is that Dr. Ghoubrial induced Plaintiffs to pay for ineffective medical equipment (TENS Units) at a high price without disclosing his financial interest in the transactions. *Id.*, *Id.* at ¶94. Putative Class D relies on four separate theories of liability: fraud, breach of fiduciary duty, unjust enrichment, and unconscionable contract. *Id.*

Additionally, Plaintiff Harbour also claims to represent a sub-class comprised of “all current and former KNR clients who had fees for injections from Dr. Ghoubrial or his employees deducted from their settlement proceeds.” Fifth Amended Complaint, Class E, ¶¶290-321. The basis for putative Class E’s claims similarly alleged that Dr. Ghoubrial induced Plaintiffs to pay for unnecessary and/or ineffective medical treatment (trigger-point injections) at a high price without disclosing his financial interest in the transactions. *Id.* Specifically, Plaintiffs allege that Dr. Ghoubrial has a practice of “inflating medical bills by coercively administering as many extremely overpriced injections as KNR clients will let him get away with.” Putative Class E relies on the same four theories of liability: fraud, breach of fiduciary duty, unjust enrichment, and unconscionable contract.

Importantly, 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.” See Fifth Amended Complaint, EX. B. Thus, based on this contractual language, Plaintiff agreed in writing that KNR could deduct from their settlement proceeds any unpaid balance due to doctors for their care and treatment.

Plaintiffs also signed a settlement memorandum with KNR showing that a portion of the settlement proceeds would be deducted and paid to Dr. Ghoubrial for unpaid medical treatment. See Fifth Amended Complaint, EXS. D and E. The settlement memorandum states that the client: approved the settlement and distribution of proceeds, reviewed the distribution information, and acknowledged that it accurately reflects all outstanding expenses associated with their personal injury claim. *Id.*

Defendant Ghoubrial argues that Plaintiffs' Fifth Amended Complaint, although crafted to allege fraud, breach of fiduciary duty, unjust enrichment, and unconscionable contract on behalf of proposed Classes D and E, is simply a medical malpractice claim disguised to avoid the applicable statute of limitations and statute of repose. R.C. 2305.113(E)(3) broadly defines "medical claim" as "any claim that is asserted in any civil action against a physician...and that arises out of the medical diagnosis, care, or treatment of any person." Dr. Ghoubrial argues that malpractice by any other name still constitutes malpractice, citing *Amadasu v. O'Neal*, 176 Ohio App.3d 217, 222 (1st Dist. Hamilton Co. 2008). He claims that Ms. Norris's and Mr. Harbour's claims are time barred by R.C. 2305.113(A)'s one-year statute of limitations because the claims arise out of their medical treatment in 2013 and 2014 (and Mr. Harbour treated with Dr. Ghoubrial in 2012). Dr. Ghoubrial also argues that the Plaintiffs claims are barred by Ohio Statute of Repose for medical malpractice claims, R.C. 2305.113(C) a four-year statute.

Finally, Dr. Ghoubrial argues that the Plaintiffs disguised medical claims for breach of fiduciary duty, unjust enrichment and unconscionable contract have no basis in law. Simply put, Dr. Ghoubrial argues Plaintiffs have no grounds to bring claims under various theories of liability that are premised on his alleged failure to inform his patients of his profit margin on the sale of medical equipment or medical treatment. Dr. Ghoubrial argues that no law exists to hold a doctor liable for failing to communicate profit margins to patients and that it is absurd to argue that a physician has a duty to inform a patient that a specific piece of medical equipment or treatment may be cheaper elsewhere.

Dr. Ghoubrial argues that although the Ohio Supreme Court has supported the notion that a physician owes a fiduciary duty to his or her patient with respect to diagnosing and treating diseases and injuries (see *Tracy v. Merrell Dow Pharmaceuticals*, 58 Ohio St.3d 147, 150, 569 N.E.2d 875 (1991)), no Ohio court has gone to the extent of extending this duty beyond the medical relationship and into the business arena. The Sixth District opined on this issue, holding that a physician's fiduciary 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. In *Huston*, the Sixth District held:

A physician undisputedly owes a fiduciary duty to his or her patient which respect to diagnosing and treating diseases and injuries. Appellant, however, directed 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.

Alternatively, to the extent Plaintiffs' claims rely on the allegation that Dr. Ghoumbrial's undisclosed financial interest affected the treatment he provided them, then the claims unequivocally fall under R.C. 2305.113's purview and are time-barred medical claims for the reasons stated above.

Lastly, Dr. Ghoumbrial argues Plaintiffs claims for unjust enrichment and unconscionable contract fail as a matter of law because each claim is premised on a non-existent fiduciary duty to disclose a referral relationship with KNR. Dr. Ghoumbrial also denies he had any fiduciary duty to disclose to his patients that they could obtain the TENS Units or trigger-point injections at a substantially reduced cost.

Plaintiffs argue that the claims against Dr. Ghoumbrial are not medical claims but are claims for fraud and breach of fiduciary duty to his patients. They assert that these claims charge Dr. Ghoumbrial with serially administering unnecessary procedures at drastically inflated prices and distributing medical equipment to them at astronomical markups. Plaintiffs also assert that Dr. Ghoumbrial conspired with KNR to launder the payments for the medical devices through deducting the amount from the gross total of the settlement proceeds with the tortfeasor. Plaintiffs also asserted that Dr. Ghoumbrial failed to disclose to the patients his financial interest in the recommendation that the patient pay the inflated price for the medical device. Further, Plaintiffs argue as follows:

In *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 514 N.E.2d 709 (1987), the defendant health-care provider informed the plaintiff that it had successfully removed an intrauterine device (IUD) when it in fact had failed to do so. *Id.* at 54. The Supreme Court of Ohio held that the defendant's conduct "was prompted not by medical concerns but by motivations unrelated and even antithetical to [the plaintiff's] well-being. *Id.* at 56. Under the circumstances, the plaintiff's fraud claim remained "separate and distinct" from any "medical claim" governed by the predecessor to R.C. 2305.011. *Id.*

Similarly, the Sixth Circuit applied *Gaines* in *Newberry v. Silverman*, 789 F.3d 636, 644 (6th Cir. 2015), where the plaintiff patient alleged that defendant doctor "'knew he had not completed the root canal,' but provided alternative diagnoses 'to hide the fact of [his] negligent performance of the root canal procedure,'" including by stating that "'there was no nerve in [the] tooth' that could be causing [the patient's] pain even though, according to the complaint, [defendant] was well-aware he had not completed the root canal." *Id.* The *Newberry* court followed *Gaines* in holding that these allegations supported a fraud claim separate and distinct from a "medical claim" under R.C. 2305.113, because they alleged a "knowing misrepresentation of material fact concerning a

patient's condition" that "appear[ed] to have been driven by 'motivations unrelated and even antithetical to [the patient's] physical well-being.'" *Id.* quoting *Gaines*, 514 N.E.2d 709 at 712-713. See also *Allinder v. Mt. Carmel Health*, 10th Dist. No. 93AP-156, 1994 WL 49792 at \*3 (10th Dist. Feb. 17, 1994) ("We conclude that because it is possible for a physician to violate his or her duty to protect the patient's confidentiality rights yet not violate his or her duty to provide competent diagnosis, medical care, or treatment to a patient, that these duties are independent from one another."); *Prysock v. Ohio State Univ. Med. Ctr.*, 10th Dist. Franklin No. 01AP-1131, 2002 Ohio 2811, ¶¶17-18 (finding that trial court erred in granting judgment to defendant under R.C. 2305.11 because plaintiff had "set forth an independent fraud claim separate and apart from her medical claim" where the "alleged failure to disclose the true name of the foreign object" left inside the plaintiff's body after a caesarian section "related to protecting the medical team that performed the [procedure]").

The Plaintiffs argue that Dr. Ghoubrial's attempts to distinguish *Gaines* by asserting that the holding only allows for a separate fraud claim in a situation where the defendant medical provider knowingly lied to the patient about medical procedures or took affirmative steps to cover up their own medical malpractice is not persuasive. This Court agrees with that argument.

Civ.R. 12(C) provides that "[a]fter the pleadings are closed but within such time are not to delay trial, any party may move for judgment on the pleadings." Judgment on the pleadings becomes appropriate where the court, after construing

the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true...finds beyond doubt, that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.

*Clardy v. Medina Twp. Bd. of Trustees*, 9th Dist. No. 17CA0075-M, 2018 Ohio 2545, ¶8, citing *State ex rel. Midwest Pride IV v. Pontius*, 75 Ohio St. 565, 570, 1996 Ohio 459, 664 N.E.2d 931.

Defendant Dr. Ghoubrial may have been operating within the appropriate standard of care in recommending that his patients have trigger-point injections or TENS Units to relieve their pain. It is quite another to grossly overcharge them for these devices knowing they placed their trust in him. This allegation is not malpractice; this is your everyday, garden variety fraud.<sup>1</sup> And, obviously there was no need for the Plaintiffs to provide an Affidavit of Merit on

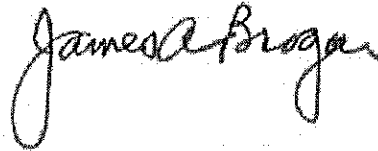
<sup>1</sup> The *Durani* cases cited in the briefing materials involve the issue of whether certain surgeries performed by Dr. Durani were necessary and whether certain medical substances used during surgery were harmful to the patient.



these claims and the Plaintiffs' claims for unjust enrichment, breach of fiduciary duty, and unconscionable contract survive the Defendant's motion as well.

Accordingly, Defendant Dr. Ghoubrial's Motion for Judgment on the Pleadings pursuant to Civ.R. 12(C) is OVERRULED.

IT IS SO ORDERED.



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JUDGE JAMES A. BROGAN  
Sitting by Assignment #18JA1214  
Pursuant to Art. IV, Sec. 6  
Ohio Constitution

THE CLERK SHALL SERVE ALL ATTORNEYS AND PARTIES OF RECORD