

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,)	Case No. 2016 09 3928
)	
Plaintiffs,)	Judge James Brogan
)	
v.)	
)	<u>SUPPLEMENT TO KNR DEFENDANTS'</u>
KISLING, NESTICO & REDICK, LLC, et al.,)	<u>BRIEF IN OPPOSITION TO PLAINTIFFS'</u>
)	<u>MOTION TO CERTIFY CLASS</u>
Defendants.)	
)	

I. INTRODUCTION

On July 26, 2019, this Court issued an Order permitting Plaintiffs to amend their complaint for a sixth time to assert a claim under R.C. 2923.34 as it relates to putative Class A. Plaintiffs have defined Class A as follows:

All current and former KNR clients who had deducted from their settlements any fees paid to Defendant Ghoubrial's personal-injury clinic for trigger-point injections, TENS units, back braces, Kenalog, or office visits, billed pursuant to the clinic's standard rates from the date of its founding in 2010 through the present.

(Plaintiffs' Mot. p. 44).

In allowing the amendment, the Court further permitted the parties to submit supplemental briefing on the new claim. (Order of July 26, 2019). The KNR Defendants submit the following supplemental brief pursuant to the Order and in response to Plaintiffs' supplemental brief filed on August 23, 2019.

II. LAW AND ARGUMENT

Class A does not meet the requirements of Civ.R. 23 regardless of the addition of a claim under R.C. 2923.34. Plaintiffs' Supplemental Brief fails to set forth how this additional claim alters the analysis of the predominance requirement necessary to certify Class A – a putative class that alleges the existence of a complex conspiracy involving multiple defendants purportedly designed to overcharge Plaintiffs for medical services. The addition of a claim

under R.C. 2923.34 does nothing to cure Plaintiffs' failure to identify a set of evidentiary facts that would establish the existence of the alleged conspiracy that affected each Class Member. Thus, the analysis set forth in KNR Defendants' Brief in Opposition to Class Certification with regard to Plaintiffs' own articulation of the "common issues" applies equally to a claim under R.C. 2923.34. (KNR Defendants' Brief in Opposition to Class Certification at pp. 14-50). Each "common issue" underscores the inability of Plaintiffs to establish that **each Class Member** was subjected to and/or harmed by the alleged wrongful conduct. In every instance, a jury would need to review the evidence associated with each individual Class Member. Such a proceeding is the antithesis of a class action.

As it relates specifically to R.C. 2923.34, Plaintiffs' supplemental brief incorrectly asserts that Plaintiffs' claim for monetary damages under the statute is somehow excepted from the requirements of Civ.R. 23 as it relates to the requirement that each class member suffer actual harm.¹ This is not the law, and the cases cited by Plaintiffs are either inapplicable or do not stand for the propositions Plaintiffs' claim.

Although Plaintiffs correctly note that the statute provides standing to an individual "who is injured or threatened with an injury," Plaintiffs in this case are individuals claiming they have suffered actual harm. Plaintiffs are **not** individuals who claim to be "threatened" with some imminent, future injury. "R.C. 2923.34 does not more specifically discuss or define how a person may be injured or threatened with injury by a violation of R.C. 2923.32. However, a reasonable construction requires that the claimant must show that he suffered personal or pecuniary loss as a result of the two or more incidents of corrupt activity that form the pattern required." *Crothers v. Pioneer Mut. Ins. Co.*, 2d Dist. Montgomery C.A. Case No. 13511, 1993 Ohio App. LEXIS 4988, at *6 (Oct. 12, 1993).

¹ "[A] civil claim under the OCPA does not require that a plaintiff have suffered 'direct injury.'" (Plaintiffs' Supplemental Brief at p.4.)

Plaintiffs' citations to *Schlenker Ents., LP v. Reese*, 3d Dist. Auglaize Nos. 2-10-16, 2-10-19, 2010-Ohio-5308, and *Samman v. Nukta*, 8th Dist. Cuyahoga No. 85739, 2005-Ohio-5444 are inapposite. In *Schlenker Ents., LP*, the court dismissed the plaintiff's OCPA claim. "Because he failed to show how he had been injured from the OCPA violations, the trial court was correct in dismissing his OCPA claims...for lack of standing." *Schlenker Ents., LP*, at ¶38. Likewise, in *Samman* the court upheld summary judgment on plaintiff's OCPA claim. "[Plaintiff] was not injured or threatened with injury by [defendant's] activity, so he cannot maintain a civil RICO claim on this basis." *Samman*, 2005-Ohio-5444, ¶ 26.

Plaintiffs' citation to *CSAHA/UHHS-Canton, Inc. v. Aultman Health Found.*, 5th Dist. Stark No. 2010CA00303, 2012-Ohio-897, is an outright fabrication of the reported opinion. In that case, a hospital sued competitors for violation of the OCPA. The case was not a class action, and the opinion thus says nothing about alleged corrupt activities that "impacted the class" as argued by Plaintiffs.

In re Community Bank of N. Virginia Mtge. Lending Practices Litigation, PNC Bank NA, 795 F.3d 380, 384 (3d Cir.2015) is not applicable to the claims asserted by Class A. Plaintiffs in that case claimed they were improperly charged a fee associated with loans. The claim was that the defendant performed no services at all in exchange for the fee. Here, Plaintiffs in Class A allege that the fees charged by Dr. Ghoumbrial were too high. They do not claim that Dr. Ghoumbrial failed to provide a back brace, or TENs unit, or trigger point injection paid for by any putative plaintiff. Thus, the *Community Bank* case has no bearing on certification of Plaintiffs' OCPA claim or any other claim by the putative members of Class A.

This is not a case involving some anticipated harm that may befall a putative plaintiff in the future. Thus, Plaintiffs here must show actual harm to prevail on a claim under the OCPA – just as they are required to show harm under any other theory recover as it relates to Class A. None of the cases cited by Plaintiffs support a different conclusion. The addition of the OCPA

claim does not operate as a magic wand to weaken the predominance requirement of Civ.R. 23 merely because it allows recovery for a person injured or *threatened with injury*.

For these reasons, and those set forth in KNR Defendants' Brief in Opposition to Class Certification, Class A fails to meet the requirements of Civ.R. 23 and Plaintiffs' Motion should be denied.

Respectfully submitted,

/s/ James M. Popson

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CERTIFICATE OF SERVICE

Pursuant to Civ.R. 5(B)(2)(f), the undersigned certifies that a copy of the foregoing *SUPPLEMENT TO KNR DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY CLASS* was filed electronically with the Court on this 9th day of September, 2019. The parties, through counsel, may access this document through the Court's electronic docket system.

/s/ James M. Popson

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