

## NINTH APPELLATE DISTRICT

Docketing Statement

Appeal No. \_\_\_\_\_

**A time-stamped copy of the final judgment being appealed must be attached to this statement.**

Trial Court Name Court of Common Pleas, Summit County, Ohio

Trial Court Caption Member Williams, et al.,  
(Name of first plaintiff)

versus

Kisling Nestico & Redick, LLC, et al.,  
(Name of first defendant)

Trial Court Case Number CV-2016-09-3928

Trial Court Judge James Brogan

Date of judgment appealed February 6, 2023.

Was the time to appeal extended by

App.R.4(B)? \_\_\_\_ Yes X No.

### CALENDAR DESIGNATION

THIS APPEAL SHOULD BE ASSIGNED TO:

X Regular Calendar.

\_\_\_\_ Accelerated Calendar. *See* Loc.R. 21.

\_\_\_\_ Expedited Calendar (generally for appeals involving termination of parental rights). *See* App.R. 11.2.

### THE RECORD

**Mark the paragraph that applies.**

**TO THE CLERK OF COURTS:** Please immediately assemble and transmit the record in this case. I certify that the paragraph I marked accurately describes the complete record to be filed:

1. \_\_\_\_ The record will consist of **ONLY** the original papers, exhibits, a certified copy of the docket and journal entries, and any transcripts of proceedings that were filed in the trial court prior to final judgment.
2. X The record will include the original papers and exhibits filed in the trial court, a certified copy of the docket and journal entries, and a full or partial transcript of proceedings prepared for this appeal by a court reporter appointed by the trial court, who I served with a praecipe that I also filed with this court. If only a partial transcript of proceedings is requested, see App.R. 9(B).
3. \_\_\_\_ The record will include the original papers and exhibits filed in the trial court and a certified copy of the docket and journal entries, and a statement of the evidence or proceedings pursuant to App.R. 9(C) or an agreed statement of the case pursuant to App.R. 9(D).
4. \_\_\_\_ The record will include the original papers and exhibits filed in the trial court and a certified copy of the docket and journal entries, and both a transcript of proceedings prepared by a court reporter appointed by the trial court and a statement of the evidence or case pursuant to App.R. 9(C) or (D). If only a partial transcript of proceedings is requested, see App.R. 9(B).

If you intend to rely upon a transcript of proceedings filed in an earlier appeal, you must seek permission from the court to supplement the record in this appeal with the transcript filed in the earlier appeal.

**A time-stamped copy of the final judgment being appealed must be attached to this statement.**  
**If the order appealed is not final and appealable under R.C. 2505.02, the Court must dismiss the appeal.**

**THE PARTIES**

Please provide the following information for **all** parties to the proceedings in the trial court.

**A party who files a notice of appeal is an appellant. A party who would be adversely affected if the judgment below is reversed should be designated as an appellee.** All other parties to the action below should retain their trial court designation (plaintiff, defendant, third-party plaintiff, third-party defendant, petitioner, respondent, etc). **See Local Rule 3.**

If a party was not represented by counsel in the proceedings below, please provide the address and phone number of the party. If there are additional parties and/or attorneys, please copy this page, complete the information for the additional parties, and attach it to this statement. **Appellant must attach a copy of any order that resolved a claim against any of the parties.**

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Was a stay requested in the trial court? ☐ Yes ☒ No

If a stay was requested, how did the trial court rule? ☐ Granted ☐ Denied ☐ Pending

If this case has previously been before this Court, list prior appellate case number(s): \_\_\_\_\_

List case names and numbers of cases pending in this court that involve the same transaction or controversy involved in this appeal: \_\_\_\_\_

Probable issues for appeal: Whether the trial court abused its discretion in certifying a class action.

**CRIMINAL CASE**

☐ Misdemeanor ☐ Felony  
☐ Trial ☐ Guilty/No contest plea

Charges

Sentence

Type of Appeal: ☐ Defendant's Appeal as of Right ☐ State's Appeal as of Right  
☐ Defendant's Appeal by Leave of Court ☐ State's Appeal by Leave of Court

**CIVIL CASE**

Type of action in trial court? Legal malpractice, fraud, breach of contract, unjust enrichment

Did the judgment dispose of all claims by and against all parties? ☐ Yes ☒ No

If not, is there a determination that there is "no just reason for delay?" Civ.R. 54(B). ☒ Yes ☐ No

Have the parties previously participated in mediation of this dispute? ☒ Yes ☐ No

Would a mediation conference assist in the resolution of this matter? ☐ Yes ☒ No ☐ Maybe

Must this case be expedited as being one of the following types of cases? ☐ Yes ☒ No

- ☐ App.R. 11.2(B) or (C) appeals (abortion without parental consent, adoption, and parental rights)  
☐ App.R. 11.2(D) appeals (dependent, abused, neglected, unruly, or delinquent child appeals)  
☐ Appeal under determination of local fiscal emergency brought by municipal corporation  
☐ Election contests as provided in R.C. 3515.08

I CERTIFY THAT THE ABOVE INFORMATION IS ACCURATE TO THE BEST OF MY KNOWLEDGE AND THAT I HAVE ATTACHED A COPY OF THE FINAL JUDGMENT FROM WHICH THIS APPEAL IS TAKEN.

/s Bradley J. Barmen (0076515)

Signature of Counsel (or party if not represented by counsel)

IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT

SANDRA KURT  
2023 FEB -6 PM 2:38

MEMBER WILLIAMS, et al.

Plaintiffs

-vs-

KISLING NESTICO & REDICK LLC,  
et al.

Defendants

CASE NO. CV 2016-09-3928

JUDGE JAMES A. BROGAN

SUMMIT COUNTY  
CLERK OF COURTS

DECISION

- - -

The Court of Appeals remanded this matter for this Court to conduct a rigorous analysis with respect to the predominance and superiority requirements as to Class A (the price gouging scheme). The Court of Appeals outlined the alleged scheme in paragraph 15 of its opinion.

{¶15} The alleged price-gouging scheme began with a quid pro quo referral network involving KNR, chiropractors such as Dr. Floros, and Dr. Ghoubrial. Both KNR and its preferred chiropractors pursued automobile accident victims with soft-tissue injuries through advertising campaigns and an array of investigative tactics. Upon identifying and securing clients, KNR and the chiropractors traded a high volume of referrals. The clients entered in a contingency fee arrangement with KNR where the firm would receive a percentage of the legal settlement as its fee for legal services. The agreement further authorized KNR to pay the costs of the client's medical treatment out of the gross settlement proceeds. Allegedly, with the aim of increasing the value of each case, the clients were encouraged to seek ongoing chiropractic care and additional medical treatment. Both KNR and the chiropractors strongly encouraged clients to seek additional pain management treatment from Dr. Ghoubrial. Dr. Ghoubrial charged above-market rates for trigger-point injections, TENS units, and back braces. Dr. Ghoubrial's personal injury clinic does not accept health insurance and clients are often not informed of the cost of the medical care. Dr. Ghoubrial required his patients to sign a form allowing for collection of his bills out of the legal settlements secured by KNR. The plaintiffs alleged that KNR prepared this form. The lack of involvement of insurance companies removes a control on what can be charged for medical care. KNR paid its preferred health care providers a disproportionately high sum of money to satisfy the medical bills out of its clients' settlements.

The plaintiffs alleged that KNR profited from the scheme by cycling a large number of clients through the system and settling cases with a high rate of efficiency prior to taking them to trial.

The Court of Appeals addressed this Court's decision in the following manner:

{¶34} Perhaps most notably, the trial court failed to undertake a rigorous analysis of how the plaintiffs could prove liability with common evidence when the evidence showed that the individual class members were not similarly situated with respect to health insurance coverage. One of the core allegations of the price-gauging scheme was that class members were overcharged for medical care compared to what would have been charged had they been able to use health insurance. Many class members who sought treatment from Dr. Ghoumbrial did not have health insurance at all. Some members, such as class representative Richard Harbour, maintained health insurance coverage but expressed a preference not to use it for the purposes of pain management treatment. Still other class members were willing to use either Medicare or their private health insurance but were forced not to do so in order to obtain treatment from Dr. Ghoumbrial. The trial court made a general finding that KNR and Dr. Ghoumbrial conspired to remove insurance companies from the equation so that Dr. Ghoumbrial's charges "would escape scrutiny by the insurance carriers and other government agencies." Notably, however, the trial court declined to analyze how the plaintiffs could prove their claims by common evidence under circumstances where the insurance situations of the individual class members varied.

{¶35} Furthermore, in addressing the contention by KNR and Dr. Ghoumbrial that the plaintiffs could not satisfy the predominance requirement regarding the payment plan because some patients received significant reductions in their charges for medical care; the trial court simply found that this argument was "not persuasive" and cited a number of cases in support of the proposition that individual differences among class members with respect to damages will not defeat class certification.<sup>1</sup> The trial court also suggested that "[Dr. Ghoumbrial's] patients who did not receive reductions could form a class and those who did could be placed in a sub- class of the price-gouging class representing the percentage of reduction." The Supreme Court has held that "[p]laintiffs in class-action suits must demonstrate that they can prove, through common evidence, that all class members were in fact injured by the defendant's actions." *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d.329, 2015-Ohio-3430, ¶33. Here, resolution of the plaintiffs' claims with respect to the price-gouging scheme will at a minimum require determinations with respect to whether Dr. Ghoumbrial's standardized rates constituted an overcharge for medical care and equipment, the extent to which Dr. Ghoumbrial's clinic ultimately accepted reduced payments as satisfaction for each patient's bill, as well as the manner in which KNR attorneys played an active role in facilitating those reductions based on the settlement value of each case in order to perpetuate the scheme. The trial court failed to undertake a rigorous analysis as to whether these issues could be resolved by common evidence in a single adjudication. *See Cullenat* ¶30.

{¶36} Finally, the trial court did not conduct a rigorous analysis when it summarily concluded that disgorgement was an appropriate remedy. In its judgment entry, the trial court stated, "Dr. Ghoumbrial would be required to disgorge to the class members the amount of the overcharge. KNR would be required to disgorge the amount of the contingent fee attributable to the overcharges made by Dr. Ghoumbrial. For example, if the settlement amount was increased by \$4,000.00 in overcharge, and KNR's contingent fee was

one-fourth of the recovery, then KNR would have to disgorge \$1,000.00 of the fee as to that class member." The trial court's damages formula involves identifying the amount of the overcharge in each class member's case. As discussed above, the calculation of the overcharge would involve a number of considerations. In addition to the fact that not all class members received the same course of treatment, the record suggests that some of Dr. Ghoumbrial's patients received little to no reduction in their medical bills while other patients received significant reductions. The trial court did not scrutinize whether the calculation of the overcharge could be established by common evidence in a single adjudication.

This Court gave counsel for the parties an opportunity to address the concerns of the Court of Appeals. The Plaintiffs argue that common proof of the Defendants' scheme predominates regarding the Class A claims. They argue that varying health insurance situations and billing discounts among the members of Class A have no relevance to the predominance issue. The Plaintiffs argue that only one adjudication is necessary to determine that Dr. Ghoumbrial overcharged his patients. The Plaintiffs argue that any later discount in the medical charges could be accounted for by this Court.

Plaintiffs argue that large groups within Class A are similarly situated for insurance purposes, and the Court can appropriately create subclasses to account for these differences. For example, one subclass could include uninsured members, whose overcharge would consist of the fees paid to Dr. Ghoumbrial in excess of average or maximum reasonable prices determined by common proof. The substantial number of class members who received Medicaid benefits could form another subclass, whose overcharge would be calculated based on Medicaid's reimbursement rates that are readily determined from public sources. And class members who carried private insurance could likewise collect the difference between what they paid for Dr. Ghoumbrial's services and an average rate determined from common evidence provided



by insurance carriers. From this common proof of standard rates for each category, all overcharges could be easily calculated in a spreadsheet.

The Defendants argue that the Plaintiffs cannot satisfy the requirements of predominance and superiority regarding the amounts paid to Dr. Ghoumbrial because some members of the proposed Class had health insurance coverage and some did not. Also, the Defendants argue some Plaintiffs received significant reductions and some did not. Consequently, Defendants argue that the Plaintiffs cannot prove liability for disgorgement with common evidence when the trier of fact must identify the specific overcharge for each member's case.

Finally, the Defendants argue that since the Plaintiffs contractually agreed to pay Dr. Ghoumbrial what he charged for the medical devices, they have no cause of action. (This argument suggests a person would willingly agree to be defrauded.)

The Court of Appeals stated that this Court failed to undertake a vigorous analysis of how the Plaintiffs could prove liability with common evidence when the evidence showed that the individual class members were not similarly situated with respect to health insurance coverage.

To address the Court of Appeals' concerns that Plaintiffs could not satisfy the predominance requirement because some patients allegedly received significant reductions in their medical bills, this Court will eliminate from the Price Gouging Class any patient or client who did receive a specific reduction of those bills from Dr. Ghoumbrial in the settlement of their lawsuit.

The Price Gouging Class A would include (1) patients and clients who had no health insurance and no specific reduction of their medical bills for trigger point

injections, TENS units, or back braces in their settlement statements. The second sub-group would be those like Richard Harbour who had health insurance, but chose not to use it to pay for alleged inflated costs for trigger point injections, TENS units, or back braces. A third sub-group would be those who were willing to use their health insurance coverage for these injections or devices, but were required not to do so to obtain medical care from Dr. Ghoumbrial as part of the alleged scheme. The predominance requirement is satisfied when generalized evidence is used to prove or disprove an element of the claim for each member of the class. Cope v. Metropolitan Co. (1998) 82 Ohio St.3d 426. A class action is not defeated solely because of some factual variations among class members. San Allen v. Buehrer, 2014-Ohio-2071. For example, one sub-class of the Price Gouging Class would be those who were overcharged for trigger point injections, another sub-class for those overcharged for TENS units, and another for those overcharged for back braces.

The Court of Appeals also noted that this Court failed to conduct a rigorous analysis of why disgorgement of the KNR Defendants' legal fees was appropriate, and why a class action was "superior" to other legal remedies available to the Plaintiffs.

Civ.R. 23(B) provides a class action may be maintained if Civ.R. 23(A) is satisfied and if (3) the court finds that questions of law or fact common to class members predominate over questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

First, it is unlikely any of the patients of Dr. Ghoumbrial or clients of KNR would pursue their own lawsuit to recover the alleged overcharges because it would be

cost prohibitive to do so for amounts so small. Plaintiffs' counsel noted in their complaint that Dr. Ghoumbrial's billings ranged from \$50 to approximately \$2,000 for the treatment in question.

A class action rates as superior if the class would "lack the strength to litigate their claim" in a piecemeal way. *LaBorde v. City of Gahanna*, 2015-Ohio-2047, 35 N.E.3d 55, ¶49 (10<sup>th</sup> Dist.). The unlikelihood that class members would pursue their own cases also confirms the superiority of a class action. *Pivonka v. Sears*, 8<sup>th</sup> Dist., No. 106749, 2018-Ohio-5866, ¶83.

Professor Christine Bartholomew has written about the superiority requirement. The Failed Superiority Requirement, *Vanderbilt Law Rev.* Vol. 69:5:1295. In the article, Professor Bartholomew notes:

Additionally troubling are the judicial interpretations of superiority that foreclose class actions for small sum cases. These cases are essential for private enforcement of consumer protection laws, ranging from the Sherman Act, to Truth in Lending, to consumer product defect and mislabeling claims. Yet as a practical matter, few litigants have the financial wherewithal to bring individual suits, and often such cases are not worth the cost it takes to bring them.

(Footnotes omitted).

Next, there is no pending litigation by or against the class members, and Summit County is a desirable forum because most of the Ghoumbrial patients and KNR clients live in Summit County where the Defendants' offices are based. Lastly, there are no apparent difficulties in managing the requested class action.


Finally, it is certainly appropriate that if the trier of fact finds that the KNR Defendants were complicit in the medical fee buildup to increase their legal fee, they should be required to disgorge the percentage of their legal fee attributable to the overcharge. See *U.S. v. Hausmann*, 345 F.3d 952, 956 (7<sup>th</sup> Cir. 2003) finding that a personal injury firm's undisclosed kickback arrangement with medical providers "clearly alleged a misuse of the fiduciary relationship and breach of duty owed to the

clients. The amount of the disgorgement is limited to the amount of the profit generated by the wrongdoing. Restatement of the Law 3d Restitution and Disgorgement §51.

In order to identify those potential class members, the KNR Defendants shall provide from their records those clients from 2010 forward who did not receive a reduction in their medical bills in the settlement of their lawsuits<sup>1</sup>.

Pursuant to R.C. 2505.02(B)(5), this is a final and appealable order and there is no just cause for delay.

IT IS SO ORDERED.

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

cc: All counsel of record

<sup>1</sup> Although it was disputed whether Dr. Ghoubril's use of trigger point injections was useful or medically necessary, the Court will assume for purposes of this lawsuit that their use was medically appropriate.