NOT INTENDED FOR PRINT PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CIVIL ACTION NO. 2:03-0437

JEROME D. MASSENBURG, M.D.

Defendant.

ORDER

Pending before the court are the government's and defendant's cross motions for summary judgment. After reviewing the motions, memoranda of law, and exhibits, the court **GRANTS IN PART** and **DENIES IN PART** the defendant's motion for summary judgment. The court **DENIES** the government's motion for summary judgment.

I. Standard of Review

To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P.* 56(c). In considering a motion for summary judgment, the court will not "weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Instead, the court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

Although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some "concrete evidence from which a reasonable juror could return a verdict in his [or her] favor." *Anderson*, 477 U.S. at 256. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere "scintilla of evidence" in support of his or her position. *Anderson*, 477 U.S. at 252.

II. Background

A. Medicare and Medicaid Claim Forms

Medicare is a federally funded program that provides health insurance to the elderly and severely disabled. Medicaid is a welfare program, jointly funded by the federal and state governments, that provides health care for the aged, blind, or disabled poor and for certain families with dependent children. The Medicare and Medicaid programs reimburse qualified providers for certain mental heath services that are rendered to covered patients. Qualified providers are health professionals that meet Medicare and Medicaid requirements and enter into a contractual agreement with the programs. These contractual agreements require that providers comply with all applicable rules and policies of the federal programs. Qualified providers receive reimbursement from Medicare and Medicaid by submitting claims to the programs. These claims include information about the patient, the provider, and the services rendered.

The provider must sign a claim form that contains the following certification: "I certify that the statements on the reverse apply to this bill and are made a part thereof." The claim forms warn

providers that "[a]ny person who knowingly files any false, incomplete or misleading information may be guilty of a criminal act punishable under law and may be subject to civil penalties." Medicare claim forms contain an additional certification which reads: "I certify that the services shown on this form were medically indicated and necessary for the health of the patient and were personally furnished by me or were furnished incident to my professional service by my employee under my immediate personal supervision, except as otherwise expressly permitted by Medicare or CHAMPUS regulations." These Medicare forms further notify providers that "[a]ny one who misrepresents or falsifies essential information to receive payment from Federal funds requested by this form may upon conviction be subject to fine and imprisonment under applicable Federal laws." Medicaid claims also include a certification, which reads: "I certify that the services listed above were medically indicated and necessary to the health of this patient and were personally furnished by me or my employee under my personal direction." Medicaid providers must also certify that "the foregoing information is true, accurate, and complete." Finally, providers must certify that they "understand that payment and satisfaction of this claim will be from Federal and State funds, and that any false claims, statements, or documents, or concealment of a material fact, will be prosecuted under applicable Federal and State laws."

B. Dr. Jerome D. Massenburg and the STEPS Up Program

STEPS Up, Inc. (STEPS Up) was a non-profit corporation in South Charleston, West Virginia that provided mental health services. Darlene Starkey and Edna Houchins operated the business and counseled its clients, but neither were qualified Medicare or Medicaid providers. The defendant, Jerome Massenburg, M.D. (Dr. Massenburg) is a medical doctor with a specialty in psychiatry.

In Feburary of 2001, Dr. Massenburg contracted with STEPS Up to provide psychiatric services on certain non-consecutive Saturdays. The undisputed arrangement between Dr. Massenburg and STEPS Up was as follows: Dr. Massenburg agreed to provide services to STEPS Up patients on certain Saturdays each month and to receive a flat rate of $600 per day in return. STEPS Up agreed to submit the Medicare and Medicaid claims for his services and the arrangement provided that STEPS Up would retain any revenue generated from such billing. As part of the arrangement with STEPS Up, Dr. Massenburg signed many blank and undated claim forms. STEPS Up employees were to fill these forms out and submit them for reimbursement. When the employees filled in these forms, they included fraudulent claims for non-covered services. Medicare and Medicaid ultimately paid STEPS Up $74,693 on these false claims.

The STEPS Up employees involved in this scheme, Darlene Starkey and Edna Houchins, pled guilty to, and were convicted of, defrauding Medicare and Medicaid. Dr. Massenburg has never been charged with any criminal offense in connection with the scheme devised by STEPS Up. Instead, the government has brought this civil action pursuant to the False Claims Act, seeking to recover the amount paid on these fraudulent claims as well as treble damages and civil penalties.

C. The False Claims Act

The Government's claims under the False Claims Act fall into three categories: (1) the knowing presentation of false or fraudulent claims to the United States Government; (2) the knowing falsification of records in order to get false or fraudulent claims paid by the Government; and (3) conspiring to defraud the Government by getting false or fraudulent claims paid. 31 U.S.C. § 3729. The complaint also alleges the following common law causes of action: unjust enrichment, fraud

and deceit, and payment by mistake. Each cause of action is examined separately below, beginning with the three civil False Claims Act causes of action.

a. Count One: 31 U.S.C. § 3729(a)(1)

Count one of the complaint states a claim pursuant to 31 U.S.C. § 3729(a)(1). The elements of a cause of action under this subsection of the False Claims Act are: (1) the knowing presentation (2) of materially false or fraudulent claims to Medicare for payment. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784-86 (4th Cir. 1999); *United States ex rel. Berge v. Board of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1459-60 (4th Cir. 1997). "Knowing" under the False Claims act means that a person "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information; [however] no proof of specific intent to defraud is required." *Harrison*, 176 F.3d at 785-86. A false statement is considered "material" if it "has a natural tendency to influence agency action or is capable of influencing agency action." *Id.* "Presentation" of the claim can mean that either the defendant presented the claim to the government or that he caused the claim to be presented. *United States v. Pres. & Fellows of Harvard College*, 323 F. Supp. 2d 151, 186 (D. Ma. 2004).

In its motion for summary judgment, the government argues that Dr. Massenburg created a false document when he signed the blank claim forms. The government argues that the defendant's signature rendered the forms false because his signature certified that the forms were an "accurate and complete" description of the care provided when, in reality, the form was blank. The government further argues that Dr. Massenburg falsified the claims when he signed the blank request

forms because by doing so, he identified himself as the "supervisor" of the services before he knew the identity of the patient and the character of the services requested.

The government further argues that Dr. Massenburg "caused" these false claims to be presented to the government. The government notes that the False Claims Act reaches "any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." In support of their argument, the government cites *United States v. Krizek*, 111 F.3d 934 (D.C. Cir. 1997). The *Krizek* case involved a False Claims Act action against a psychiatrist and his wife, who handled the billing for her husband's practice. The *Krizek* court concluded that, although the doctor's wife had prepared and submitted the false claims, Dr. Krizek was still liable under the False Claims Act. The *Krizek* court noted that the doctor was "no less liable" than his wife because he acted with reckless disregard by "utterly" failing to review the false submissions. *Id.* at 942.

Although at first glance this case seems similar to the instant facts, the *Krizek* case is easily distinguished from the reality of Dr. Massenburg's employment. While Dr. Krizek and his wife worked closely together in his full-time practice, Dr. Massenburg only worked at STEPS Up every other Saturday, or at most, two or three days a month. Additionally, while the falsely acquired funds in *Krizek* came directly into the purse of the doctor's full-time practice, Dr. Massenburg was much more insulated from the books of STEPS Up. He was paid a flat rate for his work and STEPS Up retained the Medicare/Medicaid proceeds. Thus, Dr. Krizek may have acted with reckless disregard when he ignored the "red flags," such as an extra $245,392 in revenue resulting from a practice of billing for sometimes more than 24 hours of services in a single day. It is not clear, however, that Dr. Massenburg acted with reckless disregard as a matter of law for not reviewing or noticing the

extra claims when he only worked at STEPS Up a few days a month. The government has not indicated any case where a part-time doctor was held liable under the False Claims Act for either his failure to review claims in the absence of any "red flags" or his practice of signing blank reimbursement forms.

Furthermore, the government has not established that all genuine issues of material fact have been resolved with regard to the causation element of the False Claims Act allegations. As the government points out, there are cases that conclude that one can "cause" the presentation of a false claim by delegating the submission of claims to one who then files a false claim. These cases often collapse the knowledge and causation issues and find liability when the requisite knowledge is present. Nevertheless, these cases do not seem directly applicable to Dr. Massenburg's situation, as they involve doctors who are either so entangled in office procedures that their ignorance of the fraud is deliberate or reckless or who specifically ordered the fraud. *See Krizek*, 111 F.3d at 943 (holding defendant liable where he delegated to his wife authority to submit claims on his behalf and failed to review them despite suspicious revenue); *Peterson v. Weinberger*, 508 F.2d 45 (5th Cir. 1975) (finding doctor had required knowledge under False Claims Act when the doctor received 120 checks with attached invoices reimbursing him for services he had not provided and he proceeded to endorse the checks to his brother, director of a nursing home, who had forged his signature); *United States v. Cabrera Diaz*, 106 F. Supp. 2d 234 (D.P.R. 2000) (holding doctor liable for false claims when court concluded that both "Cabrera and [his secretary] presented or caused to be presented" false claims and concluding that evidence indicated doctor either had actual knowledge or "hid behind a shield of self-imposed ignorance" and "purposefully turned the blind eye to the conduct of . . . his subordinate"); *United States v. Mack, M.D.*, 2000 U.S. Dist. LEXIS 17367 (S.D.

Tex. 2000) (granting plaintiff's motion for summary judgment because doctor either had actual knowledge of fraud or showed reckless disregard to the claims' truth or falsity by failing to supervise his staff when the doctor had "knowledge of previous deviant billing practices" and still failed to train or supervise his full-time billing staff).

In this case, the government has not alleged that Dr. Massenburg knew or had reason to know of Starkey and Houchins' fraudulent scheme. Although Dr. Massenburg may have been negligent in training and supervising Starkey and Houchins, the court does not find that this negligence entitles the government to summary judgment as a matter of law. The government may well prove at trial that this negligence was actually the "gross negligence-plus" standard that the False Claims Act is designed to deter. *Krizek*, 111 F.3d at 941-42. At this point, however, taking all inferences in the light most favorable to the non-moving party, the court is unable to find that the government is entitled to summary judgment as a matter of law.

Furthermore, even if the claims were rendered "false" by Dr. Massenburg's certification that the forms were "accurate and complete" and that the services rendered were done so under his supervision, there would still exist a genuine issue of material fact as to whether Dr. Massenburg's signature "caused" the forms to be submitted for payment within the meaning of the False Claims Act. Although the signature on the blank form may have rendered the form "false," the government would not have paid money to STEPS Up on the basis of a blank form. Thus, there exists a dispute as to whether the Doctor's certification is the actual cause of the fraud perpetrated on the government.

Thus, the court **FINDS** that there exists a genuine issue of material fact as to whether Dr. Massenburg "knew" the claims were false and whether he "caused" these false claims to be

presented to the government. Accordingly, the court **DENIES** the government's motion for summary judgment as to count one of the complaint.

In its reply to the government's motion and in its own motion for summary judgment, the defendant argues that Dr. Massenburg did not create a false claim when he signed the blank forms because he signed the forms "with the full intent and expectation that they would be completed by Houchins and/or Starkey and that they would be true, accurate and complete at the time they were submitted to Medicare or Medicaid for payment." The defendant argues that because Medicare and Medicaid policies permit staff to sign these forms with a stamp of the provider's signature, with their own signatures on behalf of the provider, or electronically without an actual signature, Dr. Massenburg's act of signing the blank forms was really no different than the signature policies already allowed by these federal programs. As the defendant noted, "in all of those instances, the physician is relying on his staff to truthfully and accurately complete the necessary documentation required to submit the claim."

Because the court finds there exists a dispute as to whether defendant Dr. Massenburg "knew" of the falsity of the claims and/or whether he acted with reckless disregard in signing blank forms and failing to review the completed forms, the court **FINDS** that there exists a genuine issue of material fact and **DENIES** the defendant's motions for summary judgment on this count.

b. Count Two: 31 U.S.C. § 3729(a)(3)

Count two of the complaint alleges that Dr. Massenburg conspired with Starkey and Houchins to defraud the United States by getting false or fraudulent claims allowed or paid by the United States in violation of 31 U.S.C. § 3729(a)(3). The general principles of civil conspiracy apply to this cause of action. *United States ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 545 (7th Cir.

1999); *United States ex rel v. Pediatric Servs. of Am.*, 142 F. supp. 2d 717, 732 (W.D.N. C. 2001). Thus, to establish a civil conspiracy, the government must present evidence that Dr. Massenburg:

> acted jointly in concert and that some overt act was done in furtherance of the conspiracy . . . . while [the government] need not produce direct evidence of a meeting of the minds, [the government] must come forward with specific circumstantial evidence that each member of the alleged conspiracy shared the same conspiratorial objective . . . . In other words, to survive a properly supported summary judgment motion, [the government's] evidence must, at least, reasonably lead to the inference that [Dr. Massenburg] positively or tacitly came to a mutual understanding to accomplish a common and unlawful plan.

Hinkle v. City of Clarksburg, 81 F.3d 416, 421 (4th Cir. 1996).

Because the government has failed to allege any facts which indicate an agreement, tacit or otherwise, between Dr. Massenburg and Houchins and Starkey, the court **DENIES** the government's motion for summary judgment on this claim. A genuine issue of fact exists if a reasonable jury considering the evidence could return a verdict for the nonmoving party. *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994)(citing *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). In the absence of any evidence indicating a conspiracy, a reasonable jury could certainly return a verdict for the defendant on this count.

The court **GRANTS** the defendant's motion for summary judgment on this count of the complaint. The defendant, as the moving party, has the initial burden to show a lack of evidence to support the government's case. *Shaw*, 13 F.3d at 798 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the defendant makes this, the burden shifts back to the government who must demonstrate to the court that a triable issue does exist. *Id.* "Such an issue will be shown if the evidence is such that a reasonable jury could return a verdict for the [plaintiff]." *Id.* In its motion,

the defendant alleges that there is no evidence in the record of the case to support a finding that Dr. Massenburg entered into an agreement with STEPS Up. The government, in its reply and response to defendant's motion failed to provide the court with any evidence that could lead a reasonable jury to return a verdict for the government on this cause of action. Accordingly, the court **FINDS** that there exists no genuine issue of material fact as to this count of the complaint and **GRANTS** the defendant's motion for summary judgment.

c. Count Three: **31 U.S.C. § 3729(a)(2)**

Count Three of government's complaint alleges liability pursuant to 31 U.S.C. § 3729(a)(2). In order to state a claim under this subsection of the False Claims Act, a government must show: (1) that the defendant made a record or statement in order to get the Government to pay money; (2) the record or statement was false or fraudulent in a material manner; and (3) the defendant knew it was false or fraudulent. *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999); *United States ex rel. Phillips v. Pediatric Servs. of Am.*, 142 F. Supp. 2d 717, 729 (W.D.N.C. 2001).

Just as with count one of the complaint, the court **FINDS** that there still exists a genuine issue of material fact as to whether Dr. Massenburg acted "knowingly" within the meaning of the False Claims Act. Thus, the court **DENIES** both the government's and the defendant's motions for summary judgment on this count of the complaint.

d. Count Four and Six: Unjust Enrichment and Payment by Mistake

In count four of its complaint, the government alleges that "[b]y virtue of the acts described above, Dr. Massenburg caused STEPS Up to be unjustly enriched . . . ." In count six of its complaint, government alleges that "[b]y virtue of the acts described above, Dr. Massenburg caused

the United States to make payments by mistake to STEPS Up. . . ." The court considers the unjust enrichment and payment by mistake claims together, as they arise out of the same common law restitution principles. In *Prudential Insurance Co. of America v. Couch*, 180 W. Va. 210 (1999), the Supreme Court of Appeals of West Virginia dealt with a similar unjust enrichment/payment-by-mistake claim. The *Prudential* Court noted that "[i]t is generally recognized in the law of restitution that if one party pays money to another party (the payee) because of a mistake of fact that a contract or other obligation required such payment, the party making the payment is entitled to repayment of the money from the payee." *Id.* at 214. The Court went on to note that the "theoretical basis for this principle is that it would be unjust to allow a person to retain money on which he had no valid claim and be unjustly enriched thereby, when in equity and justice it should be returned to the payor." *Id.* In another restitution case, *Simmons v. Simmons*, 91 W. Va. 32 (1922), the Court stated that the basis of the doctrine of restitution is that "the party who received the money has no basis for retaining it . . . [and] has received money of another to which he was not entitled."

Government has not alleged that Dr. Massenburg received any of the money that STEPS Up gained as a result of Starkey and Houchin's scheme. The undisputed facts demonstrate that Dr. Massenburg's salary of $600 per Saturday was not dependent on the government's payment of the fraudulent claims. Thus, restitution is improper in this case. Regardless of whether it is called payment-by-mistake or unjust enrichment, Massenburg simply has not received any benefit from the fraudulent acts of Houchins and Starkey. Accordingly, the court **DENIES** government's motion for summary judgment on counts four and six of the complaint and **GRANTS** the defendant's motion on these counts.

e. Count Five: Fraud and Deceit

Count five of the complaint states a claim for common law fraud and deceit, alleging that "[b]y virtue of the acts described above, Dr. Massenburg and others have perpetrated a fraud and deceit upon the United States . . . ." Under West Virginia state law,

> The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; (3) that government relied on it and was justified under the circumstances in relying upon it; and (4) that he was damaged because he relied on it.

Lengyel v. Lint, 167 W. Va. 272, 277-78 (1981).

"Fraud" is commonly defined as "a deliberate deception practiced so as to secure unfair or unlawful gain," and "fraudulent" is commonly defined as "engaging in fraud" or "marked by, constituting, or gained by fraud." WEBSTER'S II NEW COLLEGE DICTIONARY (1995). The tort of fraud or deceit is defined by the *Restatement of Torts 2d*, §525 as follows:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

The government does not address this cause of action in their motion for summary judgment. Thus, the government has failed to demonstrate that Dr. Massenburg acted fraudulently and with the purpose of inducing another to act or refrain from acting in reliance on his alleged misrepresentations. The court, therefore, **FINDS** that the government has not satisfied their burden of demonstrating that no genuine issue of material fact exists with regard to this claim. Accordingly, the court **DENIES** government's motion for summary judgment on this count.

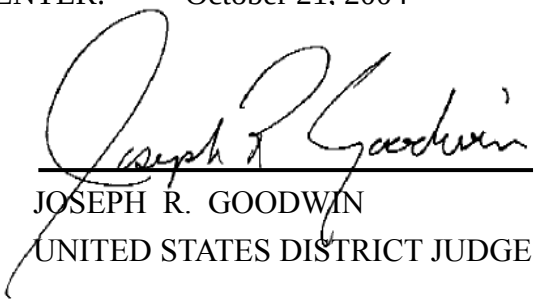
The court further **DENIES** defendant's motion for summary judgment on this count as well. The defendant's motion for summary judgment simply argues that the court should not grant the government relief pursuant to equitable remedies when adequate legal remedies exist. The defendant has also failed to satisfy his burden, as the moving party, to demonstrate that no genuine issues of material fact remain as to this count.

III. Conclusion

For the reasons stated above, the court **DENIES** the government's motion for summary judgment and **FINDS** that it has failed to demonstrate that no genuine issues of material fact remain and that it is entitled to summary judgment as a matter of law. The court further **GRANTS IN PART** and **DENIES IN PART** the defendant's motion for summary judgment. The court **GRANTS** the defendant's motion as to Counts 2, 4, and 6. The court **DENIES** the defendant's motion as to Counts 1, 3, and 5 and **FINDS** that the defendant has failed to demonstrate that no genuine issues of material fact remain as to these counts.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented parties, and **DIRECTS** the Clerk to post this unpublished opinion at **http://ww.wvsd.uscourts.gov.**

ENTER: October 21, 2004



JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE