

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS,  Plaintiff,  vs.  KISLING, NESTICO & REDICK, LLC, <i>et al.</i> ,  Defendants.	Case No. CV-2016-09-3928  Judge Todd McKenney
<b>PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS UNDER CIV.R. 12(C)</b>	

**I. Issues Presented**

1. R.C. 2323.51 does not create a cause of action for frivolous conduct. Yet Defendants have nevertheless asserted a cause of action for frivolous conduct under 2323.51 as a counterclaim against Named Plaintiff. Should this court dismiss this counterclaim?
2. Ohio law requires a plaintiff alleging abuse of process to prove that the abusive claims at issue were brought with probable cause, and that the defendant has perverted properly instituted legal proceedings for an ulterior purpose. Here, Defendant-Counterclaimants allege neither element of the tort. Should this Court dismiss their counterclaim for abuse of process?
3. Ohio law requires a plaintiff alleging tortious interference with business relations to prove that the defendant's tortious act has "cause[d] a third person not to enter into or continue a business relation with [the plaintiff]." Here, Defendant-Counterclaimants have not pled that any third person has been caused not to enter or continue a business relation with them. Should this Court dismiss their counterclaim for tortious interference?

4. R.C. 4165.02, Ohio's deceptive trade practice statute, only allows for recovery against a person acting "in the course of the person's business, vocation, or occupation." Here, Defendant-Counterclaimants have not pled that Plaintiff acted in the course of her business, vocation, or occupation. Should this Court dismiss their counterclaim under R.C. 4165.02?

## II. Introduction

Having been accused in this lawsuit of defrauding their clients by charging them a bogus "investigation fee," Defendants KNR and Alberto R. Nestico have responded with a four-count Counterclaim accusing Named Plaintiff of being a fraud herself. Specifically, Defendants allege that their former client has brought this lawsuit on frivolous grounds, based on allegations she knows to be false, in a "malicious, oppressive, fraudulent, willful, ... wanton[,] tortious," and "deceptive" effort to "defame" Defendants,' "harm[] their reputation and goodwill," and "interfere[] with [their] ... business relationships." Counterclaim ¶¶ 19, 22, 25, 30. 34. 44.

But Defendants allege nothing in their Counterclaim that couldn't be alleged of any plaintiff who sues any corporate defendant for fraud based on information from a whistleblower. Discovery on Plaintiff's claims will shortly expose Defendants' counterclaims as frivolous and malicious, in keeping with an apparent scorched-earth strategy intended to bully Plaintiff and her attorneys and intimidate potential class members and witnesses from participating in this case. *See A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St. 3d 1, 14–15, 651 N.E.2d 1283 (1995) ("A [party] may not avoid the protection afforded [to allegedly defamatory statements made in the course of litigation] merely by the use of creative pleading.").

In the meantime, the Court should dismiss all four of Defendants counterclaims under Civ.R. 12(C), because, as explained fully below, none of them are properly pled.

## III. Law and Argument

### A. Civ.R. 12(C)

"Any party may move for judgment on the pleadings" under Civ.R. 12(C) "[a]fter the

pleadings are closed but within such time as not to delay the trial.” Civ.R. 12(C). Under Rule 12(C), “[d]ismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief. Thus, [the rule] requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law.” *Rayess v. Educ. Comm'n for Foreign Med. Graduates*, 134 Ohio St. 3d 509, 2012-Ohio-5676, 983 N.E.2d 1287, ¶ 18.

On this standard, Plaintiff is entitled to dismissal of each of Defendants’ four counterclaims.

**B. This Court should dismiss Defendants’ counterclaim for “frivolous conduct” under R.C. 2323.51 (Count 1) because “R.C. 2323.51 does not create a separate cause of action.”**

Defendants’ first cause of action is for “frivolous conduct” under R.C. 2323.51, in which they allege that Plaintiff “has brought this suit to harass, maliciously injure,” and “defame” Defendants based on “allegations ... that have no evidentiary support.” Counterclaim at ¶¶ 17–19. But “R.C. 2323.51 does not create a separate cause of action for frivolous conduct.” *Wochna v. Mancino*, 9th Dist. Medina No. 07CA0059-M, 2008-Ohio-996, ¶ 29 citing *Shaver v. Wolske & Blue*, 138 Ohio App.3d 653, 673, 742 N.E.2d 164 (10th Dist. 2000); *See also Luchansky v. Jagnow*, 7th Dist. Mahoning No. 97 C.A. 191, 1998 Ohio App. LEXIS 4255, \*13–14; *Scrap Yard v. City of Cleveland*, 513 Fed. Appx. 500, 506 (6th Cir. 2013). Rather, “at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal.” *Wochna* at ¶ 29 citing R.C. 2323.51(B)(1). If, after a hearing, a court finds that such a motion is well-founded, it may then “assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct[.]” *Id.*; R.C. 2323.51(B)(2)(a). Thus, this Court should dismiss Defendants’ first cause of action.

**C. This Court should dismiss Defendants' Counterclaim for Abuse of Process (Count 2) because Defendants do not allege that Plaintiff's claims have been brought with probable cause and do not allege that Plaintiffs have perverted these legal proceedings for an ulterior purpose.**

The Ohio Supreme Court has held that “the three elements of the tort of abuse of process are: (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process.” *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St. 3d 294, 298 (Ohio 1994). “Abuse of process does not lie for the wrongful bringing of an action, but for the improper use, or ‘abuse,’ of process. Thus, if one uses process properly, but with a malicious motive, there is no abuse of process, though a claim for malicious prosecution may lie[.]” *Levey & Co. v. Oravec*, 9th Dist. Summit No. 21768, 2004-Ohio-3418, ¶ 8 citing *Yaklevich* at 298. “The tortious character of the defendant's conduct consists of his attempts to employ a legitimate process for a legitimate purpose in an improper manner[.]” *Id.* “[P]erversion of the legal process requires demands which are not properly involved in the proceeding.” *Vitrano v. CWP Ltd. Pshp.*, 9th Dist. Summit No. 19516, 1999 Ohio App. LEXIS 6179, \*9–11 citing *Edward D. Jones & Co., L.P. v. Wentz*, 9th Dist. Summit No. 23535, 2007-Ohio-3237, ¶ 13.

Here, Defendants have not alleged “that a legal proceeding has been set in motion in proper form and with probable cause.” *Yaklevich* at 298. Nor have they alleged that Plaintiff has made any “demands [that] are not properly involved in the proceeding.” *Vitrano* at \*9–11. For each of these reasons, independently, Defendants have failed to state a claim for abuse of process.

In fact, contrary to the first element of a properly pled abuse-of-process claim, Defendants “allege that the underlying legal proceedings were instituted without regard for probable cause or the rights of the [Defendants] ... in essence, ... that the filing of this litigation itself was unfounded.” *P.N. Gilcrest Ltd. P'ship v. Doylestown Family Practice, Inc.*, 9th Dist. Wayne No. 10CA0035, 2011-Ohio-

2990, ¶¶ 26–27 citing *Wochna*, 2008-Ohio-996, ¶ 27; Counterclaim ¶¶ 17-19. The law is clear that such allegations “cannot sustain a cause of action for abuse of process.” *P.N. Gilcrest*, 2011-Ohio-2990 at ¶¶ 26–27; *Wochna*, 2008-Ohio-996 at ¶ 27. Thus, Defendants second cause of action should be dismissed. *See also Willis & Linnen Co., L.P.A. v. Linnen*, 163 Ohio App. 3d 400, 2005-Ohio-4934, 837 N.E.2d 1263, ¶ 24 (9th Dist.) (“We find that the mere fact that [plaintiff’s] contempt conviction may collaterally benefit [defendant] in the future is insufficient to establish that he perverted the proceedings. ... [T]here is no evidence, or even allegations, in the record that [defendant] sought any collateral advantage *during* the contempt proceedings.”)(emphasis in original); *Gugliotta v. Morano*, 161 Ohio App. 3d 152; 2005-Ohio-2570; 829 N.E.2d 757, ¶ 50 (9th Dist.) (“[Plaintiff’s] own argument that [defendant] used the threat of litigation as a tool of coercion serves to defeat her claim of abuse of process.”); *Levey*, 2004-Ohio-3418 at ¶ 8 (“[Plaintiff] believed that the complaint and the lawsuit was for an improper purpose and that it was maintained and perverted ... to gain an upper hand in negotiations. It is clear that [plaintiff] misunderstood the nature of the abuse of process claim.”).

**D. This Court should dismiss Defendants’ counterclaim for tortious interference with business relations (Count 3) because Defendants do not allege that a third party has not entered into or continued a business relationship with them due to Plaintiff’s conduct.**

“The elements of tortious interference with a business relations are (1) a business relationship, (2) known to the tortfeasor, and (3) an act by the tortfeasor that adversely interferes with that relationship, (4) done without privilege and (5) resulting in harm.” *Telxon Corp. v. Smart Media of Del., Inc.*, 9th Dist. Summit Nos. 22098 & 22099, 2005-Ohio-4931, ¶ 88. “Specifically, element three requires an act that ‘causes a third person not to enter into or continue a business relation with another.’ *Id.* citing *A&B-Abell Elevator Co.*, 73 Ohio St.3d 1 at 14 (emphasis in original).

Here, Defendants have not pled that any third person has been “cause[d] ... not to enter into or continue a business relation” with them as a result of Plaintiff’s conduct. Thus, Defendants have failed to state a claim for tortious interference with business relations and their third cause of

action should be dismissed.

**E. This Court should dismiss Defendants' counterclaim for Deceptive Trade Practices under R.C. 4165.02 (Count 4) because R.C. 4165.02 only allows for recovery against a person acting "in the course of the person's business, vocation, or occupation."**

R.C. 4165.02 allows a plaintiff to recover for damages caused "as a proximate result of false representations of fact by another *made in the course of his own business, vocation, or occupation.*" *Akron-Canton Waste Oil v. Safety-Kleen Oil Servs.*, 81 Ohio App. 3d 591, 599, 81, 611 N.E.2d 955 (9th Dist. 1992) citing R.C. 4165.02 (emphasis added). The reason for this element is obvious: to engage in a "deceptive trade practice" one needs to be engaged in a trade. Because Defendants have not alleged that Plaintiff has acted "in the course of [her] own business, vocation, or occupation," they have not properly pled a claim under R.C. 4165.02 and the Court should dismiss their fourth cause of action. *Id.* ("Since this enactment is unequivocal in this respect, it may not be construed in any manner other than what its plain terms indicate."). *See also Patio Enclosures, Inc. v. Borchert*, 8th Dist. Cuyahoga No. 40592, 1980 Ohio App. LEXIS 12190, \*14–15 (May 15, 1980) ("Since the fundamental issue in the case before us is whether, *in the course of its business*, [defendant] caused a likelihood of confusion as to the source of its goods or services, or as to its association with [plaintiff], the prior relationship between [plaintiff] and [defendant] is irrelevant as the primary issue involves [defendant's] *present business activities.*") (emphasis added).

**IV. Conclusion**

Defendants' inadequate counterclaims reflect an intent to intimidate Named Plaintiff, potential class members, and witnesses, and "avoid the protection afforded [allegedly defamatory statements made in the course of litigation] merely by the use of creative pleading." *A & B-Abell Elevator Co.*, 73 Ohio St. 3d 1 at 14-15. *See also THI of N.M. at Valle Norte, LLC v. Harvey*, 527 Fed. Appx. 665, 669 (10th Cir. 2013) ("[T]he [abuse of process] tort is disfavored in the law [b]ecause of the potential chilling effect on the right of access to the courts."). None of the counterclaims meet

Civ.R. 12(C)'s standard and this Court should dismiss them all.

Dated: November 29, 2016

Respectfully submitted,

THE CHANDRA LAW FIRM, LLC

/s/ Peter Pattakos

Subodh Chandra (0069233)

Donald Screen (00440770)

Peter Pattakos (0082884)

1265 W. 6<sup>th</sup> St., Suite 400

Cleveland, OH 44113-1326

216.578.1700 Phone

216.578.1800 Fax

Subodh.Chandra@ChandraLaw.com

Donald.Screen@ChandraLaw.com

Peter.Pattakos@ChandraLaw.com

*Attorneys for Plaintiff Member Williams*

#### CERTIFICATE OF SERVICE

The foregoing document was served on all necessary parties by operation of the Court's e-filing system on November 29, 2016.

/s/ Peter Pattakos

*One of the Attorneys for Plaintiff*