IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, Plaintiff, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. CV-2016-09-3928 Judge Alison Breaux

MOTION FOR LEAVE TO FILE INSTANTER A SUR-REPLY BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS

Plaintiffs seek leave to file the following sur-reply, instanter, to address two especially misleading arguments contained in Defendants' reply brief. Defendants had more than four months to form their arguments for dismissal of Plaintiffs' Second Amended Complaint, that was originally filed on March 22, and Plaintiffs should be permitted a chance to fully reply—especially given that Defendants seek dismissal of Plaintiffs' claims, and the risk the Court will be misled by Defendants' continued misrepresentations. The sur-reply Plaintiffs wish to submit follows immediately below.

I. Defendants ignore that this Court is fully authorized to reconsider and vacate its prior decisions.

In the first section of their reply (at 1–2), Defendants suggest that the Court is somehow powerless to reconsider and vacate its dismissal of the fraud and unjust enrichment claims against Defendant Nestico. This is nonsense, in direct contravention of common practice and the Civil Rules, which provide both that (1) "any order or other form of decision, however designated ... is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights

and liabilities of all the parties" (Civ.R. 54(B)), and (2) "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for ... any ... reason justifying relief from the judgment" (Civ.R. 60(B)(5)). Of course, trial courts reconsider and vacate their own decisions all the time and it's absurd for Defendants to suggest that this is somehow prohibited here.

The 7th District opinion that Defendants misleadingly cite to the contrary (at 1–2), for the proposition that "the law of the case doctrine has been extended to include a lower court's adherence to its own prior decisions," derives this proposition from a 10th District case holding that a trial court may not reconsider its own decision on a legal issue when the complaining party has already waived appeal on that issue in the appeals court. *Clymer v. Clymer*, 10th Dist. Franklin No. 95APF02-239, 1995 Ohio App. LEXIS 4303, *7-8 (Sept. 26, 1995). In other words, this is a "less common aspect of the law of the case doctrine, under which courts may give preclusive effect to a ruling that could have been appealed, but has been abandoned by a failure to do so." *Id.* at 8. It has no application here to claims that have not yet been subject to appeal.

II. The OCSPA does not give attorneys and law firms a free pass to deceive the public.

While Defendants' arguments for dismissal of the OSCPA claims are, for the most part, amply addressed in Plaintiffs' opposition brief, Defendants' reply (at 8–9) omits discussion of a key point. That is, that Williams' and Wright's OSCPA claims relate to deceptive conduct committed before Williams and Wright were ever Defendants' clients—namely, Defendants' false promise to Williams of a "free consultation," and their deceptive solicitation of Williams through a chiropractor with whom they had a quid-pro-quo referral arrangement. Thus, the OSCPA exemption to "transactions between attorneys *and their clients*" could not apply here even under Defendants' erroneously expansive interpretation of the statute. *See Einhorn v. Ford Motor Co.*, 48 Ohio St. 3d 27, 29 (1990) ("The Consumer Sales Practices Act is a remedial law which is designed to compensate for

traditional consumer remedies and so must be liberally construed pursuant to R.C. 1.11.").

For these reasons, and those stated fully in Plaintiffs Opposition to Defendants' Motions for Judgment on the Pleadings, Defendants motions should be denied.

Dated: September 5, 2017 Respectfully submitted,

THE CHANDRA LAW FIRM LLC

/s/ Peter Pattakos
Subodh Chandra (0069233)
Donald Screen (00440770)
Peter Pattakos (0082884)
The Chandra Law Building
1265 W. 6th 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 September 5, 2017.

/s/ Peter Pattakos
One of the Attorneys for Plaintiff