

**IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO**

MEMBER WILLIAMS, et al.,)	CASE NO. CV-2016-09-3928
)	
Plaintiffs,)	JUDGE ALISON BREAUX
)	
vs.)	<u>THIRD AMENDED COUNTERCLAIM OF</u>
)	<u>DEFENDANTS KISLING, NESTICO &</u>
KISLING, NESTICO & REDICK, LLC, et al.,)	<u>REDICK, LLC, ALBERTO NESTICO,</u>
)	<u>AND ROBERT REDICK</u>
Defendants.)	
)	<u>JURY DEMAND ENDORSED HEREIN</u>

Now come Defendants Kisling, Nestico & Redick, LLC (“KNR”), Alberto R. Nestico (“Nestico”), and Robert Redick (“Redick” and, collectively with KNR and Nestico, “Defendants”) and hereby state for their Counterclaim against Plaintiffs Member Williams, Naomi Wright, Matthew Johnson, and Thera Reid as follows:

PARTIES

1. KNR is an Ohio law firm representing plaintiffs in civil litigation matters with its principal place of business located in Summit County, Ohio.
2. Nestico is the managing partner of KNR and a resident of Summit County, Ohio.
3. Redick is an employee of KNR and a resident of Stark County, Ohio.
4. Plaintiff Member Williams (“Williams”) is a resident of Medina County, Ohio, was a former client of KNR in a personal injury case arising out of an automobile accident.
5. Plaintiff Naomi Wright is a resident of Summit and a former client of KNR. Plaintiff Matthew Johnson is a resident of Summit and former client of KNR. Plaintiff Johnson terminated KNR’s representation on or about October 25, 2013, while Plaintiff Wright terminated KNR’s representation on or about December 22, 2016. Plaintiffs Johnson and Wright have not paid KNR any fees or expenses.
6. Plaintiff Thera Reid is a resident of Summit County and a former client of KNR.

GENERAL ALLEGATIONS

7. Defendants hereby incorporate their Answers to the Third Amended Complaint and the foregoing paragraphs of this Counterclaim as if fully rewritten herein.

8. KNR hired Robert P. Horton, Esq. ("Horton"), Horton on February 20, 2012 as an attorney. Horton's responsibilities included providing prospective clients with a free, initial, consultation, determining if the claim had merit, and if so, arranging for the client to sign KNR's fee agreement and medical authorizations, and collecting and preserving evidence.

9. On September 13, 2013, Williams called the firm and was transferred to Horton and discussed her accident. Horton decided she had a viable personal injury claim, and agreed to represent her on behalf of KNR.

10. Horton further engaged MRS Investigations, Inc. to meet with Williams the next day to execute the contingency fee agreement and obtain copies of relevant documents. Horton specifically communicated with Chuck DeRemer ("DeRemer"), an investigator with MRS Investigations, regarding the Williams matter. MRS Investigations charged separately for his services, regardless of whether KNR obtained a settlement or judgment. Horton explained to Williams that KNR would charge expenses to Williams' file only if recovery was made on her behalf.

11. On March 17, 2015 and prior to resolution of Williams' claim, Horton's employment with KNR ceased.

12. After Horton's departure, KNR settled Williams' personal injury claim with Williams' informed consent. KNR provided Williams with an itemized printout of all expenses, fees and payments which listed the investigator's charge as the first expense item. Williams was asked if she had any questions. Williams reviewed and signed the disbursement sheet, release and settlement check at KNR without any questions or objections.

13. On July 13, 2016, Williams filed this action.

14. Although Williams and her attorneys knew KNR's principal place of business was in Summit County, Ohio, and that all of the conduct giving rise to Williams' claim arose in Summit and/or Medina County, Williams filed her complaint in Cuyahoga County.

15. Upon information and belief, Williams filed in Cuyahoga County without any supporting legal authority.

16. On September 9, 2016, the Court of Common Pleas for Cuyahoga County, Ohio found there was no factual or legal basis for Williams to have filed her original complaint in Cuyahoga County, Ohio and transferred venue to the Court of Common Pleas for Summit County, Ohio.

17. During the week of September 5, 2016 Williams, acting through her agent, posted a request for assistance in finding new potential class members on social media. These posts include inaccurate and prejudicial language, including but not limited to, the incorrect allegation that KNR "has engaged in business practices that constitute fraud and other unlawful breaches against the majority of its clients dating back to 2006".

18. On September 13, 2016, KNR and Nestico sent Williams, through her agents and attorneys, a letter requesting that she cease and desist from further defaming them and remove the defamatory posts from any and all social media, including Facebook and Twitter accounts. Initially Williams and her counsel agreed, but then began posting again on Facebook, Twitter accounts, and The Chandra Law Firm's website.

19. Despite the cease and desist requests, Plaintiffs, through their agents and attorneys, continue to post defamatory statements on The Pattakos Law Firm's Facebook page and The Pattakos Law Firm's blog. These posts continue to assert, among other false allegations, that Defendants have deceived and defrauded their clients through kickback schemes and charging them fraudulent "investigation fees", none of which are true. This second round of defamatory statements began in or around October 17, 2017 and has continued to date.

20. The conduct of Plaintiffs' agents of posting defamatory, inaccurate and prejudicial information regarding Defendants occurred while (e.g., March 30, 2017) Plaintiffs Wright, Johnson, and Reid were clients of The Chandra Law Firm. Those postings included false allegations of defrauding clients and having kickback schemes with chiropractors and Liberty Capital Funding.

FIRST CAUSE OF ACTION
(Frivolous Conduct – O.R.C. § 2323.51)

21. Defendants hereby incorporate their Answer and the foregoing paragraphs of this Counterclaim as if fully restated herein.

22. Ohio appellate courts have concluded that a frivolous conduct claim can be brought as a counterclaim. See, e.g., *Texler v. Papesch*, 9th Dist. Summit No. 18977, 1998 Ohio App. LEXIS 4070, *6 (“Although the statute does not specify whether a party can make a claim for attorney’s fees in the form of counterclaim, **the case law makes clear** that it is an accepted method.”) (emphasis added); *Odita v. Phillips*, 10th Dist. Franklin No. 09AP-1172, 2010-Ohio-4321, ¶59 (citing to *Texler* and concluding: “Ohio courts have recognized that a claim for frivolous conduct under R.C.2323.51 may be made by way of a counterclaim, rather than strictly by way of motion.”); *Jones v. Billingham*, 105 Ohio App. 3d 8, 12, 663 N.E.2d 657 (2nd Dist. 1995) (“In our view, the Sixth Count of Billingham’s **counterclaim sets forth a claim** that the Complaint filed by plaintiffs-appellees is a frivolous claim under the ambit of Civ. Pro. 11 and **R.C. 2323.51.**”) (emphasis added); *Buettner v. Est. of Herbert Bader*, 6th Dist. Lucas No. L-97-1106, 1998 Ohio App. LEXIS 2, *5-6 (in concluding that the trial court did not lack jurisdiction, the appellate court stated: “In the case *sub judice*, appellees’ counterclaim set forth a claim within the ambit of R.C.2323.51.”); *Craine v. ABM Services, Inc.*, 11th Dist. Portage No. 2011-P-0028, 2011-Ohio-5710, ¶10 (string cite of cases, including *Texler*, that have allowed a frivolous conduct claim under R.C. 2323.51 to proceed via a counterclaim); *Burrell v. Kassicieh*, 128 Ohio App. 3d 226, 232, 714 N.E.2d 442 (3rd Dist. 1998) (retained jurisdiction over R.C.

2323.51 frivolous conduct counterclaim and affirmed judgment in favor defendant on it).

23. Plaintiffs have, by and through their agents, brought this suit to harass and maliciously injure Defendants, and for the improper purposes of defaming Defendants and harming their reputation and goodwill with the goal of destroying their business.

24. Plaintiffs' action consists of allegations or other factual contentions, and legal theories that have no evidentiary or legal support. In addition, the class action allegations are baseless and frivolous.

25. Pursuant to O.R.C. § 2323.51(B), Defendants are entitled to an award of their costs, reasonable attorney's fees and expenses incurred in defending Plaintiffs' frivolous action.

SECOND CAUSE OF ACTION
(Abuse of Process)

26. Defendants hereby incorporate their Answer and the foregoing paragraphs of this Counterclaim as if fully restated herein.

27. Defendants bring the abuse of process claim in the alternative to their First Cause of Action.

28. Defendants deny the allegations of Plaintiffs' Third Amended Complaint, but in the alternative, plead that Plaintiffs, by and through their agents, have brought this action in the proper forum and with probable cause. However, through the acts (e.g., repeated social media posts, having articles written about this case, sending court communications to the media) of Plaintiffs and their agents, Plaintiffs have perverted this proceeding to attempt to accomplish unlawful, ulterior purposes rather than to redress alleged damages incurred by Plaintiffs.

29. In particular, Plaintiffs and their agents have brought the instant case and the class action allegations for purposes of defaming Defendants and harming their reputation and goodwill with the goal of destroying their business, or to pressure Defendants for a quick settlement.

30. Plaintiffs and their agents' conduct is intentional, malicious, and without justification.

31. Plaintiffs have assisted, acquiesced to, and/or ratified the misconduct of their agents.

32. The conduct of Plaintiffs, as alleged above, constitutes malicious, oppressive, fraudulent, willful, and wanton tortious behavior, in blatant and reckless disregard of Defendants' rights, for which Defendants should recover compensatory and punitive damages in an amount sufficient to deter Plaintiffs, their agents, and other persons similarly situated from repeating similar conduct in the future.

33. As a direct and proximate result of Plaintiffs and their agents' abuse of process regarding this class action, Defendants have suffered compensatory and punitive damages, including, without limitation, damage to their reputations, economic loss, business losses, lost profits, opportunity costs, and inconvenience in excess of \$25,000, the exact amount to be proven at trial.

THIRD CAUSE OF ACTION

(Tortious Interference With Existing and Prospective Business Relationships)

34. Defendants hereby incorporate their Answer and the foregoing paragraphs of this Counterclaim as if fully restated herein.

35. Defendants have ongoing business relationships with clients, and further, because such relationships are usually limited to representation for a single auto accident, Defendants depend upon obtaining new clients through marketing and referrals from prior clients and other professionals to maintain their business and profession.

36. Plaintiffs and their agents have actual and/or constructive knowledge of Defendants' business relationships and the importance of maintaining their business reputations to obtain new clients.

37. Plaintiffs, by and through their agents, have recklessly, willfully, wantonly and/or intentionally interfered with Defendants' present and future business relationships by disseminating, without any justification and beyond any reasonable scope, false and inflammatory allegations against Defendants, including but not limited to Plaintiffs claim that KNR defrauded them as well as the majority of its clients since 2006. In fact, Defendants have lost clients and/or revenue because of Plaintiffs and their agents' conduct described above.

38. Plaintiffs and their agents' interference was intentional, malicious, illegal, and without any legitimate, protected, commercial justification.

39. Plaintiffs have assisted, acquiesced to, and/or ratified the misconduct of their agents.

40. Defendants have sustained damages as a result of Plaintiffs' wrongful interference with their current and prospective business relationships.

41. The conduct of Plaintiffs, as alleged above, constitutes malicious, oppressive, fraudulent, willful, and wanton tortious behavior, in blatant and reckless disregard of Defendants' rights, for which Defendants should recover compensatory and punitive damages in an amount sufficient to deter Plaintiffs, their agents, and other persons similarly situated from repeating similar conduct in the future.

42. As a direct and proximate result of Plaintiffs and their agents' tortious conduct, Defendants have suffered compensatory and punitive damages, including, without limitation, damage to their reputations, economic loss, business losses, lost profits, opportunity costs, and inconvenience in excess of \$25,000, the exact amount to be proven at trial.

FOURTH CAUSE OF ACTION
(Deceptive Trade Practices – O.R.C. § 4165.02)

43. Defendants hereby incorporate their Answer and the foregoing paragraphs of this Counterclaim as if fully restated herein.

44. Plaintiffs, by and through their agents, have engaged in an advertising campaign that contains false and misleading statements in violation of O.R.C. § 4165.02(A)(10).

45. Plaintiffs have assisted, acquiesced to, and/or ratified the misconduct of their agents.

46. These false and misleading statements are material because they are likely to adversely affect client decisions with respect to Defendants' services, and have misled consumers causing damage to Defendants that cannot be fully calculated.

47. Unless this Court enjoins Plaintiffs and their agents from continuing to make these false and misleading statements and orders their retraction, the false and misleading statements will continue to harm the general public, which has an interest in being free from mistake and deception.

48. Unless this Court enjoins Plaintiffs and their agents from continuing to make these false and misleading statements and orders their retraction, the false and misleading statements will continue to cause Defendants to suffer a loss of consumer confidence, sales, profits, reputation, and goodwill.

49. Defendants' reputation and goodwill have been irreparably harmed because Plaintiffs and their agents' false and misleading statements deceive consumers and cause them to lose confidence in Defendants and their services.

50. If Defendants and their agents are permitted to continue to make such false and misleading statements, Defendants will suffer further irreparable harm by the continued spread of false statements to consumers.

51. Plaintiffs and their agents' false and misleading statements are willful and made with malicious and deceptive intent, making this an exceptional case.

52. By reason of Plaintiffs and their agents' acts, Defendants' remedy at law is not adequate to compensate them for the injuries inflicted by Williams and her agents. Accordingly,

Defendants are entitled to a temporary restraining order and preliminary and permanent injunctive relief pursuant to O.R.C. § 4165.02.

53. By reason of Plaintiffs and their agents' willful acts, Defendants are entitled to damages, which damages may be trebled under O.R.C. § 4165.02.

54. This is an exceptional case making Defendants eligible for an award of attorneys' fees under O.R.C. § 4165.02.

WHEREFORE, Defendants respectfully request that the Court enter judgment dismissing Plaintiffs' Third Amended Complaint and a judgment in favor of Defendants as follows:

1. Awarding Defendants nominal, actual, presumed, special, and punitive damages in excess of Twenty-Five Thousand Dollars (\$25,000);

2. Awarding treble damages under O.R.C. § 4165.02;

3. Awarding Defendants their costs, expenses and attorney's fees under O.R.C. § 2323.51(B) and awarding Defendants their costs, expenses and attorney's fees in prosecuting this Counterclaim;

4. Awarding KNR pre- and post-judgment interest;

5. Granting a permanent injunction enjoining Plaintiffs, her agents, their attorneys and persons acting in concert with their or acting on her behalf, from the following acts:

- a. Making any false, misleading, libelous, slanderous, defamatory, or disparaging statements or engaging in false, misleading or unfair trade practices or tortious interference with business relationships, including without limitation stating, claiming, suggesting, intimating or implying in any manner whatsoever that any of KNR or Nestico's legal representation and/or billing of Williams and/or other clients was deceptive or fraudulent;

- b. Making any other false, misleading, slanderous, disparaging or defamatory statements about KNR, Nestico or their services; and
 - c. Otherwise engaging in acts, either directly or through other entities, of false advertising, product disparagement, libel, slander, unfair and deceptive trade practices, unfair competition, or tortious interference with actual or prospective business relations;
 - d. Publicizing the case in a manner inconsistent with the Ohio Rules of Professional Conduct and/or for purposes of improperly influencing the jury venire.
6. Award all such other and further relief, in law or in equity, to which Defendants may be entitled or which the Court deems just and proper.

Respectfully submitted,

/s/ James M. Popson

James M. Popson (0072773)

Brian E. Roof (0071451)

SUTTER O'CONNELL CO.

1301 East 9th Street

3600 Erievue Tower

Cleveland, Ohio 44114

(216) 928-2200 phone

(216) 928-4400 facsimile

jpopson@sutter-law.com

broof@sutter-law.com

/s/ R. Eric Kennedy

R. Eric Kennedy (0006174)

Daniel P. Goetz (0065549)

Weisman Kennedy & Berris Co LPA

101 W. Prospect Avenue

1600 Midland Building

Cleveland, OH 44115

(216) 781-1111 phone

(216) 781-6747 facsimile

ekennedy@weismanlaw.com

dgoetz@weismanlaw.com

/s/ Thomas P. Mannion
Thomas P. Mannion (0062551)
Lewis Brisbois
1375 E. 9th Street, Suite 2250
Cleveland, Ohio 44114
(216) 344-9467 phone
(216) 344-9241 facsimile
Tom.mannion@lewisbrisbois.com

Counsel for Defendants

DEMAND FOR JURY TRIAL

Defendants hereby demand a trial by jury of all issues of fact presented by their Counterclaim in accord with the Ohio Rules of Civil Procedure.

/s/ James M. Popson
James M. Popson (0072773)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Third Amended Counterclaim of Defendants Kisling, Nestico & Redick, LLC, Alberto Nestico, and Robert Redick was filed electronically with the Court on this 2nd day of November, 2017. The parties may access this document through the Court's electronic docket system.

Peter Pattakos
Daniel Frech
The Pattakos Law Firm, LLC
101 Ghent Road
Fairlawn, Ohio 44333
peter@pattakoslaw.com
dfrech@pattakoslaw.com

Counsel for Plaintiff

Joshua R. Cohen
Cohen Rosenthal & Kramer LLP
The Hoyt Block Building, Suite 400
700 West St. Clair Avenue
Cleveland, Ohio 44114
jcohen@crklaw.com

John F. Hill
Buckingham, Doolittle & Burroughs, LLC
3800 Embassy Parkway, Suite 300
Akron, OH 44333-8332
jhill@bdblaw.com

Counsel for Defendant Minas Floros, D.C.

/s/ James M. Popson
James M. Popson (0072773)