

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, <i>et al.</i> , Plaintiff, vs. KISLING, NESTICO & REDICK, LLC, <i>et al.</i> , Defendants.	Case No. CV-2016-09-3928 Judge James A. Brogan Reply in Support of Plaintiffs' Motion for Protective Order and Sanctions regarding Defendants' Improper Communications with Represented Third Parties
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In opposing Plaintiffs' request for a protective order and sanctions, Defendant Floros tries to persuade the Court that he acted innocently in asking Mr. Carter to sign a document Floros apparently believed would relieve him of liability in connection with this lawsuit. But as explained below and more fully in Plaintiffs' Motion for Protective Order and Sanctions regarding Defendants' Improper Communications with Represented Third Parties, filed on April 18, 2019, Floros has engaged in improper and sanctionable conduct by (1) inviting Mr. Carter to dinner and paying for his dinner in an effort to influence him into signing a document containing false statements favorable to the Defendants; (2) making misrepresentations about the lawsuit and Plaintiffs' counsel in an attempt to influence Mr. Carter's willingness to participate as a witness; (3) communicating with Mr. Carter to sign a document that purports to relieve Floros and the other Defendants of liability without contacting Mr. Carter's attorneys¹; and (4) requesting on KNR's behalf that Mr. Carter visit KNR to review his legal files with the involvement of KNR's attorneys. Such conduct—the existence of which is fully supported by Mr. Carter's properly executed and previously filed

¹ Floros also asserts throughout his Opposition that Mr. Carter was not represented by counsel, a fact that is completely and affirmatively contradicted in Mr. Carter's affidavit. *See* Plaintiffs' Motion, Exhibit A, at ¶ 3, ¶ 4, ¶ 6.

affidavit, and hardly denied by the Defendants—is properly subject to a protective order and warrants sanctions under Ohio law.

1. Defendants engaged in improper and sanctionable conduct when they attempted to influence Mr. Carter, a represented party, into to signing a false and misleading statement for use in these proceedings.

To justify his communications with Mr. Carter, a former KNR client who the firm sent to Floros for chiropractic treatment, Floros has asserted primarily that he could not have engaged in improper conduct because he did not initiate contact with Mr. Carter. *See Floros's Opposition*, at 1; 4-5; Ex. A, at ¶ 1–¶ 2. But as Plaintiffs have already acknowledged, Floros's improper conduct was not in initiating communication with Mr. Carter. *See Plaintiffs' Motion*, at 2 (“Mr. Carter visited Defendant Floros's office to receive a chiropractic adjustment based on Floros's earlier representation that he would provide free adjustments to him if the need arose.”).

To the contrary, Floros engaged in improper conduct when he exploited Mr. Carter's visit to his chiropractic clinic in an attempt to influence Mr. Carter's participation as a witness in this lawsuit. In the context of asking Mr. Carter to sign a document Floros apparently believed would “be helpful to” Floros and would “end the lawsuit immediately” (*See Plaintiffs' Motion*, Exhibit A, at ¶ 9), Floros offered and provided Mr. Carter a free meal. *Id.* at ¶ 8, ¶ 12.² When Mr. Carter did not indicate whether he would agree to sign the document, and despite that Mr. Carter had not responded, Floros continued to send text messages to Mr. Carter about his intention to sign or not sign the document. *Id.* at ¶ 14, Ex. 2.

² Floros disputes that he offered Mr. Carter a free meal, but simultaneously admits that Floros “paid for” Mr. Carter's “meal” because Floros believed it was “polite” and “decent.” *See Floros's Opposition*, Exhibit A, at ¶ 31. Despite his attempt to fix the appearance of attempting to influence Mr. Carter's participation in this lawsuit as a witness, it is plain that Mr. Carter received a free meal during a time when Floros attempted to have Mr. Carter affix his signature to a document Floros believed would be invaluable to him in his defense.

Beyond the impropriety in communicating with a represented party in this manner (as set forth in Plaintiffs' motion), it is illegal in Ohio to offer or provide a witness or potential witness with a thing of value,³ including a free meal, in an attempt to improperly influence their participation in a legal proceeding, even if such efforts do not succeed in coercing or influencing the witness. R.C. 2921.02(C).

In addition, Floros was acting on Defendant Nestico's behalf when he invited Mr. Carter to KNR to review with KNR's attorneys the same records Mr. Carter had retained Plaintiffs' counsel to review. *See* Plaintiffs' Motion, Exhibit A, at ¶ 11 ("Dr. Floros further indicated that during Dr. Floros's conversation with Defendant Nestico" before the dinner, "Defendant Nestico extended an offer for me to visit KNR...Dr. Floros told me that he would personally set up an appointment for me to meet with Defendant Nestico if I agreed."). When Mr. Carter did not accept Defendant Nestico's invitation to visit KNR, which had apparently been purposefully delivered through Floros, a non-lawyer,⁴ Floros continued exerting his influence over Mr. Carter by pleading with him to visit KNR's lawyers. *See id.*, ¶ 14, Ex. 2 ("[P]lease meet with the lawyers to see for yourself everything you need to see. Literally everything").

³ Ohio courts construe the phrase "any valuable thing or valuable benefit" broadly. An item is valuable when it is "the desire of some person or persons, not necessarily of most persons, or all persons." *Scott v. State*, 107 Ohio St. 475, 487, 141 N.E. 19 (1923); *see also State v. Bissantz*, 3 Ohio App.3d 108, 114, 444 N.E.2d 92 (12th Dist.1982) (finding a "job commitment" to be "a valuable thing because at least some people desire it..."); and *State v. Dahms*, 3d Dist. Seneca No. 13-16-16, 2017-Ohio-4221, ¶ 66 (finding sufficient evidence that defendant offered "a valuable thing or benefit" when he offered to "return money" that was "previously borrowed").

⁴ In its Opposition, KNR asserts that KNR could not have engaged in improper conduct because Mr. Carter "initiated contact" with Floros and because "KNR's only involvement with this issue was receiving a phone call from Dr. Floros regarding Mr. Carter's contact with Dr. Floros." KNR's Opposition, at 1. But Prof.Cond.R. 4.2 "applies even though the represented person initiates or consents to the communication." *See* Comment 3. Moreover, lawyers are strictly prohibited from communicating with represented parties "through the acts of another." *See id.*, at Comment 4. As explained above, Floros told Mr. Carter that Floros was inviting Mr. Carter to KNR's office based on a conversation he recently had with Defendant Nestico. *See* Plaintiffs' Motion, Exhibit A, at ¶ 11

These actions represent an effort to persuade Mr. Carter not only into rethinking his choice to participate as a witness in this lawsuit, but to submit a false statement to support the Defendants' position in the suit. For these reasons, as explained more fully in Plaintiffs' motion, the Court should grant a protective order barring Defendants from engaging in any similar conduct and sanction Defendant Floros, as well as any other Defendant or representative thereof who was involved in improperly communicating with Mr. Carter.

b. A protective order and sanctions are warranted for Defendants' improper conduct.

Floros also wrongly suggests that it would be inappropriate for the Court to fashion a protective order preventing Defendants from engaging in future communications with represented third parties, such as Mr. Carter, related to discovery in this case. *See, e.g., Stanton v. Univ. Hosps. Health Sys.*, 166 Ohio App.3d 758, 2006-Ohio-2297, 853 N.E.2d 343, ¶ 8 (8th Dist.) (the civil rules permit courts to fashion protective orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."). In its sound discretion, the Court may issue a protective order to preserve the integrity of these proceedings, including the testimony of witnesses, from the Defendants' attempts to influence or alter their testimony.

Floros is similarly incorrect that the Court could not properly sanction Defendant Floros, Defendant Nestico, or any other of Defendants' representatives for their improper conduct in communicating with Mr. Carter in an attempt to exert influence over his participation as a witness in this lawsuit. *See* R.C. 2323.51(A)(1)(a) (defining "Conduct" under the statute, in part, as "the taking of any other action in connection with a civil action"); R.C. 2323.51(A)(2)(a)(i) (defining "Frivolous Conduct" under the statute as including taking an action for an "improper purpose"); *Turowski v. Johnson*, 70 Ohio App.3d 118, 123, 590 N.E.2d 434 (9th Dist.1991) (discussing that "the frivolous conduct statute was patterned after the Disciplinary Rules" and therefore courts may consider the "culpability" of the alleged wrongdoer).

Conclusion

Ohio has a strong public policy against persons who seek to obstruct, interfere with, or otherwise frustrate the judicial process by attempting to influence witnesses. *See, e.g.*, R.C. 2921.02(C); *See also State v. Hoehn*, 9th Dist. Medina No. 03CA0076-M, 2004-Ohio-1419, ¶ 41 (affirming conviction under R.C. 2921.02(C) where defendant stated to his daughter that he would give her mother “whatever she wants in the divorce” if the mother would recant her allegations); and *State v. Jurek*, 55 Ohio App.3d 70, 75, 562 N.E.2d 941 (8th Dist.1989) (affirming conviction under R.C. 2921.02(C) where defendant offered money and requested that its recipient cease pursuing legal action against the defendant).

Accordingly, the Court should issue a protective order and sanctions against Defendant Floros and any other Defendant, including their counsel, who participated in communicating with Mr. Carter to prevent such improper communications from reoccurring. The Defendants’ phone, text message, and email records from April 16, 2019 should reveal the extent of their participation in the improper communications at issue, thus, the Court should order that these records be immediately produced.

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on May 24, 2019, using the Court's e-filing system, which will serve copies on all necessary parties.

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