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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

KELLY MCCOY, PLC, an Arizona professional limited liability company,

Plaintiff,

v.

DESERT PALM SURGICAL GROUP, PLC, an Arizona professional limited liability company; ALBERT E. CARLOTTI, MD and MICHELLE L. CABRET-CARLOTTI, MD, husband and wife,

Defendants.

DESERT PALM SURGICAL GROUP, PLC, an Arizona professional limited liability company; ALBERT E. CARLOTTI, MD and MICHELLE L. CABRET-CARLOTTI, MD, husband and wife,

Counterclaimants,

v.

KELLY MCCOY, PLC, an Arizona professional limited liability company, MATTHEW J. KELLY and JANE DOE KELLY, husband and wife, KEVIN C.

No: CV2018-003112

RESPONSE TO MOTION TO DISMISS COUNTERCLAIM

Assigned to the Honorable James D. Smith

(ORAL ARGUMENT REQUESTED)

MCCOY and JANE DOE MCCOY, husband and wife,

Counterdefendants.

BACKGROUND

The Phoenix law firm of Kelly McCoy represented physicians Albert Carlotti, MD and Michelle Carlotti, MD (the "Carlottis") and their professional corporation, Desert Palm Surgical Group ("DPSG"), from 2011 to 2015, in litigation that began in 2008 and was not terminated until September of 2016. (See Exhibit "A", the docket in CV2008-003112.) This case sought damages and other relief from Sherry Petta, a former patient who posted online her dissatisfaction with medical services she received from DPSG.

In 2015, Kelly McCoy withdrew after its clients expressed dissatisfaction with their representation. In 2018, Kelly McCoy sued its clients for unpaid fees. DPSG and the Carlottis ("Counterclaimants") filed an Answer and a Counterclaim for legal malpractice. Kelly McCoy has moved to dismiss the counterclaim.

The FACTS AND PROCEDURAL BACKGROUND Section of the Motion Misstates the Basis for the Legal Malpractice Claim

Counterdefendants' Motion to Dismiss Counterclaim states, "Specifically, Defendants contend that Plaintiffs' alleged negligence **arises from** the 'inability to sustain a trial verdict of $12,009,489.96 for the reasons stated by the Court of Appeals' in *Desert Palm Surgical Group, P.L.C. v. Petta*, 236 Ariz. 568, 343 P.3d 438 (App. 2015), review denied July 30, 2015." Counterclaim, ¶¶ 18-23. (Emphasis added)

The counterclaim actually states, at ¶ 23, "**Damages** proximately caused by negligence of the counterdefendants includes, but is not limited to, the inability to sustain a trial verdict of $12,009,489.96 for the reasons stated by the Court of Appeals in *Desert Palm Surgical Group v.*

Petta, 236 Ariz. 568, 343 P.3d 438 (Ct. App. 2015)." (Emphasis added) A subsequent section of this memorandum will discuss the adequacy of the counterclaim as a notice pleading under the Arizona Rules of Civil Procedure.

The Cause of Action Against Kelly McCoy Did Not Accrue Until the *Petta* Litigation Was Terminated and Counterclaimants' Rights Were Fixed

In *Amfac Distribution Corporation v Miller, 138 Ariz. 155, 673 P.2d 795 (Ct App. 1983),* "*Amfac I,*" the Court of Appeals explained that in legal malpractice cases based at least in part on litigation negligence, determining when the cause of action accrues is not always straightforward. As Kelly McCoy argues in this case, accrual can occur once all appellate remedies have been exhausted:

> [N]o cause of action accrued until after the plaintiffs discovered or could reasonably have discovered the malpractice and until after the judgment ... had become final. The judgment did not become final until the Court of Appeals decided the appeal and the time to appeal to the [state] Supreme Court ... had expired.
>
> Woodruff v. Tomlin, 511 F.2d 1019, 1021 (6th Cir.1975) (emphasis added); see Simmons v. Ocean, 544 F.Supp. 841 (D.V.I.1982) (cause of action accrues when negligence becomes "irreversible" leaving plaintiff with "no remaining recourse"); Webb v. Pomeroy, 8 Kan.App.2d 246, 655 P.2d 465
>
> Page 797
>
> [138 Ariz. 157] (1982) (no cause of action until underlying lawsuit resolved); Biberstine v. Woodworth, 406 Mich. 275, 278 N.W.2d 41 (1979) (malpractice action against attorney for failing to schedule debt in bankruptcy runs from date of plaintiff's discharge in bankruptcy); contra Woodburn v. Turley, 625 F.2d 589 (5th Cir.1980); see generally Annot., 18 A.L.R.3d 978 (1968).
>
> 138 Ariz. at 156 – 157, 673 P.2d at 796 – 797

The Court of Appeals made clear, however, that termination of the litigation[1] is the trigger for accrual of a cause of action for legal malpractice:

> Our holding also recognizes the practical difficulties which a client faces in gauging his attorney's actions. Even where an attorney's performance in litigation is obviously poor, most clients would not be able to make an informed judgment whether the conduct constitutes malpractice. While the client may feel that the attorney has made a mistake or exercised improper judgment, that is clearly not the same as a recognition or awareness that the particular conduct is negligent. [3] Generally, it is only when the litigation is terminated and the client's rights are "fixed" that it can safely be said that the lawyer's misdeeds resulted in injury to the client.
>
> Id. at 157, 797 (Emphasis added)

The opinion of the Arizona Court of Appeals in *Desert Palm Surgical Group v. Petta*, 236 Ariz. 568, 587, 343 P.3d 438, 457 (Ct. App. 2015) did not terminate the litigation underlying this case. The holding in this case was:

> ¶ 60 We affirm the superior court's denial of Petta's motions for judgment as a matter of law. We vacate the judgment in favor of Plaintiffs and remand for a new trial, however, because the jury verdict cannot be supported by the damages evidence presented and shocks the conscience of this court. We also reverse the superior court's summary judgment on Petta's counterclaim for medical battery.
>
> (Emphasis added)

[1] The Court also used the phrase, "no remaining recourse." 138 Ariz. at 156, 673 P.2d at 796.

The *Petta* Litigation Was Not Terminated Until September of 2016

Following the remand of the case against Ms. Petta, counterclaimants expressed their displeasure with Kelly McCoy and **the firm** terminated the attorney/client relationship on August 15, 2015.[2]

Counterclaimants briefly were unrepresented, but soon they retained Ed Hopkins of Hopkins Way, PLLC of Denver and Phoenix. Because the Court of Appeals remanded the case for trial, Mr. Hopkins had to prepare the case for a second trial. This required discovery to establish an evidentiary basis for a damages model that would withstand a challenge on appeal. Mr. Hopkins obtained a court order permitting additional discovery and he requested and obtained a new trial date. Mr. Hopkins simultaneously pursued settlement negotiations to eliminate the risk and expense of trial and to minimize reputational harm that was ongoing throughout the representation by Kelly McCoy. His settlement negotiations were successful.

On **May 20, 2016** a confidential settlement agreement was executed. Because of the confidentiality provisions and an order sealing certain court orders entered pursuant to this settlement, the details of the settlement cannot be publicly discussed. An affidavit of Ed Hopkins, attached to this memorandum as Exhibit "C", establishes that court orders commonly used in cases of this nature involve remedies that often take months to pursue, following the acceptance by the litigants of the terms of settlement. These are remedies Kelly McCoy failed to pursue.

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[2] Attached as Exhibit "B," is the E-Mailed resignation by Kelly McCoy dated 8/15/2015. **The law firm was not fired.** It is understandable that counsel for Kelly McCoy is unaware of remedial steps required after his clients withdrew.

In this case, the **May 20, 2016** settlement resulted in sealed court orders dated **June 13, 2016** that authorized certain actions by Mr. Hopkins, who carried out these actions over a period of months. Mr. Hopkins' affidavit describes the steps he took and the time required to determine the damages being sustained by the counterclaimants.

The Hopkins affidavit provides several important dates to be utilized in determine the date counterclaimants' cause of action against Kelly McCoy accrued:

January 5, 2016, order setting retrial of the *Petta* case for **September 6 – 8, 12 – 15 and 19 – 22, 2016** to a Maricopa County jury; the parties were given until **June 8, 2016** to complete discovery and file dispositive motions;

May 20, 2016: date of confidential settlement agreement;

June 13, 2016: Injunction entered, allowing Mr. Hopkins to begin long overdue efforts to reduce counterclaimants' ongoing reputational damage;

June 23, 2016 – September 8, 2016: Mr. Hopkins took steps now available to reduce ongoing damage to the counterclaimants' reputations;

September 8, 2016: *Petta* litigation dismissed; the matter had now terminated and the parties' rights were fixed, per *Amfac I;* legal expense had continued to accrue until at least this date.

A Cause of Action Does Not Accrue Until Damages Can Be Determined

Before accrual of a legal malpractice cause of action can occur, the clients must be able to determine the damages incurred by their lawyers' negligence. In the present case, the reversal of the $12,000,000 verdict did not determine the extent of the harm caused by Kelly McCoy's negligence. Not only was the case remanded for trial to determine the verdict a properly tried case could produce, the damages incurred by Kelly McCoy's years long failure to protect counterclaimants' reputation were indeterminate.

In *Walk v. Ring*, 202 Ariz. 310, 44 P.3d 990, 996 (S. Ct. 2002), the Arizona Supreme Court pointed out that, in most cases, the jury must decide when the claimant has sufficient information for a cause of action to accrue:

> Thus, the "jury must determine at what point Plaintiff's knowledge, understanding, and acceptance in the aggregate provided sufficient facts to constitute a cause of action." *Id.* at ¶ 36. We pointed out that determinations of the time when discovery occurs and a cause of action accrues "are usually and necessarily questions of fact for the jury." *Id.* at 323 ¶ 32, 955 P.2d at 961 ¶ 32 (citing *Gust, Rosenfeld,* 182 Ariz. at 591, 898 P.2d at 969).

Mr. Hopkins is prepared to testify, in accordance with his affidavit, that counterclaimants were incurring unnecessary damage to their professional reputations throughout the four plus years they were represented by Kelly McCoy—long before the Court of Appeals reversed a $12,000,000 trial verdict. But the extent of this damage could not be determined until available remedies had been exhausted. That process lasted well into 2016. If the anticipated testimony of Ed Hopkins is accepted by the jury, the statute of limitations has not yet run![3]

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[3] If suit had been filed by July of 2017, as Kelly McCoy argues, the complaint would have been subject to dismissal as premature, because damages could not yet be

The Counterclaim Satisfies Arizona's Notice Pleading Requirements

Counsel for defendants/counterclaimants were first retained on April 30, 2018. (See Exhibit "D") Kelly McCoy had served its collection action 30 days earlier. CPSG and the Carlottis were in default. Research into the background of very complicated litigation ongoing for over 8 years had to be done promptly, with investigation into the existence of what might be a compulsory counterclaim for legal malpractice, the date of accrual of such an action and the key question—was there negligence by Kelly McCoy? Those issues were addressed and an Answer and Counterclaim were filed on May 2, 2018.

If Kelly McCoy truly needs additional detail to understand why its clients were unhappy with them in 2015, dismissal of the counterclaim is not the remedy. *Rowland v. Kellogg Brown & Root, Inc.*, 210 Ariz. 530, 115 P.3d 124, 128 (Ct. App. 2005); *Folk v. City of Phoenix*, 27 Ariz. App. 146, 151, 551 P.2d 595, 600 (Ct. App. 1976). Given the E-Mail exchanges surrounding Kelly McCoy's withdrawal as counsel, however, they appear to have understood the clients' dissatisfaction.

On August 15, 2015, Kevin McCoy ended an E-Mail exchange with Albert Carlotti, MD with the phrase, "We are done."

> ----- Forwarded Message -----
> **From:** Kevin McCoy <kmccoy@kelly-mccoy.com>
> **To:** "drcarlotti@yahoo.com" <drcarlotti@yahoo.com>
> **Cc:** "drmichellec@yahoo.com" <drmichellec@yahoo.com>; "mkelly@kelly-mccoy.com" <mkelly@kelly-mccoy.com>
> **Sent:** Tuesday, August 18, 2015, 10:52:45 PM CDT
> **Subject:** Re: Termination of Attorney/Client Relationship
>
> Al, we will make our files available to whoever you want. We are done.

---

determined. *See, Environmental Liners, Inc. v. Ryley, Carlock & Applewhite, 187 Ariz. 379, 384 – 385, 930 PI.2d 456, 461 - 462 (Ct App. 1996)*

Sent from my iPhone

On Aug 18, 2015, at 8:07 PM, Al <drcarlotti@yahoo.com> wrote:

Kevin,

I am versed in the rules applying to an attorney terminating their client. You are required to provide entire file before we can terminate your client. Also if there's a pending matter at hand, you cannot abandon your client if that would prejudice their ability to respond to that filing in a timely manner.

The issue with response to Petta at the Superior Court must be replied to. We expect that your firm will do so in a timely manner. With respect to the bankruptcy court, as this is a moot issue since the judgment has completely been reversed, you may withdraw. No response from us is even necessary at this point.

The recent charge to our card may stand.

I will have an answer to your other 2 options in the next 30 days.

Regards,

Albert

Sent from my iPhone

(See Exhibit "B")

The Counterclaim Contains Adequate Factual Allegations

The counterclaim states that Kelly McCoy held itself out as "skilled in trials, appeals, bankruptcy, commercial litigation and defamation" (¶ 19) and that it "lacked the skills required to perform in accordance with the appropriate standard of care. (¶ 20). For purposes of Rule 12(b)(6), those allegations are taken as true. As Kelly McCoy is aware, it handled matters for Counterclaimants in each listed area of the law.

The counterclaim makes clear that the counterclaimants' damages include loss of the $12,000,000 trial verdict as well as claims that one of its principals appeared for oral argument at the Court of Appeals while intoxicated and that another of its principals continued to work on

this matter after being expressly instructed not to do so. These allegations alone are sufficient to satisfy Arizona's notice pleading requirements. *Belen Loan Investors v. Bradley*, 231 Ariz. 448, 296 P.3d 984, 993 (Ct. App. 2012).

Counterdefendants Are Not Entitled to the Relief They Seek

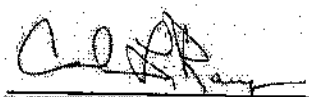
Arizona is a notice pleading state, but it is also a state that requires its litigants to comply with Rule 26.1, Ariz. R. Civ. P. Once this Motion to Dismiss has been decided, counterclaimants will be entitled to an Initial Disclosure Statement that includes an Affidavit of Merit, signed by a witness qualified to testify to the standard of care for the legal malpractice alleged in this case.

Dismissal pursuant to Rule 12(b)(6) is not the appropriate remedy for the pleading deficiencies alleged in the motion. If this Court finds the need to supplement the record before the Initial Disclosure Statement is due, an order requiring a more definite statement of the claims is sufficient.

If this response has not defeated the statute of limitations argument as a matter of law, any remaining questions of fact must be decided by the trial jury. The motion must be denied and the counterdefendants required to answer.

DATED this 25th day of July, 2018

CALVIN L. RAUP , PLLC



Calvin L. Raup
Attorney for Defendants/Counterclaimants

Debus, Kazan & Westerhausen, Ltd

For
Larry L. Debus
Co-counsel for Defendants/Counterclaimants

E-Filed this 25th day of July, 2018.

Copies E-Mailed to:

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Russell E. Krone
Attorneys for Counterdefendants Kelly McCoy, Kelly & McCoy

From: Albert Carlotti <drcarlotti@yahoo.com>
Subject: Fw: Re: Termination of Attorney/Client Relationship
Date: June 18, 2018 at 11:20:21 AM MST
To: Cal Raup <cal@rauplaw.com>

----- Forwarded Message -----
From: Kevin McCoy <kmccoy@kelly-mccoy.com>
To: "drcarlotti@yahoo.com" <drcarlotti@yahoo.com>
Cc: "drmichellec@yahoo.com" <drmichellec@yahoo.com>; "mkelly@kelly-mccoy.com" <mkelly@kelly-mccoy.com>
Sent: Tuesday, August 18, 2015, 10:52:45 PM CDT
Subject: Re: Termination of Attorney/Client Relationship

Al, we will make our files available to whoever you want. We are done.

Sent from my iPhone

On Aug 18, 2015, at 8:07 PM, Al <drcarlotti@yahoo.com> wrote:

Kevin,

I am versed in the rules applying to an attorney terminating their client. You are required to provide entire file before we can terminate your client. Also if there's a pending matter at hand, you cannot abandon your client if that would prejudice their ability to respond to that filing in a timely manner.

The issue with response to Petta at the Superior Court must be replied to. We expect that your firm will do so in a timely manner. With respect to the bankruptcy court, as this is a moot issue since the judgment has completely been reversed, you may withdraw. No response from us is even necessary at this point.

The recent charge to our card may stand.

I will have an answer to your other 2 options in the next 30 days.

Regards,

Albert

Sent from my iPhone

On Aug 18, 2015, at 4:36 PM, Kevin McCoy <kmccoy@kelly-mccoy.com> wrote:

Albert and Michelle,

Upon further consideration, I do not believe that an in-person meeting will provide any benefit to this discussion, other than to, perhaps, give you both another opportunity to unfairly criticize this firm for its handling of your case. Instead, I think there are really only three possible options at hand: You can (1) continue to allow us to run your credit card each month in the amount of $3500 as per our prior agreement until the current past due balance of approximately $136,000 is paid in full, (2) pay us a one-time lump sum payment of $70,000 in full satisfaction of the past due balance, or (3) refuse to remit any more payments. Matt and I have discussed these options and are fine with whatever you choose. Be advised, however, that if you choose the third option, we will be forced to sue you for the full amount now currently due and owing. This is not a course of action that we wish to take and would prefer to amicably part ways. Regardless of which option you choose, at a minimum, Kelly McCoy, PLC must immediately withdraw as your counsel of record in the bankruptcy and superior court matters. Like you, we are not financially able to endure another trial and incur additional fees and costs that might not get paid.

Concerning the most recent charge to your credit card, despite what you may have thought, your August 7 email in no way stated that we were no longer authorized to run your card in accordance with our prior agreement. Rather, you stated that you wanted to sit down and "reach a settlement." If we cannot reach an amicable settlement, then we will no longer run the card. But under no circumstances are we going to reverse

the charge. You owe this firm a considerable amount of money and we have worked with you for quite some time on payment terms.

I have also attached the most recent pleadings filed by Petta in the bankruptcy and state court proceedings. Because we will be withdrawing as your counsel in both venues, I urge you to pass these pleadings along to your general counsel, Edwin Hsu, so that he can respond to them as he sees fit. Please consider this proposal and let me know how you wish to proceed.

Regards,

Kevin

Kevin C. McCoy, Esq.

KELLY McCOY, PLC

340 E. Palm Lane, Suite 300

Phoenix, Arizona 85004

(602) 687-7433

(602) 687-7466 (fax)

kmccoy@kelly-mccoy.com

We have moved our offices. Please note our new mailing address.

Our firm is a debt relief agency. Among other legal services, we help individuals and businesses file for bankruptcy relief under the United States Bankruptcy Code.

From: Albert Carlotti [mailto:drcarlotti@yahoo.com]
Sent: Tuesday, August 18, 2015 1:20 PM
To: Kevin McCoy; Matthew Kelly
Subject: Fw: Receipt

Kevin & Matt,

I am not thrilled with the fact that Lisa just charged my credit card in light of the fact that you have agreed to discuss our issues with your firm.

In the interim it should be reversed. My last correspondence to you suggested that we wait until Matt returns to sit down.

You should be aware that via correspondence with Mr. Lorenz and our general counsel, Edwin Hsu, Petta has issued a settlement offer to us. She expects us to pay her $200,000.

Not kidding.

Please reverse the charge and advise me when you both would like to meet.

Regards,

Albert

----- Forwarded Message -----
From: Lisa Plisko <lplisko@kelly-mccoy.com>
To: "drcarlotti@yahoo.com" <drcarlotti@yahoo.com>
Cc: Matthew Kelly <mkelly@kelly-mccoy.com>; Kevin McCoy <kmccoy@kelly-mccoy.com>
Sent: Monday, August 17, 2015 10:32 AM
Subject: Receipt

Attached is a receipt for your August 2015 payment. Thank you.

Lisa Plisko

Legal Assistant

KELLY McCOY, PLC

340 East Palm Lane, Suite 300

Phoenix, Arizona 85004

(602) 687-7433

(602) 687-7466 (fax)

lplisko@kelly-mccoy.com

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<20150818145008147.pdf>