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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, III and MICHELLE L. CABRET-CARLOTTI, husband and wife,
Defendants.

No: CV2018-003112

ANSWER AND COUNTERCLAIM

Assigned to the Honorable Karen Mullins

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

Counterdefendants.

Defendants, through counsel undersigned, in response to plaintiff's Complaint, admit, deny and allege as follows:

PARTIES AND JURISDICTION

1. Defendants admit, on information and belief, the allegations of Paragraph 1.

2. Defendants admit the allegations of Paragraph 2.

3. Defendants admit the allegations of Paragraph 3.

4. Defendants admit the allegations of Paragraph 4.

BREACH OF CONTRACT

5. In response to Paragraphs 5 – 14, defendants affirmatively allege that plaintiff has no written fee agreement with defendants and therefore has no enforceable contract with defendants. ER 1.5(b), Arizona Rules of Professional Conduct.

QUANTUM MERUIT

6. In response to Paragraphs 15 – 19, defendants affirmatively allege that plaintiff has no written fee agreement with defendants and therefore has no claim for Quantum Meruit. ER 1.5(b), Arizona Rules of Professional Conduct.

DEFENSES COMMON TO ALL COUNTS

7 Plaintiff's Complaint fails to state a claim upon which relief may be granted. Rule 12(b)(6), Ariz. R. Civ. P.

8. Plaintiff's Complaint was filed in violation of Rule 11(b), Ariz. R. Civ. P.

9. WHEREFORE, having fully answered plaintiff's Complaint, defendants pray for:

(a) an order dismissing plaintiff's Complaint and that plaintiff take nothing thereby,

(b) for an award of taxable costs incurred,

(c) for sanctions pursuant to Rule 11(b) and ARS §12-349; and

(d) for such other and further relief as the Court deems just.

COUNTERCLAIM

In support of their counterclaims, counterclaimants allege as follows:

10. The admissions, denials and allegations of the preceding paragraphs of this Answer are incorporated by reference.

11. Counterclaimants Albert Carlotti, MD and Michelle Carlotti, MD, husband and wife, reside in Austin, Travis County, Texas and Scottsdale, Maricopa County, Arizona.

12. Counterclaimant Desert Palm Surgical Group is an Arizona professional limited liability corporation with its principal place of business in Scottsdale, Maricopa County, Arizona.

13. Counterdefendants Matthew J. Kelly ("Kelly") and Kevin C. McCoy ("McCoy") are attorneys licensed to practice in Arizona and practicing law in Phoenix, Maricopa County, Arizona.

14. Counterdefendant Kelly McCoy, PLC ("Kelly McCoy") is an Arizona limited liability law firm with its principal place of business in Phoenix, Maricopa County, Arizona.

15. At all times material to this counterclaim, Kelly and McCoy acted on behalf of their respective marital communities.

16. At all times material to this counterclaim, Kelly and McCoy acted as agents, owners and employees of Kelly McCoy.

17. Kelly McCoy is vicariously liable for the acts and omissions of Kelly and McCoy.

COUNT ONE—PROFESSIONAL NEGLIGENCE (ALL COUNTERDEFENDANTS)

18. Counterdefendants owed counterclaimants a duty of providing legal services in a competent and professional manner, in accordance with standard of care imposed upon a reasonably prudent Arizona attorney.

19. Counterdefendants held themselves out as skilled in trials, appeals, bankruptcy, commercial litigation and defamation.

20. Counterdefendants lacked the skills required to perform in accordance with the appropriate standard of care.

21. Counterdefendants failed to comply with the appropriate standard of care in their representation of counterclaimants.

22. Counterdefendants proximately caused harm to the counterclaimants through negligence in their representation.

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).

COUNT TWO—UNJUST ENRICHMENT (ALL COUNTERDEFENDANTS)

24. The admissions, denials and allegations of the preceding paragraphs of this Answer are incorporated by reference.

25. Fees charged and collected by counterdefendants were not earned and must be refunded to counterclaimants.

26. Counterdefendants were unjustly enriched by virtue of their billing and collecting fees to which they were not entitled.

COUNT THREE—INTENTIONAL INFLICTIONOF EMOTIONAL DISTRESS

(COUNTERDEFENDANTS KELLY AND MCCOY)

27. The admissions, denials and allegations of the preceding paragraphs of this Answer are incorporated by reference.

28. Kelly and McCoy engaged in extreme and outrageous conduct.

29. Kelly and McCoy's conduct was intentional and reckless.

30. Kelly and McCoy knew that their conduct would result in emotional distress but engaged in this conduct regardless.

31. The conduct by defendant Kelly included appearing for oral argument at the Court of Appeals in what appeared to the Carlottis to be an intoxicated state.

32. The conduct by McCoy included continuing to work and to bill on the Carlottis' matter after being specifically and repeatedly instructed not to do so.

33. Kelly and McCoy acted, knowing that their conduct created a substantial risk of significant harm.

34. Kelly acted with an evil hand guided by an evil mind.

35. McCoy acted with an evil hand guided by an evil mind.

36. Counterclaimants are entitled to punitive damages in amount sufficient to deter such conduct in the future.

WHEREFORE, counterclaimants pray for judgment as follows:

(a) For compensatory damages in an amount to be proved at trial;

(b) For punitive damages in an amount sufficient to deter such conduct in the future;

(c) For taxable costs incurred;

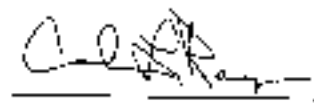
(d) And for such other and further relief the Court deems just.

DATED this 2 day of May, 2018

CALVIN L. RAUP, PLLC

Calvin L. Raup
Attorney for Defendants/Counterclaimants

Debus, Kazan & Westerhausen, Ltd



Larry L. Debus
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E-Filed this 2 day of May, 2018

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Attorneys for Defendants/Counterclaimants

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.	No: CV2018-003112 **MOTION TO DISMISS AND MOTION FOR SANCTIONS**
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,	Assigned to the Honorable Karen Mullins

v.

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

Counterdefendants.

Defendants, through counsel undersigned, pursuant to Rules 12(b)(6) and 11(a), Ariz. R. Civ. P. and ARS §§12-349 – 350, move to dismiss for failure to state a claim, for sanctions for the violation of Rule 11(a) and for an award of attorney's fees and costs unnecessarily incurred to defend this action.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff's Complaint contains two counts: Breach of Contract and *Quantum Meruit*. The Complaint references multiple "retentions" and "engagement agreements." Nowhere is there any reference to the written agreement required by ER 1.5(b):

> (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible **shall be communicated to the client in writing**, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.

Rule 12(b)(6) Entitles Defendants to An Order Dismissing This Case.

The Complaint fails to state a claim upon which relief may be granted. Rule 12(b)(6), Ariz. R. Civ. P. In considering such a motion the trial court must take as true the allegations of the Complaint. *Mohave Disposal, Inc v. City of Kingman*, 186 Ariz.

343, 346 ,922 P.2d 308, 311 (S.Ct. 1996). The Court looks only to the pleading itself and considers only well-pled facts. *Cullen v. Auto-Owners Ins. Co.* 218 Ariz. 417, 189 P.3d 344, 346 (S. Ct. 2008). Conclusions unsupported by well-pled facts are not considered. *Id.*; *Stauffer v. Premier Service Mortgage, LLC*, 240 Ariz. 575, 382 P.3d 790, 793 (Ct. App. 2016). In order to be upheld on appeal the Court must find that the plaintiff would not be entitled to relief under any facts susceptible of proof. *Menendez v. Paddock Pool Construction Co.,* 172 Ariz. 258, 836 P.2d 968, 971 (Ct. App. 1991). It is the pleader's burden to include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Rowland v. Kellog Brown and Root, Inc.,* 210 Ariz. 530, 115 P.3d 124, (Ct. App. 2005). In order to do so in this case, plaintiff must recite the existence of a written fee agreement that complies with ER 1.5(b), *supra*.

In *Levine v. Harlason, Miller, Pitt, Feldman & McAnally, PLC,* 1CA-CV-0590, (Decided 1/25/2018; Petition for Review Pending, CV-18-0068PR) plaintiff Jack Levine sued to recover contingent fees without a written fee agreement. Like plaintiff in this action, he attempted to cover his oversight by asserting a claim for *quantum meruit*. The action was dismissed under Rule 12(b)(6) and affirmed on appeal. The Court of Appeals pointed out:

> **Although "recovery under *quantum meruit* presupposes that no enforceable written or oral contract exists,"** 42 C.J.S. *Implied Contracts* § 62 (2017); *see also W. Corr. Grp., Inc. v. Tierney*, 208 Ariz. 583, 590, ¶ 27 (App. 2004) (citing *Blue Ridge Sewer Improvement Dist. v. Lowry & Assocs., Inc.*, 149 Ariz. 373, 375 (App. 1986)), this does not mean the remedy is available in every circumstance where no contract exists. **"[E]quitable relief is not available when recovery at law is forbidden because the contract is void as against**

> **public policy.**" *Landi v. Arkules*, 172 Ariz. 126, 136 (App. 1992); *see also Mouza v. Saba*, 222 Ariz. 581, 587, ¶ 27 (App. 2009) (denying the plaintiff recovery in unjust enrichment for performance of illegal broker services); *Peterson v. Anderson*, 155 Ariz. 108, 113 (App. 1987) (denying recovery for a contract claim of an out-of-state attorney seeking payment pursuant to a fee-splitting arrangement that required him to practice law in a manner that was against public policy).
>
> Fastcase, p. 4, ¶8. (Emphasis added)

The Court provided the following explanation of why public policy demands a written fee agreement between lawyers and clients:

> ¶12 The Arizona Rules of Professional Conduct are designed to prevent harm and protect clients. *See In re Zang*, 154 Ariz. 134, 144, 146 (1987) (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 463–64 (1978)). An oral agreement for legal services may mislead, misinform, or confuse the
>
> Page 6
>
> client. *See* ER 1.5, cmt. 2 ("A written statement concerning the terms of the engagement reduces the possibility of misunderstanding."). Moreover, when an attorney fails to follow ER 1.5, one or both parties may later attempt to alter the terms of the representation and/or payment during the course of litigation. A client, dissatisfied with the outcome, may assert he was misled by an unscrupulous legal adviser and refuse to pay the agreed-upon amount, or an attorney may spend more time on a case than anticipated and attempt to increase his recovery to offset those additional expenditures. Such disputes devolve into self-serving recollections of how the agreement was formed and what the parties intended at the litigation's outset. As the disciplinary judge stated in the course of separate proceedings against Appellant in connection with this matter, ER 1.5 "avoids precisely the chaos in the attorney client relationship [that Appellant] brought by seeking to obtain a division of the fees contrary to the ethical rules." *See In re Levine*, PDJ 2017-9033 (State Bar of Arizona disciplinary proceeding Aug. 25, 2017) (decision and order imposing sanctions), at *22.

The Court also pointed out that the failure to document a fee agreement is a violation of the Arizona Rules Professional Conduct.

> ¶13 Reducing a fee agreement to writing ultimately protects both the attorney and the client in the event of a fee dispute and seeks to avoid unnecessary litigation. Appellant did not embrace these protections when he undertook the Clients' representation. His actions violated the Arizona Rules of Professional Conduct, and his reliance upon the asserted existence of oral contingent fee and division of fee agreements are void as against public policy. Therefore, recovery in *quantum meruit* is not available.

Levine involves an oral contingent fee agreement. Plaintiff Kelly McCoy apparently alleges the existence of an oral hourly fee agreement. That said, there is no basis to distinguish the *Levine* opinion because it does not turn on the nature of the representation. It turns on the absence of a writing in accordance with ER 1.5. Plaintiff's Complaint fails to state a claim upon which relief may be granted.

Defendants Are Entitled to Sanctions.

Attached as Exhibit "A" is a letter from undersigned counsel for defendants to attorney Walid Zarili, the Kelly McCoy lawyer that signed the Complaint in this action. Exhibit "A" includes a request to withdraw the claim pursuant to the notice provision of ARS §12-349(C):

> C. Attorney fees shall not be assessed if after filing an action a voluntary dismissal is filed for any claim or defense within a reasonable time after the attorney or party filing the dismissal knew or reasonably should have known that the claim or defense was without substantial justification.

Mr. Zarili responded personally and conveyed his clients' position: "Go ahead and file." Sanctions are now appropriate under Rule 11(b) and ARS §12-350:

12-350. Determination of award; reasons; factors

In awarding attorney fees pursuant to section 12-349, the court shall set forth the specific reasons for the award and may include the following factors, as relevant, in its consideration:

1. The extent of any effort made to determine the validity of a claim before the claim was asserted.

2. The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid.

3. The availability of facts to assist a party in determining the validity of a claim or defense.

4. The relative financial positions of the parties involved.

5. Whether the action was prosecuted or defended, in whole or in part, in bad faith.

6. Whether issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict.

7. The extent to which the party prevailed with respect to the amount and number of claims in controversy.

8. The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

Rule 11 sanctions are to be imposed when a lawyer knew or should have known that the pleading being signed and filed was substantially lacking in merit. Although the *Levine* decision was published less than 90 days ago, Rule 11 cases against lawyers have existed for decades. E.g., *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Protection*, 177 Ariz. 316, 868 P.2d 329 (Ct. App. 1993); *Boone v. Superior Court*, 145 Ariz. 235, 700 P.2d 1335 (S. Ct. 1985). Even applying *Boone's* rather liberal rule of, "a good faith belief, formed on the basis of that reasonable investigation, that a colorable claim exists," (Id. at 1341) signing the Complaint in this action violated

Rule 11(b) and warrants sanctions pursuant to ARS §§12-349 and 12-350, specifically, double damages of $5,000 plus attorney's fees and costs incurred to defend this action.

The Subject Of The *Levine* Decision Was Disciplined For This Conduct.

On September 28, 2017 the Presiding Disciplinary Judge published his findings in PDJ-2017-9033, styled "In The Matter Of A Suspended Member Of The State Bar Of Arizona, Jack Levine, Bar No. 001637, Respondent." One of the counts resulting in further discipline—to a lawyer well known to the State Bar Disciplinary Committee—was the subject of the *Levine v. Harlason, Miller, Pitt, Feldman & McAnally* decision. This case and the underlying disciplinary order arose from conduct virtually identical to the events leading up to the case before this Court. The Final Judgment and Order is attached as Exhibit "B." This Order states:

> In Count III, Mr. Levine argued he "totally complied with all the requirements of ER 1.5(c)," because "to date, there has been no division of any fees between Respondent and Attorney Jerry Krumwiede." (Emphasis in original). [Levine Prehearing memorandum.] His argument fails. He seeks to obtain that which the ethical rules categorically prohibit under the facts before us. Mr. Levine states he relies on the fee agreement the Erhardts signed with Mr. Krumwiede because it "expressly authorized Mr. Krumwiede to associate counsel." (Emphasis in original). [Id.] Such reliance is revealing.
>
> Exhibit "B" at 20 (Emphasis added)

The Order concludes with:

> We find there was no ER 1.5 compliant approval in writing signed by the clients. He may have had an informal relationship with Krumwiede. But the language of the rule is clear and explicit. The client must agree "in a writing signed by the client."
>
> Exhibit "B" at 23 (Emphasis added)

Defendants Are Entitled To The Remedies They Seek

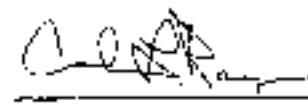
Taking all allegations of plaintiff's Complain as true, it still fails to state a claim upon which relief may be granted. Lawyers that choose not to comply with ER 1.5 cannot seek judicial assistance to collect unpaid fees. In addition, lawyers filing cases in the Superior Court are held to know not only the law but also the Rules of Civil Procedure. Rule 11(b) imposes a duty to certify that a claim or defense is supported by both law and facts. The Complaint in this action was filed in violation of that rule. Defendants are entitled not only to a dismissal with prejudice but also to sanctions to include their fees, costs and double damages up to the statutory maximum of $5,000. This Court is respectfully requested to grant the relief the defendants seek.

DATED this 3 day of May, 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 ____ day of May, 2018

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE 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; *et al.*,

Defendants.

No. CV2018-003112

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SANCTIONS

(Assigned to the Hon. Karen Mullins)

DESERT PALM SURGICAL GROUP, PLC, an Arizona professional limited liability company; *et al.*

Counterclaimants,

v.

KELLY MCCOY, PLC, an Arizona professional limited liability company; *et al.*

Counterdefendants.

Plaintiff Kelly McCoy, PLC, an Arizona professional limited liability company (the "Firm"), responds in opposition to defendants' motion to dismiss and motion for sanctions. Neither motion is well taken and must be denied. Alternatively, to the extent the Court finds that the Firm's complaint fails to state a claim upon which relief can be granted, the remedy is to allow the Firm the opportunity to amend its complaint to assert

the "magic language" defendants argue is missing, rather than the Draconian remedy of dismissal with prejudice. This response is supported by the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Relying upon the Ethical Rules, defendants suggest that the Firm has failed to state a claim for either breach of contract or *quantum meruit*. Defendants' arguments are without merit.

A motion to dismiss pursuant to Ariz. R. Civ. P. 12(b)(6) is designed to test the legal sufficiency of the complaint when accepting as true the allegations of the complaint. *Parks v. Macro-Dynamics, Inc.*, 121 Ariz. 517, 519, 591 P.2d 1005, 1007 (App. 1979) ("A Rule 12(b) motion to dismiss for failure to state a claim, which assumes the complaint's allegations are true, attacks the legal sufficiency of the complaint."). The salient allegations of the Firm's complaint include:

- Defendants "retained the Firm" to represent them in state court litigation. *Id.* at ¶ 5.
- Defendants "retained the Firm" to represent them in related bankruptcy proceedings. *Id.* at ¶ 6.
- Defendants "retained the Firm" to represent them in connection with an appeal to the Arizona Court of Appeals. *Id.* at ¶ 7.
- The Firm "performed legal services" on behalf of the defendants in all three matters. *Id.* at ¶ 8.
- Defendants "failed and refused to pay all amounts due and owing for services rendered." *Id.* at ¶ 9.
- Defendants' failure to pay for legal services "has resulted in a material breach of the engagement agreement between the Firm and [defendants]." *Id.* at ¶ 10.
- "As a result of defendants' breaches of the engagement agreements, the Firm has incurred damages." *Id.* at ¶¶ 11-12.

These allegations, which are assumed to be true, set forth the *prima facie* elements for breach of contract. *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, ¶ 30, 83 P.3d 1103, 1111 (App. 2004) (breach of contract claim requires existence of contract, breach of the contract, and resulting damages).

Defendants further conflate the marked distinction between contingent fee agreements and other engagement agreements between lawyer and client. The case upon which defendants rely—*Levine v. Haralson, Miller, Pitt, Feldman & McAnnaly, PLC*, 783 Ariz. Adv. Rep. 6, ___ P.3d ___ (App. 2018) is simply inapplicable to this matter. *Levine* involved a lawyer's effort to recover a contingent fee in *quantum meruit* in a situation in which he did not have a written fee agreement signed by the clients. *Id.* at *1, ¶ 1. The Court of Appeals held that, "in the absence of a written fee agreement, an attorney may not recover the *quantum meruit* value of his services **because unwritten contingent fee agreements** are void as against public policy." *Id.* (emphasis added).

According to defendants, no distinction exists between the unwritten contingent fee agreement in *Levine* and what defendants characterize as an oral hourly fee agreement. Motion at 5:10-14.[1] Defendants are incorrect. Contingent fee agreements are treated uniquely from other engagement agreements. Under ER 1.5(c), a contingent fee agreement "shall be in a writing **signed by the client** and shall state the method by which the fee is to be determined . . ." (emphasis added). Pursuant to ER 1.5(b), however, non-contingent fee agreements do not require a client's signature—rather, the lawyer need only provide to the client in writing "[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. . ." This is precisely what the Firm did prior to undertaking defendants' representation. Notwithstanding, the Firm did receive its engagement agreement signed by defendants.

Attached hereto as Exhibit "A," "B," and "C" are the writings evidencing the fact that defendants retained the firm to represent them in the state court litigation, the

[1] The Firm did not allege that the engagement agreements with the defendants were oral.

bankruptcy proceedings, and the appeal, respectively. Moreover, attaching these documents to this response does not transform defendants' Motion into a motion for summary judgment under Rule 12(b)(6), Ariz. R. Civ. P. Matters outside the pleadings "do not include matters that, although not appended to the complaint, are central to the complaint." *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 602, ¶ 13, 382 P.3d 812, 817 (App. 2016) (citation omitted), review denied (May 24, 2017). The engagement agreements referenced in the Complaint are central to the complaint.

The Firm also asserted a claim for *quantum meruit* together with a breach of contract claim because, although it received a signed engagement agreement from defendants, the Firm is unable to locate the signed engagement agreement. The inability to locate the signed engagement agreement, however, is not fatal to a claim for *quantum meruit* where the scope of the representation and basis for the fee was provided in writing to defendants, the legal services were actually performed, defendants received the benefit of those services, and defendants at least partially performed their payment obligation for those services.

Finally, defendants' claim for sanctions is spurious. Neither Rule 11, Ariz. R. Civ. P., nor A.R.S. § 12-349 provide a basis to award sanctions. The complaint filed against defendants for recovery of unpaid fees was not brought for an improper purpose, has evidentiary support, and was not brought without substantial justification—i.e., groundless and not made in good faith. Defendants have simply failed to honor their payment obligations and the Firm is entitled to recover the value of the services it provided over a several year time span.

CONCLUSION

The Firm has stated a claim for both breach of contract and *quantum meruit*. Defendants' efforts to avoid their obligations to the firm are without merit. Nevertheless, to the extent the Court believes that the Firm has failed to state a claim for either cause of action, the Firm requests leave of court to file an amended complaint to remedy any perceived error in original pleading. *Dube v. Likins*, 216 Ariz. 406, 415, ¶ 24, 167 P.3d

93, 102 (App. 2007) ("Before the trial court grants a Rule 12(b)(6) motion to dismiss, the non-moving party should be given an opportunity to amend the complaint if such an amendment cures its defects." (citation omitted)). Finally, defendants have failed to demonstrate with even a modicum of evidence or argument that any sanctions are appropriate. Defendants' motion must be denied in its entirety.

RESPECTFULLY SUBMITTED this 22nd day of May 2018.

KELLY McCOY, PLC

By /s/ Walid A. Zaritì
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Original e-filed and a copy
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE 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 MICHELE L. CABRET-CARLOTTI, MD, husband and wife,

Defendants.

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

Counterclaimants,

v.

Case Number: CV2018-003112

MOTION TO DISMISS COUNTERCLAIM

Assigned to the Honorable Karen Mullins

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

Counterdefendants.

Plaintiff Kelly McCoy, PLC and Counterdefendants Matthew J. Kelly and Kevin C. McCoy (collectively, "Plaintiffs"), by and through their attorneys undersigned, respectfully moves this Court to dismiss the Counterclaim filed by Defendants/Counterclaimants ("Defendants"). This Motion is made pursuant to Rule 12(b)(6), *Ariz.R.Civ.P.*, and filed on the grounds that Defendants' professional negligence and intentional infliction of emotional distress counterclaims are barred by the applicable statute of limitations, and that their unjust enrichment and intentional infliction of emotional distress counterclaims do not comply with Arizona's notice pleading standard. This Motion is supported by the accompanying Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS AND PROCEDURAL BACKGROUND.

Plaintiffs filed the Complaint in this action on February 27, 2018. The Complaint alleges the non-payment of fees rendered in connection with Plaintiffs' representation of Defendants in Maricopa County Superior Court Case Number CV2008-010464, *Desert Palm Surgical Group, PLC, et al. v. Sherry Petta, et. al.* (the "Original Action"), together with representation in a related bankruptcy proceeding, *In re Petta* and *Desert Palm*

Surgical Group, PLC, et al. v. Petta, case nos. 2:12-bk-03464-RJH and 2:12-ap-01036-RJH, respectively (the "Bankruptcy Proceeding"), and the appeal from the judgment entered in the Original Action, *Desert Palm Surgical Group, et al. v. Petta*, case no. 1 CA-CV 13-0376 (the "Appeal"). Defendants filed their Answer and Counterclaim (the "Counterclaim") in the instant matter on May 3, 2018. *See* Court file.

As part of its Counterclaim, Defendants allege three distinct causes of action against Plaintiffs. First, Defendants allege that Plaintiffs committed professional negligence by failing to adhere to the appropriate standard of care in representing Defendants in the Original Action and in defending the trial verdict on appeal. 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.

Defendants allege unjust enrichment as their second counterclaim, stating only that the fees that Plaintiffs charged and collected were unearned and unjustly enriched them to Defendants' detriment. Counterclaim, ¶¶ 24-26. Finally, Defendants also assert an intentional infliction of emotional distress counterclaim against Plaintiffs. Namely, Defendants allege that Kevin McCoy's billing practices were improper, and Matthew Kelly appeared for oral argument on appeal in the Original Action in what appeared to be an intoxicated state. Counterclaim, ¶¶ 27-36.

//

II. LEGAL STANDARD.

Defendants have failed to state any claim upon which relief can be granted and accordingly, the Counterclaim should be dismissed in its entirety. Rule 12(b)(6), *Ariz.R.Civ.P.* A motion to dismiss for failure to state a claim under Rule 12(b)(6), *Ariz. R. Civ. P.*, tests the formal sufficiency of the claims for relief. *Moretto v. Samaritan Health Sys.*, 190 Ariz. 343, 346, 947 P.2d 917, 920 (App. 1997). While the Court must treat the factual allegations as true in deciding a motion to dismiss, this presumption does not extend to conclusions of law or unwarranted deductions of fact. *Folk v. Phoenix*, 27 Ariz. App. 146, 150, 551 P.2d 595, 599 (1976). The Court is "limited to considering the well-pled facts and all reasonable interpretations of those facts" and may not "speculate about hypothetical facts that might entitle the [claimants] to relief." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 4, 189 P.3d 344, 345-46 (2008). Moreover, "a complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard." *Id.* at ¶ 7, 189 P.3d at 346. The affirmative defense of statute of limitations "is properly raised in a motion to dismiss where it appears from the face of the complaint that the claim is barred." *Anson v. Am. Motors Corp.*, 155 Ariz. 420, 421, 747 P.2d 581, 582 (App. 1987) (*citing Dicenso v. Bryant Air Conditioning Co.*, 131 Ariz. 605, 606, 643 P.2d 701, 703 (1982)).

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III. ARGUMENT.

A. Defendants' Professional Negligence Counterclaim is Time-Barred.

The applicable statutes and case law mandate the dismissal of Defendants' professional negligence counterclaim. In Arizona, a two-year limitations period applies to professional negligence claims. *See* A.R.S. § 12-542; *Cannon v. Hirsch Law Office, P.C.*, 222 Ariz. 171, 174, ¶ 8, 213 P.3d 320, 323 (App. 2009). A professional negligence claim accrues when "(1) the plaintiff knows or reasonably should know of the attorney's negligent conduct; and (2) the plaintiff's damages are ascertainable, and not speculative or contingent." *Kiley v. Jennings, Strouss & Salmon*, 187 Ariz. 136, 139, 927 P.2d 796, 799 (App. 1996). The so-called "discovery rule" is also material to legal malpractice claims, and applies "not only to the discovery of negligence, but also to discovery of causation and damage." *Commercial Union Ins. Co. v. Lewis & Roca*, 183 Ariz. 250, 253, 902 P.2d 1354, 1357 (App. 1995). Accordingly, "the limitations period starts to run when the client has suffered harm and knows or should have known that the harm was a direct result" of the attorney's alleged negligence. *Keonjian v. Olcott*, 216 Ariz. 563, 565, ¶ 9, 169 P.3d 927, 929 (App. 2007).

Here, the Court of Appeals reversed the jury verdict in the Original Action on January 15, 2015. *See Petta*, 236 Ariz. 568, 343 P.3d 438, *review denied* July 30, 2015. As Defendants' Counterclaim states, it is clear that the basis of their damages arising from Plaintiffs' alleged negligence is the firm's "inability to sustain a trial verdict of $12,009,489.96" in the Appeal. Counterclaim, ¶ 23. Thus, the alleged damages that Defendants sustained became fully known to them on that date. Defendants knew with

certainty as of January 15, 2015 that they would be required to either pursue review in the Arizona Supreme Court or retry the case. *Koonjian*, 216 Ariz. at ¶ 9, 169 P.3d at 929. However, they only brought this cause of action on May 3, 2018, nearly fifteen months after the expiration of the limitations period.

At any rate, there is no question that Defendants' claim for alleged malpractice accrued no later than when the Arizona Supreme Court denied review on July 30, 2015. *See Petta*, 236 Ariz. 568, 343 P.3d 438; *Kaufman v. Jesser*, 884 F. Supp. 2d 943, 958 (D. Ariz. 2012) (*citing Amfac Distribution Corp. v. Miller*, 138 Ariz. 152, 154, 673 P.2d 792, 794 (1983)) ("the injury or damaging effect on the unsuccessful party is not ascertainable until the appellate process is completed or is waived by a failure to appeal"). Defendants fully exhausted their appellate rights on this date. Even assuming that their damages only became fully discoverable and "ascertainable" at that time, Defendants would have had to bring their action on or before July 29, 2017. By waiting until May 3, 2018 to file their Counterclaim in this action, Defendants' failed to bring a cause of action before the statute of limitations ran. Accordingly, this Court should dismiss Defendants' professional negligence counterclaim for being time-barred.

B. Defendants' Unjust Enrichment Claim is Legally Defective as Pled.

A party making an unjust enrichment claim must prove the following elements: (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law. *City of Sierra Vista v. Cochise Enters., Inc.*,

144 Ariz. 375, 381–82, 697 P.2d 1125, 1131–32 (App.1984). However, the "mere receipt of a benefit is insufficient" to maintain an entitlement to compensation under this cause of action. *Freeman v. Sorchych*, 226 Ariz. 242, 251, ¶ 27, 245 P.3d 927, 936 (App. 2011). Rather, it must be shown "that it was not intended or expected that the services be rendered or the benefit conferred gratuitously, and that the benefit was not conferred officiously." *Id.* at ¶ 27, 245 P.3d at 936-37 (quotations omitted) (*citing Pyeatte v. Pyeatte*, 135 Ariz. 346, 353, 661 P.2d 196, 203 (App. 1982)). Even under Arizona's liberal notice pleading standards, a party's obligation to provide the basis of its entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Dube v. Likins*, 216 Ariz. 406, 424, ¶ 14, 167 P.3d 93, 111 (App. 2007) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)); *see also Cullen*, 218 Ariz. at ¶ 7, 189 P.3d at 346.

Defendants' Counterclaim contains only two paragraphs which spell out the basis of this cause of action, and allege only that Plaintiffs "charged and collected" legal fees that "were not earned and must be refunded," and that this conduct unjustly enriched Plaintiffs. Counterclaim, ¶¶ 25-26. With only these bare allegations, Plaintiffs cannot meaningfully respond to the assertions therein, nor have Defendants placed Plaintiffs "on notice of the specific nature" of their counterclaim. *See also Belen Loan Invrs, LLC v. Bradley*, 231 Ariz. 448, 456, ¶ 19, 296 P.3d 984, 992 (App. 2012).

Despite the relatively low bar that notice pleading imposes, Defendants have nonetheless failed to adequately formulate the basis of their unjust enrichment counterclaim.

This leaves Plaintiffs guessing as to what actual conduct may be at issue. This Court is also required to engage in wholesale speculation in determining what facts transpired to substantiate this counterclaim, which is disfavored under Arizona law. *Cullen*, 218 Ariz. at ¶ 4, 189 P.3d at 345-46. Accordingly, the Court should dismiss Defendants' unjust enrichment counterclaim due to their insufficient and threadbare articulation of allegations substantiating this claim. Alternatively, Plaintiffs move this Court to order Defendants to provide a more definite statement before Plaintiffs file a responsive pleading, pursuant to Rule 12(e), *Ariz.R.Civ.P.*

C. Defendants' Intentional Infliction of Emotional Distress Counterclaim Has Been Brought Outside of the Time Allowed by the Statute of Limitations, and is Also Insufficiently Pled.

Defendants' intentional infliction of emotional distress claim is also deficient as pled and barred by the statute of limitations. A party advancing an intentional infliction of emotional distress claim must prove that "the defendant caused severe emotional distress by extreme and outrageous conduct committed with the intent to cause emotional distress or with reckless disregard of the near-certainty that such distress would result." *Watkins v. Arpaio*, 239 Ariz. 168, 170-71, ¶ 8, 367 P.3d 72, 74-75 (App. 2016). The statute of limitations for intentional infliction of emotional claims in Arizona is two years. *See* A.R.S. § 12-542(A)(1).

Assuming *arguendo* that this counterclaim is sufficiently substantiated, it is flatly barred by the statute of limitations. The Petition for Review to the Arizona Supreme Court was denied on July 30, 2015. *See Petta*, 236 Ariz. 568, 343 P.3d 438. All of the factual

occurrences that Defendants allege in their intentional infliction of emotional distress claim all would have occurred over two years prior to the date on which the Counterclaim was filed. A.R.S. § 12-542(A)(1). Simply put, the statute of limitations unequivocally prohibits the survival of this counterclaim.

Even if not barred by the statute of limitations, Defendants' similar neglectfulness in pleading this counterclaim also renders it fatally defective. In the Counterclaim, Defendants again fail to allege with any degree of specificity which of Kevin McCoy's billing practices or any bills that he submitted to Defendants satisfy the elements of intentional infliction of emotional distress. *Watkins*, 239 Ariz. at ¶ 8, 367 P.3d at 74-75; *Bradley*, 231 Ariz. at ¶ 19, 296 P.3d at 992. Defendants also allege that Matthew Kelly appeared for oral argument in the Appeal in what Defendants subjectively believed was an intoxicated state, without advancing any additional factual assertions in support of this claim.[1] Taken together, these allegations constitute precisely the type of speculation "about hypothetical facts" that Arizona courts must scrupulously avoid in assessing the validity of a claim as pled. *See Cullen*, 218 Ariz. at ¶ 4, 189 P.3d at 345-46.

IV. CONCLUSION.

In light of the foregoing, Plaintiffs respectfully request that Defendants' three counterclaims be dismissed in their entirety for failure to state valid claims upon which relief

[1] Plaintiffs adamantly deny these events occurred and assert that the evidence will ultimately disprove Defendants' insulting allegation. However, as discussed *infra*, this claim still fails even though the Court must assume the truth of the allegations within the Counterclaim for purposes of deciding this Motion. *See Dixon v. Osmon*, 22 Ariz. App. 430, 431, 528 P.2d 181, 182 (1974).

can be granted. Rule 12(b)(6), *Ariz.R.Civ.P.* If the Court is not inclined to dismiss Defendants' unjust enrichment counterclaim, Plaintiffs further request that Defendants be ordered to provide a more definite statement in support of this cause of action, pursuant to Rule 12(e), *Ariz.R.Civ.P.*

RESPECTFULLY SUBMITTED this 2nd day of July, 2018.

THOMPSON•KRONE, P.L.C.

By: /s/ Russell E. Krone
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Original of the foregoing filed
this 2nd day of July, 2018 with:

Maricopa County Superior Court
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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.	No: CV2018-003112 **RENEWED MOTION TO DISMISS**
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,	Assigned to the Honorable James D. Smith

v.

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

Counterdefendants.

Defendants, through counsel undersigned, *hereby renew their motion*, pursuant to Rules 12(b)(6) and 11(a), Ariz. R. Civ. P. and ARS §§12-349 – 350, to dismiss for failure to state a claim, for sanctions for the violation of Rule 11(a) and for an award of attorney's fees and costs unnecessarily incurred to defend this action.

This Court Granted Leave to Amend

By minute entry order dated June 11, 2018 this Court ruled:

> **IT IS ORDERED** denying Defendants/Counterclaimants' Motion to Dismiss and Motion for Sanctions. Plaintiff is granted leave to amend its Complaint. The Amended Complaint shall be separately filed and served in accordance with Ariz.R.Civ.P. 15(a)(5).

Rule 15(a)(5) Requires Amendment Within Ten Days

> (5) *Filing and Response*. If a motion for leave to amend is granted, the moving party must file and serve the amended pleading **within 10 days** after the entry of the order granting the motion, unless the court orders otherwise. If the pleading is one to which a responsive pleading is required, an opposing party must answer or otherwise respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after the amended pleading is served, whichever is later, unless the court orders otherwise.
>
> (Emphasis added)

Kelly McCoy Cannot Comply with Rule 15(a)(5) Without Violating Rule 11(a)

Defendants' Reply Memorandum stated:

> Amending the Complaint while complying with Rule 11(a) will not help. There simply is no agreement to be enforced—merely a proposal which, by its own terms, requires written acceptance to be operative.

Defendants' Reply Memorandum pointed out that Kelly McCoy did not and could not allege an agreement or meeting of the minds because the very terms of the proposed fee agreement included acceptance in writing as proof of assent. That never occurred.

It has been more than 30 days but Kelly McCoy has chosen not to accept this Court's invitation to amend its Complaint.

Defendants' Motion to Dismiss Should Be Granted

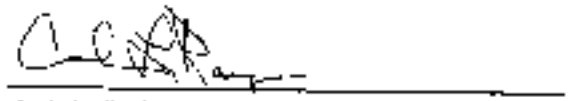
This Court followed the command of Rule 15 and liberally granted leave to amend. Kelly McCoy did not do so and undoubtedly is unwilling to do so, due to the requirements of Rule 11(a). Dismissal of the Complaint is now in order.

Sanctions Are Appropriate

Defendants were required to retain counsel to defend a Complaint that should never have been filed. They should recover their fees as a sanction for the violation of Rule 11(a).

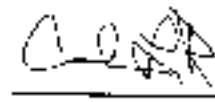
DATED this 12 day of July, 2018

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 12 day of July, 2018

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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 F. CARLOTTI, MD and MICHELLE L. CABRET-CARLOTTI, MD, husband and wife,

Defendants.

DESERT PALM SURGICAL GROUP, PLC, an Arizona professional limited liability company; ALBERT F. 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: CV2018-010112

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. 84, (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)

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[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 *Petra* 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: *Petra* 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![5]

---

[5] 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 18, 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:** "drmichellee@yahoo.com" <drmichellee@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 P.2d 456, 461 - 462 (Ct App. 1996)*

Sent from my iPhone

On Aug 18, 2015, at 8:07 PM, Al <drearlotti@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

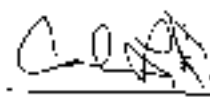
Arizona is a notice pleading state, but it is also a state that requires its litigants to comply with Rule 26.1, Ariz. R. Civ. P. Once this Motion to Dismiss has been decided, counterclaimants will be entitled to an Initial Disclosure Statement that includes an Affidavit of Merit, signed by a witness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

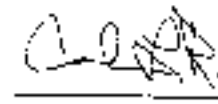
DATED this 25th day of July, 2018

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:

Walid A. Zarifi
KAZ@Kelly-McCoy.com
Kelly McCoy, PLC
340 E. Palm Lane, Suite 300
Phoenix, AZ 85004
Attorneys for Plaintiffs Kelly McCoy, Kelly & McCoy

Thompson-Krone, P.L.C.
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24601 East Fort Lowell Road, Suite 109
Tucson, AZ 85712
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 abillty 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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<20150818145019354.pdf>
<20150818145008147.pdf>

SUPERIOR COURT OF ARIZONA
COUNTY OF MARICOPA

KELLY MCCOY, PLLC,	No. cv2018-003112
Plaintiff,	**AFFIDAVIT OF EDWARD HOPKINS, ESQ.**
v.	Assigned to the Hon. James D. Smith
DESERT PALM SURGICAL GROUP, PLC, ET AL.,	
Defendants.	

I, Edward Hopkins, Esq., declare under penalty of perjury as follows:

1. I am an attorney authorized to practice law in the State of Arizona and the State of Colorado since 2011. My Arizona bar number is 028825. My Colorado bar number is 43298. I am also a member in good standing of the bars for the U. S. District Court, District of Arizona; U. S. District Court, District of Colorado; U. S. District Court, District of New Mexico, U. S. Court of Appeals, Ninth Circuit; U. S. Court of Appeals, Tenth Circuit; and U. S. Supreme Court.

2. I hold all seven certifications offered by the International Association of Privacy Professionals (IAPP) (https://iapp.org), including certifications in the privacy laws of the United States (CIPP/US), European Union (CIPP/E), Canada (CIPP/C), and Asia (CIPP/A); United States governmental privacy laws (CIPP/G); IT privacy best practices (CIPT); and information privacy management (CIPM). The IAPP awarded me its Fellow of Information Privacy (FIP) designation in 2016.

3. I founded the HopkinsWay PLLC law firm in 2012. *See* https://www.hopkinsway.com. The firm represents clients in Arizona's and Colorado's state and federal courts. I focus the majority of my practice on litigating cases involving computer crimes, defamation, invasions of privacy, and racketeering. *See* https://www.hopkinsway.com/attorneys/ed-hopkins.

4. I have litigated more than 20 defamation cases in state and federal courts in Arizona and Colorado. I have represented both plaintiffs and defendants in defamation actions. In 2014, I represented the plaintiffs in the last defamation jury trial I tried. My clients secured a six-figure verdict. In 2017, I represented the plaintiff in the last defamation bench trial I tried. My client secured a six-figure verdict. I am currently litigating four pending defamation lawsuits in state and federal courts in Arizona and Colorado.

5. I have litigated seven state court appeals that focused on defamation issues. Two of those cases resulted in published opinions.

6. I have resolved more than 100 defamation matters at the pre-litigation stage for clients in the United States and around the world.

7. In 2015, I served as the standard of care expert witness for an Arizona fee arbitration hearing that involved another Arizona attorney who primarily practices internet defamation, invasion of privacy, and cyberharassment law and who had represented the complainant in an internet defamation case.

8. I have served as a paid consulting expert for other attorneys' defamation cases in the United States and Canada.

9. I have presented continuing legal education presentations to attorneys and judges that explained how to remove defamatory online reviews and how to litigate defamation claims.

10. I have also helped clients obtain injunctive relief in the form of court orders that held or ruled webpages containing defamatory or privacy-invading statements about my clients were unlawful and violated their legal rights under the laws of the U.S. After obtaining those orders, I have worked with major search engine companies, such as Google, Bing, and Yahoo! Search, to help my clients get harmful and damaging webpages de-indexed or de-listed from those companies' U.S. search results.

11. Pursuant to Section 230 of the Communications Decency Act of 1996, websites and Internet Search Engine companies cannot generally be compelled remove information other parties published.

12. Before November 2016, Internet Search Engine companies, like Google.com, would routinely and voluntarily de-list or de-index harmful webpages from their U.S. search results if they were presented with U.S. court orders containing findings of fact and law that confirmed plaintiffs' legal rights had been violated by unlawful acts of defamation or invasions of privacy.

13. When these Internet Search Engine companies de-listed or de-indexed webpages from their U.S. search results, the de-listed or de-indexed webpages stopped appearing in the search results when U.S. Internet users performed Internet searches using these companies' search platforms.

14. Once these companies had de-listed or de-indexed the webpages containing the unlawful content, plaintiffs who were the subjects of the derogatory webpages would immediately begin to suffer less future damages.

15. I began representing Desert Palm Surgical Group, PLC; Dr. Albert Carlotti and Dr. Michelle Cabrer-Carlotti ("Clients"), the plaintiffs and

counterdefendants in Case CV2008-010464, Maricopa County Superior Court, in October 2015.

16. On November 4, 2015, I argued against a motion to dismiss the Defendant had filed. The Defendant's motion was denied the same day.

17. On January 5, 2016, the Court entered a Jury Trial Set Order that set the civil action's trial dates for September 6-8, 12-15, and 19-22, 2016. The Order also instructed the parties to file their dispositive motions no later than June 8, 2016, giving the parties months to complete their discovery.

18. Months prior to the action's termination, the parties had completed settlement negotiations on May 20, 2016. I cannot furnish any details about the settlement.

19. On June 13, 2016, the Court entered an Order for Injunction.

20. The parties' Stipulation for Dismissal was not filed until months later.

21. Settlement agreements that include litigants' promises to try to take steps to delete, de-index, or de-list disparaging webpages often contain terms that are contingent on the parties' and third parties' future actions. Litigants who enter into such agreements often need to wait several months, while they or their attorneys communicate with third parties, before they can confirm all the material terms of their settlement agreements have been fulfilled. Only after they know all the terms of their settlement agreements have been fulfilled can they reasonably agree to move courts to dismiss their actions.

22. Between June 23, 2016, and September 8, 2016, my law firm wrote to third parties—Internet Search Engine companies and other companies that had published or republished webpages containing disparaging statements about the Clients. My firm shared the Court's June 13, 2016, Order for Injunction

with the third parties who could de-index or delist webpages. We explained the litigants had settled their disputes in our communications to other third parties and asked those third parties to delete the webpages they controlled. As a direct result of our firm's communications with the third parties, almost all of them agreed, for the first time, to delete, de-index, or de list webpages that contained disparaging statements about the Clients. My law firm did not receive some responses confirming third parties had deleted, de-indexed, or de-listed webpages until after July 25, 2016.

23. Before my law firm had received all the responses to our communications, the Clients had no way to estimate the damages they had likely suffered as a direct result of their prior counsel's acts or omissions

24. Due to their prior trial counsel's acts or omissions, the Clients had suffered reputational, mental, and economic damages between the date their first jury trial ended and the date my law firm received the last response to our June 2016 communications to third parties.

25. The first time the Clients would have been able to accurately assess their additional damages would have been after confirming all reasonable efforts to delete, de-index, or de-list the harmful webpages had been completed. They had to find out what more than a dozen third parties were willing and able to do in response to my firm's written requests. Before July 25, 2016, the Clients could not have estimated the damages they had suffered after their first trial.

26. After the Clients had confirmed all reasonable efforts to delete, de-index, or de list harmful webpages had been completed, they agreed to move the Court to dismiss the civil action that began in 2008.

27. On September 8, 2016, the Court entered an Order dismissing the case, terminating the action.

28. Among the damages the Clients incurred as a direct result of their prior attorneys' acts or omissions were the legal costs they paid to our firm to represent them in defamation- and privacy-related matters after the Arizona Court of Appeals had remanded their case back to the trial court. Also among their damages were the additional reputational, mental, and special damages they incurred because their prior trial counsel failed to obtain the injunctive relief they needed to reasonably mitigate their damages immediately following their first jury trial.

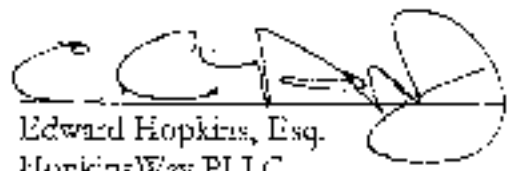
29. I am willing and able to testify under oath about all my above statements.

I declare and certify under penalty of perjury the foregoing is true and correct to the best of my knowledge.

Executed on:

7/23/18

Signed by:



Edward Hopkins, Esq.
HopkinsWay PLLC
7900 E. Union Ave, Ste. 1100
Denver, CO 80237
Tel: 602 714-7172 | Fax: 602-714-7173

SWORN DECLARATION OF CALVIN L. RAUP

1. I am an attorney licensed in Arizona and Texas and practicing here since 1975.

2. I was first retained by Desert Palm Surgical Group ("DPSG") and its owners, Albert Carlotti, MD and Michelle Carlotti, MD ("the Carlottis") on April 30, 3018 in connection with CV2018-003112.

3. At the time I was retained my clients were in default In the above referenced action, an extension they had obtained having already expired. In addition, they wanted to pursue a legal malpractice claim against their former law firm, Kelly McCoy, and its principals.

4. The litigation underlying the above referenced action was very complex litigation, including appeals and a bankruptcy, lasting from 2008 until late 2016.

5. I was concerned that the legal malpractice claim might be considered a compulsory counterclaim that would have to be filed along with Answer, which already was overdue.

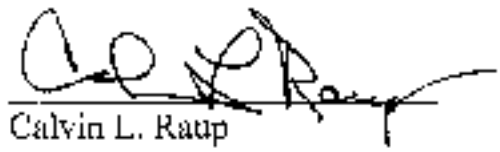
6. I immediately began to investigate whether the statute of limitations had run on a legal malpractice claim, whether there was a legal and factual basis for such a claim and whether I could secure the necessary expert opinion to support such a claim.

7. By May 2, 2018 I had concluded there in fact was sufficient evidence to meet the requirements of Rule 11(a) and ARS 12-2602. I also concluded that the statute of limitations could not have run before May 20, 2018 and, most likely, months later.

8. The counterclaim I drafted was not intended to describe all acts of negligence or all damage claims; I simply was not able to do that given the constraints of time, nor is it required by the Arizona Rules of Civil Procedure.

9. If this case is alive at the time for the filing of the Rule 26.1 Initial Disclosure Statement it will describe the claims and the legal and factual basis for these claims, along with the required Certificate of Merit.

I declare under penalty of perjury under the laws of the state of Arizona that the foregoing is true and correct.



Calvin L. Raup

July 23, 2018

Dated

Thompson•Krone, P.L.C.
4601 East Fort Lowell Road, Suite 109
Tucson, AZ 85712
Telephone: (520) 884-9694
Facsimile: (520) 323-4613
Russell E. Krone, State Bar No. 015859
Russ@thompsonkrone.com
Maxwell T. Riddiough, State Bar No. 032560
Max@thompsonkrone.com
Attorneys for Counterdefendants

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE 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 MICHELE L. CABRET-CARLOTTI, MD, husband and wife,

Defendants.

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

Counterclaimants,

v.

Case Number: CV2018-003112

REPLY IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM

Assigned to the Honorable James D. Smith

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

Counterdefendants.

Plaintiff Kelly McCoy, PLC and Counterdefendants Kelly McCoy, PLC, Matthew J. Kelly and Kevin C. McCoy (collectively, "Plaintiffs"), by and through their attorneys undersigned, respectfully submit their Reply in support of their Motion to Dismiss the Counterclaim filed in this Action. This Reply is more fully supported by the accompanying Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Plaintiffs filed their Motion to Dismiss Defendants' Counterclaim ("Motion") on July 2, 2018. Defendants filed their Response to Motion to Dismiss Counterclaim (hereinafter the "Response") on July 25, 2018. The Response fails to adequately demonstrate that the Counterclaim contains a sufficient legal basis to withstand Plaintiffs' Motion. Specifically, Defendants do not provide any legal authority to support their argument that their professional negligence claim against Plaintiffs did not accrue until the underlying litigation in Maricopa County Superior Court Case Number CV2008-010464, *Desert Palm Surgical Group, PLC, et al. v. Sherry Petta, et. al.* (the "Original Action") eventually settled. Moreover, Defendants also fail to provide an adequate basis to substantiate the legal

sufficiency of their unjust enrichment and intentional infliction of emotional distress counterclaims as pled. Accordingly, dismissal of all three causes of action contained therein is warranted.

II. ARGUMENT.

A. Defendants Knew Or Should Have Known That Their Alleged Malpractice Claim Accrued At The Latest When the Arizona Supreme Court Denied Their Petition for Review on July 30, 2015.

In Arizona, accrual of a professional malpractice claim occurs "when the plaintiff knew or should reasonably have known of the malpractice and when the plaintiff's damages are certain and not contingent upon the outcome of an appeal." *Althaus v. Cornelio*, 203 Ariz. 597, 600, ¶ 10, 58 P.3d 973, 976 (App. 2002). Moreover, "actual injury or damages must be sustained" before a negligence cause of action accrues, and in the context of legal malpractice, "the injury or damaging effect on the unsuccessful party is not ascertainable until the appellate process is completed or is waived by a failure to appeal." *Amfac Distribution Corp. v. Miller*, 138 Ariz. 152, 154, 673 P.2d 792, 794 (1983) ("*Amfac II*"). Accordingly, accrual of a legal malpractice claim occurs where the plaintiff not only discovers alleged negligence, but also causation and "appreciable, non-speculative" damages arising therefrom. *Commercial Union Ins. Co. v. Lewis & Roca*, 183 Ariz. 250, 253-54, 902 P.2d 1354, 1356-57 (App. 1995). Accrual "requires only actual or constructive knowledge of the fact of damage, rather than of the total extent or calculated amount of damage." *CDI, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 198 Ariz. 173, 176, ¶ 11, 7 P.3d 979, 982

(App. 2000) (principals underlying claim accrual "applies to any negligence claim against professionals").

Defendants' reliance upon *Amfac Distribution Corp. v. Miller*, 138 Ariz. 155, 673 P.2d 795 (App. 1983) ("*Amfac I*") for their accrual argument is misplaced. In *Amfac I*, a company sued its former attorney after the attorney failed to adduce sufficient evidence at trial which resulted in dismissal of the complaint in January 1978. The attorney-defendant then appealed on behalf of the company but the Arizona Supreme Court affirmed the trial court's dismissal order in September 1979. In the malpractice action filed in May 1980, the parties disputed whether the company's malpractice claim accrued when the trial court dismissed the complaint or when the dismissal was affirmed on appeal. The Court of Appeals held that the malpractice claim was timely filed, because legal malpractice claims accrue: (1) when the plaintiff "should reasonably have known" of the alleged malpractice; and (2) when the plaintiff's damages are "certain" and no longer "contingent upon the outcome of an appeal." 138 Ariz. at 156, 673 P.2d at 796. As part of its holding, the *Amfac I* court also articulated the general rule that "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, 673 P.2d at 797.

Here, Defendants fully exhausted their appellate rights on July 30, 2015 when the Arizona Supreme Court denied review. As of this date, the trial judgment in the Original Action was permanently vacated. If it was not abundantly clear to Defendants that the trial judgment was no longer valid at the time of the Court of Appeals' decision on January 15,

2015 (the "Appeal"), this was indisputably the case when the Arizona Supreme Court denied Defendants' Petition for Review. It was at that time that Defendants knew or should have known that any damages they allegedly sustained from Plaintiffs' representation became fixed once the trial judgment in the Original Action could not be affirmed through the appellate process. *See Amfac II*, 138 Ariz. at 153-54, 673 P.2d 793-94.

Defendants suggest the discussion from *Amfac I*, that "[g]enerally, 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." *Amfac I* at 157, 797, means that the underlying case must be fully litigated and the case terminated before a professional negligence claim may accrue. However, that sentence merely explains why, in that case, the claim did not accrue until after "the Court of Appeals decided the appeal and the time to appeal to the [state] Supreme Court [...] had expired" *Id.* [1] The language does not alter the well settled law that accrual "requires only actual or constructive knowledge of the fact of damage, rather than of the total extent or calculated amount of damage." *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C., supra.*

---

1 While not necessary for the determination of this matter, it is useful to note that, unlike the *Amfac I* case, Defendants here terminated Plaintiffs' representation following their receipt of the Court of Appeals' January 15, 2015 opinion and hired new counsel, including a former Chief Justice of the Arizona Supreme Court, Stanley Feldman, before filing the Petition for Review. Plaintiffs find it somewhat disingenuous for Defendants to contend in their *Response*, that following the termination of the Kelly McCoy firm's representation, "Counterclaimants briefly were unrepresented, but soon they retained Ed Hopkins of Hopkins Way, PLLC" without also noting that they had hired former Justice Feldman and David Abney to file their Petition for Review.

Here, it is Defendants' actual and constructive knowledge of the fact that they had sustained damages that controls when this claim accrued. *CDT, Inc.*, 198 Ariz. 173 at ¶ 11, 7 P.3d at 982 (*citing Commercial Union Ins. Co.*, 183 Ariz. at 253-54, 902 P.2d at 1356-57). In *Commercial Union Ins. Co.*, an insurance carrier brought a legal malpractice claim against its former law firm based upon legally incorrect research and advice, which brought about a denial of coverage and subsequent coverage litigation brought against the carrier by the policy's insured. There, the Court of Appeals held that the carrier's malpractice claim accrued when its motion for summary judgment in the coverage litigation was denied, because it "then had reason to believe that Lewis and Roca's negligent advice was the cause of Commercial Union's expenditure of defense costs." 183 Ariz. at 258, 902 P.2d at 1362.

This reasoning is directly applicable to the facts of this case. When the Court of Appeals reversed the trial judgment, Defendants had reason to know that they would need to expend additional time and resources to seek reaffirmation of the trial court judgment before the Arizona Supreme Court. At the very latest, Defendants knew that they would then be required to either retry or settle the case if they wished to continue pursuing their claims once the Petition for Review was denied. That Defendants should have been aware of: (1) any perceived deficiencies in Plaintiffs' representation relating to the inability to obtain the affirmation of the trial court judgment, or (2) any other facet of their performance in the course of the representation up until that point, clearly establishes the "fact of damages" for purposes of this claim's accrual by no later than July 30, 2015. *CDT, Inc.*, 198 Ariz. 173 at ¶

11, 7 P.3d at 982. Accordingly, Arizona law is clear that Defendants' professional negligence counterclaim accrued and expired before the Counterclaim was filed.

B. This Court Need Not Resort to Matters Outside the Pleadings in Deciding Plaintiffs' Motion to Dismiss.

Where a party brings a motion under Rule 12(b)(6), *Ariz.R.Civ.P.*, and "matters outside the pleadings are presented to, and not excluded by, the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Rule 12(d), *Ariz.R.Civ.P.* However, analysis under Rule 56 is "not required" when the court "does not rely on proffered extraneous materials." *Belen Loan Invr's, LLC v. Bradley*, 231 Ariz. 448, 452, ¶ 7, 296 P.3d 984, 988 (App. 2012). The motion "need not be converted" to a motion for summary judgment "if extraneous matters neither add to nor subtract from the deficiency of the pleading." *Id.* at ¶ 5, 296 P.3d at 987.

The Court "shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Ariz.R.Civ.P.* Rule 56(a); *see also Dobson v. Grand Intern. Broth. Of Locomotive Engineers*, 101 Ariz. 501, 506, 421 P.2d 520, 525 (1966). "Even where the facts are not disputed, summary judgment is improper if the evidence of record does not demonstrate that the movant is entitled to judgment as a matter of law." *City of Tempe v. State*, 237 Ariz. 360, 363, 351 P.3d 367, 370 (App. 2015) (*quoting Comerica Bank v. Mohmoodi*, 224 Ariz. 289, 291, 229 P.3d 1031, 1033 (App. 2010). "The moving party bears the burden of providing undisputed admissible evidence that would entitle it to judgment as a

matter of law." *Watkins v. Arpaio*, 239 Ariz. 168, ¶ 7, 367 P.3d 72, 74 (App. 2016). Moreover, "affidavits that only set forth ultimate facts or conclusions of law can neither support nor defeat a motion for summary judgment." *Florez v. Sargeant*, 185 Ariz. 521, 526, 917 P.2d 250, 255 (1996).

The only concrete allegation within Defendants' professional negligence claim is that Plaintiffs did not obtain affirmation of the trial judgment on appeal. The use of self-serving affidavits of counsel also do not warrant summary judgment on this basis. *Florez*, 185 Ariz. at 526, 917 P.2d at 255; *see also Cemex Const. Materials S., LLC v. Falcone Bros. & Associates, Inc.*, 237 Ariz. 236, 245, P 38, 349 P.3d 210, 219 (App. 2015) ("a motion for summary judgment may not be granted or denied when supported solely by a self-serving and conclusory affidavit"). Here, the two affidavits that Defendants attach to their Response are nothing more than an attempt to obscure the date on which the alleged damages for their professional negligence claim became known to them so that it may survive dismissal in spite of Arizona case law governing accrual of this claim. *See Amjac I; Amjac II; Commercial Union Ins. Co., supra.* Ultimately, this neither adds to nor subtracts from the deficiency of this claim as pled, and the Court should disregard these extraneous materials in considering the legal sufficiency of the counterclaims. *Bradley* at ¶ 5, 296 P.3d at 987.

Moreover, Defendants themselves note that "[t]he counterclaim makes clear that the counterclaimants' damages include loss of the $12,000,000 trial verdict". *Response* at Page 9. Their attempt to obscure the date of accrual notwithstanding, by their own admission, they knew or should have known at the conclusion of the Appeal that their claim had accrued.

C. Defendants' Unjust Enrichment and Intentional Inflict of Emotional Distress Claims Are Insufficient as Pled.

In their Response, Defendants do not address Plaintiff's arguments that their intentional infliction of emotional distress and unjust enrichment claims are insufficient to satisfy Arizona's notice pleading standard. In reviewing the legal sufficiency of a pleading, the Court must consider only "the well-pled facts and all reasonable interpretations of those facts" and may not "speculate about hypothetical facts that might entitle the [claimants] to relief." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 4, 189 P.3d 344, 345–46 (2008).

First, the allegations that Defendants have levelled require the Court to engage in a guessing game as to what conduct unjustly enriched Plaintiffs. All Defendants have alleged is that Plaintiffs charged and collected fees that were "not earned." Simply stated, there is no concrete factual basis under which this counterclaim can survive without hypothesizing which specific fees were unreasonable or legally illegitimate. *Cullen*, 218 Ariz. at ¶ 4, 189 P.3d at 345-46. Although Defendants cite to Rule 12(b)(6), *Ariz.R.Civ.P.*, for the proposition that the allegations within their counterclaim must be taken as true, they fail to provide any concrete support as to how merely alleging that Plaintiffs collected unearned fees to which they were not entitled satisfies Arizona's notice pleading standard.

Second, Defendants' intentional infliction of emotional distress counterclaim is similarly ineffectual. While Defendants argue in their Response that their damages claim includes assertions "that one of its principals appeared for oral argument at their Court of

Appeals while intoxicated[2] and that another of its principals continued to work on this matter after being expressly instructed not to do so," they fail to acknowledge how these allegations alone satisfy the remaining elements of this counterclaim. Response at 9:24-10:1; *See Watkins v. Arpaio*, 239 Ariz. 168, 170-71, ¶ 8, 367 P.3d 72, 74-75 (App. 2016) (a plaintiff must prove that "the defendant caused severe emotional distress by extreme and outrageous conduct committed with the intent to cause emotional distress or with reckless disregard of the near-certainty that such distress would result"). Moreover, Defendants also do not respond to Plaintiffs' contention that this counterclaim is barred by the statute of limitations, particularly given that the Appeal definitively terminated when the Arizona Supreme Court denied review on July 30, 2015. All of Plaintiffs' alleged conduct giving rise to this counterclaim thus occurred outside the two-year limitations period enshrined in A.R.S. § 12-542(A)(1). Accordingly, this Court should dismiss the second and third counts of the Counterclaim.

III. CONCLUSION.

In light of the foregoing, Plaintiffs respectfully request that Defendants' three counterclaims be dismissed in their entirety for failure to claims upon which relief can be granted under Rule 12(b)(6), *Ariz.R.Civ.P.*

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[2] Plaintiffs also note that the Court of Appeals' opinion in *Petra* is bereft of any suggestion that Plaintiffs engaged in any deficient or unacceptable conduct in briefing or arguing the matter on appeal. 236 Ariz. 568, 343 P.3d 438. Moreover, Defendants never claimed Plaintiffs committed malpractice or that they argued at the Court of Appeals while intoxicated, which they adamantly deny, until after Plaintiffs brought the instant action to collect the balance of fees owed.

RESPECTFULLY SUBMITTED this 13th day of August, 2018.

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