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IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

Case No.: 502019CA004756XXXXMB
Division AK

MARNI BRYSON,

Plaintiff,

v.

WILLIAM R. SCHERER JR., and CONRAD & SCHERER, LLP,

Defendants.
_______________________________/

DEFENDANTS' MOTION TO DISMISS AND
MOTION TO STRIKE ALLEGATIONS

The purpose of a complaint is to frame the issues, not make headlines. The Complaint in this action ignores this sound principle. Thus, Defendants William R. Scherer, Jr. ("Scherer") and Conrad & Scherer, LLP (the "Firm"), move to dismiss this action for Plaintiff's failure to properly state a cause of action, and to strike the many irrelevant and immaterial allegations contained in the Complaint prejudicial to Defendants.

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Factual Background

1. This is an action brought by Plaintiff Marni Bryson ("Bryson") alleging intentional infliction of emotional distress and seeking injunctive relief. She is represented by Paul D. Turner ("Turner") and Turner's law firm, Perlman, Bajandas, Yevoli & Albright, P.L. ("PBYA").

2. The genesis of these allegations apparently stem from a 2015 post-divorce proceeding in which Bryson sought to modify prior custodial and visitation arrangements with her former husband. Neither Scherer nor any member of his Firm represented Bryson or her former husband in that proceeding or have they at any other time.

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3. Prior to filing her post-divorce proceeding, Bryson learned that her husband had an ongoing romantic relationship with the wife of a married man. Incensed by her former husband's interest in another woman, Bryson began an unrelenting campaign of harassment against the woman through text messages and emails. Bryson then began her own relationship with the husband of this woman which led to unimaginable consequences for these four individuals. For instance, unaware that this man shared a cellular account with his wife, Bryson texted nude photographs of herself to him following an evening of drinks together, which then came into possession of his wife. Perhaps unaware that the wife had these photographs, and hoping to gain some sort of advantage in the post-divorce proceeding by exposing the affair, Bryson served a subpoena on the woman to produce documents and testify in the post-divorce proceeding. The woman engaged Scherer and the Firm to represent her should she be required to give testimony and produce documents in compliance with the subpoena.

4. Recognizing that the subpoena had no legitimate purpose would require production of the harassing text messages, emails, and photographs Bryson had sent, Scherer reached out to an attorney in Palm Beach County who he believed represented Bryson to explain the purposeless point of the subpoena and the harm that could befall Bryson should she not withdraw it. As a result, Bryson did not require compliance with the subpoena, and the post-divorce proceeding concluded without this woman's participation. Scherer and the Firm had no other involvement in the matter and closed the file.

5. Almost four years later, on April 8, 2019, Scherer received an email from Turner attaching a "draft" Complaint, and a threat to file the Complaint unless Scherer and the Firm paid Bryson ten million dollars ($10,000,000) within seventy-two (72) hours.[1]

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[1] Bryson falsely characterizes the photographs in question as "pregnancy progress" photos without explaining how the photographs came into possession of the "other woman." The photos are most

6. Finding Turner's email and threatened lawsuit meritless, Scherer and the Firm did not "accept" the terms of Bryson's demand, and the 72 hours lapsed. Instead, on April 11, 2019 at 11:18 am Scherer filed a civil action in Broward Circuit Court against Turner and his firm seeking to enjoin the filing of the complaint. Later that afternoon Turner filed Bryson's Complaint.

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS AND MOTION TO STRIKE

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I. Legal Standard on a Motion to Dismiss

Florida Rule of Civil Procedure 1.140(b) provides for dismissal of an action for "failure to state a cause of action." "A motion to dismiss is designed to test the legal sufficiency of a complaint and not to determine any factual issues." *Felder v. State, Dep't of Mgmt. Servs., Div. of Retirement*, 993 So. 2d 1031, 1034 (Fla. 1st DCA 2008). "For the purposes of a motion to dismiss . . . allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the plaintiff." *Ralph v. City of Daytona Beach*, 471 So. 2d 1, 2 (Fla. 1983). The "court's review of a motion to dismiss is limited to the four corners of the challenged complaint." *Wells Fargo Bank, N.A. v. Bohatka*, 112 So. 3d 596, 600 (Fla. 1st DCA 2013).

II. The Complaint Fails to State a Cause of Action

The Court should dismiss the Complaint for several reasons. First, Bryson is using the Rules Regulating the Florida Bar as a legal basis to assert her claim. This fails because the Florida Bar Rules do not create private causes of action. Second, Bryson fails to adequately plead the requisite "outrageous conduct" by Scherer and the Firm to support a claim for intentional infliction of emotional distress considering that Bryson released nude photos of herself to third parties and thus has no reasonable expectation of privacy or to be free from emotional distress relating to

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certainly not "pregnancy progress" photos and appear taken long after Bryson gave birth to her only child via a cesarean delivery. However, in fairness, Bryson may not know specifically which of the nude photos of her that she transmitted to third parties are involved here.

dissemination of the photographs. Third, Bryson fails to adequately plead ultimate facts that entitle her to an injunction.

A. The Florida Bar Rules

In Count I, Bryson cites to the Florida Bar Rules seven times, including references to the Preamble and rules 4-1.2, 4-2.1, 4-3.4, 4-4.4, 4-8.4, and 4-1.8. *See* Compl. ¶¶ 44–76 in an attempt to create a cause of action against Scherer and the Firm for "intentional infliction of emotional distress." Remove the reference to the Florida Bar Rules and all that is left are inconsequential allegations that reference a statute and references to irrelevant and impertinent material that is the subject of the motion to strike below. *See infra*.

The Preamble to the Rules state that "[v]iolation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption that a legal duty has been breached. . . . They are not designed to be a basis for civil liability." This sound policy is critical for the administration of justice in our state because "the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons." *Id.* Ignoring this admonition, Bryson tries to use the Florida Bar Rules as a legal basis on which to state a claim against Scherer and the Firm instead of alleging a proper lawful basis for her claim. Thus, the Complaint should be dismissed for this reason alone.

Even if the Bar Rules could provide a cause of action, Count I also fails because Scherer and the Firm have never represented Bryson and owe no duty to her as her lawyer. In other words, Bryson was never in privity with Scherer or the Firm which is required to impose any form of obligation to her as a lawyer... *See Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner*, 612 So. 2d 1378, 1379–80 (Fla. 1993) ("An attorney's liability for negligence in the performance of his or her professional duties is limited to clients with whom the attorney shares privity of

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contract. . . . To bring a legal malpractice action, the plaintiff must either be in privity with the attorney, wherein one party has a direct obligation to another, or, alternatively, the plaintiff must be an intended third-party beneficiary.").

B. Bryson Fails to Properly Plead Intentional Infliction of Emotional Distress.

In Florida,

> [t]o prove intentional infliction of emotional distress, the plaintiff must show: (1) The wrongdoer's conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional distress would likely result; (2) the conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community; (3) the conduct caused emotional distress; and (4) the emotional distress was severe.

Deauville Hotel Mgmt., LLC v. Ward, 219 So. 3d 949, 954–55 (Fla. 3d DCA 2017). The second element of "outrageous conduct" is a threshold issue, which the court must decide on a motion to dismiss. *Id.* at 955. ("What constitutes outrageous conduct is a question that must be decided as a matter of law."); *Scheller v. Am. Med. Int'l, Inc.*, 502 So. 2d 1268, 1271 (Fla. 4th DCA 1987).

1. The Facts Alleged Do Not Constitute "Outrageous Conduct."

Outrageous conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Clemente v. Horne*, 707 So. 2d 865, 867 (Fla. 3d DCA 1998) (quoting Restatement (Second) of Torts § 46 cmt. d). The Restatement (Second) of Torts, which Florida courts have widespread adopted, explains: "It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *Scheller*, 502 So. 2d at 1271 (quoting Restatement (Second) of Torts § 46 cmt. d). "The standard for 'outrageous conduct' is

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particularly high in Florida." *Patterson v. Downtown Med. & Diag. Ctr., Inc.*, 866 F. Supp. 1379, 1383 (M.D. Fla. 1994) (applying Florida substantive tort law).

Taking as true all of the allegations of Scherer and the Firm's conduct for ***purposes of this motion to dismiss***, they fall well short of the "particularly high" standard in Florida for outrageous conduct needed to support a claim for intentional infliction of emotional distress. What is alleged is a vague threat from a ***third party***—an ***unnamed, anonymous*** person—allegedly acting at the direction of Scherer and the Firm to release nude photographs to unnamed people that Bryson herself released through text messaging. These allegations even if true are inadequate to meet the extraordinary demanding standard of "outrageous conduct." See *e.g. Gallogly v. Rodriguez*, 970 So. 2d 470, 472 (Fla. 2d DCA 2007) (a "campaign of harassment by running a drug and prostitution ring out of [his] bottle club and refusing to investigate illegal activities inside or associated with the bottle club while harassing [him] and his employees to ensure their silence" could be "outrageous conduct" for a claim of intentional infliction of emotional distress.)

The allegations in *Gallogly* stand in stark contrast to this action. Here Bryson's allegations that Scherer and the Firm threatened four years ago to release photographs of her (that she previously released and which would have been required to be produced had the subpoena been enforced) was a *one-time* episode. In fact, the only allegations of "repeated" conduct enumerated in the Complaint come in the form of shifting from this one-time episode to an entirely unrelated case in a federal court in Alabama. This strategy fails because there are no allegations of a pattern of conduct directed at Bryson by Scherer and the Firm.

Simply put, there are no set of facts that Bryson can adequately allege "outrageous conduct" by the Defendants and the Complaint should be dismissed.

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2. Bryson Fails to Allege Facts Supporting "Severe" Emotional Distress.

Further, Bryson has failed to adequately plead that her alleged emotional distress is "severe." While this element is typically a factual matter, courts can dismiss based on inadequate pleading. *See, e.g.*, *Doyle v. Hasbro, Inc.*, 884 F. Supp. 35, 40 (D. Mass. 1995) ("Nor has [plaintiff] even attempted to plead severe distress of a nature that no reasonable [person] could be expected to endure it." (second alteration in original)). The only allegation in the entire Complaint of Bryson's alleged emotional distress is the vague conclusory and unsupported statement: "Bryon's emotional distress was severe." Compl. ¶ 76. For instance there are no allegations that this threat made years ago caused Bryon to seek therapy or take anti-anxiety medication, as would typically be alleged to support suffering of "severe" emotional distress.

Conclusory allegations are not entitled to the assumption of truth and legal conclusions like those made here must be supported by factual allegations. Bryson's Complaint simply does not contain the factual content that allows a reasonable inference that Defendants are liable for the alleged misconduct. Therefore, the Complaint must be dismissed.

C. Bryson's Claim for Injunctive Relief Fails.

It is unclear exactly all that Bryson is attempting to enjoin under Count II as she alleges she is seeking "mandatory" relief for information she wants to have about the photographs. Nonetheless, if Bryson is seeking to enjoin Defendants from disseminating the photographs Bryson sent to others, Bryson must first establish a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief." *Liberty Counsel v. Fla. Bar Bd. of Governors*, 12 So. 3d 183, 186 n.7 (Fla. 2009) (quotation marks omitted). "The clear-legal-right factor is equivalent to, or at least envelops, the criterion of a substantial likelihood of success on the merits

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[for a temporary injunction]." *Cordis Corp. v. Prooslin*, 482 So. 2d 486, 490 n.2 (Fla. 3d DCA 1986).

Bryson does not (and cannot) establish legal ownership of the nude photographs she sent to third parties and therefore has no clear legal right to enjoin dissemination of the photographs or defendants possession of them or to force disclosure of information Scherer or the Firm have about the photographs. Defendants do not have exclusive possession or control of the photographs and cannot account for these and other nude photographs Bryson may have sent to others. Moreover, to state a cause of action for injunctive relief, Bryson must allege ***ultimate facts*** which, if true, would establish (1) irreparable injury, (2) lack of an adequate remedy at law and (3) that requested injunction would not be contrary to public interest. *Weekley v. Pace Assembly Ministries, Inc.*, 671 So.2d 220 (Fla. 1st DCA 1996). Bryson fails to allege facts showing the irreparable injury she will suffer, why there is a lack of an adequate remedy at law, or facts about why the public interest as opposed to Bryson's interest will be served through an injunction. In fact, Bryson's four year delay to seek injunctive relief after knowing that the photographs she sent to third parties were in the possession of Scherer prevents her from credibly alleging any irreparable harm she will suffer now in the absence of an injunction. She also fails to allege facts supporting a belief that there is a danger that Scherer will disseminate the photographs.

At bottom, Bryson has failed to properly frame the issues that state a cause of action both for violation of the Florida Bar Rules or infliction of emotional distress, and her conclusory allegations fail to establish a clear legal right to an injunction. On this basis, the entire Complaint should be dismissed.

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MOTION TO STRIKE

I. Unfairly Prejudicial Allegations

Pursuant to Florida Rule of Civil Procedure 1.140(f), "[a] party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." "The striking of a party's pleadings has long been an available and often favored remedy for a party's misconduct in the litigation process.'" *Empire World Towers, LLC v. CDR Creances, S.A.S.*, 89 So. 3d 1034, 1038 (Fla. 3d DCA 2012) (quoting *Bertrand v. Belhomme*, 892 So. 2d 1150, 1152 (Fla. 3d DCA 2005)).

As the Fourth District has noted: A court should grant a motion to strike "if the material is wholly irrelevant, can have no bearing on the equities and no influence on the decision." *Pentecostal Holiness Church, Inc. v. Murray*, 270 So. 2d 762, 769 (Fla. 4th DCA 1972).

Defendants recognize that motions to strike are generally viewed with disfavor, but as described below, Bryson's improper and highly prejudicial allegations in the Complaint fall squarely within the parameters of "wholly irrelevant." If such allegations are left untouched, a jury reviewing the Complaint would be subjected to impertinent allegations regarding Defendants' other legal disputes with third parties including scandalous accusations taken out of context of those disputes. In addition, any discovery undertaken to obtain evidence regarding these allegations will be wasteful because the evidence has no probative value to the factual issues in this case, and will be inadmissible at trial as unfairly prejudicial and confusing under Florida Evidence Code Section 90.403.

As stated above, Bryson brings claims for intentional infliction of emotion distress and injunctive relief relating solely to nude photographs of herself she sent via text messaging over four years ago copies of which Defendants acquired. Yet, Bryson interjects immaterial allegations

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regarding Defendants' legal battles with third parties which have no legitimate relationship to these claims. Specifically, and in addition to the many false allegations contained in the Complaint, paragraphs 62-66—contains highly prejudicial allegations that are not even tangentially relevant to Bryson's alleged dispute with Scherer and the Firm, but rather relate to other court cases Scherer and the Firm have been involved in over the years. Bryson is neither a party to nor a witness in these cases. Not incidentally, while Bryson has no relationship to these cases, her counsel Paul Turner does, as he represents the former client of Scherer and the Firm in the long ago resolved action referred to in paragraph 65. Nothing in the allegations, discovery, or findings of fact in that lawsuit have had or will have any impact on this action. Even if Bryson was able to prove each and every underlying allegation in these paragraphs, such proof moves nothing in Bryson's burden of proof in *this* matter.

Bryson included paragraphs 61 through 66 in the Complaint for absolutely no reason other than to attempt to prejudice this Court's mind and preemptively impugn the character of Scherer and the Firm, and "make headlines" rather than frame the relevant issues. Provided the Court does not dismiss the Complaint for the reasons stated above, the Court should strike the allegations contained in paragraphs 61-66 from the Complaint.

CONCLUSION

For the foregoing reasons, the Complaint fails to state a cause of action against Scherer and the Firm and should be dismissed – frankly with prejudice because no amount of amendments will cure the legal defect in Bryson's claims. If the Court disagrees and allows this action to move forward by allowing Bryson to amend her Complaint, at a minimum the Court should strike paragraphs 62–66, as they are entirely irrelevant, scandalous, and unfairly prejudicial to Defendants.

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Respectfully submitted,

KOZYAK TROPIN THROCKMORTON, LLP
Counsel for Defendants
2525 Ponce de Leon Boulevard, 9th Floor
Miami, FL 33134
Tel: (305) 372-1800
Fax: (305) 372-3508

By: */s/ Harley S. Tropin*
Harley S. Tropin, Esq.
Florida Bar No. 241253
hst@kttlaw.com
Gail A. McQuilkin, Esq.
Florida Bar No. 969338
gam@kttlaw.com

Irwin R. Gilbert, Esq.
Florida Bar No. 0099473
Conrad & Scherer LLP
633 South Federal Highway
Fort Lauderdale, Florida 33301
Tel: (954) 847-3328
Fax: (954) 463-9244
Email: IGilbert@conradscherer.com

Bruce S. Rogow, Esq.
Florida Bar No. 067999
Bruce S. Rogow, P.A.
100 NE 3rd Avenue, Suite 1000
Fort Lauderdale, FL 33301-1177
Tel: 954-767-8909
Fax: 954-764-1530
Email: brogow@rogowlaw.com

Counsel for Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2019, I electronically filed the foregoing with the Florida Court E-Filing Portal, which will serve it via electronic mail to counsel of record on the Service List below.

By: */s/ Harley S. Tropin*

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