IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

JESSIE SPANO

CASE NO.: 09-WC-1415
DIVISION: 21

Plaintiff,

vs.

ZACK MORRIS,

Defendant.
____/

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, ZACK MORRIS ("Mr. Morris"), by and through its undersigned counsel and pursuant to Rule 1.510(b), *Florida Rules of Civil Procedure*, hereby file this Motion for Summary Judgment against Plaintiff, JESSIE SPANO ("Ms. Spano") and in support thereof states as follows:

STATEMENT OF FACTS

1. Ms. Spano and Mr. Morris are residents of Orange County, Florida. (Complaint ¶1.)

2. Venue is proper in Orange County, Florida, as the acts giving rise to this cause of action occurred in Orange County, Florida. (Compl. ¶ 3.)

3. Ms. Spano and Mr. Morris began a committed, loving, relationship in January of 2008. (Slater Deposition, 3:1-10, July 5, 2009.)

4. Ms. Spano and Mr. Morris relationship came to an end in February of 2009 soon after Mr. Morris learned that before their relationship Ms. Spano posed nude in the adult

magazine “Playboy” and had been featured in the pornographic pictures such as “Showgirls.” (Slater Dep. 4:1-10, July 5, 2009; Morris Dep. 4:5-15, July 5, 2009.)

5. Given the sensitive nature of the “Playboy” images, Mr. Morris has not attached Exhibit “A” to this motion, but will disclose the photos under seal at the direction of the Court. The cover of the pornographic picture “Showgirls” has been attached as Exhibit “B.”

6. Ms. Spano’s involvement in both “Playboy” and pictures like “Showgirls” was never disclosed to Mr. Morris during their relationship. Mr. Morris became aware of Ms. Spano’s involvement after a mutual friend of both parties, A.C. Slater, saw “Showgirls” on the Internet and notified him. (Slater Dep. 5:11-15, July 5, 2009.)

7. Mr. Morris received notice Ms. Spano may have posed nude in “Showgirls” in late January of 2009. He confirmed it for himself and also discovered the “Playboy” pictorial at on or around the same date. Mr. Morris called off his relationship with Ms. Spano on or around the same date which he discovered these disturbing images and videos. (Morris Dep. 5: 01-23, July 5, 2009.)

8. Immediately following the date of calling off his relationship with Ms. Spano on or around early February of 2009 is when Mr. Morris sent the images and videos he had found on the Internet by email and U.S. mail to mutual friends and family. (Compl. ¶ 4; Morris Dep. 6: 01-05, July 5, 2009.)

9. Mr. Morris also created a website and posted flyers which included copies of the same images and videos Mr. Morris had sent by email and U.S. mail. (Compl. ¶ 6.)

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when two conditions exist: (1) there is no genuine issue of material fact and (2) the moving party is entitled to judgment as a matter of law. *See Clark v. City of Atl. Beach,* 124 So.2d 305, 306 (Fla. 1st DCA 1960); *see also* Rule 1.510, Fla.R.Civ.P. "If evidence conflicting as to an issue of fact, or if there are conflicting inferences that may be reasonably drawn from uncontradicted evidence, the issue as to that fact must be submitted to the jury..." *Prof'l Archers Ass'n v. Cmty. Promotions, Inc.*, 214 So. 2d 21, 23 (Fla. 1st DCA 1986). The movant has the burden to conclusively prove that there is no genuine issue of material fact. *Marinaro v. Redding,* 762 So.2d 1048; 1049 (Fla. 5th DCA 2000). "All doubts regarding the existence of an issue in a motion for summary judgment are resolved against the moving party, and all evidence before the court plus favorably inferences reasonably justified thereby are to be liberally construed in favor of the opponent". *Id.*

Although the movant has the initial burden to establish the nonexistence of a genuine issue as to any material fact, once the movant provides competent evidence in support of its motion, the opposing party must come forward with counter evidence sufficient to reveal a genuine issue. *See Landers v. Milton,* 370 So.2d 368, 370 (Fla. 1979). It is never enough for the opposing party to merely assert that an issue of fact does not exist. *Fisel v. Wynns*, 667 So.2d 761, 764. Furthermore, the burden of proof on the moving party is limited to those issues which have been raised by the pleadings. *Holl v. Talcott,* 191 So.2d 40 (Fla. 1966).

LEGAL ARGUMENTS

COUNTS I THROUGH IV – DEFAMATORY STATEMENTS

Ms. Spano alleges in Counts I through IV of her complaint that Mr. Morris made written false statements regarding Ms. Spano through various mediums that constitute libel per se.

There is however, no mention in the complaint specifically as to what these statements were. According to *Razner v. Wellington Regional Medical Center, Inc.,* "In order to plead a cause of action for defamation, Plaintiff must specify the statements made, the Defendants who have made those statements and to whom those statements were made." *Razner v. Wellington Regional Medical Center, Inc.,* 1999 WL 34997348. Stating broadly that Mr. Morris made statements regarding the chastity of Ms. Spano without stating what those statements actually are does not meet the specificity required. *Id.*

Furthermore it has been established that, in determining whether a publication is libellous per se, the words used in the publication 'are not to be construed or taken in their mildest or most grievous sense, but in that sense in which they may be understood and in which they appear to have been used and according to the ideas which they were adopted to convey to those who hear them, or to whom they are addressed.' Budd v. J. Y. Gooch Co., 157 Fla. 716, 27 So.2d 72, 74.

Any statement Mr. Morris may have made regarding Ms. Spano on any of the mediums Ms. Spano is alleging in Counts I through IV would naturally touch on the issue of her chastity considering the state of undress Ms. Spano is in.

Therefore, since Ms. Spano has not specifically alleged Mr. Morris wrote anything, other than producing actual pictures and videos of Ms. Spano in a state she volunteered to be in, we request that Ms. Spano's Counts I through IV be stricken.

COUNT I – DEFAMATION – ELECTRONIC COMMUNICATIONS

Defamation of a private person has five elements under Florida law: (1) publication to a third party; (2) a false statement; (3) fault, amounting to at least negligence, in the making of the publication; (4) actual damages; and (5) a defamatory statement. *Signature Pharmacy, Inc. v. Soares*, 717 F. Supp. 2d 1276 (M.D. Fla. 2010) When determining the fault required under

Florida law in order for a private individual to recover actual damages for defamation, the standard adopted after *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) is negligence – i.e., publication of false and defamatory statements without reasonable care to determine their falsity. *Boyles v. Mid-Florida Television Corp*., 431 So.2d 627, 634 (Fla. 5th DCA 1983).

For the purposes of this motion only, Mr. Morris will accept Ms. Spano's factual claim that he disclosed to the public what normally would meet the standard required to bring a defamation claim if Mr. Morris had disclosed false information. However, anything Mr. Morris made available by electronic communication is protected as the truth.

The truth of the statement published is an affirmative defense. If upon a lawful occasion for making a publication he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice. *Grad v. Copeland,* 280 So.2d 461, 468 (Fla. 4th DCA 1973); *citing; Garrison v. State of Louisiana*, 379 U.S. 64 (1964).

Since Ms. Spano does not allege specifically what Mr. Morris said regarding her chastity it is impossible to determine what to defend against.

Though for the purposes of this motion, Mr. Morris admits that he distributed written statements, pictures, and videos concerning Ms. Spano through electronic communications. Though it should be noted that everything Mr. Morris distributed was either material Ms. Spano previously had made public, or was absolute truth.

WHEREFORE, since any statements Mr. Morris has made is true, Mr. Morris requests that the above referenced Count for Invasion of Privacy be dismissed, and any other such relief as the court deems just and proper.

COUNT II – DEFAMATION – WEBSITE

Defamation of a private person has five elements under Florida law: (1) publication to a third party; (2) a false statement; (3) fault, amounting to at least negligence, in the making of the publication; (4) actual damages; and (5) a defamatory statement. *Signature Pharmacy, Inc* 717 F. Supp. 2d 1276. When determining the fault required under Florida law in order for a private individual to recover actual damages, the standard adopted after *Gertz* is negligence – i.e., publication of false and defamatory statements without reasonable care to determine their falsity. *Boyles* 431 So.2d at 634.

For the purposes of this motion only, Mr. Morris will accept Ms. Spano's factual claim that he disclosed to the public what normally would meet the standard required to bring a defamation claim if Mr. Morris had disclosed false information. However, anything Mr. Morris made available by a website is protected as the truth.

The truth of the statement published is an affirmative defense. If upon a lawful occasion for making a publication he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice. *Grad,* 280 So.2d at 468; *citing; Garrison v. State of Louisiana*, 379 U.S. 64 (1964).

Since Ms. Spano does not allege specifically what Mr. Morris said regarding her chastity it is impossible to determine what to defend against.

Though for the purposes of this motion, Mr. Morris admits that he distributed written statements, pictures, and videos concerning Ms. Spano through a website on the Internet. Although it should be noted that everything Mr. Morris distributed was either material Ms. Spano previously had made public, or was absolute truth.

WHEREFORE, since any statements Mr. Morris has made is true, Mr. Morris requests that the above referenced Count for Invasion of Privacy be dismissed, and any other such relief as the court deems just and proper.

COUNT III – DEFAMATION – PUBLICLY POSTED FLYERS

Defamation of a private person has five elements under Florida law: (1) publication to a third party; (2) a false statement; (3) fault, amounting to at least negligence, in the making of the publication; (4) actual damages; and (5) a defamatory statement. *Signature Pharmacy, Inc* 717 F. Supp. 2d 1276. When determining the fault required under Florida law in order for a private individual to recover actual damages, the standard adopted after *Gertz* is negligence – i.e., publication of false and defamatory statements without reasonable care to determine their falsity. *Boyles* 431 So.2d at 634.

For the purposes of this motion only, Mr. Morris will accept Ms. Spano's factual claim that he disclosed to the public what normally would meet the standard required to bring a defamation claim if Mr. Morris had disclosed false information. However, anything Mr. Morris made available by publicly posted flyers is protected as the truth.

The truth of the statement published is an affirmative defense. If upon a lawful occasion for making a publication he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice. *Grad,* 280 So.2d at 468; *citing; Garrison v. State of Louisiana*, 379 U.S. 64 (1964).

Since Ms. Spano does not allege specifically what Mr. Morris said regarding her chastity it is impossible to determine what to defend against.

Though for the purposes of this motion, Mr. Morris admits that he distributed written statements, pictures, and videos concerning Ms. Spano through publicly posted flyers. Although

it should be noted that everything Mr. Morris distributed was either material Ms. Spano previously had made public, or was absolute truth.

WHEREFORE, since any statements Mr. Morris has made is true, Mr. Morris requests that the above referenced Count for Invasion of Privacy be dismissed, and any other such relief as the court deems just and proper.

COUNT IV – DEFAMATION – U.S. MAIL

Defamation of a private person has five elements under Florida law: (1) publication to a third party; (2) a false statement; (3) fault, amounting to at least negligence, in the making of the publication; (4) actual damages; and (5) a defamatory statement. *Signature Pharmacy, Inc* 717 F. Supp. 2d 1276. When determining the fault required under Florida law in order for a private individual to recover actual damages, the standard adopted after *Gertz* is negligence – i.e., publication of false and defamatory statements without reasonable care to determine their falsity. *Boyles* 431 So.2d at 634.

For the purposes of this motion only, Mr. Morris will accept Ms. Spano's factual claim that he disclosed to the public what normally would meet the standard required to bring a defamation claim if Mr. Morris had disclosed false information. However, anything Mr. Morris made available by a website is protected as the truth.

The truth of the statement published is an affirmative defense. If upon a lawful occasion for making a publication he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice. *Grad,* 280 So.2d at 468; *citing; Garrison v. State of Louisiana*, 379 U.S. 64 (1964).

Since Ms. Spano does not allege specifically what Mr. Morris said regarding her chastity it is impossible to determine what to defend against.

Though for the purposes of this motion, Mr. Morris admits that he distributed written statements, pictures, and videos concerning Ms. Spano through U.S. Mail. Although it should be noted that everything Mr. Morris distributed was either material Ms. Spano previously had made public, or was absolute truth.

WHEREFORE, since any statements Mr. Morris has made is true, Mr. Morris requests that the above referenced Count for Invasion of Privacy be dismissed, and any other such relief as the court deems just and proper.

COUNTS V THROUGH VII – INVASION OF PRIVACY-

The elements of the tort invasion of privacy by public disclosure of private fact can be summarized as (i) the publication, (ii) of private facts, (iii) that are offensive, and (4) are not of public nature. *Cape Publ'ns, Ins. v. Hitchner*, 549 So.2d 1374, 1377 (Fla. 1989). To prove the tort of invasion of privacy by publication of private facts, the publication must be "highly offensive to a reasonable person." *Post- Newsweek Stations Orlando, Inc. v. Guetzloe,* 968 So.2d 608, 613 (Fla. 5th DCA 2007).

In paragraph 6a, Ms. Spano alleges that Mr. Morris emailed false statements regarding the chastity of *the Defendant*. This allegation doesn't give rise to a cause of action as except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded. *Loft v. Fuller,* 408 So.2d 619, 622 (Fla. 4th DCA 1982). Mr. Morris, the Defendant, emailing false statements regarding the chastity of *himself* does not give Ms. Spano standing to sue him for invasion of privacy.

Consequently, we request this count be stricken.

Should this Honorable Court find the use of the word "Defendant" instead of "Plaintiff" in paragraph 6a as an unintentional and excusable mistake by Ms. Spano, Mr. Morris would then raise the defense of republication of facts.

COUNT V – INVASION OF PRIVACY – ELECTRONIC COMMUNICATIONS

The elements of the tort invasion of privacy by public disclosure of private fact can be summarized as (i) the publication, (ii) of private facts, (iii) that are offensive, and (4) are not of public nature. *Cape Publ'ns, Ins. v. Hitchner*, 549 So.2d 1374, 1377 (Fla. 1989). To prove the tort of invasion of privacy by publication of private facts, the publication must be "highly offensive to a reasonable person." *Post- Newsweek Stations Orlando, Inc. v. Guetzloe,* 968 So.2d 608, 613 (Fla. 5th DCA 2007).

For the purposes of this motion, Mr. Morris will accept Ms. Spano's factual claim that he disclosed to the public what normally would meet the standard required to bring an invasion of privacy claim. However, Mr. Morris relies on the fact that what he disclosed was already made available to the public and therefore gives Mr. Morris an appropriate legal defense.

The defense of republication of facts is proper in this case because Ms. Spano has already made the pictures and videos in question public when she willingly posed nude for Playboy and "Showgirls." Facts already publicized elsewhere and republicized cannot provide a basis for an invasion of privacy claim. *Heath v. Playboy Enters., Inc.,* 732 F. Supp. 1145, 1149 (S.D. Fla. 1990) The law is clear that there is no liability for giving further publicity to what the plaintiff leaves open to the public eye. *Mayhall v. Dinneis Stuff Inc.,* 31 Media L. Rep. 1567 (Fla. Cir. Ct. 2002)

The pictures and videos Mr. Morris made available by electronic communications were already made available to the public, hence the reason A.C. Slater and Mr. Morris were able to

discover Ms. Spano's past. Moreover, republication of public facts, even in a "damaging context," is not actionable because an invasion of privacy "focuses on the *matter* being published, not its *context* or *inferences." Id.*

WHEREFORE, since the *matter* published by Mr. Morris had already been published by Ms. Spano voluntarily, Mr. Morris requests that the above referenced Count for Invasion of Privacy be dismissed, and any other such relief as the court deems just and proper.

COUNT VI – INVASION OF PRIVACY – WEBSITE

The elements of the tort invasion of privacy by public disclosure of private fact can be summarized as (i) the publication, (ii) of private facts, (iii) that are offensive, and (4) are not of public nature. *Hitchner*, 549 So.2d at 1377. To prove the tort of invasion of privacy by publication of private facts, the publication must be "highly offensive to a reasonable person." *Guetzloe,* 968 So.2d at 613.

For the purposes of this motion, Mr. Morris will accept Ms. Spano's factual claim that he disclosed to the public what normally would meet the standard required to bring an invasion of privacy claim. However, Mr. Morris relies on the fact that what he disclosed was already made available to the public and therefore gives Mr. Morris an appropriate legal defense.

The defense of republication of facts is proper in this case because Ms. Spano has already made the pictures and videos in question public when she willingly posed nude for Playboy and "Showgirls." Facts already publicized elsewhere and republicized cannot provide a basis for an invasion of privacy claim. *Heath,*732 F. Supp. at 1149. The law is clear that there is no liability for giving further publicity to what the plaintiff leaves open to the public eye. *Mayhall,* 31 Media L. Rep. 1567.

The pictures and videos Mr. Morris made available on a website were already made available to the public, hence the reason A.C. Slater and Mr. Morris were able to discover Ms. Spano's past. Moreover, republication of public facts, even in a "damaging context," is not actionable because an invasion of privacy "focuses on the *matter* being published, not its *context* or *inferences." Id.*

WHEREFORE, since the *matter* published by Mr. Morris had already been published by Ms. Spano voluntarily, Mr. Morris requests that the above referenced Count for Invasion of Privacy be dismissed, and any other such relief as the court deems just and proper.

COUNT VII – INVASION OF PRIVACY – PUBLICLY POSTED FLYERS

The elements of the tort of invasion of privacy by public disclosure of private fact can be summarized as (i) the publication, (ii) of private facts, (iii) that are offensive, and (4) are not of public nature. *Hitchner*, 549 So.2d at 1377. To prove the tort of invasion of privacy by publication of private facts, the publication must be "highly offensive to a reasonable person." *Guetzloe,* 968 So.2d at 613.

For the purposes of this motion, Mr. Morris will accept Ms. Spano's factual claim that he disclosed to the public what normally would meet the standard required to bring an invasion of privacy claim. However, Mr. Morris relies on the fact that what he disclosed was already made available to the public and therefore gives Mr. Morris an appropriate legal defense.

The defense of republication of facts is proper in this case because Ms. Spano has already made the pictures and videos in question public when she willingly posed nude for Playboy and "Showgirls." Facts already publicized elsewhere and republicized cannot provide a basis for an invasion of privacy claim. *Heath,* 732 F. Supp. at 1149. The law is clear that there is no liability

for giving further publicity to what the plaintiff leaves open to the public eye. *Mayhall,* 31 Media L. Rep. 1567.

The pictures and videos Mr. Morris made available by flyers were already made available to the public, hence the reason A.C. Slater and Mr. Morris were able to discover Ms. Spano's past. Moreover, republication of public facts, even in a "damaging context," is not actionable because an invasion of privacy "focuses on the *matter* being published, not its *context* or *inferences." Id.*

WHEREFORE, since the *matter* published by Mr. Morris had already been published by Ms. Spano voluntarily, Mr. Morris requests that the above referenced Count for Invasion of Privacy be dismissed, and any other such relief as the court deems just and proper.

COUNT VIII – INVASION OF PRIVACY – U.S. MAIL

The elements of the tort of invasion of privacy by public disclosure of private fact can be summarized as (i) the publication, (ii) of private facts, (iii) that are offensive, and (4) are not of public nature. *Hitchner*, 549 So.2d at 1377. To prove the tort of invasion of privacy by publication of private facts, the publication must be "highly offensive to a reasonable person." *Guetzloe,* 968 So.2d at 613.

For the purposes of this motion, Mr. Morris will accept Ms. Spano's factual claim that he disclosed to the public what normally would meet the standard required to bring an invasion of privacy claim. However, Mr. Morris relies on the fact that what he disclosed was already made available to the public and therefore gives Mr. Morris an appropriate legal defense.

The defense of republication of facts is proper in this case because Ms. Spano has already made the pictures and videos in question public when she willingly posed nude for Playboy and "Showgirls." Facts already publicized elsewhere and republicized cannot provide a basis for an

invasion of privacy claim. *Heath,* 732 F. Supp. at 1149. The law is clear that there is no liability for giving further publicity to what the plaintiff leaves open to the public eye. *Mayhill,* 31 Media L. Rep. 1567.

The pictures and videos Mr. Morris made available through U.S. Mail were already made available to the public, hence the reason A.C. Slater and Mr. Morris were able to discover Ms. Spano's past. Moreover, republication of public facts, even in a "damaging context," is not actionable because an invasion of privacy "focuses on the *matter* being published, not its *context* or *inferences." Id.*

WHEREFORE, since the *matter* published by Mr. Morris had already been published by Ms. Spano voluntarily, Mr. Morris requests that the above referenced Count for Invasion of Privacy be dismissed, and any other such relief as the court deems just and proper.

COUNT IX – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The elements of a cause of action for the intentional infliction of emotion distress are: (i) the wrongdoer's conduct was intentional or reckless, *i.e.,* he intended his behavior when he knew or should have known that emotional distress would likely result; (ii) the conduct was outrageous, *i.e.*, beyond all bounds of decency, atrocious and utterly intolerable in a civilized community; (iii) the conduct caused emotional distress; and (iv) the emotional distress was severe. *State Farm Mutual Automobile Insurance Co. v. Novotny,* 657 So.2d 1210, 1212 (Fla. 5th DCA 1995).

Ms. Spano relies on paragraphs 1-8 of the complaint as the basis of all her Defamation claims as well as the Intentional Infliction of Emotional Distress claim. The Intentional Infliction of Emotional Distress count in paragraph 83 alleges "Defendant's conduct was outrageous and beyond all bounds of decency…in a civilized community." The successful invocation of a

Defamation claim based solely on those facts, does not give the plaintiff the ability to transform those same facts into a claim for intentional infliction of emotional distress simply by characterizing the alleged defamatory statements as "outrageous." *Boyles*, 431 at 636.

Due to Florida law precluding Ms. Spano from bringing a cause of action for intentional infliction of emotional distress if the sole basis for the latter cause of action is the defamatory publication, we respectfully request that this count be stricken. *Id.*

WHEREFORE, Defendant, ZACK MORRIS, respectfully requests this court to enter a summary judgment in its favor against Plaintiff, JESSIE SPANO, for such other and further relief as this court deems equitable and just.

DATED this 29th day of March, 2011.

DUNFORD, DUNFORD & DUNFORD

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

JESSIE SPANO

CASE NO.: 09-WC-1415
DIVISION: 21

Plaintiff,

vs.

ZACK MORRIS,

Defendant.
_______________________________________/

NOTICE OF HEARING

Defendant's counsel will make a motion for Summary Judgment to the Court on the grounds there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clark v. City of Atl. Beach,* 124 So.2d 305, 306 (Fla. 1st DCA 1960).

The hearing will be held on April 4th, 2011 at the Orange County Courthouse, located at 425 N. Orange Avenue, Orlando, FL 32801 in Judge Jackson's chambers at 9:00 a.m. or as soon as the matter can be heard. The motion will be based on the pleadings, papers and files of the case and on the affidavits of JESSIE SPANO and ZACK MORRIS, which are attached to the Notice.

Fifteen (15) minutes have been reserved for this hearing.

PLEASE GOVERN YOURSELF ACCORDINGLY

Executed on March 29, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following on March 29, 2010.

JESSIE SPANO
1234 Castle Road
Orlando, FL 32807

Attorney for Plaintiff
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4321 Beano Blvd.
Kissimmee, FL 32805

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