PHILIP GODLEWSKI,		:	IN THE COURT OF COMMON PLEAS
	Plaintiff,	:	of LACKAWANNA COUNTY, PA
		:	
v.		:	CV-2023-1354
		:	
BRIENNA DuBORGEL,		:	CIVIL ACTION-LAW
	Defendant.	:	JURY TRIAL DEMANDED

ORDER

AND NOW, this ____ day of _____ 2023, upon consideration of Plaintiff's Motion for Partial Judgment on the Pleadings it is hereby ORDERED as follows:

A. Plaintiff shall file a Brief in Support not later than the ____ day of _____ 2023.

B. Defendant shall file an Answer and Brief in reply to the Motion for Partial Judgment on the Pleadings not later than the _____ day of _____ 202___.

C. Argument shall be held on the _____ day of _____ 202___ at ____ o'clock _____M. in Courtroom No. _____ of the Lackawanna County Courthouse.

BY THE COURT:

_____

, J.

PHILIP GODLEWSKI,		:	IN THE COURT OF COMMON PLEAS
	Plaintiff,	:	of LACKAWANNA COUNTY, PA
		:	
v.		:	CV-2023-1354
		:	
BRIENNA DuBORGEL,		:	CIVIL ACTION-LAW
	Defendant.	:	JURY TRIAL DEMANDED

PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

COMES NOW Plaintiff Philip Godlewski, by and through his counsel, Kolman Law PC, and makes the following Motion:

1. Plaintiff Philip Godlewski ("Godlewski") commenced this action on March 27, 2023 by filing a Complaint against Defendant Brienna DuBorgel ("DuBorgel") alleging causes of action for defamation, false light invasion of privacy, and publicity to private life invasion of privacy.

2. On May 5, 2023 DuBorgel responded by filing an Answer with New Matter and Counterclaim alleging causes of action against Godlewski for defamation, false light invasion of privacy, assault, battery, intentional infliction of emotional distress ("IIED"), and negligent infliction of emotional distress ("NIED").

3. On July 7, 2023 Godlewski filed an Answer to BuBorgel's New Matter and New Matter to DuBorgel's counterclaim.

4. DuBorgel has filed a reply to Godlewski's New Matter.

5. The pleadings in this matter are closed.

6. The Pennsylvania Rules of Civil Procedure permit a party to move for judgment on the pleadings "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay trial. Pa.R.C.P. 1034 (a).

COUNT I - DEEMED ADMISSION OF PLAINTIFF'S ALLEGATIONS - Pa.R.C.P. 1029 (b)

7. Paragraphs 1 through 6 of this Motion are hereby restated and reincorporated by reference as though fully set forth.

8. The Pennsylvania Rules of Civil Procedure require that ["a"] responsive pleading shall admit or deny each averment of fact in the preceding pleading or any part thereof to which it is responsive." Pa.R.C.P. 1029 (a).

9. Further, "[a]verments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial ... shall have the effect of an admission." Pa.R.C.P. 1029 (b).

10. Paragraphs 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 22, 44, and 45 of DuBorgel's Answer contain the language "Denied as stated." See DuBorgel's Answer and New Matter to Plaintiff's Complaint and Counter-Claim [sic] attached hereto as Exhibit 1.

11. The language, "Denied as stated" is legally insufficient to specifically deny the allegations of paragraphs 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 22, 44, and 45 [sic] of the Complaint. See Hauser v. York Water Co., 278 Pa. 387, 123 A. 330 (1924).

12. Paragraphs 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 22, 44, and 45 of the Complaint must be deemed admitted.

13. Paragraph 12 of DuBorgel's Answer contains only the word, "Denied" along with a demand for strict proof. See Exhibit 1.

14. The language, "Denied " is legally insufficient to specifically deny the allegations of paragraph 12 of the Complaint. See Swift v. Milner, 371 Pa.Super. 302, 538 A.2d 28 (1988).

15. Paragraph 12 of the Complaint must be deemed admitted.

16. Paragraphs 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 46, 47 and 48 of DuBorgel's Answer purport to specifically deny the corresponding allegations of the Complaint but offer no contradicting facts or other explanation of the denials. See Exhibit 1.

17. The purported specific denials without an offer of contradicting facts or other explanation contained in Paragraphs 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 46, 47 and 48 of DuBorgel's Answer are legally insufficient to constitute specific denials and are mere general denials. See King v. Altman, 256 A.3d 1, 2021 WL 2287432 (Pa.Super. 2021); Kappe Associates, Inc. v. Aetna Casualty and Surety Company, 234 Pa.Super. 627, 341 A.2d 516 (1975); Yulsman v. Levy, 97 Pa.Super. 392 (1929).

18. The allegations contained in Paragraphs 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 46, 47 and 48 of the Complaint must be deemed admitted.

COUNT II - STATUTE OF LIMITATIONS - ASSAULT

19. Paragraphs 1 through 18 of this Motion are restated and reincorporated by reference as though fully set forth.

20. Ordinarily, an action for assault must be commenced within two years. 42 Pa.C.S.C.A. § 5524 (1).

21. In the case of an unemancipated minor, the limitations period begins to run when the unemancipated minor reaches the age of 18. 42. Pa.C.S.A. § 5533 (b)(1)(i).

22. A minor is a person who has not yet reached the age of 18 years. 42. Pa.C.S.A. § 5533 (b)(1)(ii).

23. When a person is under 18 years of age at the time that a cause of action related to sexual abuse arises, that person will have a period of 37 years after attaining the age of 18 to bring an action. 42. Pa.C.S.A. § 5533 (b)(2)(i).

24. "Sexual abuse" for purposes of the statute of limitations requires that the "individual bringing the civil action engaged in such activities as a result of forcible compulsion or the threat of forcible compulsion which would prevent resistance by a person of reasonable resolution." 42. Pa.C.S.A. § 5533 (b)(2)(ii).

25. "Forcible compulsion" for purposes of the statute of limitations "shall have the meaning given to it by 18 Pa.C.S.A. § 3101.

26. "Forcible compulsion" is "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied." 18 Pa.C.S.A. § 3101.

27. For purposes of the statue of limitations, the following acts are indicative of "sexual abuse":

> (A) sexual intercourse, which includes penetration, however slight, of any body part or object into the sex organ of another;
>
> (B) deviate sexual intercourse, which includes sexual intercourse per os or per anus; and
>
> (C) indecent contact, which includes any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire in either person.

42 Pa.C.S.A. § 5533 (b)(ii)(A-C).

28. DuBorgel has not brought her action for assault within the two years after turning 18.

29. DuBorgel has not alleged facts which support that she engaged in sexual activities with Godlewski as a result of forcible compulsion or threat of forcible compulsion which would prevent resistance by a person of reasonable resolution.

30. DuBorgel has not alleged that she engaged in sexual intercourse with Godlewski involving penetration, however slight, of any body part or object into the sex organ of either party.

31. DuBorgel has not alleged that she engaged in sexual intercourse per os or per anus with Godlewski.

32. DuBorgel has not alleged that Godlewski touched DuBorgel's sexual or other intimate parts for the purpose of arousing or gratifying sexual desire in either Godlewski or DuBorgel.

33. DuBorgel has not alleged facts which entitled DuBorgel to the extended statute of limitations under 42. Pa.C.S.A. § 5533 (b)(2)(i) for minor victims of sexual abuse.

34. DuBorgel's assault claim is barred by the statute of limitations.

35. DuBorgel's assault claim must be dismissed.

COUNT II - STATUTE OF LIMITATIONS - BATTERY

36. Paragraphs I through 35 of this Motion are restated and reincorporated by reference as though fully set forth.

37. Ordinarily, an action for battery must be commenced within two years. 42 Pa.C.S.C.A. § 5524 (1).

38. In the case of an unemancipated minor, the limitations period begins to run when the unemancipated minor reaches the age of 18. 42. Pa.C.S.A. § 5533 (b)(I)(i).

39. A minor is a person who has not yet reached the age of 18 years. 42. Pa.C.S.A. § 5533 (b)(1)(ii).

40. When a person is under 18 years of age at the time that a cause of action related to sexual abuse arises, that person will have a period of 37 years after attaining the age of 18 to bring an action. 42. Pa.C.S.A. § 5533 (b)(2)(i).

41. "Sexual abuse" for purposes of the statute of limitations requires that the "individual bringing the civil action engaged in such activities as a result of forcible compulsion or the threat of forcible compulsion which would prevent resistance by a person of reasonable resolution." 42. Pa.C.S.A. § 5533 (b)(2)(ii).

42. "Forcible compulsion" for purposes of the statute of limitations "shall have the meaning given to it by 18 Pa.C.S.A. § 3101.

43. "Forcible compulsion" is "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied." 18 Pa.C.S.A. § 3101.

44. For purposes of the statue of limitations, the following acts are indicative of "sexual abuse":

> (A) sexual intercourse, which includes penetration, however slight, of any body part or object into the sex organ of another;
>
> (B) deviate sexual intercourse, which includes sexual intercourse per os or per anus; and
>
> (C) indecent contact, which includes any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire in either person.

42 Pa.C.S.A. § 5533 (b)(ii)(A-C).

45. DuBorgel has not brought her action for battery within the two years after turning 18.

46. DuBorgel has not alleged facts which support that she engaged in sexual activities with Godlewski as a result of forcible compulsion or threat of forcible compulsion which would prevent resistance by a person of reasonable resolution.

47. DuBorgel has not alleged that she engaged in sexual intercourse with Godlewski involving penetration, however slight, of any body part or object into the sex organ of either party.

48. DuBorgel has not alleged that she engaged in sexual intercourse per os or per anus with Godlewski.

49. DuBorgel has not alleged that Godlewski touched DuBorgel's sexual or other intimate parts for the purpose of arousing or gratifying sexual desire in either Godlewski or DuBorgel.

50. DuBorgel has not alleged facts which entitled DuBorgel to the extended statute of limitations under 42. Pa.C.S.A. § 5533 (b)(2)(i) for minor victims of sexual abuse.

51. DuBorgel's battery claim is barred by the statute of limitations.

52. DuBorgel's battery claim must be dismissed.

COUNT III - STATUTE OF LIMITATIONS - IIED

53. Paragraphs 1 through 52 of this Motion are restated and reincorporated by reference as though fully set forth.

54. Ordinarily, an action for IIED must be commenced within two years. 42 Pa.C.S.C.A. § 5524 (7).

55. In the case of an unemancipated minor, the limitations period begins to run when the unemancipated minor reaches the age of 18. 42. Pa.C.S.A. § 5533 (b)(1)(i).

56. A minor is a person who has not yet reached the age of 18 years. 42. Pa.C.S.A. § 5533 (b)(1)(ii).

57. When a person is under 18 years of age at the time that a cause of action related to sexual abuse occurs, that person will have a period of 37 years after attaining the age of 18 to bring an action. 42. Pa.C.S.A. § 5533 (b)(2)(i).

58. "Sexual abuse" for purposes of the statute of limitations requires that the "individual bringing the civil action engaged in such activities as a result of forcible compulsion or the threat of forcible compulsion which would prevent resistance by a person of reasonable resolution." 42. Pa.C.S.A. § 5533 (b)(2)(ii).

59. "Forcible compulsion" for purposes of the statute of limitations "shall have the meaning given to it by 18 Pa.C.S.A. § 3101.

60. "Forcible compulsion" is "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied." 18 Pa.C.S.A. § 3101.

61. For purposes of the statue of limitations, the following acts are indicative of "sexual abuse":

> (A) sexual intercourse, which includes penetration, however slight, of any body part or object into the sex organ of another;
>
> (B) deviate sexual intercourse, which includes sexual intercourse per os or per anus; and
>
> (C) indecent contact, which includes any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire in either person.

42 Pa.C.S.A. § 5533 (b)(ii)(A-C).

62. To the extent that DuBorgel's IIED claims are predicated on acts other than sexual abuse, they must be brought within two years after turning 18.

63. DuBorgel has not brought her action for IIED within the two years after turning 18.

64. DuBorgel has not alleged facts which support that she engaged in sexual activities with Godlewski as a result of forcible compulsion or threat of forcible compulsion which would prevent resistance by a person of reasonable resolution.

65. DuBorgel has not alleged that she engaged in sexual intercourse with Godlewski involving penetration, however slight, of any body part or object into the sex organ of either party.

66. DuBorgel has not alleged that she engaged in sexual intercourse per os or per anus with Godlewski.

67. DuBorgel has not alleged that Godlewski touched DuBorgel's sexual or other intimate parts for the purpose of arousing or gratifying sexual desire in either Godlewski or DuBorgel.

68. DuBorgel has not alleged facts which entitled DuBorgel to the extended statute of limitations under 42. Pa.C.S.A. § 5533 (b)(2)(i) for minor victims of sexual abuse.

69. DuBorgel's IIED claims is barred by the statute of limitations.

70. DuBorgel's IIED claim must be dismissed.

COUNT IV - STATUTE OF LIMITATIONS - NIED

71. Paragraphs 1 through 70 of this Motion are restated and reincorporated by reference as though fully set forth.

72. Ordinarily, an action for NIED must be commenced within two years. 42 Pa.C.S.C.A. § 5524 (7).

73. In the case of an unemancipated minor, the limitations period begins to run when the unemancipated minor reaches the age of 18. 42. Pa.C.S.A. § 5533 (b)(1)(i).

74. A minor is a person who has not yet reached the age of 18 years. 42. Pa.C.S.A. § 5533 (b)(1)(ii).

75. When a person is under 18 years of age at the time that a cause of action related to sexual abuse arises, that person will have a period of 37 years after attaining the age of 18 to bring an action. 42. Pa.C.S.A. § 5533 (b)(2)(i).

76. "Sexual abuse" for purposes of the statute of limitations requires that the "individual bringing the civil action engaged in such activities as a result of forcible compulsion or the threat of forcible compulsion which would prevent resistance by a person of reasonable resolution." 42. Pa.C.S.A. § 5533 (b)(2)(ii).

77. "Forcible compulsion" for purposes of the statute of limitations "shall have the meaning given to it by 18 Pa.C.S.A. § 3101.

78. "Forcible compulsion" is "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied." 18 Pa.C.S.A. § 3101.

79. For purposes of the statue of limitations, the following acts are indicative of "sexual abuse":

(A) sexual intercourse, which includes penetration, however slight, of any body part or object into the sex organ of another;

(B) deviate sexual intercourse, which includes sexual intercourse per os or per anus; and

(C) indecent contact, which includes any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire in either person.

42 Pa.C.S.A. § 5533 (b)(ii)(A-C).

80. To the extent that DuBorgel's NIED claims are predicated on acts other than sexual abuse, they must be brought within two years after turning 18.

81. DuBorgel has not brought her action for NIED within the two years after turning 18.

82. DuBorgel has not alleged facts which support that she engaged in sexual activities with Godlewski as a result of forcible compulsion or threat of forcible compulsion which would prevent resistance by a person of reasonable resolution.

83. DuBorgel has not alleged that she engaged in sexual intercourse with Godlewski involving penetration, however slight, of any body part or object into the sex organ of either party.

84. DuBorgel has not alleged that she engaged in sexual intercourse per os or per anus with Godlewski.

85. DuBorgel has not alleged that Godlewski touched DuBorgel's sexual or other intimate parts for the purpose of arousing or gratifying sexual desire in either Godlewski or DuBorgel.

86. DuBorgel has not alleged facts which entitled DuBorgel to the extended statute of limitations under 42. Pa.C.S.A. § 5533 (b)(2)(i) for minor victims of sexual abuse.

87. DuBorgel's NIED claims is barred by the statute of limitations.

88. DuBorgel's NIED claim must be dismissed.

COUNT V - DEMURRER - ASSAULT

89. Paragraphs 1 through 88 of this Motion are restated and reincorporated by reference as though fully set forth.

90. In order to state a cause of action for assault in Pennsylvania, a plaintiff must plead:

A. an act intended to cause offensive or harmful bodily contact or to put another in reasonable apprehension of offensive physical contact and;

B. the victim actually experiences apprehension.

91. DuBorgel has failed to plead sufficient facts to show that Godlewski intended to cause offensive or harmful bodily contact.

92. DuBorgel has failed to plead sufficient facts to show that Godlewski committed an act intended to put DuBorgel in reasonable apprehension of offensive physical contact.

93. DuBorgel has failed to plead sufficient facts to show that DuBorgel experienced apprehension as a result of Godlewski's alleged acts.

94. DuBorgel has failed to state a cause of action for assault.

95. DuBorgel's claim for assault must be dismissed.

COUNT VI - DEMURRER - BATTERY

96. Paragraphs 1 through 95 of this Motion are restated and reincorporated by reference as though fully set forth.

97. In order to state a cause of action for battery in Pennsylvania, a plaintiff must plead that she was intentionally subjected to unwelcome bodily contact, however slight.

98. DuBorgel has failed to plead sufficient facts to show that Godlewski intentionally subjected DuBorgel to unwelcome physical contact.

99. DuBorgel has failed to state a cause of action for battery.

100. DuBorgel's claim for battery must be dismissed.

COUNT VII - DEMURRER - IIED

101. Paragraphs I through I00 of this Motion are restated and reincorporated by reference as though fully set forth.

102. In order to state a cause of action for IIED, a plaintiff must plead:

A. Extreme and outrageous conduct;

B. that is intentional and reckless;

C. causing severe emotional distress; and

D. resulting in some physical harm.

103. DuBorgel has failed to allege sufficient facts which support an inference of extreme and outrageous conduct on the part of Godlewski.

104. DuBorgel has failed to allege sufficient acts to show intentional or reckless conduct on the part of Godlewski.

105. DuBorgel has failed to allege sufficient facts supporting an inference that Godlewski has caused DuBorgel severe emotional distress.

106. DuBorgel has failed to allege sufficient facts to support an inference of resulting physical harm.

107. DuBorgel has failed to state a cause of action for IIED.

108. DuBorgel's IIED claim must be dismissed.

COUNT VIII - DEMURRER - NIED

109. Paragraphs 1 through 108 of this Motion are restated and reincorporated by reference as though fully set forth.

110. DuBorgel attempts to state a claim for NIED based upon an alleged "special relationship" with Godlewski

111. In order to state a cause of action for NIED, a plaintiff must plead:

A. that defendant had a contractual or fiduciary duty to the plaintiff; and

B. that plaintiff suffered immediate and substantial physical harm;

C. resulting from negligent conduct.

112. DuBorgel has failed to allege a fiduciary or contractual duty, or other legally sufficient special relationship on the part of Godlewski.

113. DuBorgel has failed to allege a duty of care owed to DuBorgel by Godlewski.

114. DuBorgel has failed to allege a breach of duty of care on the part of Godlewski.

115. DuBorgel has failed to allege resulting harm from a breach of a duty of duty of care.

116. DuBorgel has failed to allege immediate and substantial physical harm.

117. DuBorgel has failed to state a cause of action for NIED.

118. DuBorgel's NIED claim must be dismissed.

WHEREFORE, Plaintiff Philip Godlewski respectfully requests that the Honorable Court grant his Motion for Partial Judgment on the Pleadings and entering an Order providing the following relief:

A. Deeming paragraphs 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 22, 44, and 45 of the Complaint admitted.

B. Deeming paragraphs 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 46, 47 and 48 of the Complaint admitted.

C. Dismissing Count III (Assault) of DuBorgel's Counterclaim with prejudice.

D. Dismissing Count IV (Battery) of DuBorgel's Counterclaim with prejudice.

E. Dismissing Count V (Intentional Infliction of Emotional Distress) of DuBorgel's Counterclaim with prejudice.

F. Dismissing Count VI (Negligent Infliction of Emotional Distress) of DuBorgel's Counterclaim with prejudice.

Respectfully submitted,

KOLMAN LAW, PC

DATE: December 27, 2023

/s/ Timothy M. Kolman

Timothy M. Kolman, PA51982

Timothy A. Bowers, PA77980
414 Hulmeville Avenue
Penndel, PA 19047
(215) 750-3134
Attorney for Plaintiff.

PHILIP GODLEWSKI,	:	IN THE COURT OF COMMON PLEAS
Plaintiff,	:	of LACKAWANNA COUNTY, PA
v.	:	CV-2023-1354
BRIENNA DuBORGEL,	:	CIVIL ACTION-LAW
Defendant.	:	JURY TRIAL DEMANDED

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

QUESTIONS PRESENTED

I. WHETHER THE COURT MUST DEEM CERTAIN PARAGRAPHS OF PLAINTIFF'S COMPLAINT ADMITTED AS DEFENDANT HAS FAILED TO PROVIDE LEGALLY SUFFICIENT RESPONSES.

II. WHETHER THE COURT MUST DISMISS DEFENDANT'S CLAIMS FOR ASSAULT, BATTERY, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ("IIED"), AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS ("NIED") AS THOSE CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

III. WHETHER THE COURT MUST DISMISS DEFENDANT'S CLAIMS FOR ASSAULT, BATTERY, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ("IIED"), AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS ("NIED") FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

STATEMENT OF THE CASE

1. Procedural history.

Plaintiff Philip Godlewski ("Godlewski") commenced this action on March 27, 2023 by filing a Complaint against Defendant Brienna DuBorgel ("DuBorgel") alleging causes of action for defamation, false light invasion of privacy, and publicity to private life invasion of privacy. On May 5, 2023 DuBorgel responded by filing an Answer with New Matter and Counterclaim alleging causes of action against Godlewski for defamation, false light invasion of privacy,

assault, battery, intentional infliction of emotional distress ("IIED"), and negligent infliction of emotional distress ("NIED"). On July 7, 2023 Godlewski filed an Answer to BuBorgel's New Matter and New Matter to DuBorgel's counterclaim. On July 18, 2023 DuBorgel has filed a reply to Godlewski's New Matter, thus closing the pleadings in this matter.

Godlewski filed a Motion for Partial Judgment on the Pleadings contemporaneously with this Brief.

2. Facts of the case.

A factual record has not yet been developed in this matter. At this stage, the Court must look to the allegations in the pleadings. Godlewski alleges in his Complaint that DuBorgel has falsely stated, in an affidavit provided in other litigation, that Godlewski and DuBorgel "had sex multiple times while [DuBorgel] was in the nineth [sic] (9th) grade and tenth (10th) grade. Complaint at ¶ 9. Godlewski further alleges that DuBorgel falsely stated that the two "commenced a sexual relationship" while DuBorgel was 15 and Godlewski was approximately ten years older than DuBorgel. Complaint at ¶¶ 7, 8.

In her Counterclaim, DuBorgel asserts that Godlewski and DuBorgel engaged in sexual intercourse multiple times during the period of Fall 2008 through Spring/Summer 2010 while DuBorgel was a minor and Godlewski was 25 or 26 years of age. Counterclaim at ¶¶ 55, 62. DuBorgel further alleges that Godlewski sent a series of text messages to DuBorgel. Counterclaim at ¶ 72 (a-k), Exhibit A.

DuBorgel alleges that Godlewski was a baseball coach at DuBorgel's high school. Counterclaim at ¶¶ 56, 64, 82. DuBorgel further alleges that Godlewski "took on somewhat of a

role of a grief counselor in his capacity as a coach at Defendant's high school..." Counterclaim at ¶ 84.

ARGUMENT

The Pennsylvania Rules of Civil Procedure permit a party to move for judgment on the pleadings "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay trial. Pa.R.C.P. 1034 (a). The Superior Court has found that"[a] motion for judgment on the pleadings is similar to a demurrer. It may be entered when there are disputed issues of fact and the moving party is entitled to judgment as a matter of law. In determining if there is a dispute as to facts, the court must confine its consideration to the pleadings and relevant documents." Miller v. Nelson, 765 A.2d, 858, 860 (Pa.Super. 2001) citing Citicorp North America, Inc. v. Thornton, 707 A.2d 536, 538 (Pa.Super. 1998).

For purposes of deciding judgment on the pleadings, "[a]ll well pleaded statements of fact, admissions and any documents properly attached to the pleadings must be accepted as true." Venema v. Moser Builders, Inc., 284 A.2d 208, 212 (Pa.Super. 2022) citing Rourke v. Penn. Nat. Mut. Cas. Ins. Co., 116 A.3d 87, 91 (Pa.Super. 2015). However, "[i]t is not necessary to accept as true any averments in the complaint that conflict with the exhibits attached to it." Allen v. Com., Dept. of Corrections, 103 A.3d 365, 369 (Pa.Cmwlth. 2014) citing Lawrence v. Dept. of Corrections, 941 A.2d 70 (Pa.Cmwlth. 2003).

In construing DuBorgel's pleadings, the Court must be mindful that "Pennsylvania is a fact pleading jurisdiction." Caldwell v. Dept. of Corrections, 252 A.3d 708, *8 (Pa.Super. 2021) appeal denied 271 A.3d 1284 (2022) citing Pa.R.C.P. 1019(a). "A plaintiff is required 'to plead all the facts that he must prove in order to achieve recovery on the alleged cause of action.'" Id.

citing McCulligan v. Pennsylvania State Police, 123 A.3d 1136, 1141 (Pa.Super. 2015). "'Legal conclusions and general allegations of wrongdoing, without the requisite specific factual averments or support, fail to meet the pleading standard.'" Id. Additionally, the "Court is not required to accept as true legal conclusions, unwarranted factual inferences, allegations that constitute argument, or mere opinion." Id. citing Com. v. Percudani, 825 A.2d 743 745 (Pa.Cmwlth. 2003).

Finally, "[a] demurrer must be sustained where it is clear and free from doubt the law will not permit recovery under the alleged facts; any doubt must be resolved by a refusal to sustain the demurrer." Id. citing Kretchmar v. Commonwealth, 831 A.2d 793 (Pa.Cmwlth. 2003).

In the case at bar, the Court must look to the allegations of DuBorgel's Counterclaim. The Court must accept DuBorgel's well-pled allegations of fact as true. However, the Court need not accept any of DuBorgel's factual allegations which are contradicted by the documents attached by DuBorgel to her pleading. In doing so, the Court will conclude that it must dimiss DuBorgel's claims for assault, battery, IIED and NIED as they are barred by the statute of limitations or, in the alternative, fail to state claims upon which relief may be granted.

I. THE COURT MUST DEEM CERTAIN PARAGRAPHS OF PLAINTIFF'S COMPLAINT ADMITTED AS DEFENDANT HAS FAILED TO PROVIDE LEGALLY SUFFICIENT RESPONSES.

The Pennsylvania Rules of Civil Procedure require that ["a"] responsive pleading shall admit or deny each averment of fact in the preceding pleading or any part thereof to which it is responsive." Pa.R.C.P. 1029 (a). Further, "[a]verments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by

necessary implication. A general denial ... shall have the effect of an admission." Pa.R.C.P. 1029 (b). The express intention of this provision was to make the requirement of specific denial applicable to torts such as defamation. Pa.R.C.P. 1029 Explanatory Comment --1994, 1. *Scope of rule*.

Rule 1029 does provide certain exceptions to the need for specific denials. A party may state "that after reasonable investigation the party is without knowledge or information sufficient to form a belief as to the truth of an averment." Pa.R.C.P. 1029 (c). However, a party cannot rely on 1029(c) "when it is clear that the pleader must know whether a particular allegation is true or false." Pa.R.C.P. 1029 (c), Note citing Cercone v. Cercone, 254 Pa.Super. 381, 386 A.2d 1 (1978).

Rule 1029 further exempts "[a]verments in a pleading to which no responsive pleading is required..." Pa.R.C.P. 1029(d). This exception typically applies to material such as allegations of law or prayers for relief. "Whether an allegation is of fact or law is determined by the context disclosing the circumstances and purpose of the allegation." Srednick v. Sylak, 343 PA. 486, 493, 23 A.2d 333, 337 (1941).

The Supreme Court of Pennsylvania has held that "[t]he statement that several allegations of the petition are denied 'as averred' is clearly evasive. This is not a negation of the substantial accuracy of the facts set forth in the petition; if that was meant, it should have been explicitly so stated." Hauser v. York Water Co., 278 Pa. 387, 390, 123 A. 330, 331 (1924). Further, "the rules contemplate that a pleading party is entitled to notice of what facts, in his opponent's view, counter the averments set forth in new matter." King v. Altman, 256 A.3d 1, 2021 WL 2287432,

*5 (Pa.Super. 2021). Finally, Pennsylvania's appellate courts have found that responses asserting that a "document speaks for itself" are unsupported, general denials. See DrPhoneFix USA, LLC v. Mitchel Enterpriser, LLC, 272 A.3d 510, *3-4 (Pa.Super. 2022); Sea-Z, LLC v. Filipino, 2020 WL 974409, * 2 (Pa.Super. 2020); Stevens & Lee, P.C. v. Cresswell, 2016 WL 6441304, *2 (Pa.Super. 2016); Gerber v. Piergrossi, 142 A.3d 854, 861 (Pa.Super. 2016).

In the case before the Court, paragraphs 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 22, 44, and 45 of DuBorgel's Answer contain the language "Denied as stated." Paragraph 12 of DuBorgel's Answer contains only the word, "Denied" along with a demand for strict proof. Paragraphs 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 46, 47 and 48 of DuBorgel's Answer purport to specifically deny the corresponding allegations of the Complaint but offer no contradicting facts or other explanation of the denials. These responses are insufficient as a matter of law and the corresponding paragraphs of the Complaint must be deemed admitted.

II. THE COURT MUST DISMISS DEFENDANT'S CLAIMS FOR ASSAULT, BATTERY, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ("IIED"), AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS ("NIED") AS THOSE CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

As a preliminary matter, the Superior Court has found that defenses involving the statue of limitations may be entertained in a motion for judgment on the pleadings. See Moore v. McComsey, 316 Pa.Super. 264, 459 A.2d 841 (1983).

Ordinarily, an action for assault, battery, IIED and/or NIED must be commenced within two years. 42 Pa.C.S.C.A. § 5524 (1) and (7).[1] In the case of an unemancipated minor, the limitations period begins to run when the unemancipated minor reaches the age of 18. 42. Pa.C.S.A. § 5533 (b)(1)(i). A minor is a person who has not yet reached the age of 18 years. 42. Pa.C.S.A. § 5533 (b)(I)(ii). However, when a person is under 18 years of age at the time that a cause of action related to sexual abuse occurs, that person will have a period of 37 years after attaining the age of 18 to bring an action. 42. Pa.C.S.A. § 5533 (b)(2)(i).

"Sexual abuse" for purposes of the statute of limitations requires that the "individual bringing the civil action engaged in such activities as a result of forcible compulsion or the threat of forcible compulsion which would prevent resistance by a person of reasonable resolution." 42 Pa.C.S.A. § 5533 (b)(2)(ii). "Forcible compulsion" for purposes of the statute of limitations "shall have the meaning given to it by 18 Pa.C.S.A. § 3101." 42 Pa.C.S.A. 5533 (b)(iii). "Forcible compulsion" is "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied." 18 Pa.C.S.A. § 3101.

For purposes of the statue of limitations, the following acts are indicative of "sexual abuse":

> (A) sexual intercourse, which includes penetration, however slight, of any body part or object into the sex organ of another;

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[1] The Court should note that basis of DuBorgel's IIED and NIED appears to be a series of alleged text messages and other communications from Godlewski rather than the purported sexual relationship between the parties. See Counterclaim at ¶¶ 70 - 75. To the extent that the IIED and NIED claims are predicated upon this alleged conduct, they are subject to the 18 plus 2 years limitations period prescribed by 42 Pa.C.S.A. § 5533 (b)(1)(i). As DuBorgel has failed to bring her IIED and NIED claims within the statutory period, they must be dismissed.

(B) deviate sexual intercourse, which includes sexual intercourse per os or per anus; and

(C) indecent contact, which includes any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire in either person.

42 Pa.C.S.A. § 5533 (b)(ii)(A-C).

In the matter *sub judice*, it must be reasonably inferred from DuBorgel's own factual averments regarding her age that DuBorgel turned 18 in 2012 or 2013. DuBorgel would ordinarily have had two years from that time to bring her claims against Godlewski. That time passed long before the filing of DuBorgel's Counterclaim in 2023. DuBorgel now seeks to bring her claims under the extended statute of limitations for cases of sexual abuse. As we shall demonstrate, DuBorgel fails to qualify as she has: 1. failed to allege facts which satisfy the definition of forcible compulsion; and 2. has failed to allege facts which substantiate sexual abuse.[2] Godlewski will analyze each of these factors in turn.

A. Forcible compulsion.

As mentioned above, forcible compulsion is "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied." 18 Pa.C.S.A. § 3101. Our appellate courts have held that forcible compulsion "includes not only physical force or violence but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will." Com. v. Titus, 383 Pa.Super. 54, 58-59, 556 A.2d 425, 427 (1989) citing Com. v. Rhodes, 510 Pa.

[2] Note that it is not necessary for the Court to find that DuBorgel has failed in both of these respects in order to grant judgment on the pleadings. Either failing, in and of itself, is fatal to DuBorgel's case.

537, 555, 510 A.2d 1217, 1226 (1986). Further, "[w]hether a defendant did or did not engage in forcible compulsion or the threat of forcible compulsion sufficient to prevent resistance by a person of reasonable resolution is a determination to be made in each case based upon the totality of the circumstances." Id.

In making this case-by-case determination, the appellate courts have employed significant factors such as:

> "the respective ages of the victim and the accused, the respective mental and physical conditions of the victims and the accuses, the atmosphere and physical setting in which the incident was alleged to have taken place, the extent to which the accused may have been in a position of authority, domination or custodial control over the victims, and whether the victim was under duress. This list of possible factors is by no means exclusive."

Id.

The Superior Court has more recently cautioned that "[t]he distinction between forcible compulsion and lack of consent is important to remember." Com. v. Gonzalez, 109 A.3d 711, 721 (Pa.Super. 2015). "'Forcible compulsion' means 'something more' than mere lack of consent." Id. citing Com. v. Smolko, 446 Pa.Super. 156, 666 A.2d 672, 676 (1995). "Where there is lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion, the 'forcible compulsion' requirement... is not met." Id.

Pennsylvania's appellate courts have declined to adopt a bright-line rule finding that an adult-minor relationship necessarily constitutes forcible compulsion. Indeed, the Superior Court has specifically stated that even a parent-child relationship does not

automatically establish sufficient moral, psychological or intellectual force without some additional factor. See Com v. Titus, 383 Pa.Super. at 63, 556 A.2d at 430.

In SS v. Woodward Pennsylvania, LLC, 2023 W.L. 2539654 (M.D.Pa. 2023), the Middle District of Pennsylvania has construed the sufficiency of pleading forcible compulsion in the context of a civil action. In SS, the plaintiff alleged that she was a junior counselor at a summer gymnastics camp. SS asserted that the head coach "groomed" her over the course of the summer. This apparently culminated with the head coach pressuring SS to sneak out of her bunk to have "inappropriate sexual contact" with the head coach. Given these facts, the Middle District found that the mere coach-counselor or coach-student relationship was insufficient to support an inference of forcible compulsion.

In the case *sub judice*, DuBorgel attempts to assert that Godlewski's position on as a coach at DuBorgel's high school supplies the requisite relationship from which the Court may infer forcible compulsion in the alleged sexual interactions between Godlewski and DuBorgel. See DuBorgel's Answer and New Matter to Plaintiff's Complaint and Defendant's Counter-Claim [sic], ¶¶ 56, 64, and 82. However, DuBorgel entirely fails to plead that Godlewski was DuBorgel's coach or had any interaction at all with DuBorgel in his capacity as a coach. Additionally, DuBorgel makes no allegation whatsoever of forcible compulsion. Rather, DuBorgel elliptically suggests that consent to sexual activity was not possible because of Godlewski's position as a coach. This fatally

ignores the distinction between forcible compulsion and lack of consent drawn by this Court in Gonzalez. More importantly, DuBorgel's allegations of lack of consent are flatly contradicted by the voluminous text messages which DuBorgel attached to her pleadings.[3] In DuBorgel's Exhibit B, the Court may look to the mutual protestations of love at ST2796 which end with DuBorgel saying, "I just wanna sniff you;/." At ST2800, Godlewski allegedly says, "I want you so bad but I can't have you" to which DuBorgel replies, "yes you can :/" At ST2805, DuBorgel boasts, "we just pulled off having sex in my grandparents house with my dad down the street, HEEEEWWW." DuBorgel makes her enjoyment of the alleged sexual encounters clear with "I love having sex w you," "me to, fuckkkk I could have sex w you all day," and "no, we always have crazy sex, I just don't know what I did :("

The following alleged exchange at ST2807 is illustrative:

DuBorgel: "we had sex today <3"

Godlewski: "You wanted that really bad, didn't you"

DuBorgel: "YEAH"

In a similar vein, DuBorgel texts at ST2811 "I wanna see your big stupid face :(" followed by "and then sniff you" finished with "no. I want kiss you all over the place"

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[3] Godlewski adamantly denies that these messages constitute an exchange between the parties. However, as DuBorgel has attached them to her pleading, and as they contradict the allegations in the pleading, they may be considered by the Court in the context of a motion for judgment on the pleadings. All references in this brief to Godlewski as a participant are made for convenience and are not to be construed as an admission that Godlewski made those communications.

DuBorgel's enthusiasm for the alleged sexual liaisons is set forth at ST2814:

DuBorgel: "it's okay, I want your penis in me"

Godelewski: "Again? Jesus, nympho"

DuBorgel: "we just had sex yesterday and it feels like forever"

Godlewski: "The only way we'd ever be sexually satisfied is if we did it like 4-5 times a day"

DuBorgel: "or more."

At ST2815, DuBorgel indicates, "I never get bored having sex with you. like there's those certain people you just get "bored" with, but every time we have sex it gets better and better. I am so fucking attracted to you."

At ST2819, Godlewski allegedly declines DuBorgel's invitation to sex, stating "I don't have time to have sex with you :((((" Unsatisfied with this, DuBorgel follows up with "you can spare a half hour :)" and "If we have sex tonight it'll be the craziest sex we've ever had." At ST2821, DuBorgel declares "I want to have crazy wild naked ridiculous loud sweaty sex with you" and "I like when you're in me" At ST2822, DuBorgel writes "I'll ride youuuuu for like an houurrr" This was apparently to happen at "mom moms house tomorrow." At 2825, DuBorgel shows some restraint, writing "LMAO. I always want to have sex with you. but I have my period, so let's go to pet palace. and then go out to eat <3"

It is apparent from DuBorgel's own words that she was an enthusiastic, repeat participant in the alleged sexual acts which she now complains were non-consensual. As DuBorgel's pleading is directly contradicted by DuBorgel's own exhibits, the Court need not accept her allegations as true. Accordingly, DuBorgel has failed to plead forcible compulsion and her assault, battery, IIED, and NIED claims are barred by the statute of limitations.

B. Insufficient facts to substantiate sexual abuse.

Assuming *arguendo* that DuBorgel has sufficiently alleged some element of forcible compulsion, she must still allege some act which constitutes sexual abuse in order to benefit from the extended statute of limitations. For purposes of the statue of limitations, the following acts are indicative of "sexual abuse":

> (A) sexual intercourse, which includes penetration, however slight, of any body part or object into the sex organ of another;
>
> (B) deviate sexual intercourse, which includes sexual intercourse per os or per anus; and
>
> (C) indecent contact, which includes any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire in either person.

42 Pa.C.S.A. § 5533 (b)(ii)(A-C).

In Caldwell v. Department of Corrections, 252 A.3d 708 (Pa.Super. 2021) the Commonwealth Court considered the level of detail required to sufficiently plead tort claims arising from sexual assault. Caldwell, a DOC inmate, alleged that a corrections officer ("CO") "'targeted the plaintiff... in his sexual assault and harament [sic], Sexual Rub-downs, by selecting

the plaintiff out from other inmates for inappropriate pat-down searches.'" Id. at *7. Caldwell elsewhere referred to the CO's conduct simply as "sexual assault." Id.

The Commonwealth Court noted, with disapproval, that Caldwell "did not indicate a specific time or location at which the alleged assault or assaults occurred." Id. at *8. Further, "[he] did not plead that Officer Sokol touched him in any particular place on his body, with any particular degree of force, or for any particular duration. Rather, Caldwell merely pleaded that Officer Sokol had subjected him to pat-down searches, which Caldwell viewed as 'inappropriate' and amounting to 'sexual assault.'" Id. The Caldwell Court concluded that "[t]hese latter characterizations, however, are plainly legal conclusions and generalized assertions of wrongdoing, which lack the requisite factual support." Id. citing McCulligan v. Pennsylvania State Police, 123 A.3d 1136, 1141 (Pa.Cmwlth. 2015). Accordingly, the Commonwealth Court found that "[it] need not accept these averments as true for purposes of review. This appreciably contrasts with decisions such as Minor, wherein the plaintiff provided a detailed factual account of the injury giving rise to his claim rather than mere legal conclusions." Id. citing Minor v. Kraynak, 155 A.3d 114, 116-18 (Pa.Cmwlth. 2017).

In DuBorgel's Counterclaim, DuBorgel uses vague terms such as "sexual relationship" (Counterclaim, ¶¶ 1, 2, 4, 6, 8(a), 8(b), 8(g), 10), "having had sex" (Counterclaim, ¶ 8(d), 11,), "sexual intercourse" (Counterclaim, ¶¶ 55, 62, 68), and "sexual interactions" (Counterclaim, ¶¶ 57, 58, 63). Nowhere in DuBorgel's Counterclaim does she allege a single date or time of alleged sexual activity, much less any factual description of that activity. It is impossible to determine whether DuBorgel alleges that Godlewski engaged in any of the acts set forth at 42 Pa.C.S.A. § 5533 (b)(ii)(A-C). DuBorgel simply offers legal

conclusions and generalized assertions of wrongdoing in formulaic language similar to that used by Caldwell, As the Commonwealth Court found Caldwell's conclusory allegations insufficient, this Court should make the same finding with respect to DuBorgel's Counterclaim.

Accordingly, this Court should find that DuBorgel has failed to sufficiently plead facts to entitle her to the extended statute of limitations provided by 42. Pa.C.S.A. § 5533 (b)(2)(i) and dismiss her claims for assault, battery, IIED, and NIED.

III. THE COURT MUST DISMISS DEFENDANT'S CLAIMS FOR ASSAULT, BATTERY, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ("IIED"), AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS ("NIED") FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Assuming *arguendo* that the Court finds that DuBorgel has successfully availed herself of the extended statute of limitations under § 5533, the Court will still find that DuBorgel has failed to sufficiently plead her tort claims for assault, battery, IIED, and NIED. Godlewski will address each of these claims.

A. Assault and Battery.

Under Pennsylvania law, "[a] battery is defined as a 'harmful or offensive contact' with the person of another." CCH v. Philadelphia Phillies, Inc., 596 Pa. 23, 29, fn. 4, 940 A.2d 336, 340, fn. 4 (2008) citing Dalrymple v. Brown, 549 Pa. 217, 701 A.2d 164, 170 (1997). A battery action "requires 'no physical injury, but only some contact.'" Piazza v. Young, 403 F.Supp.3d 421, 422 (M.D.Pa. 2019) citing Montgomery v. Bazar-Seghal, 568 Pa. 574, 798 A.2d 742, 749 (2002). Further, "a touching or bodily contact is offensive if it 'offends a reasonable sense of personal dignity.'" Id. citing Herr v. Booten, 398 Pa.Super. 165, 580 A.2d 1115, 1117 (1990). However, "the matter of permission goes to the quality of the contact, and consent to being so

touched is a defense." Montgomery, 568 Pa. at 586, 798 A.2d at 749. Indeed, lack of consent is an essential element to the tort of battery. See Levenson v. Souser , 384 Pa.Super. 132, 147, 557 A.2d 1081, 1088 (1989).

An assault is "an act intended to put another person in reasonable apprehension of an immediate battery." Cucinotti v. Outmann, 399 Pa. 26, 27, 159 A.2d 216, 217 (1960).

In Counts III and IV of her counterclaim, DuBorgel conclusorily alleges "sexual interactions" without pleading a single detail concerning the nature of these interactions. Further, DuBorgel fails to allege that she did not consent to the alleged contact with Godlewski.[4] Indeed, such an allegation would be flatly contradicted by the numerous text messages which DuBorgel asserts passed between the parties. In those messages, as described at length above and below, DuBorgel repeatedly describes her alleged encounters with Godlewski and on many occasions demands that Godlewski meet DuBorgel's demands for sexual contact. As these documents flatly contradict the bare allegations of the counterclaim, DuBorgel's claims for assault and battery must be dismissed.

B. Intentional Infliction of Emotional Distress.

In order to state a cause of action for IIED, a plaintiff must show the following four elements:

1. the conduct must be extreme and outrageous;

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[4] On this issue, DuBorgel asserts at paragraph 64 that there was no "actual consent." However, DuBorgel acknowledges that some form of consent may have been given and then attempts to explain away the consent as the product of duress. DuBorgel fails to plead any facts which support a conclusion of duress. Duress usually requires that restraint or threat of force be applied sufficient to overcome the mind of a person of ordinary firmness. See DeLuca v. Mountaintop Area Joint Sanitary Authority, 234 A.3d 886, 900-01 (Pa.Cmwlth. 2020). DuBorgel's pleading is devoid of any such allegations.

2. the conduct must be intentional or reckless;

3. it must cause emotional distress; and

4. the distress must be severe.

Jordan v. Pennsylvania State University, 276 A.3d 751, 775 (Pa.Super. 2022) citing Madreperla v. Williams Co., 606 F.Supp. 874, 879-80 (E.D.Pa. 1985). Further, "[f]or an IIED claim to survive a preliminary objection, a "'court must determine, as a matter of law, whether there is sufficient evidence for reasonable persons to find extreme or outrageous conduct.'" Id. Additionally, "[t]he 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.'" Id. citing Rineheimer v Luzerne County Community College, 372 Pa.Super. 480, 494-95, 539 A.2d 1298, 1305 (1988); Restatement (Second) of Torts § 46, comment d (1965). Finally, "[w]hile Pennsylvania recognizes the cause of action for IIED, courts 'have allowed recovery only in very egregious cases." Id. citing Hoy v. Angelone, 456 Pa.Super. 596, 610, 691 A.2d 476, 482 (1997), as modified, 456 Pa.Super. 615, 691 A.2d 485 (1997), and aff'd, 554 Pa. 134, 720 A.2d 745 (1998), and aff'd, 554 Pa. 134, 720 A.2d 745 (1998).

In addition, "[a] plaintiff must also allege physical manifestations of the distress." M.S. ex rel. Hall v. Susquehanna Twp. School Dist., 43 F.Supp.3d 412, 430 (M.D.Pa. 2014) citing Reeves v. Middletown Athletic Ass'n., 866 A.2d 1115, 1122 (Pa.Super. 2004) ("[A] plaintiff must suffer some type of resulting physical harm due to the defendant's outrageous conduct."). In Susquehanna Twp., the Middle District further noted that various courts have found general, non-specific averments of physical harm are insufficient to survive a motion to dismiss. Id. at 430.

Specifically, the Middle District pointed to Abadie v. Riddle Memorial Hosp., 404 Pa.Super. 8, 589 A.2d 1143, 1145–46 (1991) (dismissing IIED claim where, although Plaintiff pled that she was suffering from psychological factors affecting her physical condition, and that she would need to spend money in medical care for her injuries, she did not specifically plead the nature of those injuries); and White v. Brommer, 747 F.Supp.2d 447, 465–466 (E.D.Pa.2010) (dismissing IIED claim for failure to plead requisite degree of physical harm where sole averment was that plaintiff "suffered, and continues to suffer, severe emotional distress"). Id. at 430-31.

In the case at bar, DuBorgel's allegations of resulting harm appear in paragraphs 78, 79 and 80 of her responsive pleading. DuBorgel alleges a series of emotional complaints and generalized emotional distress and "other injuries or damages resulting from those injuries listed above." However, DuBorgel has not alleged a single physical manifestation of the asserted maladies. Rather, DuBorgel relies on the type of generalized assertions of harm that both federal and Pennsylvania Courts have deemed insufficient in Susquehanna Twp., Abadie, and White. This Court should follow their lead and dismiss DuBorgel's claim for IIED.

Next, the Court must examine whether DuBorgel as sufficiently pled intent on Godlewski's part. The Middle District of Pennsylvania has found that "[t]o state a claim for [IIED] under Pennsylvania law, a plaintiff must allege that the defendant undertook the complained-of conduct 'with knowledge ... that severe emotional distress [was] substantially certain' to result." Piazza v. Young, 403 F.Supp.3d 421, 422 (M.D.Pa. 2019) citing LH v. Pittston Area School Dist., 130 F.Supp.3d 918, 927 (M.D.Pa. 2015) (quoting Forster v. Manchester, 410 Pa. 192, 189 A.2d 147, 151 (1963).

In Piazza, the plaintiffs asserted that one defendant intentionally or recklessly erased a basement video camera. Id. This was allegedly done "to prevent law enforcement and the Piazzas from having direct evidence to prove the facts of the ... hazing" and "to prevent the Piazzas from obtaining justice in their civil action and other legal proceedings." Id. The Middle District concluded that despite these averments, the complaint did not allege intent on the part of defendant to emotionally harm the Piazza's son and dismissed the IIED claim. Id. 443.

In the case at bar, DuBorgel relies in large part upon her allegations at paragraphs 73 through 75 concerning an alleged suicide threat by Godlewski.[5] However, DuBorgel ascribes the following motive to Godlweski: "Plaintiff intentionally and/or recklessly used this threat, as he knew it would elicit an extreme emotional response out of Defendant in the hopes that it would persuade her against testifying." Counterclaim, ¶ 75. Just as in Piazza, DuBorgel alleges that Godlewski engaged in conduct not intended to emotionally harm DuBorgel, but to influence the outcome of judicial proceedings. As the Piazza court found those allegations insufficient to establish requisite intent, so to should this Court determine that DuBorgel has not alleged intent and dismiss the IIED claim.

DuBorgel further fails in her duty to plead outrageous conduct. Aside from the suicide threat, DuBorgel relies upon a narrowly selected series of text messages allegedly sent by Godlewski and set forth at ¶¶ 72 (a - k) of the Counterlcaim.[6] As Godlewski will demonstrate, a

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[5] The Court should note that DuBorgel has not specifically set forth the alleged date of the suicide threat in contravention of Pa.R.C.P. 1019 (f) requiring specific averments of time. For this reason alone, the sections of the Counterclaim referencing the suicide threat should be dismissed.

[6] At this point, Godlewski would remind the court that he denies participating in any of these exchanges of text messages.

more complete reading of the alleged conversations refutes the assertion that DuBorgel found the alleged conduct outrageous or that she suffered intense emotional distress as a result. The following lettered paragraphs correspond to those in ¶ 72 of the Counterclaim.

a. In this paragraph, DuBorgel complains that Godlewski asserted he was going out to get drunk. This text appears at ST 2804 and was allegedly sent at 01:15:49 (GMT).[7] However, DuBorgel asserted 45 minutes prior (on ST 2803) that she herself was "drunk lol." The conversation continues with DuBorgel making casual inquiries about whether Godlewski has with friends or another woman (ST2804-2805). Apparently, DuBorgel was not traumatized but this exchange as she later brags, "we just pulled off having sex in my grandparents house with my dad down the street, HEEEEWWW" (ST2805).

b. Here, DuBorgel complains of an alleged text about a puppy on February 28, 2010. This message appears at ST2817. However, the conversation regarding a puppy was initiated by DuBorgel when she declared, "I want a puppy" (ST2814). From there, the conversation proceeds in desultory fashion, occasionally touching on the puppy subject. (ST2814-2817). DuBorgel was apparently not put off by Godlewski's alleged statement as it did not deter DuBorgel from her plans to smoke marijuana as she stated, "were sparking it now, give me 20 minutes and I'll be retarded" (ST2817).

[7] All times are unhelpfully given as GMT. Eastern time is GMT -4 or -5 depending on the time of year and whether standard or daylight savings time is being observed in the US.

c. In this passage, DuBorgel complains that Godlewski allegedly shows irritation at being ignored by DuBorgel on March 1, 2010. (ST2824). The conversation proceeds with mutual recriminations until DuBorgel simply declares, "I'm with my fucking father phil, you need to chill the fuck out. stop being a douchebag. text me tomorrow when you cool down, I love you." (ST2825). DuBorgel does not appear to have been either surprised or traumatized by the exchange.

d. DuBorgel complains that on March 2, 2021 Godlewski allegedly sent a message saying "3:00 and no later you bitch. I'll kill you if you're late again." (ST2825). DuBorgel does not appear to take this as a threat as she follows with "doctors. brb." and "I want a puppy." (ST2826).

e. DuBorgel implies that Godlewski attempted to extort DuBorgel in some way by conditioning the purchase of a car upon adhering to rules. (ST2837) Previously, Godlewski allegedly said "And No, the weed money would pay for your gas. The job pays for insurance" and "Yanno, the weed that you're NOT doing anymore, ever again IF I get you a car?" (ST2837). DuBorgel then asserts "I don't pay to smoke. I smoke weed with guys who think I'm hot, so its free :) wen I smoke with my friends if anything I'll pay $5" and "If you got me a car I'd never smoke weed again" (ST2837). When allegedly questioned about how DuBorgel's parents might react to the appearance of a car, DuBorgel responds, "Rofl. No that won't happen. I'm Brie duborgel, I do what I want" (ST2838).

f. Here DuBorgel alleges a text message from March 6, 2010 in which Godlewski indicates that he will end the alleged relationship between them. (ST2848). Conversation began earlier that day with DuBorgel texting, "If you don't come visit me at work before 3 I'll tear your balls off with my teeth." (ST2843) After this, it is DuBorgel who takes a hard line, stating "If you end this now there will be no more me & you in the future" and "No, if we end this now I won't ever get back together with you in the future. Ever." (ST2850) DuBorgel continues, "Yah not what you tell her. And you aren't hurting me, I have tom, who is nice to me" (ST2850).

g. DuBorgel recites a continuation of the alleged March 6, 2010 conversation with excerpts from ST2854. Clearly unfazed by Godlewski's alleged texts, DuBorgel interjects with comments like ".....!!!?!!???!?!!? Are you on fucking drugs?" (ST2854) DuBorgel states her view on the alleged relationship with, "you fuck me over again. I ruin your life. What's fair is fair" (ST2855). DuBorgel abruptly shifts the tenor of the conversation by asking "Can we have sex today?" (ST2856) DuBorgel continues, "You're gonna make fucking time. Were having sex. Switch stuff around or something. I'm fucking you until you won't even know how to get to Carbondale." (ST2856). DuBorgel quite emphatically continues, "Make time to do something. I'll pay you." (ST2856). When Godlewski allegedly indicates that the proceedings will be brief, DuBorgel states, "Me either. I only have time to pull your pants down as soon as we walk in the house." (ST2856). DuBorgel elaborates with "Counting last year and this

year, even for that whole time we didn't talk I never wanted you this bad. Ever and I'm not making it up. I wanna fuck the ever loving shit out of you and you can't walk" (ST2856). To offer a point of clarification, DuBorgel writes, "As soon as we walk in I'm throwing you down, tearing your pants off and sucking your dick." and "Were having sex like 3 times." (ST2857). To unambiguously state her position, DuBorgel continues, "Over and over again. Oh and I'm sitting on top of you riding while your rubbing my clit and I'm leaned back holding onto your legs, I'm pretty sure well have time." (ST2857).

h. DuBorgel recites alleged March 7, 2020 text messages from Godlewski appearing at ST2865. During conversation just under an hour earlier, DuBorgel indicated "I just need a car. That's all I want" and "I know the car I want. I don't even want to look anywhere. I've been eyein it up for like two months now and I have a small orgasm every time I see it. It's a white two door Honda civic at gaughans on main street in Taylor" (ST2863). The car apparently cost approximately $13,000.00, a sum which Godlewski was allegedly not willing to pay. (ST2863). DuBorgel goes on to assert that Godlewski bought an Infiniti for Dori. (ST2864). After much back and forth about the car issue, DuBorgel states, "No u make my Life miserable" (ST2865). Godlewski then makes the statement recited in subparagraph g. DuBorgel responds with "I love you so much <3" (ST2865). DuBorgel immediately shifts to asking "Okay then what about something decent at $10,000 or under" (ST2865).

From these exchanges, it is impossible to conclude that DuBorgel was severely distressed by Godlewski's alleged conduct. Accordingly, the IIED count must be dismissed.

C. Negligent Infliction of Emotional Distress.

The Superior Court has held that "Pennsylvania courts have limited a cause of action based on NIED to four theories of recovery. In order recover, a plaintiff must prove one of four theories: (1) situations where the defendant owed the plaintiff a pre-existing contractual or fiduciary duty (the special relationship rule); (2) the plaintiff suffered a physical impact (the impact rule); (3) the plaintiff was in a 'zone of danger' and reasonably experienced a fear of immediate physical injury (the zone of danger rule); or (4) the plaintiff observed a tortious injury to a close relative (the bystander rule). Jordan v. Pennsylvania State University, 276 A.3d 751, 774 (Pa.Super. 2022). Further, "absent a finding of negligence, [a] negligent infliction of emotional distress claim cannot survive" Id. citing Brezenski v. World Truck Transfer, Inc., 755 A.2d 36, 45 (Pa.Super. 2000). "To establish a negligence claim, [a p]laintiff must prove there is a 'breach of a legally recognized duty or obligation that is causally connected to the damages suffered by the complainant.'" Id. at 771 citing Bilt-Rite Contractors, Inc. v. The Architectural Studio, 581 Pa. 454, 866 A.2d 270, 280 (2005). Also citing Wittrien v. Burkholder, 965 A.2d 1229, 1232 (Pa.Super. 2009) for the proposition that "[i]n any negligence case, the plaintiff must prove duty, breach, causation and damages."

In the case at bar, DuBorgel makes no attempt to plead the impact rule, the zone of danger rule, or the bystander rule. Rather, DuBorgel attempts to assert liability based on the special relationship rule. At paragraph 83 of the counterclaim, DuBorgel states, "Plaintiff's position as a coach at Defendant's high school constitutes a "Special Relationship" for purposes

of this claim." At paragraph 85, DuBorgel conclusorily asserts "that such infliction of emotional distress was at least negligent, and arising from the special relationship between Plaintiff and Defendant." This attempt at pleading NIED is legally insufficient for two reasons.

First, DuBorgel has not asserted facts upon which a finding of negligence may be based. The Supreme Court of Pennsylvania has written, "we conclude that justification exists to extend NIED liability to a subset of cases involving preexisting relationships. In doing so, we consider the standard elements of negligence claims: duty, breach, causation, and damages." Toney v. Chester County Hospital, 614 Pa. 98, 116-17, 36 A.3d 83 94-95 (2011) citing The Law of Torts, § 114, 269-71. The Middle District of Pennsylvania has recently echoed Toney, writing that "[i]n all cases [alleging negligent infliction of emotional distress], [p]laintiff must establish a prima facie case of negligence." Humphries v. Pennsylvania State University, 492 F.Supp. 393, 409 (M.D.Pa. 2020) citing Deitrick v. Costa, 2015 WL 1605700 (M.D.Pa. 2015). Also citing Brezenski at 45. DuBorgel has not asserted any particular duty on the part of Godlewski or a breach of that duty. Accordingly, DuBorgel has not made a prima facie showing of negligence. As the Superior Court in Jordan upheld the dismissal of an NIED claim where negligence was not successfully pled, so too should this Court dismiss DuBorgel's claim.

Second, DuBorgel has failed to plead a legally sufficient special relationship. The Jordan court clearly articulated that a special relationship must be predicated upon a "preexisting contractual or fiduciary duty." Jordan at 774. Our Supreme Court found "it prudent to limit the reach of this NIED claim to preexisting relationships involving duties that obviously and objectively hold the potential of deep emotional harm in the event of breach." Toney, 614 Pa. at 117, 36 A.3d at 95. Additionally, "the special relationships must encompass an implied duty to

care of the plaintiff's emotional well-being." Id. Further, the Supreme Court found "it prudent to leave the legal question of whether a sufficient duty exists to our trial judges to decide on a case-by-case basis, at some point prior to trial, be it preliminary objections, summary judgment, or the like." Id.

The Toney court found that the relationship between an obstetrician and a patient was of the sort that could give rise to an NIED claim. Various trial courts have followed this lead by finding sufficient, preexisting relationships in other medical contexts. See Nicholson-Upsey v. Touey, 2013 WL 2321116 (Phil.Com.Pleas 2013); Mulawka v. Pennsylvania, 2013 WL 171911 (W.D.Pa. 2013). Additionally one federal district court has extended the NIED doctrine to the relationship between an adoption agency and adoptive parents. See Madison v. Bethanna, Inc., 2012 WL 1867459 (E.D.Pa. 2012).

However, state and federal have more recently declined to extend the NIED doctrine to cases involving students and educational institutions and their employees. See Hershman v. Muhlenberg College, 17 F.Supp.3d 454 (E.D.Pa. 2014); Humphries v. Pennsylvania State University, 492 F.Supp.3d 393 (M.D.Pa. 2020); Jordan v. Pennsylvania State University, 276 A.3d 751 (Pa.Super. 2022).

Additionally, the Eastern District has noted (in Hershman, 17 F.Supp.3d at 460, note 8) that trial courts have declined to extend the doctrine of special relationship NIED in a wide variety of contexts. See Black v. Cmty. Educ. Centers, Inc., 13–CV–6102, 2014 WL 859313 (E.D.Pa. Mar. 4, 2014) (no NIED liability in employer / employee relationship); Hawkins v. Fed. Nat. Mortgage Ass'n, 13–CV–6068, 2014 WL 272082 (E.D.Pa. Jan. 23,

2014) (no NIED liability in lender / borrower relationship); Yarnall v. Philadelphia Sch. Dist., 11–CV–3130, 2013 WL 5525297 (E.D.Pa. Oct. 7, 2013) (no NIED liability between a union and its members); Grimaldi v. Bank of Am., 12–CV–2345, 2013 WL 1050549 (M.D.Pa. Mar. 14, 2013) (no NIED liability in lender / borrower relationship); Okane v. Tropicana Entm't, Inc., 12–CV–6707, 2013 WL 56088 (E.D.Pa. Jan. 3, 2013) (no NIED liability in casino / patron relationship); Emekekwue v. Offor, 1:11–CV–01747, 2012 WL 1715066 (M.D.Pa. May 15, 2012) (No NIED liability between ethnic group organization and one of its members); Shulick v. United Airlines, 11–CV–1350, 2012 WL 315483 (E.D.Pa. Feb. 2, 2012) (no NIED liability between an airline and its passengers); Weiley, 51 A.3d at 218 (no special relationship between decedent's son and the hospital where father died); Trotta v. Luckinbill, 12–cv–3062, 2014 WL 353817 (C.P. Lycoming January 13, 2014) (no NIED liability in contractor / building owner relationship); Healey v. Fargo, 11–CV–3340, 2012 WL 994564 * n. 13 (C.P. Lackawana, March 20, 2012) (no NIED liability in lender / borrower relationship).

In the case at bar, the sum total of DuBorgel's allegations concerning the alleged special relationship are the following:

> 82. At the beginning of the relationship between Plaintiff and Defendant, Plaintiff was a baseball coach at Defendant's high school and twenty-five-twenty-six years old.
>
> 83. Plaintiff's position as a coach at Defendant's high school constitutes a "Special Relationship" for purposes of this claim.
>
> 84. Further, by Plaintiff's own admission in his Rumble/DLive/Locals livestreams, Plaintiff took on somewhat of a role of a grief counselor in his capacity as a coach at Defendant's high school, further clarifying that a "special relationship" existed between Defendant and Plaintiff.

DuBorgel makes no allegation whatsoever that Godlewski was, in fact, DuBorgel's coach. Similarly, DuBorgel does not allege that she had any contact with Godlewski in his capacity as a baseball coach at Riverside High School. Further, DuBorgel does not allege that any of the alleged tortious contact with Godlewski occurred at the school or during school functions. On the contrary, DuBorgel alleges extensive contact with Godlewski outside of the confines of the the school. Given these omissions and admissions, DuBorgel cannot argue that Godlewski stood in a position of contractual or fiduciary responsibility to DuBorgel, much less one in which there was an implied duty to guard DuBorgel's well-being. Accordingly, DuBorgel has failed to plead the requisite special relationship to support her NIED claims and it must be dismissed.

CONCLUSION

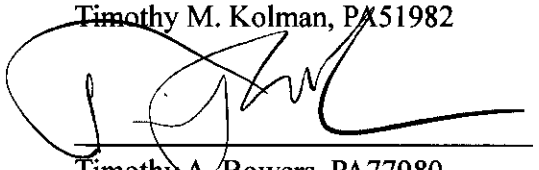
For the foregoing reasons, Plaintiff Philip Godlewski respectfully requests that the Honorable Court grant his Motion for Partial Judgment on the Pleadings

Respectfully submitted,

KOLMAN LAW, PC

DATE: December 27, 2023

/s/ Timothy M. Kolman
Timothy M. Kolman, PA51982



Timothy A. Bowers, PA77980
414 Hulmeville Avenue
Penndel, PA 19047
(215) 750-3134
Attorney for Plaintiff.

COMBINED CERTIFICATE

I HEREBY CERTIFY that I have, this 27th day of December, 2023, served a true and correct copy of the foregoing document by email upon the following:

Gregory E. Fellerman, Esquire
gef@fclawpc.com
Edward J. Ciarimboli, Esquire
ejc@fclawpc.com
Molly Dempsey Clark, Esquire
mclark@fclawpc.com
Counsel for Defendant

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Timothy M. Kolman
Timothy M. Kolman, PA51982

Timothy A. Bowers, PA77980