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JULY 17 2023

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PHILIP GODLEWSKI

PLAINTIFF,

V.

BRIENNA L. DUBORGEL

DEFENDANT.

IN THE COURT OF COMMON PLEAS  
OF LACKAWANNA COUNTY

CIVIL ACTION - LAW

JURY TRIAL DEMANDED

NO.: CV-2023-1354

**DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL JUDGEMENT ON  
THE PLEADINGS**

**QUESTIONS PRESENTED**

- I. WHETHER THIS COURT MUST REFUSE TO DEEM PARAGRAPHS OF PLAINTIFF'S COMPLAINT ADMITTED WHERE DEFENDANT SUFFICIENTLY RESPONDED TO ALL PARAGRAPHS IN PLAINTIFF'S COMPLAINT, PLAINTIFF HAS INCLUDED ATTACHMENTS TO HIS OWN COMPLAINT THAT CREATE A QUESTION OF MATERIAL FACT WITH REGARD TO THE PARAGRAPHS IN QUESTION, AND SUFFICIENT SUPPORT FOR DEFENDANT'S DENIALS EXISTS IN THE RECORD TO ENSURE DEFENDANT DID NOT ADMIT TO ANY OF THE RELEVANT ALLEGATIONS MADE IN PLAINTIFF'S COMPLAINT.  
**SUGGESTED ANSWER: YES.**
- II. WHETHER THIS COURT MUST ALLOW DEFENDANT'S COUNTERCLAIMS FOR ASSAULT, BATTERY, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (IIED"), AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS ("NIED") TO PROCEED WHERE THE STATUTE OF LIMITATIONS FOR SUCH CLAIMS HAS BEEN TOLLED BY STATUTE.  
**SUGGESTED ANSWER: YES.**
- III. WHETHER THIS COURT MUST ALLOW DEFENDANT'S COUNTERCLAIMS FOR ASSAULT, BATTERY, IIED, AND NIED TO PROCEED WHERE DEFENDANT HAS

PLED SUFFICIENT FACTS TO ESTABLISH A CLAIM UPON WHICH RELIEF MAY BE GRANTED.  
**SUGGESTED ANSWER: YES.**

### **PROCEDURAL HISTORY**

On March 27, 2023, Plaintiff filed a Complaint alleging causes of action for defamation, false light invasion of privacy, and publicity to private life invasion of privacy. On May 5, 2023, Defendant filed an Answer with New Matter to Plaintiff's Complaint and Counterclaim ("Defendant's Responsive Pleading) in responses to Plaintiff's Complaint, raising causes of action against Plaintiff 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, Plaintiff filed an Answer to Defendant's New Matter and a New Matter to Defendant's Counterclaim. On July 18, 2023, Defendant filed a reply to Plaintiff's New Matter. On December 27, 2023, Plaintiff filed a Motion for Partial Judgement on the Pleadings, to which this Brief and accompanying Response instantly respond.

### **FACTUAL BACKGROUND**

Beginning in or around October of 2008, Plaintiff began engaging in a sexual relationship with Defendant. At the time the sexual relationship commenced, Plaintiff was between twenty-five and twenty-six (25-26) years old, and Defendant was fifteen (15) years old. See ¶¶ 5-6 of the Affidavit attached as Exhibit 1 to Plaintiff's Complaint. Plaintiff alleges that Defendant's statements in her Affidavit are false and defamatory in nature. See ¶13 of Plaintiff's Complaint.

Plaintiff, who, by his own admission, reached and/or reaches millions of viewers across multiple social media platforms, asserted to his viewers that Defendant lied about the existence of a sexual relationship between Plaintiff and Defendant while Defendant was fifteen (15) years of age, and claimed Defendant fabricated her Affidavit acknowledging the same. See ¶¶13-19 of Defendant's Counterclaim.

Defendant has produced text messages evidencing the existence of a sexual relationship between Plaintiff and Defendant while Defendant was fifteen (15) years of age, and Plaintiff was approximately ten (10) years older than the minor Defendant. See Exhibit A to Defendant's Counterclaim.

### **LEGAL STANDARD AND 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). 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.Cmwth. 2014) citing Lawrence v. Dept. of Corrections, 941 A.2d 70 (Pa.Cmwth. 2003).

- I. DEFENDANT SUFFICIENTLY RESPONDED TO ALL PARAGRAPHS IN PLAINTIFF'S COMPLAINT, PLAINTIFF RAISED SUFFICIENT QUESTIONS OF FACT THROUGH HIS OWN ATTACHMENTS TO HIS COMPLAINT TO ENSURE NO PARAGRAPHS IDENTIFIED BY PLAINTIFF SHOULD BE ADMITTED, AND SUFFICIENT SUPPORT FOR DEFENDANT'S DENIALS EXISTS IN THE RECORD TO ENSURE DEFENDANT DID NOT ADMIT TO ANY OF THE RELEVANT ALLEGATIONS IN PLAINTIFF'S COMPLAINT.***

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. Admissions and denials in a responsive pleading shall refer specifically to the paragraph in which the averment admitted or denied is set forth. " 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.

It is well accepted in Pennsylvania law that the entire record should be considered when contemplating whether to deem paragraphs within a Complaint to be admitted based on an insufficient response in the Answer. Cercone v. Cercone, 254 Pa. Super. 381 "(W)e should examine the pleadings as a whole in determining whether a defendant has admitted the material factual allegations of a complaint." See also Kappe Associates, Inc. v. Aetna Casualty & Surety Co., 234 Pa. Super. 627 and Cramer v. Conn, 204 Pa. Super. 2. In addition to Defendant's Responsive Pleading and its accompanying Exhibits, this includes any documents included by Plaintiff as attachments to his Complaint that serve to conflict with the allegations in the Plaintiff's Complaint.

Defendant's responses to paragraphs 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 22, 44, and 45 are sufficient to specifically deny the averments in their corresponding paragraphs in Plaintiff's Complaint. The phrase "denied as stated" is legally sufficient where additional information is provided in the paragraph, elsewhere in the response, and/or elsewhere in the pleadings that factually supports the denial in the paragraph. See Cercone v. Cercone, 254 Pa. Super. 381.

The above paragraphs in Plaintiff's Complaint made direct reference to the Affidavit attached to Plaintiff's Complaint as Exhibit 1, the Information attached to Plaintiff's Complaint as Exhibit 2, and/or the Guilty Plea Colloquy attached to Plaintiff's Complaint as Exhibit 3. Defendant denied Plaintiff's interpretations of the referenced documents and cited directly to the documents in response. See ¶¶ 6-11, 13-19, 22, 44-45 of Defendant's Answer. Defendant cites directly to the documents in their entirety, as the documents must be read as a whole, in the context of the entire document, to contextualize and properly understand the statements made within. The referenced documents are two (2), one (1), and four (4) pages in length respectively, and the language within each is only properly contextualized when read in its entirety. See Exhibit 1, Exhibit 2, and Exhibit 3 to Plaintiff's Complaint.

Defendant's responses to paragraphs 12, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 46, 47, and 48 are sufficient to specifically deny the averments in their corresponding paragraphs. Further, the language in Defendant's responsive pleading along with additional information found in the record, denies and offers evidence in opposition to each specific claim made by Plaintiff as follows:

a. See Paragraph 12 of Plaintiff's Complaint and Defendant's Answer – Plaintiff had a sexual relationship with Defendant while Defendant was a minor. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A.

b. See Paragraph 20 of Plaintiff's Complaint and Defendant's Answer – Defendant's statements made in her Affidavit are not defamatory, because they are true. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A. Further, Defendant did not state or imply in her Affidavit that Plaintiff was convicted of sex offenses. Defendant identified in her Affidavit that Plaintiff was charged with a crime related to his sexual relationship with Defendant. See ¶9 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1.

c. See Paragraph 21 of Plaintiff's Complaint and Defendant's Answer – Defendant did not Publish her Affidavit to Attorney Timmothy J. Hinton with the knowledge and intent that Attorney Hinton would republish the Affidavit in other litigation. Defendant cannot identify support from the record to evidence her lack of knowledge and intention due to the difficulty in externally supporting thoughts and intentions of this kind. See ¶¶1-

13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1 for Defendant's actual statements.

d. See Paragraph 22 of Plaintiff's Complaint and Defendant's Answer – Defendant did not identify Plaintiff only as an “alleged perpetrator” of sexual acts with a minor in her Affidavit. Defendant identified Plaintiff as an individual who did, in fact, have sexual relations with the minor Defendant. See ¶¶ 6 and 8 of the Affidavit attached to Plaintiff's Complaint as Exhibit 1.

e. See Paragraph 23 of Plaintiff's Complaint and Defendant's Answer – Defendant clearly identifies in her response to Paragraph 23 that the Affidavit is not Defamatory as it speaks the truth. See ¶23 of Defendant's Answer. Support for the truthfulness of Defendant's statements in her Affidavit is well documented in the record. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1 and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A..

f. See Paragraph 24 of Plaintiff's Complaint and Defendant's Answer - Defendant did not identify Plaintiff only as an “alleged perpetrator” of sexual acts with a minor in her Affidavit. Defendant identified Plaintiff as an individual who did, in fact, have sexual relations with the minor Defendant. See ¶¶ 6 and 8 of the Affidavit attached to Plaintiff's Complaint as Exhibit 1.

g. See Paragraph 25 of Plaintiff's Complaint and Defendant's Answer – Plaintiff did not suffer special harm by way of damage to his reputation and character. Defendant cannot provide support for the lack of existence of a special harm due to the nature of the denial.

h. See Paragraph 26 of Plaintiff's Complaint and Defendant's Answer – Defendant did not need conditional privilege to make any statements she made, as the

statements were true, and thus not defamatory. Support for the truthfulness of Defendant's statements in her Affidavit is well documented in the record. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1 and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A. Further, Defendant was conditionally privileged to make any and all statements, as Plaintiff's position as a social media influencer and political commentator with a massive audience renders his actions a matter of public interest. See ¶¶ 14-17 of Defendant's Counterclaim.

i. See Paragraph 27 of Plaintiff's Complaint and Defendant's Answer – Defendant did not need conditional privilege to communicate any statements she made, as the statements were true, and thus not defamatory. Support for the truthfulness of Defendant's statements in her Affidavit is well documented in the record. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A. Defendant had a proper motive in communicating the statements made in her Affidavit, as her motive was to tell the truth, she did so in a reasonable manner, and she did so for the simple cause of ensuring the truth was heard.

j. See Paragraph 28 of Plaintiff's Complaint and Defendant's Answer – Defendant's statements made in her Affidavit are true. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A.

k. See Paragraph 29 of Plaintiff's Complaint and Defendant's Answer – Defendant did not make statements in her Affidavit with "reckless disregard for their veracity" because the statements are true. See ¶20 of Defendant's Answer, ¶¶1-12, 19,

55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A.

l. See Paragraph 30 of Plaintiff's Complaint and Defendant's Answer – Defendant did not make statements in her Affidavit with “negligent disregard for their veracity”, because the statements are true. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A.

m. See Paragraph 31 of Plaintiff's Complaint and Defendant's Answer - Defendant did not make statements in her Affidavit with “actual malice”, because the statements are true. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A.

n. See Paragraph 32 of Plaintiff's Complaint and Defendant's Answer - Defendant's statements made in her Affidavit are not “defamatory per se”, because they are true. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A.

o. See Paragraph 33 of Plaintiff's Complaint and Defendant's Answer – Paragraph 33 is an incorporation paragraph to which Defendant need not respond, which Defendant noted in her answer. Defendant then incorporated the responses in her own answer by way of response. See ¶23 of Defendant's answer.



p. See Paragraph 34 of Plaintiff's Complaint and Defendant's Answer – Defendant's statements in her Affidavit do not place Plaintiff in a "false light", because the statements are true. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A.

q. See Paragraph 35 of Plaintiff's Complaint and Defendant's Answer - Defendant's statements made in her Affidavit are not "highly offensive to a reasonable person", because they are true. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A.

r. See Paragraph 36 of Plaintiff's Complaint and Defendant's Answer - Defendant's statements made in her Affidavit do not "contain major misrepresentations of Godlewski's character, history, activities and/or beliefs", because they are true. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A.

s. See Paragraph 37 of Plaintiff's Complaint and Defendant's Answer - Defendant did not make statements in her Affidavit "knowing them to be false and with willful disregard of the truth" because the statements are true. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A.

t. See Paragraph 38 of Plaintiff's Complaint and Defendant's Answer – Defendant did not make statements in her Affidavit with “reckless disregard for their veracity” because the statements are true. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A.

u. See Paragraph 39 of Plaintiff's Complaint and Defendant's Answer - Defendant did not make statements in her Affidavit with “negligent disregard for their veracity”, because the statements are true. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A.

v. See Paragraph 40 of Plaintiff's Complaint and Defendant's Answer - Defendant did not make statements in her Affidavit with “actual malice”, because the statements are true. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A.

w. See Paragraph 41 of Plaintiff's Complaint and Defendant's Answer - Defendant's statements in her Affidavit do not place Plaintiff in a “false light”, because the statements are true. See ¶20 of Defendant's Answer, ¶¶1-12, 19, 55-73 of Defendant's Counterclaim, ¶¶1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1, and the Text Messages between Plaintiff and Defendant attached to Defendant's Responsive Pleading as Exhibit A.

x. See Paragraph 46 of Plaintiff's Complaint and Defendant's Answer – Plaintiff implies in Paragraph 46 that the sexual relationship between Plaintiff and

Defendant was private in nature, however due to Plaintiff's position as a social media influencer and political commentator with a massive following, and the illegal nature of Plaintiff's sexual relationship with Defendant, the relationship is of public rather than private interest. See ¶¶ 14-17 of Defendant's Counterclaim.

y. See Paragraph 47 of Plaintiff's Complaint and Defendant's Answer - Due to Plaintiff's position as a social media influencer and political commentator with a massive following, and the illegal nature of Plaintiff's sexual relationship with Defendant, Defendant's statements in her Affidavit are, in fact, matters of legitimate public concern. See ¶¶ 14-17 of Defendant's Counterclaim, and ¶¶ 1-13 of Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1.

z. See Paragraph 48 of Plaintiff's Complaint and Defendant's Answer - Defendant did not "invade Godlewski's privacy by giving publicity to Godlewski's public life," as Godlewski chose to give publicity to his public life on his own by actively becoming a social media influencer and political commentator. See ¶¶ 14-17 of Defendant's Counterclaim. Defendant also did not give publicity to Plaintiff's private life, as the matters addressed in Defendant's affidavit were of public concern considering Plaintiff's status as a social media influencer and political commentator with a sizeable following. See ¶¶ 14-17 of Defendant's Counterclaim.

As outlined above, there is ample support in Defendant's Responsive Pleading and elsewhere in the record for Defendant's denials.

Further, "[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.Cmwth. 2014) citing Lawrence v. Dept. of Corrections, 941 A.2d 70 (Pa.Cmwth. 2003). The statements in Defendant's Affidavit attached to Plaintiff's Complaint as Exhibit 1 directly conflict with the allegations made by Plaintiff in Plaintiff's Complaint. Generally, Plaintiff claims he never had a sexual relationship with Defendant while Defendant was a minor, and that Defendant lied

about the existence of such a sexual relationship. See paragraphs including, but not limited to ¶¶12-13, 20, 23, 28-32, 34, 36-41, and 43 of Plaintiff's Complaint. Defendant's Affidavit clearly states that Plaintiff and Defendant did have a sexual relationship while Defendant was a minor. See ¶¶6 and 8 of the Affidavit attached to Plaintiff's Complaint as Exhibit 1. As these statements are in direct conflict with one and other, it is not necessary for this Court to accept such averments as true. Id.

**II. THIS COURT MUST ALLOW DEFENDANT'S COUNTERCLAIMS FOR ASSAULT, BATTERY, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ("IIED"), AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS ("NIED") TO PROCEED WHERE THE STATUTE OF LIMITATIONS FOR SUCH CLAIMS HAS BEEN TOLLED BY STATUTE.**

Defendant does not deny that actions for assault, battery, IIED, and NIED usually must be commenced within two years. See 42 Pa. C.S.C.A. §5524(1) and 42 Pa. C.S.C.A. §5524(7). However, it has been statutorily prescribed that 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" as used in this context is defined as "[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 statute of limitations, the following acts are considered "sexual abuse" when coupled with the additional relevant factors:

"(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).

Defendant has clearly pled facts that position her within the purview of 42 Pa. C.S.A. §5533. Defendant pled facts that clearly identify forcible compulsion, and facts that clearly identify sexual abuse, which will be discussed in turn.

A. Forcible Compulsion

As defined above, forcible compulsion includes “physical, intellectual, moral, emotional or psychological force, either express or implied.” This definition was adopted by our legislature to mirror the language outline by our Supreme Court in Commonwealth v. Rhodes, 510 Pa. 537. The Court explained their reasoning initially by stating “‘forcible compulsion’ clearly connotes more than the exercise of sheer physical force... The phrase also connotes the act of using superior force -- physical, moral psychological, or intellectual -- to compel a person to do a thing against that person’s volition and/or will.” The Supreme Court went on to outline a list of factors that should be considered when deciding whether forcible compulsion is present, including:

“the respective ages of the victim and the accused, the respective mental and physical conditions of the victim and the accused, 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 victim, and whether the victim was under duress.”

Id.

The Supreme Court cites to Rhodes in a 2003 case, acknowledging that:

"There is an element of forcible compulsion, or the threat of forcible compulsion that would prevent resistance by a person of reasonable resolution, inherent in the situation in which an adult who is with a child who is younger, smaller, less psychologically and emotionally mature, and less sophisticated than the adult, instructs the child to submit to the performance of sexual acts. This is especially so where the child knows and trusts the adult. In such cases, forcible compulsion or the threat of forcible compulsion derives from the respective capacities of the child and the adult sufficient to induce the child to submit to the wishes of the adult ("prevent resistance"), without the use of physical force or violence or the explicit threat of physical force or violence."

Commonwealth v. Fears, 575 Pa. 281.

The Superior Court further elaborated on Rhodes, identifying that forcible compulsion can be found in instances where "the force applied to compel their submission (is) by and large subtle and psychological." Commonwealth v. Poindexter, 372 Pa. Super. 566. Additionally, the Superior Court acknowledges that "psychological manipulation designed to overcome the will of the child" establishes additional support for a finding of forcible compulsion. Commonwealth v. Ruppert, 397 Pa. Super. 132.

In the instant case, nearly every factor outlined by the Rhodes Court as it pertains to a finding of forcible compulsion weighs in favor of a finding of forcible compulsion. The Court first identifies that the ages of the victim and the assailant are relevant in finding forcible compulsion. Plaintiff had sexual intercourse with Defendant when Plaintiff was between twenty-five and twenty-six (25-26) years old, and Defendant was a fifteen (15) year old minor. See ¶¶3, 5-6, 8 of the Affidavit attached to Plaintiff's Complaint as Exhibit 1, ¶¶1-4, 8, 11, 55, 62, 68, 77, and 82 of Defendant's Counterclaim, and ¶20 of Defendant's Answer. As an adult, Plaintiff used his

"psychological and emotional matur(ity)" to pressure Defendant into engaging in a sexual relationship.

The Court then advises that courts look to "the respective mental and physical conditions of the victim and the accused." At the time Plaintiff initiated a sexual relationship with Defendant, Defendant was mourning the suicide of her boyfriend. See ¶¶4-6 of the Affidavit attached to Plaintiff's Complaint as Exhibit 1, and ¶¶73-74 of Defendant's Counterclaim. Plaintiff used Defendant's grief, and his position as Defendant's deceased boyfriend's former baseball coach, as an opportunity to reach out and get closer to the Defendant and eventually initiate a sexual relationship with Defendant.

The Court then looks to "the atmosphere and physical setting in which the incident was alleged to have taken place." Plaintiff would take Defendant to rental properties over which he had ownership to engage in sexual intercourse with Defendant, further solidifying his control over Defendant and the encounter. See ¶4 of Defendant's Counterclaim.

The Court next identifies the relevance of "the extent to which the accused may have been in a position of authority, domination or custodial control over the victim." When the sexual relationship began, Plaintiff was employed by Defendant's high school as a baseball coach and acknowledged in his own words that he took on the role of a grief counselor for Defendant. See ¶¶56, 64, 82-84 of Defendant's Counterclaim. As an employee of Defendant's high school, Plaintiff had an undeniable status of authority over Defendant, and exploited such authority to initiate a sexual relationship with Defendant. In addition, Plaintiff took on the role of a grief counselor to emotionally manipulate Defendant into engaging in sexual intercourse with Plaintiff. See ¶84 of Defendant's Counterclaim.

Finally, the Court recommends that courts look to whether or not the victim is under duress. Although Defendant was not under any physical duress, Defendant was still in a mental state where she was conscientious of ensuring the happiness of male pursuers following the

suicide of her boyfriend. See ¶¶4-6 of the Affidavit attached to Plaintiff's Complaint as Exhibit 1, and ¶¶73-74 of Defendant's Counterclaim.

As clearly indicated above, Plaintiff utilized "physical, intellectual, moral, emotional or psychological force, either express or implied" to engage in a sexual relationship with Defendant. See 18 Pa. C.S.A. §3101.

B. Sexual Abuse

Pennsylvania defines sexual intercourse in the relevant statute and identifies it as indicative of sexual abuse when coupled with other certain factors ("(A) sexual intercourse, which includes penetration, however slight, of any body part or object into the sex organ of another;" 42 Pa. C.S.A. §5533 (b)(ii)(A). Defendant specifically states on numerous occasions that Defendant and Plaintiff engaged in sexual intercourse. See ¶¶55, 62, 68 of Defendant's Counterclaim.

Defendant also identifies that Plaintiff and Defendant "had sex", which cannot reasonably be defined to mean anything other than "sexual intercourse, which includes penetration, however slight, of any body part or object into the sex organ of another; deviate sexual intercourse, which includes sexual intercourse per os or per anus; and(/or) (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). See ¶8 of the Affidavit attached to Plaintiff's Complaint as Exhibit 1, ¶¶8, 11, 72 of Defendant's Counterclaim.

Defendant further identifies that Plaintiff and Defendant were engaged in a "sexual relationship", which cannot reasonably be defined as not including "sexual intercourse", and/or "sex." See ¶¶1-11, 69.

It is clear that Plaintiff engaged in sexual acts with Defendant under 42 Pa. C.S.A. §5533 (b)(ii)(A-C) that would constitute sexual abuse dependent on the circumstances surrounding the sexual acts.

Further, Plaintiff argues that he never had any sexual relationship with the Defendant while the Defendant was under the age of sixteen (16). The Defendant that conversely attempts to



argue that the sexual intercourse and other sexual acts Defendant engaged in with Plaintiff were consensual. It is patently absurd for Defendant to simultaneously argue that no such acts occurred, and that such acts were consensual.

As it is apparent that Plaintiff sexually abused Defendant through forcible compulsion, the statute of limitations regarding Defendants claims for Assault, Battery, NIED, and IIED must be extended to thirty-seven (37) years after her eighteenth (18th) birthday in accordance with 42 Pa. C.S.A. §5533 (b)(2)(i).

**III. THIS COURT MUST ALLOW DEFENDANT'S COUNTERCLAIMS FOR ASSAULT, BATTERY, IIED, AND NIED TO PROCEED WHERE DEFENDANT HAS PLED SUFFICIENT FACTS TO ESTABLISH A CLAIM UPON WHICH RELIEF MAY BE GRANTED.**

Defendant has sufficiently pled facts to establish claims for relief regarding assault, battery, IIED, and NIED, which will be discussed in turn.

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 "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). A lack of consent is required in proving a battery. ("(T)he 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. See also 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 sections III and IV of her Counterclaim, Defendant specifically identifies that sexual intercourse occurred between Plaintiff and Defendant while Defendant was a minor. See ¶¶ 55

and 62 of Defendant's Counterclaim. Further, Defendant incorporates the proceeding paragraphs of the pleading into each section, identifying additional instances of sexual contact between Plaintiff and Defendant. See ¶¶53 and 61 of Defendant's Counterclaim.

Plaintiff again attempts to argue that Defendant consented to sexual acts that Plaintiff also alleges never occurred. Plaintiff's arguments are irreconcilable, as they are in direct opposition to one and other.

Further, Plaintiff attempts to use Defendant's consent to the sexual intercourse as a defense to assault and battery, however Defendant lacked the ability to consent to such contact, as she was below the age of sixteen (16) at the time of the sexual intercourse. In C.C.H. v. Phila. Phillies, Inc., 596 Pa. 23, the Supreme Court found that a victim under the age of thirteen (13) was incapable of consenting to sexual contact with boys aged between fifteen sixteen (15-16), as the law made it clear she was incapable of consenting to such contact. The Court explains that "by criminalizing sexual contact with minors under 13 irrespective of consent, intended to protect young children as a class from being sexually exploited who, due to their youth or inexperience, lack the judgment necessary to protect themselves from sexual aggressors... Accordingly, we find it consistent with our legislature's intent to protect young children from sexual exploitation, to reject with equal force, in both the criminal and civil contexts, the proposition that an 11-year-old has the capacity to consent to sex." Id.

Likewise, Pennsylvania has criminalized sexual contact between those sixteen (16) years of age and younger, and those four (4) or more years older than the minor. See 18 Pa. C.S. §3122.1. It follows that just as the Court in C.C.H. "reject(s) with equal force, in both the criminal and civil contexts" the proposition that an individual under the age of thirteen (13) can consent to sexual intercourse in any context, an individual under the age of sixteen (16) cannot consent to sexual intercourse with an individual four (4) or more years older than the individual. Any other interpretation of the law would result in absurd results, as an individual four (4) years

older than their less than sixteen (16) year old counterpart would be subject to criminal charges for having sexual intercourse with an individual who consented to the sexual intercourse.

As the assault and battery here represent the underlying contact relating to the sexual intercourse between Plaintiff and Defendant, and Defendant did not have the capacity to consent to such sexual intercourse, Defendant could have consented to the underlying physical contact.

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. extreme and outrageous conduct on the part of the inflictor;
2. intentional or reckless conduct by the inflictor;
3. emotional distress endured by the victim; and
4. the victim's distress must be severe.

See 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, "[a] plaintiff must also allege physical manifestations of the distress." 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 the instant case, Plaintiff's conduct is extreme and outrageous in nature, evidenced by the text messages included as Exhibit A to Defendant's responsive pleading, and cited to in Defendant's Counterclaim along with additional support regarding Plaintiff's extreme and outrageous conduct. See ¶¶67-77 of Defendant's Counterclaim. Such conduct was intentional and reckless, as Plaintiff intentionally abused and manipulated Defendant for the purpose of initiating and/or continuing a sexual relationship with Defendant. See ¶¶67-77 of Defendant's Counterclaim. Defendant suffered severe emotional distress as a result, which was

acknowledged in ¶79 of Defendant's Counterclaim. Specifically, Defendant identifies in ¶79(f) that she suffered "all other injuries and damages from those injuries listed above", which includes physical manifestations of distress. As such, Defendant has met all elements required to plead a claim for IIED and included sufficient support for such claims within the pleadings.

C. Negligent Infliction of Emotional Distress

The Superior Court of Pennsylvania acknowledges in relevant part 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)" Jordan v. Pennsylvania State University, 276 A.3d 751, 774 (Pa.Super. 2022).

Additionally, the Supreme Court identifies that "it (is) 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 v. Chester County Hosp., 614 Pa. 98. The same Court acknowledges that, "the special relationships must encompass an implied duty to care of the plaintiff's emotional well-being." Id. Further, the Supreme Court noted that it is "prudent to leave the legal question of whether a sufficient duty exists to our trial judges to decide on a case-by-case basis" Id.

In the instant case, Plaintiff acknowledged in his own words that he took on the role of a grief counselor for Defendant following the death of her boyfriend in addition to his role as an employee at Defendant's high school. See ¶82-84 of Defendant's Counterclaim.

The Supreme Court chose not to develop an exhaustive list of special relationships that may exist, and chose instead to allow the trial courts to consider on a case-by-case basis whether such a relationship exists. Id. Plaintiff took it upon himself to take on the role of a grief counselor for a fifteen (15) year old girl who was mourning the loss of her boyfriend, who had recently committed suicide. See ¶84 of Defendant's Counterclaim. Plaintiff took this role on at a point when Defendant was emotionally and mentally unstable, and developed a relationship with

Defendant that would “obviously and objectively hold the potential of deep emotional harm in the event of breach.” Id.

Plaintiff took on the duty of being a grief counselor, (see ¶184 of Defendant’s Counterclaim), breached that duty by using the relationship to sexually abuse Defendant (see ¶¶67-85 of Defendant’s Counterclaim), and by using the threat of suicide as a way to manipulate Defendant (see ¶¶67-85 of Defendant’s Counterclaim), caused severe emotional damage to Defendant by sexually abusing and manipulating Defendant (see ¶79 of Defendant’s Counterclaim), and Defendant has been permanently damaged both mentally and emotionally as a result (see ¶79 of Defendant’s Counterclaim).

As a result, Plaintiff negligently inflicted emotional distress upon the Defendant by developing and breaching a special relationship with Defendant, causing severe mental and emotional damage.

Respectfully submitted,

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