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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR FLAGLER COUNTY, FLORIDA

M.D., Plaintiff, v. GERARD ABATE, M.D., Defendant.	Case No. 2021-CA-304

DEFENDANT GERARD ABATE, M.D.'S MOTION TO DISMISS AND ALTERNATIVE MOTION TO STRIKE WITH INCORPORATED MEMORANDUM OF LAW

Defendant GERARD ABATE, M.D., ("Defendant") by and through the undersigned Counsel, pursuant to Fla. R. Civ. P. 1.100(c)(1), 1.140(b)(6), and 1.140(f), hereby moves this Honorable Court for the entry of an Order, dismissing Counts 1, 3, 4, 5, and 6 of the Complaint with prejudice, dismissing Count 2 of the Complaint without prejudice, and alternatively striking immaterial, impertinent, and scandalous material from the Complaint, and in support thereof, states the following:

INTRODUCTION AND BACKGROUND

1. On June 16, 2021, Plaintiff "M.D." filed a *Complaint and Demand for Jury Trial*, and the Clerk of Court issued a *Summons* for the Defendant.

2. On October 4, 2021, Plaintiff filed a *Motion to Extend Time to Serve Complaint*, which this Court granted by written order on November 18, 2021. The

order granted Plaintiff an additional 120 days to serve the *Summons* on the Defendant.

3. On January 21, 2022, Plaintiff filed an *Amended Affidavit of Service* indicating that the Defendant had been served with process on December 18, 2021, at 3:20 p.m. at 44 Mount Rushmore Drive in Toms River, New Jersey 08753.

4. On January 24, 2022, Plaintiff filed a *Motion for Clerk's Default*, and thereupon, the Clerk entered a *Default* against the Defendant.

5. On July 21, 2022, Plaintiff filed a *Motion for Default Final Judgment on Liability and to Set Jury Trial on Damages* ("Motion for Default Final Judgment on Liability").

6. On September 7, 2022, this Court entered its *Order Setting Jury Trial, Requiring Mediation and Directing Pre-trial Procedure*.

7. On September 12, 2022, this Court entered its *Order on Plaintiff's Motion for Default Final Judgment on Liability*, which granted the Motion for Default Final Judgment on Liability.

8. However, on December 15, 2022, the Defendant filed his *Motion to Quash Service of Process and to Set Aside the Order on Plaintiff's Motion for Default Final Judgment on Liability and the Clerk's Default*.

9. Therein, the Defendant asserted that he had not been served with a Summons and that this Court had not properly exercised personal jurisdiction over him theretofore.

10. An evidentiary hearing was scheduled for January 12, 2023, on the Defendant's Motion to Quash. However, before the hearing, the parties reached an agreement, pursuant to which the Defendant's Motion to Quash was granted and the Defendant voluntarily submitted himself to the personal jurisdiction of this Court and waived service of process as of the date that this Court signed the parties' proposed Consent Order to that effect.

11. On January 20, 2023, this Court signed and entered the parties' proposed Consent Order.

12. In the Consent Order, the Court stated: "By agreement of the parties, as of the date of this order, the Defendant submits himself to the personal jurisdiction of this Court and waives service of process. Defendant shall respond to Plaintiff's *Complaint and Demand for Jury Trial* within thirty (30) days hereof, and the case shall proceed in the ordinary course thereafter."

13. This Motion is therefore timely filed.

MEMORANDUM OF LAW

I. STANDARD

A. Rule 1.100(c)(1): Every Pleading Must Contain the Parties' Names

In Florida, "Every pleading must have a caption containing the name of all of the parties . . ." FLA. R. CIV. P. 1.100(c)(1). The Committee Notes to Rule 1.100's 2016 Amendment note that, "Subdivision (c) is amended to address the naming of parties in pleadings and amended pleadings similarly to Federal Rule of Civil Procedure 10(a)," which provides in relevant part that "The title of the complaint must name all the parties . . ." While Florida's rules of procedure provide limited exceptions to this rule, for example by allowing the identification of minor children by their initials only, *see, e.g.*, FLA. R. JUD. ADMIN. 2.425(a)(1), the Florida Supreme Court has made clear that "*all* trials, civil and criminal, are public events and there is a strong presumption of public access to these proceedings and their records, subject to certain narrowly defined exceptions." *Barron v. Fla. Freedom Newspapers, Inc.*, 531 So.2d 113, 114 (Fla. 1988) (emphasis in original). The Supreme Court held that court proceedings could be closed **only** when necessary to (1) comply with established public policy, (2) to protect trade secrets, (3) to protect compelling governmental interests, (4) to obtain evidence to properly determine legal issues in a case, (5) to avoid substantial injury to innocent third-parties, or (6) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific

type of civil proceeding sought to be closed. *Id.* at 118; *see also* FLA. R. JUD. ADMIN. 2.420.

B. Rule 1.140(b)(6): Failure to State a Cause of Action

A motion to dismiss should be granted where the complaint fails to state a claim upon which relief may be granted. FLA. R. CIV. P. 1.140(b)(6). Specifically, it tests the legal sufficiency of a complaint by questioning whether the complaint sets forth sufficient factual allegations to state a cause of action under Florida law. *McWhirter, Reeves McGothlin, Davidson, Rief & Bakass, P.A. v. Weiss*, 704 So. 2d 214, 215 (Fla. 2d DCA 1998). The Court must dismiss a claim when the Court concludes that the allegations and exhibits reveal that the Plaintiff is not entitled to relief. *See Jackson Grain co. v. Kemp*, 177 So. 2d 513, 516 (Fla. 2d DCA 1965).

Florida law requires a party to plead ultimate facts sufficient to show entitlement to relief. FLA. R. CIV. P. 1.110. A Complaint, therefore, "must contain ultimate facts supporting each element of the cause of action. Mere conclusions are insufficient." *Clark v. Boeing Co.*, 395 So. 2d 1226, 1229 (Fla. 3d DCA 1981); *Other Place of Miami, Inc. v. City of Hialeah Gardens*, 353 So. 2d 861, 862 (Fla. 3d DCA 1977) ("[W]e will not be bound by bare allegations which are unsupported or unsupportable").

A plaintiff must assert the claims in the Complaint with "sufficient particularity" for a defense to be prepared. *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris v. Bowmar Instrument Corp.*, 527 So. 2d 211, 212 (Fla. 3d DCA

1987). "The complaint must set out the elements and the facts that support them so that the court and the defendant can clearly determine what is being alleged." *Barrett v. City of Margate*, 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999) (citing *Messana v. Maule Indus.*, 50 So.2d 874, 876 (Fla. 1951) (a complainant must "plead [a] factual matter sufficient to apprise his adversary of what he is called upon to answer.")). It is, therefore, "insufficient to plead opinions, theories, legal conclusions or argument" and, instead, "factual assertions that can be supported by evidence" must be pled. *Barrett*, 743 So. 2d at 1162- 63. Indeed, a cause of action cannot be properly set forth by alleging, in conclusive form, acts which lack factual allegations and are merely bare, legal conclusions. *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So. 2d 490, 501 (Fla. 3d DCA 1994). Dismissal is appropriate if the complaint is so vague, indefinite, and ambiguous as to completely fail to state a cause of action. *Frisch v. Kelly*, 137 So.2d 252 (Fla. 1st DCA 1962).

C. Rule 1.140(f): Redundant, Immaterial, Impertinent, or Scandalous Material in Pleadings

"A party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." FLA. R. CIV. P. 1.140(f). "A complaint in a lawsuit is not a press release. The hallmarks of good pleading are brevity and clarity in the statement of the essential facts upon which the claim for relief rests 'rather than intricate and

complex allegations designed to plead a litigant to victory." *Rapp v. Jews for Jesus, Inc.*, 944 So.2d 460, 463-64 (Fla. 2006) (affirming trial court order that struck allegations that were "redundant, bellicose, and unnecessary to state the causes of action alleged."), *decision quashed on other grounds*, 997 So.2d 1098 (Fla. 2008).

II. ARGUMENT

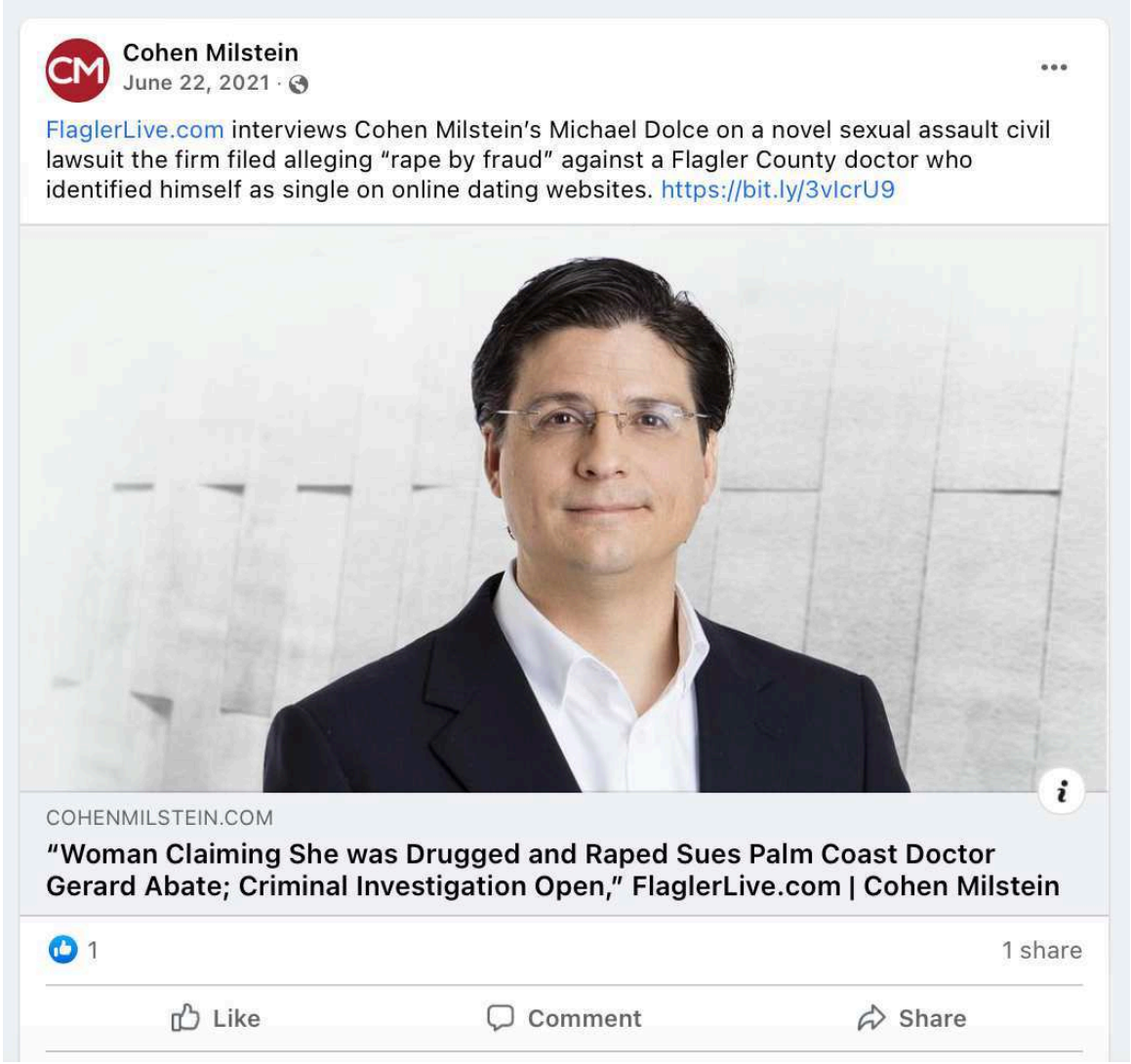
A. Plaintiff is not Entitled to Proceed Anonymously

Rule 1.100(c)(1) requires Plaintiff to state her name in the caption of this case. *See* FLA. R. CIV. P. 1.100(c)(1). Plaintiff has not done that, and no exception to the rule applies herein.

While Plaintiff may claim that anonymity is necessary for her to "avoid substantial injury", *see Barron*, *supra.* at 4, Plaintiff has not yet made such a claim. Additionally, even if Plaintiff were to make such a claim, it would be baseless for a variety of reasons, not the least significant of which is Plaintiff's own efforts to draw as much attention to this case as possible by authorizing her attorneys to make statements to news media[1] and to publish blogposts[2] about her allegations.

[1] https://flaglerlive.com/164753/gerard-abate/
https://flaglerlive.com/184886/ex-palm-coast-doctor-dispute/

[2] https://www.cohenmilstein.com/case-study/jane-doe-v-gerard-abate-md
https://www.cohenmilstein.com/update/flagler-county-doctor-accused-using-online-dating-site-lure-and-rape-victim
https://www.cohenmilstein.com/update/"woman-claiming-she-was-drugged-and-raped-sues-palm-coast-doctor-gerard-abate-criminal
https://www.cohenmilstein.com/update/"ex-palm-coast-doctor-doesn't-contest-civil-suit-alleging-grave-claims-judge-sets-trial



https://www.facebook.com/cohenmilstein/posts/flaglerlivecom-interviews-cohen-milsteins-michael-dolce-on-a-novel-sexual-assaul/5539678309440641/

Plaintiff cannot expect this Court to grant her anonymity and privacy while she simultaneously undermines those interests.

In her Complaint, Plaintiff alleges that, "Pursuant to Florida law [no citation] and the Rules of this Court [no citation], including Fla. R. Jud. Admin. 2.420(d), as a survivor of sexual offenses, Plaintiff M.D. is identified by her initials only." Complaint, at ¶ 3. Contrary to Plaintiff's assertion, FLA. R. JUD.

ADMIN. 2.420(d) does not permit Plaintiff to identify herself only by her initials. First, while FLA. R. JUD. ADMIN. 2.420(d)(1)(B) identifies information that "shall be maintained as confidential," the rule requires the filing of a "Notice of Confidential Information within Court Filing", and then the Clerk of Court is the one who maintains its confidentiality. FLA. R. JUD. ADMIN. 2.420(d)(1), (d)(2). Plaintiff has not filed such a Notice and, therefore, should not be permitted to avail herself of the confidentiality provisions of that rule.

Second, Plaintiff's name is not encompassed within the several categories of information and documents that described in FLA. R. JUD. ADMIN. (d)(1)(B). Plaintiff may claim that FLA. R. JUD. ADMIN. 2.420(d)(1)(B)(xiii) applies to her. That subparagraph says that "protected information regarding victims of . . . sexual offenses. §§ 119.071(2)(h), 119.0714(1)(h), Fla. Stat." is subject to the rule's confidentiality provisions. However, upon review of the incorporated Florida Statutes, this subparagraph applies only to "criminal intelligence information" and "criminal investigative information". *See* FLA. STAT. §§ 119.071(2)(h), 119.0714(1)(h). Plaintiff's name is neither "criminal intelligence information" nor "criminal investigative information" because her name was not collected nor compiled by a criminal justice agency. *See* FLA. STAT. §§ 119.011(3)(a) (defining "criminal intelligence information" as "information . . . collected by a criminal justice agency . . ."), (3)(b) (defining "criminal investigative information" as

"information . . . compiled by a criminal justice agency."), § 119.011(4) (defining "criminal justice agency").

In light of the foregoing, the complaint should be dismissed without prejudice, and Plaintiff should be permitted to file an amended complaint that discloses her name, as required.

B. Plaintiff's Complaint Fails to State a Cause of Action

Plaintiff's complaint alleges contains six different counts: sexual battery (count 1), battery (count 2), aggravated battery (count 3), exposing another to sexually transmissible disease without notice and consent (count 4), poisoning (count 5), and Rape and Sexual Assault by Deception or Fraud (count 6). Most of these alleged causes of action are not cognizable under Florida law, and the one that is has not been pled adequately. Therefore, Plaintiff requests the entry of an order, dismissing counts 1, 3, 4, 5, and 6 with prejudice, and dismissing count 2 without prejudice.

1. Counts 1, 3, 4, 5, and 6 Fail to State Civil Causes of Action under Florida Law; Therefore, They Should be Dismissed With Prejudice

The only published opinion addressing a civil claim for "aggravated battery" arose from a case that was filed by a *pro se* prison inmate who didn't know any better. *See Quilling v. Price*, 894 So.2d 1061, 1063-64 (Fla. 5th DCA 2005) (finding the complaint to have been "inartfully drafted" and noting that Florida law does not recognize an "aggravated battery" tort). While Plaintiff's Complaint

suggests that battery, aggravated battery, and sexual battery are all independently actionable claims, "the law of torts only recognizes the tort of 'battery'." *Id.* at 1063.

Throughout her Complaint, Plaintiff cites to and relies on provisions in Florida's Penal Code. *See, e.g.,* Complaint at ¶¶ 26, 34, 41, 44, 57. However, "a mere violation of the penal statutes does not give rise to [civil] liability per se." *Lavis Plumbing Svcs., Inc. v. Johnson*, 515 So.2d 296, 298 (Fla. 3d DCA 1987) (citing *Tourismart of Am., Inc. v. Gonzalez*, 498 So.2d 469, 470 (Fla. 3d DCA 1986) (finding that Florida's criminal worthless check statute does not authorize a private civil remedy).

Plaintiff's legal theories of civil liability in Counts 1, 3, 4, 5, and 6 are simply not recognized in Florida law. Therefore, those counts should be dismissed with prejudice.

2. Plaintiff has Failed to State a Cause of Action for Battery; Therefore, Count 2 Should be Dismissed Without Prejudice

In Count 2, although "battery" is a recognized civil cause of action under Florida law, Plaintiff cites FLA. STAT. § 784.03(1) and seeks damages for "Defendant's illegal acts". Complaint at ¶ 35. Because Plaintiff is invoking Florida's penal code, rather than common law, Count 2 should be dismissed without prejudice, and Plaintiff should be permitted to replead Count 2 in the form of a civil cause of action for battery.

C. Plaintiff's Complaint Contains Impertinent and Scandalous Allegations that should be Stricken

Plaintiff's Complaint contains a salacious narrative of allegations that is immaterial, impertinent, and scandalous, not only because the allegations are irrelevant to the causes of action pled, but especially because the causes of action pled are not cognizable as a matter of Florida law. *See* Complaint at ¶¶ 5-24. Additionally, Plaintiff's express reference to Florida's penal code is likewise immaterial, impertinent, and scandalous, and all such allegations should be stricken from Plaintiff's Complaint.

CONCLUSION

Plaintiff should not be permitted to masquerade in anonymity, in complete disregard and derogation of Florida law. Plaintiff should not be able to have it both ways – feigning a need for privacy, while simultaneously authorizing press releases and interviews about this case. Plaintiff should not be permitted to abuse this Court's process by making scandalous, scurrilous allegations that have no place in this forum, all while failing to allege even a single plausible, valid, civil cause of action.

For all of the foregoing reasons, the Complaint should be dismissed with prejudice as to all Counts but Count 2. Should Plaintiff choose to file an amended complaint, she should be ordered to cure the deficiencies noted above and to comply with the Florida Rules of Civil Procedure.

WHEREFORE, Defendant GERARD ABATE, M.D., respectfully requests the entry of an Order, dismissing Counts 1, 3, 4, 5, and 6 of the Complaint with prejudice; dismissing Count 2 of the Complaint without prejudice; alternatively striking immaterial, impertinent, and scandalous allegations from the Complaint; directing the Plaintiff to state her unabbreviated name in the caption of this case on all future pleadings; and providing such other and further relief as this Honorable Court deems just and proper.

Dated February 21, 2023.

Respectfully submitted,

/s/ Andrew Bonderud
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 21, 2023, I filed the foregoing document with the Clerk of Court via the statewide e-filing Portal, which will serve a notice of electronic filing via email upon:

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