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6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
7 **IN AND FOR THE COUNTY OF MARICOPA**

8 **LAURA OWENS,**

9 **Plaintiff,**

10 **v.**

11 **GREGORY GILLESPIE,**

12 **Defendant.**

Case No.: CV2021-052893

**REPLY IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

(Oral Argument Requested)

(Assigned to the Hon.
Michael Gordon)

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14 Pursuant to Ariz.R.Civ.P. 56(a), Defendant Gregory Gillespie (“Defendant”), by
15 and through undersigned counsel, hereby replies in support of his Motion for Summary
16 Judgment (“Motion”). This Reply is supported by the following Memorandum of Points
17 and Authorities.

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **I. SUMMARY OF ARGUMENTS**

20 On July 26, 2023, Defendant brought his Motion on the grounds that Plaintiff did
21 not adequately demonstrate a claim for intentional infliction of emotional distress. In
22 particular, Plaintiff did not demonstrate or allege any physical symptoms associated with
23 her alleged depression and anxiety, and, absent such a demonstration, Plaintiff cannot
24 maintain a claim for intentional infliction of emotional distress. Additionally, Plaintiff only
25 alleges to have suffered damages in the form of attorneys’ fees and costs, which is not
26 permitted in a tort action. Even if Plaintiff’s alleged damages were recoverable, Plaintiff

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1 has not disclosed a computation and measure of damages to support Plaintiff’s alleged
2 damages. As Plaintiff’s damages are not calculated with reasonable certainty, Plaintiff’s
3 claim for intentional infliction of emotional distress must fail.

4 In response, Plaintiff argues that her damages are associated with her emotional
5 distress and not her anticipated attorneys’ fees. Plaintiff further contends that she need not
6 compute her damages at all, because emotional distress damages are difficult to calculate
7 and need not be supplemented by expert testimony. Plaintiff also asserts that Plaintiff’s
8 vague, undisclosed testimony is sufficient to withstand summary judgment. Plaintiff
9 further argues that a showing of bodily injury is unnecessary to support a claim for
10 intentional infliction of emotional distress and that Defendant should have disclosed his
11 argument that a physical showing was necessary to support such a claim.

12 Plaintiff’s arguments are without merit. First, a plain reading of Plaintiff’s
13 Computation and Measure of Damages leads to the conclusion that Plaintiff is only seeking
14 damages for her reasonable attorneys’ fees and costs. Even if Plaintiff is permitted to seek
15 other forms of damages, Plaintiff stated that her damages are at least \$40,000.00, without
16 any computation of said damages. With respect to Plaintiff’s claim, Plaintiff is required to
17 establish every element of her claim. Indeed, Plaintiff seeks to reverse the burden of proof
18 and require Defendant to first establish that Plaintiff did not meet her burden of proof for
19 every element of her claim for intentional infliction of emotional distress. Defendant is not
20 required to put Plaintiff on notice that she did not establish each and every element of her
21 claim. Absent a demonstration that Plaintiff can prove, by a preponderance of evidence,
22 every element of her claim, summary judgment is warranted. Because Plaintiff failed to
23 adequately disclose her damages or otherwise show that she suffered severe emotional
24 distress, summary judgment is proper as to Plaintiff’s claim.

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1 **II. LEGAL ARGUMENT**

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3 **a. Objections to Plaintiff’s Additional Statement of Facts, Affidavit, and Exhibits.**

4 As a preliminary matter, Defendant objects to Plaintiff’s Additional Statement of
5 Facts and corresponding exhibits as follows:

- 6 ➤ Paragraphs 1 through 9: Objection. These allegations are irrelevant to the
7 Defendant’s Motion and therefore do not establish a genuine dispute or
8 otherwise preclude summary judgment. Ariz.R.Civ.P. 56(c)(3)(B)(ii).
- 9 ➤ Paragraph 10: Objection. Other than a vague, conclusory reference to
10 anxiety, depression, and guilt in Plaintiff’s Affidavit and disclosure
11 statement, Plaintiff fails to present any admissible evidence that she suffered
12 from anxiety, depression, and guilt or that Plaintiff suffered damages.
13 Defendant also objects to Exhibit 1 to Plaintiff’s Affidavit, because, Exhibit
14 1 is not accompanied by any evidence that the photographs accurately depict
15 what they purport to show. Accordingly, Exhibit 1 lacks foundation and is
16 inadmissible. Exhibit 1 is also objectionable as Plaintiff does not describe
17 when the photographs were taken. Lastly, Exhibit 1 was never disclosed via
18 a Rule 26.1 disclosure statement, and, as a result, Plaintiff cannot use Exhibit
19 1 pursuant to Ariz.R.Civ.P. 37(c).
- 20 ➤ Paragraph 11: Defendant restates and realleges his objections to Exhibit 1.
21 Defendant further objects to Paragraph 11, because Plaintiff does not present
22 any evidence that her alleged heartburn was directly or proximately caused
23 by her claim of intentional infliction of emotional distress. Plaintiff has also
24 failed to disclose that she allegedly suffered from heartburn; therefore,
25 Plaintiff is precluded from making such an allegation pursuant to
26 Ariz.R.Civ.P. 37(c).

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- Paragraph 12: Objection. Paragraph 12 contains allegations that were not disclosed via a Rule 26.1 disclosure statement; therefore, the Court should disregard the allegation pursuant to Ariz.R.Civ.P. 37(c).
- Paragraph 13: Objection. Defendant objects to Paragraph 13 for the same reasons he objected to Paragraph 12.
- Paragraph 14: Objection. Defendant objects to Paragraph 14 for the same reasons he objected to Paragraph 12.
- Paragraph 15: Objection. Defendant objects to Paragraph 15, because it is highly inflammatory and lacks any probative value for the purposes of the Motion. *See* Ariz.R.Evid. 403.
- Paragraph 18: Objection. Defendant is not required to disclose that Plaintiff’s claim is faulty for failure to demonstrate all necessary elements.

b. Plaintiff has not disclosed any damages, much less damages calculated with reasonable certainty.

Read in its entirety, Plaintiff’s Disclosure Statement provides: “*The* award Plaintiff seeks shall be *computed* by accurate accounting of all costs and fees associated with this case, billed at reasonable rates. It is anticipated that *the* damages will amount to at least \$40,000.00 due to the trauma that [Plaintiff] suffered.” [*See* Defendant’s SOF at ¶ 12] (emphasis added). Notably, Plaintiff’s Computation and Measure of Damages does not state that Plaintiff is seeking emotional distress damages. Under a plain reading of Plaintiff’s Computation and Measure of Damages, Plaintiff only seeks an award of damages associated with all costs and fees associated with this matter. The Measure and Computation of damages is not, as Plaintiff states, unartfully phrased; rather, Plaintiff only states that she is seeking her attorneys’ fees and costs, without any mention of other forms of damages. As Plaintiff notes, “[t]he disclosure requirements are intended to allow parties a ‘reasonable opportunity to prepare.’” *SWC Baseline & Crimson Investors, L.L.C. v.*

1 *Augusta Ranch Ltd. Partnership*, 228 Ariz. 271, 284, ¶ 47, 265 P.3d 1070, 1083 (App.
2 2011) (quoting *Waddell v. Titan Ins. Co.*, 207 Ariz. 529, 537, ¶ 33, 88 P.3d 1141, 1149
3 (App. 2004)). A direct reference to Plaintiff’s attorneys’ fees and costs without reference
4 to any other form of damages does not provide Defendant with any reasonable opportunity
5 to prepare for Plaintiff’s claim for emotional distress damages.

6 Even under an extraordinarily generous reading of Plaintiff’s disclosure statement,
7 Plaintiff is still required to disclose a computation and measure of damages. *See*
8 Ariz.R.Civ.P. 26.1(a)(7); *see also SWC Baseline*, 228 Ariz. at 284, ¶ 47, 88 P.3d at 1149.
9 Assuming that Plaintiff is claiming emotional distress damages, and while emotional
10 distress damages can be difficult to calculate with mathematical certainty, Plaintiff’s
11 disclosure statement placed a figure on her damages of \$40,000.00. Given Plaintiff’s figure
12 of \$40,000.00, Plaintiff is required to disclose how she arrived at this figure. Absent such
13 a computation, Plaintiff has not complied with Ariz.R.Civ.P. 26.1(a)(7), and Defendant is
14 not afforded a reasonable opportunity to prepare for arbitration.

15 Lastly, it is irrelevant that Plaintiff is claiming damages in the amount of
16 \$40,000.00. Plaintiff is still required to compute her damages with reasonable certainty.
17 Given the above, summary judgment is proper as to Plaintiff’s claim for intentional
18 infliction of emotional distress.

19 **c. Plaintiff has not established that she is entitled to relief, and it is**
20 **Plaintiff’s responsibility to allege and prove all elements of her claim.**

21 As a preliminary matter, Plaintiff is only entitled to justifiable inferences in her
22 favor on a motion for summary judgment. *National Bank of Arizona v. Thruston*. 218 Ariz.
23 112, 116, ¶ 17, 180 P.3d 977, 981 (App. 2008). Even applying inferences in Plaintiff’s
24 favor, summary judgment for Defendant is warranted.

25 *Pankratz v. Willis* does follow step with the relevant Restatement in that a showing
26 of a bodily injury is not expressly required for a claim of intentional infliction of emotional

1 distress. 155 Ariz. 8, 16–17, 744 P.2d 1182, 1190–91 (App. 1987); *see also* Restatement
2 (Second) of Torts § 46 (1965); *Pierre-Canel v. American Airlines*, 375 F. Supp. 3d. 1044,
3 1056 (D. Ariz.). However, contrary to Plaintiff’s contention, the *Pankratz* court did not
4 find that a showing of depression, alone, was sufficient to create a genuine dispute of
5 material fact. *See Pankratz*, 155 Ariz. at 13, 744 P.2d at 1186.

6 The *Pierre-Canel* court recognized that a showing of bodily harm is not expressly
7 required, but the *Pankratz* court found a genuine dispute of material fact where emotional
8 distress accompanied physical symptoms, i.e., headaches and hemorrhoids. *Pierre-Canel*,
9 375 F. Supp. 3d. at 1056 (citing *Pankratz*, 155 Ariz. at 13, 744 P.2d at 1186); *see also Ford*
10 *v. Revlon*, 153 Ariz. 38, 41, 734 P.2d 580, 583 (Ariz. 1987). And, as the *Pierre-Canel* court
11 noted, the Arizona Court of Appeals more recently observed that a lack of a showing of a
12 physical manifestation of severe emotional distress does not create a material question of
13 fact to withstand a motion for summary judgment. *Id.* (citing *Harding v. Sternsher*, No. 1
14 CA-CV 16-0127, 2017 WL 3138184, at *3 (Ariz. Ct. App. July 25, 2017)).¹

15 Therefore, as a practical matter, an allegation of severe emotional distress, absent
16 an allegation of physical symptoms, cannot defeat a motion for summary judgment. And,
17 as noted in Defendant’s objections to Plaintiff’s Additional Statement of Facts, Plaintiff’s
18 allegations regarding skin rashes and heartburn are inadmissible as a matter of law.
19 Accordingly, Plaintiff has not established a genuine dispute of material fact.

20 Moreover, a claimant must establish *every* element of a civil action by a
21 preponderance of the evidence. *Aileen H. Char Life Interest v. Maricopa County*, 208 Ariz.
22 286, 93 P.3d 486 (Ariz. 2004). For any claim, a plaintiff must show, by a preponderance
23 of evidence, that she is entitled to damages. *Linthicum v. Nationwide Life Ins. Co.*, 150
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25 ¹ This decision was attached to Defendant’s Motion for Summary Judgment as required by
26 Ariz.Sup.Ct.R. 111(c).

1 Ariz. 326, 332, 723 P.2d 675, 681 (Ariz. 1986). Defendant is not, and should not, be
2 required to disclose an affirmative defense for Plaintiff’s failure to adequately plead, and
3 disclose, all necessary elements to support a claim. Regardless of any disclosure
4 requirements, it is Plaintiff’s obligation to prove each and every element of her claim. To
5 hold otherwise would require a defendant to effectively remind a plaintiff of the
6 requirement to disclose, and prove, every element of plaintiff’s claim. In other words,
7 Plaintiff seeks to shift the burden to Defendant to rebut, or otherwise show, that Plaintiff
8 did not establish every element of her claim. It is not Defendant’s responsibility to ensure
9 that Plaintiff demonstrates all elements of her claim for intentional infliction of emotional
10 distress. As such, the Court should find that Plaintiff is precluded from bringing additional
11 evidence in support of her claim and that summary judgment is proper.

12 **III. CONCLUSION**

13 For the foregoing reasons, the Court should grant Defendant’s Motion for Summary
14 Judgment.

15 **RESPECTFULLY SUBMITTED** this 26th day of September 2023.

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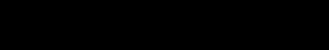
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