Cause No. 2007-38998

K. SYVETTE WIMBERLY	§	IN THE DISTRICT COURT OF
	§	
V.	§	HARRIS COUNTY, TEXAS
	§	
VIVID ENTERTAINMENT GROUP	§	
AND LARA MADDEN A/K/A	§	
SYVETTE WIMBERLY	§	234TH JUDICIAL DISTRICT

DEFENDANT VIVID ENTERTAINMENT GROUP'S FIRST AMENDED TRADITIONAL AND NO EVIDENCE MOTION FOR SUMMARY JUDGMENT

Defendant Vivid Entertainment, L.L.C. (improperly named Vivid Entertainment Group) now files this First Amended Traditional and No Evidence Motion for Summary Judgment as to all claims asserted by Plaintiff K. Syvette Wimberly.

I. SUMMARY OF THE ARGUMENT

Defendant Vivid produces and distributes adult films. On one occasion, it hired Defendant Lara Madden to perform on a contract basis. Madden chose the stage name "Syvette Wimberly." Madden performed one scene for Vivid. Vivid edited and distributed various films and videos of her scene. Plaintiff is the "real" Syvette Wimberly, a high school classmate of Madden's. Wimberly is now married and is known as Syvette Keathley.

To a tremendous amount of media coverage, Plaintiff sued Madden and Vivid in 2007. Plaintiff complains that Vivid "allowed" Madden to use her name. She has sued Vivid and Madden for (1) Invasion of Privacy, (2) Negligence and (3) Intentional Infliction of Emotional Distress.

The law is clear: without commercial value associated with one's name, no proprietary interest exists and that name may be used by whoever wishes to use it for whatever purpose they wish. Plaintiff has admitted that her name is of no marketable value. She has further admitted she has no evidence of negligent conduct by Vivid. All of Wimberly's claims fail as a matter of law.

Summary judgment is appropriate.

II. FACTS AND PROCEDURAL STATUS

The facts are undisputed.

Vivid produces and distributes adult films. Exhibit 1, Vivid Affidavit ("Vivid Aff."), ¶ 3. It hires actors on a contract basis to perform in those films. *Id.* For obvious reasons, adult film actors generally select stage names.

Madden was selected to perform for Vivid on by Shailar Schmoeller, a Vivid production manager who is responsible for selecting prospective actors for scenes. Exhibit 5, Affidavit of Shailar Schmoeller ("Schomoeller Aff."), ¶ 2-3. Schmoeller found Madden by searching through photographs posted on the internet by a company known at that time as "Exotic Star Models". *Id.* at ¶ 3. Exotic Star Models is separate and independent from Vivid. *Id.* at ¶ 4. On this website, Madden was identified by the name "Syvette Wimberly." *Id.* When Schmoeller spoke with Madden's agent, they both referred to her as Syvette Wimberly. *Id.* at ¶ 4. The name Laura Madden was never mentioned until Madden signed the contract with Vivid on the day of filming. Vivid Aff., ¶ 6; Schomoeller, Aff. ¶ 5. Madden did not select "Syvette Wimberly" as a stage name because Vivid demanded she choose one – that was a name by which she had been known prior to any contact whatsoever with Vivid. Schomoeller, Aff. ¶¶ 3-5.

On December 16, 2004, Madden, then living in Los Angeles, contracted with Vivid to perform in an adult film. *Id.* at ¶ 5-6; Exhibit 1-A thereto, Madden's contract with Vivid.

Pursuant to federal and California law, certain safeguards are observed in the casting and production of adult movies. *Id.* at ¶ 7. Those safeguards include but are not limited to checking the identification of actors to confirm that they are at least 18 and screening actors for HIV/AIDS. *Id.*

These safeguards were taken with respect to Madden. *Id.*

Madden signed a contract to work for one day. *Id.* at ¶ 9. The contract she signed included a space for the performer's stage name. *Id.* at ¶ 8. In that space, Madden wrote "Syvette Wimberly," the name by which she was already known. *Id.*

By Plaintiff's own admission, the name "Syvette Wimberly" carried with it no reputation, prestige, commercial standing or public interest. *See* Exhibit 2, Wimberly Deposition, p. 24 and p.9-10 (excerpts on p. 6 below). The name "Syvette Wimberly" similarly carried with it no incidental value or newsworthiness. Vivid Aff., ¶ 10; *see also* Exhibit 3, Westlaw search results of news stories from before December 16, 2004 (the date Madden selected "Syvette Wimberly" as her stage name) showing not a single appearance of that name in any publication. In short, the name "Syvette Wimberly" was unknown in both the adult entertainment business and in the public domain in general.

On December 16, 2004, Madden performed. Her scene was recorded and edited into a movie called *Desperate*. Vivid Aff., ¶ 9. Although Madden's one scene was subsequently edited into several other films, she never performed for Vivid again. *Id.* Several films containing Madden's scene have been produced, published and distributed. *Id.* One scene was the extent of her relationship to Vivid. *Id.*

Along with a great deal of national network and tabloid publicity, Wimberly filed this suit in June 2007 claiming, according to one news account, that "a porn star stole [her] name". [1] No notice preceded the filing of this case.

Wimberly has sued Vivid for (1) Invasion of Privacy; (2) Negligence; and (3) Intentional

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[1] See http://www.thesmokinggun.com/archive/years/2007/0703072alias1.html

Infliction of Emotional Distress.

Among other things, Wimberly seeks actual, punitive and special damages, attorneys' fees and a permanent injunction preventing Vivid and Madden from further use of Wimberly's name. Since this lawsuit was filed, Plaintiff has married and is no longer named Syvette Wimberly. Exhibit 6. Her name is now Syvette Keathley. *Id.*

Written discovery has been conducted and the plaintiff deposed. Trial is set for September 1, 2008.

As a matter of law, Wimberly cannot recover against Vivid. Summary Judgment is appropriate.

III. SUMMARY JUDGMENT STANDARD

A. Traditional Motion for Summary Judgment

Summary judgment is proper when the movant establishes that there are no genuine issues of material fact and proves he is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(a); *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991); *Nixon v. Mr. Property Management*, 690 S.W.2d 546, 548 (Tex. 1985). To prevail on a motion for summary judgment, the movant must offer admissible evidence proving that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law on the issues expressly set out in the motion. TEX.R.CIV.P. 166a(c); *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1998).

Once the movant has established that he is entitled to summary judgment as a matter of law, the burden of proof shifts to the non-movant; the non-movant must present enough proof to raise a genuine issue of material fact. *Casso v. Brand*, 776 S.W.2d 551, 555-56 (Tex.1989).

B. No Evidence Summary Judgment

After adequate time for discovery, a party may move for no-evidence summary judgment on one or more causes of action or defenses. TEX.R.CIV.P. 166a(i). The purpose of a no-evidence summary judgment is to promptly dispose of unmeritorious claims or defenses. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 n.5 (Tex. 1979). Once a sufficiently specific no-evidence motion for summary judgment is filed, the burden of proof is on the non-movant to produce summary judgment evidence raising a genuine issue of material fact on the challenged element or elements. *Gen. Mills Restaurants, Inc. v. Texas Wings, Inc.*, 12 S.W.3d 827, 832 (Tex. App.–Dallas 2000, no pet.). A no-evidence motion for summary judgment is properly granted if the non-movant fails to produce more than a scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of the non-movant's claim on which the non-movant would have the burden of proof at trial. *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70-71 (Tex. App.–Austin 1998, no pet.).

Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion of a fact, and the legal effect is that there is no evidence." *Id.* at 71. The mere filing of a no-evidence motion for summary judgment under Rule 166a(I) shifts the burden to the non-movant to "come forward with enough evidence to take [the] case to [a] jury." *Id.* at 71. See also, *Risner v. McDonald's Corp.*, 18 S.W.3d 903, 907 (Tex. App.–Beaumont 2000, pet. denied)(although the non-movant is not required to marshal its proof, it must present evidence that raises a genuine fact on the challenged elements).

Vivid is entitled to summary judgment because it can conclusively disprove one or more elements of Plaintiff's causes of action against it. Vivid is also entitled to summary judgment

because, by her own admission, there is no evidence to support Wimberly's claims against it.

IV. WIMBERLY'S CLAIM FOR INVASION OF PRIVACY FAILS AS A MATTER OF LAW

Wimberly claims that Vivid "appropriated Plaintiff's name and its value and Plaintiff can be identified from the publication because of her name." Plaintiff's Original Petition at p. 4, ¶17. But Wimberly cannot establish a claim for invasion of privacy by misappropriation as a matter of law because, as she admits, her name has no value associated with it.[2]

"The three elements of invasion of privacy by misappropriation are: (1) the defendant appropriated the plaintiff's name or likeness for the value associated with it; (2) the plaintiff can be identified from the publication; and (3) there was some advantage or benefit to the defendant." *Express One Intern., Inc. v. Steinbeck*, 53 S.W.3d 895, 900 (Tex. App.—Dallas 2001, no pet.).

A. Wimberly Cannot Establish a Claim for Invasion of Privacy Because She Admits in Her Deposition That There is No Value Associated With Her Name.

"Texas law does not protect a name *per se*, but the value associated with it." *Express One Intern., Inc.*, 53 S.W.3d at 900. "Liability for invasion of privacy arises only when the defendant appropriates for his own benefit the commercial standing, reputation, or other values associated with the plaintiff's name." *Id.* In *Matthews v. Wozencraft*, for example, a man sued his wife's book publisher for invasion of privacy for publishing a book about his life story. *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994) (applying Texas law). The court held that because there was no value associated with his life story, he did not have an actionable claim. *Id.* "No one has the right to object merely because his name or his appearance is brought before the public, since neither is in

[2] False light invasion of privacy is not a recognized cause of action in Texas. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994) ("we join those jurisdictions that do not recognize the false light invasion of privacy action"). To the extent Wimberly asserts this claim, it too fails as a matter of law.

any way a private matter and both are open to public observation." *Id.* at 439.

Invasion of privacy is intended to protect the value of an individual's notoriety or skill. *Id.* The rationale being that "[p]rotecting one's name or likeness from misappropriation is socially beneficial because it encourages people to develop special skills, which then can be used for commercial advantage. Associating one's goodwill with a product transmits valuable information to consumers. Without the artificial scarcity created by the protection of one's likeness, that likeness would be exploited commercially until the marginal value of its use is zero." *Id.*

Thus, as a matter of law, Wimberly cannot establish a claim for invasion of privacy because, as she testified, there is no commercial or reputational value associated with her name:

Q. (By Mr. Berg) All right. Have you ever worked in the adult film industry?
A. No.
Q. Never made an adult film, never worked in the adult film industry?
A. No.
Q. The fact is your only connection to the adult film industry is the lawsuit that you filed against Vivid and Ms. Madden?
A. Correct.

Wimberly Depo., p. 24 (objection omitted).

Q. All right. Are you famous, or were you before the publicity about this case?
A. No.
Q. Are you known in any particular industry for anything special?
A. No.

Id. at p. 9-10.

Q. Well, you haven't copyrighted [your name], have you?
A. No.
Q. You don't claim any special ownership interest in it other than it is your name?
A. Look, I don't know if I own the rights to my name, but I do know that I've -- I've been harmed in this situation and I have dealt with stress in this situation and –

Id. at p. 28-29 (objections omitted).

Not only does Wimberly admit that her name has no value associated with it, she admits that

the sole basis for her claim is that it is *her* name and that the use of the name embarrasses her because she does not want her name associated with the adult film industry.

Q. All right. So every day since December 2006, somebody has said something to you about this issue?
A. Maybe not every single day but, I mean, it's a recurring that comes up.
Q. How does that make you feel?
A. Embarrassed.
Q. Why?
A. I don't want my name associated with the porn business. This is embarrassing, and it's disgrading [sic] to me.

Wimberly Depo., p. 25-26 (objections omitted).

Q. What if she had chosen the name Syvette Smith, would that be okay?
A. No.
Q. That wouldn't be okay?
A. No.
Q. Tell the jury why not.
A. Syvette is a unique name. Everyone is going to recognize whether it's Syvette Wimberly or Syvette Smith. It still is harming me.

Wimberly Depo., p. 28 (objections omitted).

Uniqueness alone does not bestow a proprietary interest in Wimberly's name. No goodwill, notoriety, skill, commercial value, or reputational value is associated with it. Her name is placed before the public; there is nothing private about it which would entitle her to protection under Texas law. *See Express One Intern., Inc.*, 53 S.W.3d at 900.

"Without abandoning his real name a person may adopt ***any*** name, style or signature wholly different from his own name by which he may transact business, execute contracts, issue negotiable paper and sue or be sued." *Miller v. Thomason Supply Co.*, 107 S.W.2d 752, 753 (Tex. Civ. App. 1937, no pet.) (emphasis added). "Such assumed or fictitious name may be either a purely artificial name or a name that is or **may be applied to natural persons**." *Id.* (emphasis added). Madden did just that when she entered into a contract with Vivid – she selected a performance name without

abandoning her real name. *See* Ex. 1-A, Contract between Vivid and Madden.

Texas law allows a person to adopt and use *any* name, and will only find an actionable tort when a name is taken for its commercial or reputational value. Because Wimberly admits that her name possesses no commercial or reputational value, there is no genuine issue of material fact and no actionable tort. As a matter of law, Vivid is entitled to summary judgment.

B. Wimberly (now named Keathley) Admits That She Cannot Be Identified From the Publication.

To establish the second element of her invasion of privacy claim, the plaintiff mush also show that she can be identified by the publication. Wimberly admits in her deposition that nobody has ever confused her with the Syvette Wimberly in adult films.

Q. (By Mr. Berg) Okay. So your testimony is that you got contacted by a lot of people?
A. Correct.
Q. None of them confused you with Lara Madden?
A. No.
Q. All right. None of them said, "Syvette, are you doing porn?"
A. No.

Wimberly Depo., p. 23, l. 2-10 (objections omitted).

In fact, Wimberly testified that only her friends and two patients at the dental office where she works were even aware that Lara Madden went by "Syvette Wimberly" in adult films.

Q. Okay. When that patient asked you if you were the real Syvette Wimberly or the fake Syvette Wimberly, what did you say?
A. I said I'm the real Syvette Wimberly.
Q. And that was the end of the conversation?
A. That was the end of the conversation.
Q. And the other patient that asked you I'm surprised, the woman patient who came in, you told her that wasn't you, correct?
A. Yes.
Q. And what did she say?
A. She said -- she's like, "Well, good, **I didn't think you would do anything like that.**"
Q. And that was the end of the conversation?
A. Yeah.

Q. And those are really the only two people who have said anything about this to you?
A. Correct.
Q. Other than your friends?
A. Correct.
Q. Who were joking around?
A. Correct.

Id. at p. 80-81 (emphasis added).

Wimberly confirms that the two patients asked her about this only after her lawsuit was publicized. *See* Wimberly Depo., p. 33, l. 6-8 ("Q. So this was after the publicity surrounding your lawsuit? A. Yes."). *Id.* at p. 33, l. 21-24 ("Q. So the second person who said something to you about it, I just want to pin down the period of time that that was. A. This was four weeks ago.").[3]

Wimberly not only testified that nobody ever confused her with an adult film actress, she also confirmed that noone would ever believe it. *Id.* at p. 33, l. 18-20 ("Q. Sure. Nobody would think that you would do adult films, right? A. Right."). Moreover, prior to July 2, 2008, Syvette Wimberly has married and changed her name to Syvette Keathley. See Ex. 6-A. Thus, it is not likely anyone will identify her from the publication in the future.

To establish an invasion of privacy claim, Wimberly must show that she can be identified by the publication. She has testified that she cannot. Accordingly, Wimberly's claim fails as a matter of law.

C. Wimberly Cannot Establish That Vivid Obtained Any Advantage or Benefit From Use of Her Name

To establish the third essential element of an invasion of privacy claim, the plaintiff must show that the defendant obtained an advantage or benefit from use of the name. *Express One Intern., Inc.*, 53 S.W.3d at 900.

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[3]Suit was filed on September 4, 2007. Wimberly's deposition was taken on February 20, 2008.

In *Matthews v. Wozencraft*, in which the plaintiff claimed his life story was misappropriated by the book publisher, the court held, "[t]he use of his name does not provide value to the book, nor is she using his name to 'endorse' the book to the public, because his name has no independent value. In short, Matthew's life story, while interesting to readers and film-goers, is not a 'name or likeness' for purposes of applying the misappropriation doctrine." *Matthews*, 15 F.3d at 437.

Such is the case here. Even if Wimberly's name were considered "unique" by film viewers, it is does not add value to Vivid's films and is not the basis for Vivid's movie sales. Moreover, Vivid was not the first company to publish Madden's stage name. Schmoeller Aff., ¶ 3. The cleverness or uniqueness of an actor's name is not what draws the interest of Vivid's film audience. Thus, even if Wimberly's allegation that her name is "unique" is taken as true, it is of no consequence; no genuine issue of material fact exists.

Wimberly cannot establish that Vivid appropriated the name to obtain any commercial benefit or advantage from its value – she has testified that it has none. The undisputed evidence shows that Vivid selected Madden before Madden selected the stage name for reasons wholly unrealted to what Madden would later call herself. *See* Vivid Aff., ¶ 4. Vivid did not ask Madden to chose a stage name – she arrived with one. *Id.* at ¶ 8; *see also* Schmoeller Aff., ¶ 3. As established above, Wimberly admits her name was not recognized in any industry or known to have any value. *See* Wimberly Depo., p. 9-10. Without such evidence, Wimberly's claim fails as a matter of law. No genuine issue of material fact exists.

In sum, Wimberly cannot establish any of the three elements of invasion of privacy. No genuine issue of material fact exists with regard to any element as it is Wimberly's own testimony that negates each element of the claim. Thus, summary judgment should be granted on Wimberly's

invasion of privacy claim.

V. VIVID WAS NOT NEGLIGENT

Wimberly claims that Vivid was negligent because it "failed to use ordinary care in ascertaining the accuracy of information given to others; failed in instituting appropriate hiring practices; failed in training its employees; failed to screen its potential employees; [and] failed to use ordinary care in making representations to others." *See* Plaintiff's Original Petition, p. 3, ¶12.

A. Wimberly's Negligence Claim Fails Because (1) As a Matter of Law Vivid Had No Legal Duty to Wimberly, and Because (2) Wimberly Admits she has No Evidence of Negligence.

Underlying Plaintiff's allegations is the presumption by Plaintiff that Vivid owed her a duty. It did not. Put simply, negligence has three elements. They are:

1. a legal duty owed by one person to another;
2. a breach of that duty; and
3. damages proximately resulting from the breach.

El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex. 1987).

Unless a plaintiff demonstrates that a defendant owed it a legal duty, a plaintiff cannot recover. *Graff v. Beard*, 858 S.W.2d 918, 919 (Tex. 1993). The existence of duty is a question of law for the court to decide from the facts surrounding the occurrence in question. *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 312 (Tex. 1983); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). "In determining whether the defendant was under a duty, the court will consider several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. Of all these factors,

foreseeability of the risk is the foremost and dominant consideration." *Greater Houston Transp. Co.*, 801 S.W.2d at 525 (Tex. 1990). "Thus, before liability will be imposed, there must be sufficient evidence indicating that the defendant knew or should have known that harm would eventually befall a victim. Absent such a showing, a defendant is absolved of liability." *Id.* at 526.

For example, in *Greater Houston Transp. Co. v. Phillips*, the Texas Supreme Court analyzed whether Yellow Cab owed a duty of care to a motorist who was shot by a cab driver after a traffic incident. The plaintiff claimed Yellow Cab had a duty to admonish its cab drivers not to carry guns, which was against the law. The Court held Yellow Cab owed no duty to do so because this rare incident was unforeseeable since "the record show[ed] that Yellow Cab had been operating in the City of Houston for nearly twenty years and, in any given year, it is involved in approximately 1000 traffic accidents. During this period there was only one prior incident involving the use of a weapon and the driver in that case was exonerated of any wrongdoing." *Id.* The court further stated, "[g]iven the facts of this case, we cannot conclude that the risk of harm (injury) to others was foreseeable. We hold that as a matter of law, under these facts, that the cab company had no duty to warn its cab drivers not to carry guns." *Id.* at 526-27.

Here, Wimberly's Petition alleges that Vivid "failed to use ordinary care in ascertaining the accuracy of information given to others; failed in instituting appropriate hiring practices; failed in training its employees; failed to use ordinary care in making representations to others." Plaintiff's Original Petition, p. 3, ¶ 12. When asked specifically about each of these allegations in her deposition, Wimberly testified that all of these allegations are grounded on the contention that Vivid owed a duty to inquire whether the stage name Madden selected belonged to anyone she knew, and that Vivid should have confirmed this with a background check or investigation. As a matter of law,

however, no such duty exists. Moreover, Wimberly *admits* she has **no evidence** of the general negligence allegations made in her petition such as negligent hiring and ascertaining the accuracy of information given to others.

Q. (By Mr. Berg) All right. So what you're saying is Vivid, when it asks an actress to pick a stage name and the actress communicates the stage name, Vivid has an obligation, in your opinion, to make sure that that's not actually somebody's name?
A. Well, or somebody they know.

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Q. So what was the information that Vivid gave to others that was inaccurate?
A. Being able to use my name. I don't --
Q. Other than that --
A. Yeah, I don't --
Q. -- that -- that's it?
A. Yes.

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Q. You also alleged that Vivid failed in instituting appropriate hiring practices. What hiring practices or what -- what hiring practices did they not undertake in your view --
Q. -- that they should have?
A. You know, like I said before, asking if they have any -- if they're associated with the name that they're using, if they know anybody that's going to cause harm to. I mean --
Q. Anything else?
A. No.

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Q. Sure. Other than your general allegation that Vivid should not have allowed Ms. Madden to use your name, you have no evidence that it failed to use ordinary care in ascertaining the accuracy of information given to others, correct?
A. Correct.

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Q. Okay. And, again, other than the general allegation that it shouldn't be allowed to have performers select a name that might belong to someone else, you have no evidence that it failed in instituting appropriate hiring practices, correct?
A. I think they did -- well, I think they should ask. I mean, it's a unique name, where did you get that name, what made you pick that name.
Q. And other than that?
A. No. Correct.
Q. Okay. You allege that it failed -- Vivid failed in training its employees. What training did Vivid fail to give to its employees?

A. I'm not sure.
Q. So sitting here, you have no evidence that it failed to train its employees?
A. Correct.

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Q. You allege that it failed to screen its potential employees?
A. Correct.
Q. Tell the jury what you mean by screen.
A. Screen, you know, like I said, before, I mean, just the way she picked my name and she knew me.
Q. So Vivid ought to be required to do a complete background check --
A. Yes.
Q. -- on its performers?
A. Yes.

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Q. You allege that Vivid failed to use ordinary care in making representations to others. Other than the use of your name by Ms. Madden, do you have any evidence that that statement is true?
A. No.

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Q. Tell the jury everything Vivid ought to do, in your opinion, to find out whether the names that its actors and actresses select are actually names of other people.
A. I think when they select a name, you know, if they knew somewhere they were friends with someone in the past, I don't think they should be able to use that name. I mean --
Q. How would Vivid know that?
A. Well, they should have asked her.
Q. What if she didn't say?
A. Well, they should have double-checked with her and asked her and she should have said yes.

Wimberly Depo., p. 35-41 (objections and sidebar omitted).

Wimberly admits she has no evidence that Vivid breached any duty other than one unknown in the law – to inquire and investigate whether every actor has ever met anyone with the name they have selected. As a matter of law, this is not a legal duty. It is not a duty, not only because Vivid had a legal right to publish non-propriety names, but also because the alleged harm was simply not foreseeable.

In the 24 years Vivid has been in business, it has never encountered these facts. Vivid Aff., ¶ 12. It is unreasonable to find a duty where none has been held to previously exist. This duty would impose on all film studios – mainstream and adult – the burden of investigating through a "background check" every stage name to prevent use of a name which might be part of the name of someone the actor once met. Such a duty would chill all film makers' ability to publish.[4]

The facts of this case are even more compelling than *Greater Houston Transp. Co. v. Phillips*. There, the plaintiff alleged Yellow Cab had a duty to prevent an independent contractor or employee from illegally carrying concealed weapon. No duty was imposed by the Texas Supreme Court in that case. Wimberly contends Vivid owed an even greater duty than the defendant in *Greater Houston* – to prevent the **legal** use of any name which might cause offense. A matter of law this duty does not exist Vivid was not negligent.

Even if a duty existed, however, Wimberly admitted in her deposition that she has no evidence of negligence. Wimberly *admitted* that she had no evidence that Vivid "failed to institute appropriate hiring practices," no evidence that Vivid "failed to use ordinary care in ascertaining the accuracy of information given to others," no evidence that Vivid "failed to train its employees," no evidence that Vivid "failed to screen its potential employees," and no evidence Vivid "failed to use ordinary care in making representations to others." [4]*See* Wimberly Deposition, p. 35-41 (expert on p. 13-14 above). Summary judgment is appropriate.

C. Wimberly Cannot Establish Causation

Even assuming Vivid owed a legal duty to Wimberly (which it did not), her claim fails as a matter of law because Wimberly cannot establish that Vivid's conduct proximately caused her

[4]Plaintiffs actual name at that time was Kristen Syvette Wimberly.

damages.[5] She cannot prove that but for Vivid's conduct she would not have suffered any harm (assuming harm was suffered).

"Proximate cause has two elements: cause in fact and foreseeability." *Western Investments, Inc. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005). "These elements cannot be established by mere conjecture, guess, or speculation." *Id.* "The test for cause in fact is whether the act or omission was a substantial factor in causing the injury without which the harm would not have occurred. If the defendant's negligence merely furnished a condition that made the injuries possible, there can be no cause in fact." *Id.* "In other words, even if the injury would not have happened but for the defendant's conduct, the connection between the defendant and the plaintiff's injuries simply may be too attenuated to constitute legal cause." *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995).

Wimberly cannot establish that but for Vivid's hiring Madden, Madden would not have chosen, used, and published the name "Syvette Wimberly." Another company, A-List Talent, Inc. formerly known as Exotic Star Models, published the name Syvette Wimberly before Vivid. Schmoeller Aff., ¶ 3. Wimberly cannot establish that it was Vivid's publication, and not another company's publication, that caused her alleged injury. Wimberly's complaint that Vivid "allowed" Madden to use a name which Madden had a legal right to use is insufficient to establish causation. *Western Investments, Inc.*, 162 S.W.3d at 551. Moreover, Vivid's conduct is just too attenuated to constitute legal cause. *Doe*, 907 S.W.2d at 477.

Wimberly has less than a scintilla of evidence that her claimed stress and anxiety was in any way caused by Vivid. Wimberly testified that she generally stresses about things. Wimberly Depo.,

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[5]Wimberly also admitted a complete lack of damages as discussed in Section D below.

p. 44, l. 16-18 ("Q: So you're sort of generally a person who stresses about things in your life? A. Yes."). Wimberly also admitted that there are other causes of her stress, including the planning of her wedding. *See* excerpt below and Wimberly Depo. at p. 44-45. Wimberly did not even feel the need to discuss the facts underlying this lawsuit with the general practitioner who proscribed her anxiety medication:

> Q. (By Mr. Gordon) Let's -- let's slow down. Anxiety and you just started going to see a therapist for anxiety? [6]
> A. In December because they started getting worse, yes.
> Q. December of '07?
> A. Uh-huh.
> Q. Okay. Is that for the anxiety or for the migraines?
> A. That's for my anxiety.
> Q. Okay. And you'd never seen a therapist before?
> A. No.
> Q. Okay. And did you talk about this lawsuit with the therapist?
> A. No.
> Q. Did you talk about Lara Madden with the therapist?
> A. No.
> Q. But you told the therapist what was going on in your life?
> A. Well, I told him I had a lot of stress going on and, you know, I've been worrying about a lot of stuff.
> Q. What other stress do you have going on?
> A. Well, I mean, everyday stress, work, you know, planning a wedding.

Wimberly Depo, p. 76-78 (sidebar omitted).

With respect to Wimberly's migraines, she admits that they are not caused by Vivid or Madden:

> Q. (By Mr. Berg) I -- I hate to -- to ask this but I have to. With respect to your migraines, are they tied in any way to your menstrual cycle?
> A. Yes, but they also come up with stress –
> Q. Okay.
> A. -- and anxiety.

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[6]Counsel misspoke. Wimberly testified that she has not seen a therapist, but rather a general practitioner. *See* Wimberly Depo. p.43, l. 1-12.

Q. Okay. Is this something you've had all your life or since puberty or?
A. No, they started -- my mom had them so they're hereditary and they started, you know, a couple of years ago.

Id. at p. 50, l. 5-15.

Wimberly does nothing more than speculate that Vivid had anything whatsoever to do with her stress and migraines. As a matter of law, Wimberly cannot establish proximate cause. *Western Investments, Inc.*, 162 S.W.3d at 551. Summary judgment should be granted.

D. Wimberly Has No Injury

To establish a negligence cause of action, a plaintiff must show injury. *See, generally*, *Western Ins v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). As established above, Wimberly testified that the stress and anxiety she claims she suffered was brought on by other causes, including that she is a generally a stressed person, she is planning a wedding, and she has had hereditary migraines for the last two years caused by her menstrual cycle.

Wimberly even admits that she did not discuss the facts underlying this lawsuit –the very facts she now claims were caused by Defendants – with the doctor who proscribed the anxiety medication. *See* Wimberly Depo., p. 76-78. And although she refers to the doctor that proscribed her anxiety medication as a "therapist" in the testimony above, she corrects this by testifying that he is actually a general practitioner:

Q. What anti-anxiety medicine are you on?
A. Lexapro.
Q. How much do you take?
A. 10 milligrams.
Q. Is Dr. --
A. He's a general physician. Is that what you were going to ask?
Q. Yeah. He's a general practitioner? He's not a psychiatrist?
A. No.
Q. You told him about your stress?
A. Uh-huh.

Wimberly Depo., p. 43, l. 1-12.

In Plaintiff's Answers to Interrogatories, Plaintiff does not even mention this general practitioner ("therapist") that she consulted for alleged stress and anxiety. *See* Exhibit 4, Plaintiffs Answers to Interrogatories, ("Interrogatory No. 11: Describe each injury, whether physical, psychological, emotional, economic or otherwise, that you contend was proximately caused by any act of omission of Defendant...Answer: Dr. Stephen Lovitt, 7505 Main, Suite 290, Houston Texas 713-795-0074. Plaintiff saw this doctor for two years because of migraines. He prescribes medicine to remedy this." (sub-parts of question and objection omitted)). These are the migraines she later testifies are hereditary and also caused by her menstrual cycle. *See* Wimberly Depo., p. 50, l. 5-15.

Additionally, Wimberly admits she has incurred no economic injury:

Q. I assume you have insurance that paid for your doctor visits?
A. Yes.
Q. You have insurance that covers your medication?
A. Uh-huh.
Q. And you haven't missed any work?
A. No.
Q. I asked that. You haven't been turned down for any jobs?
A. No.

Wimberly Depo., p. 51, l. 9-19.

Because Wimberly has no evidence of any injury caused by Vivid, she fails to establish the final element of negligence.[7] Thus as a matter of law, Vivid is entitled to summary judgment on Wimberly's negligence claim.

[7]Wimberly's attorney's fees are not a recoverable damage. The general rule in Texas is that each litigant must pay its own attorney's fees. *Turner v. Turner*, 385 S.W.2d 230, 233 (Tex. 1964). Recovery of attorney's fees from the adverse party is allowed only when the recovery is permitted by statute, by a contract, or under equity. *Holland v. Wal-Mart Stores*, 1 S.W.3d 91, 95 (Tex. 1999). Attorney's fees for negligence, invasion of privacy, and intentional infliction of emotional distress are not recoverable by statute. *See* TEX. CIV. PRAC. REM. CODE § 38.001.

E. To the Extent Wimberly Claims Negligent Hiring Against Vivid, Her Claim Fails as A Matter of Law Because She Did No Suffer a Physical Injury (or any injury)

Wimberly cannot establish a negligent hiring claim against Vivid as a matter of law because she suffered no physical injury – a required element of a negligent hiring claim. "Under the tort of negligent hiring the duty of the employer or contractee extends only to prevent the employee or independent contractor from causing **physical harm** to a third party." *Sibley*, 998 S.W.2d at 403-04 (emphasis added) (holding, "[p]hysical injury is not an allegation raised in this case. Therefore, if this allegation is the one brought by Sibley, there is no evidence to support it."); *see also Verinakis v. Medical Profiles, Inc.*, 987 S.W.2d 90, 97-98 (Tex. App.—Houston [14 Dist.] 1998, no pet.) (holding that "because Meditest and Medical Profiles established as a matter of law that Costas did not suffer a serious bodily injury giving rise to a recovery for mental anguish damages from the breach of any duty owed under a negligence cause of action, the trial court did not err in granting summary judgment on the Verinakises' claims for vicarious liability and negligent hiring and supervision.").[8]

To the extent that Wimberly's claims for negligence are grounded on a negligent hiring theory, her claim fails as a matter of law because she has no physical injury (in fact, as established above, she has no injury *at all*). Wimberly does not purport to have a physical injury. Wimberly only alleges that she has suffered "embarrassment, loss of enjoyment of life, inconvenience, emotional distress, and mental anguish" – none of which are physical. *See* Plaintiff's Original Petition at p. 4, ¶15.

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[8] Vivid notes that there is a split among the Texas Courts of Appeals on the physical injury requirement. While this holding stands in the Houston and Texarkana Court of Appeals, other courts have disagreed. *See e.g. Gonzales v. Willis*, 995 S.W.2d 729, 739 (Tex. App.—San Antonio 1999, no pet.) (requiring a "legally cognizable injury."). Vivid has found no cases from the Texas Supreme Court or Southern District of Texas disagreeing with or overruling the holdings in *Verinakis* and *Sibley*. More importantly, as established above, Plaintiff has not suffered any injury.

Even if Wimberly's allegations of injury are taken as true, Wimberly has suffered no physical injury proximately caused by Vivid – an essential element of a negligent hiring claim. Because Wimberly's negligence claim against Vivid may be based on a negligent hiring theory, it fails as a matter of law.

VI. WIMBERLY CANNOT ESTABLISH INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

As a matter of law, Vivid's conduct was not extreme and outrageous, nor did it cause Wimberly to suffer severe emotional distress. "To recover for this tort, the plaintiff must prove: 1) the defendant acted intentionally or recklessly; 2) the conduct was extreme and outrageous; 3) the defendant's actions caused the plaintiff emotional distress; and 4) the resulting emotional distress was severe." *Sibley*, 998 S.W.2d at 404.

A. As a Matter of Law Vivid Was Not Reckless

The "intent" element of this tort requires that the actor either intended to cause severe emotional distress or that severe emotional distress be the primary risk created by the actor's conduct. *Standard Fruit and Vegetable Co. v. Johnson*, 985 S.W.2d 62, 63 (Tex. 1998). Wimberly alleges that Vivid "recklessly chose to accept and heavily publicize Plaintiff's name as though it was Defendant Madden's name and without regard to the true person and identity of the name in question." Plaintiff's Original Petition, p. 5, ¶ 21. Even if this allegation is taken as true, it does not constitute reckless behavior.

The publishing of every natural name not known to be associated with any property right simply cannot be considered reckless conduct. *See Twyman v. Twyman*, 855 S.W.2d 619, 624 (Tex. 1993) ("An actor is reckless when he knows or has reason to know ... of facts which create a high degree of risk of ... harm to another, and deliberately proceeds to act, or fails to act, in conscious

disregard of, or indifference to that risk."). And the harm anticipated must be emotional distress. *See Standard Fruit*, 985, S.W.2d at 67-68. Vivid did not have reason to anticipate a high degree of risk of emotional distress by allowing an actor to publish a stage name that she has a legal right to use, and which she and others had published in the past. Wimberly's allegation that Vivid was reckless fails as a matter of law.

B. As a Matter of Law Vivid's Conduct Was Not Extreme and Outrageous

The "outrageous" element is meant to require behavior that is beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Sibley*, 998 S.W.2d at 404. Whether the defendant's conduct may be regarded as extreme and outrageous by reasonable people is a matter for the court to decide. *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003). Generally, insensitive or rude behavior is not considered to be extreme and outrageous. *Mattix-Hill v. Reck*, 923 S.W.2d 596, 597 (Tex. 1996). A defendant's conduct is not extreme and outrageous when the defendant asserts a legal right in a permissible way, even if the defendant is aware that this assertion is certain to cause emotional distress. *See e.g. Hogan v. Hearst Corp.*, 945 S.W.2d 246, 251 (Tex. App.—San Antonio 1997, no writ) (reporters acted within legal rights by publishing information about the plaintiff's arrest, which was available from public records).

Vivid's conduct was not extreme and outrageous as it was acting within its legal right to publish an unprotected name. Its conduct does not even amount to rude and insensitive behavior (which is as a matter of law not extreme and outrageous) given the fact that there is no relationship between Vivid and Wimberly, Vivid had no duty to determine whether Madden had ever met anyone named Syvette Wimberly, and the name had no independent value. Simply failing to inquire whether Madden had ever met anyone with the name she selected cannot amount to conduct that is atrocious

and beyond all possible bounds of decency. *See Tiller*, 121 S.W.3d at 713. Summary Judgment is appropriate.

C. As a Matter of Law, Wimberly's Alleged Emotional Distress Was Not Severe

As a matter of law, Wimberly has not suffered severe emotional distress. "Severe emotional distress means distress so severe that no reasonable person could be expected to endure it without undergoing unreasonable suffering." *Sibley*, 998 S.W.2d at 404. In *Benavides v. Moore*, for example, the plaintiffs' claim for intentional infliction of emotional distress for sexual harassment was dismissed on summary judgment because the plaintiff's deposition testimony established that her distress was not severe enough such that a reasonable person could not endure. *Benavides v. Moore*, 848 S.W.2d 190, 195-96 (Tex. App.—Corpus Christi 1992, writ denied) ("Appellant testified that she only felt stress and anguish from her termination.... her admission that she had not consulted mental health professionals and that she had no intention of doing so, and her tangential response to the inquiry as to whether she could work out the stress and anguish by herself, indicate that whatever actual distress appellant suffered, it did not rise to the level that a reasonable person could not be expected to endure.").

Wimberly's distress was so insignificant that she did not see a mental health professional. *See* Wimberly Depo., p. 43, l. 1-12. Although she testified that she saw a doctor who prescribed her anxiety medication, she admitted that the reason for the prescription had nothing to do with Vivid or Madden. *See* Wimberly Depo., p. 77-78 (deposition excerpt, p. 17 above).

When asked at her deposition to describe all of her alleged injuries, Wimberly stated:

> Q. (By Mr. Berg) All right. Tell the jury how you've suffered loss of enjoyment of life.
> A. Well, like I said, whenever I go places and I run into people, you know, it's a joke or people bring it up and I always have to worry when I meet somebody new if it's going to cross their mind, and that's embarrassing.

Q. Anything else?
A. I mean, you know, I've -- I've been stressed over this. You know, it's -- it's just embarrassing. I have anxiety over this. I want it to be over.
Q. Have you ever applied for a job that you didn't get because of this?
A. No, I've been with the same company that I've been working with so I have not applied to another job.
Q. Have you tried to get into another school that wouldn't let you in?
A. No.

Wimberly Depo., p. 41-42.

Q. (By Mr. Gordon) Okay. You also say that you've been inconvenienced. How have you been inconvenienced?
A. Well, like I said before, going to places and being asked about it's -- it's annoying. You get tired of hearing jokes or people making -- talking about it.
Q. When was the last time there was a joke?
A. I mean, you know, my friends joke about it and it's -- you know, you get tired of it.
Q. Have you told your friends?
A. Yes, I have.
Q. What did you tell them?
A. I told them it's not funny and, you know, I don't want to joke or talk about it.
Q. And yet they continue to harass you about it?
A. Well, no, they apologized.

Id. at p. 75

Stress caused by annoyance and embarrassment is not, as a matter of law, so severe that no person could endure it without undergoing unreasonable suffering. *Sibley*, 998 S.W.2d at 404. The level of stress, anxiety and inconvenience alleged in Wimberly's testimony at best amounts to general embarrassment and annoyance. Her emotional distress cannot be severe when, as testified, she was merely subjected to discussions about the matter and jokes by her friends (who quickly apologized when she let them know it was not funny).

As a matter of law, Vivid is entitled to summary judgment on Wimberly's claim for intentional infliction of emotional distress.

VII. CONCLUSION AND PRAYER

Syvette Wimberly's claims for invasion of privacy, negligence, and intentional infliction of emotional distress each fail as a matter of law. Wimberly has not provided evidence of every element of her claims and in some instances provides testimony negating essential elements. Vivid Entertainment, L.L.C. prays that the Court grant summary judgment against Plaintiff K. Syvette Wimberly on all claims and for all other relief to which it may be justly entitled at law or in equity.

A proposed Order is attached.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 10th day of July, 2008, I served the foregoing via personal delivery service as follows:

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