

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED *cm*

2014 MAY -8 PM 1:00
GATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

MELINDA HEISS and
GEORGE HEISS,
Plaintiffs,

v. Civil Action No. 14-C-685
Judge Carrie Webster

ALBERT BRAY CARY, JR., individually, and
WEST VIRGINIA MEDIA HOLDINGS, LLC,
a Delaware corporation,
Defendants.

ANSWER OF ALBERT BRAY CARY, JR.

Now, comes the Defendant, ALBERT BRAY CARY, JR., by counsel, William C. Forbes, Forbes Law Offices, PLLC, and pursuant to the West Virginia Rules of Civil Procedure, hereby timely files his answer to the plaintiffs complaint and in response and defense to each numbered paragraph of the complaint states as follows:

FIRST DEFENSE

In response to each numbered paragraph of the complaint, Defendant states as follows:

COUNT ONE: THE PARTIES

1. Defendant is without sufficient information to either admit or deny the residency of plaintiffs in Kanawha County as alleged in paragraph 1 of the complaint.
2. Defendant admits the allegations contained in paragraph 2 of the complaint..
3. Defendant admits the allegations contained in paragraph 3 of the complaint.

COUNT TWO: JURISDICTION AND VENUE

4. Defendant restates and incorporates by reference each and every response set forth in Paragraphs 1 through 3 above.

5. Defendant denies any and all allegations contained in paragraph 5 of the complaint and demands strict proof thereof.

6. Defendant denies the allegations contained in Paragraph 6 of the complaint and demands strict proof thereof.

COUNT THREE: Alleged Unlawful Restraint

7. Defendant restates and incorporates by reference each and every response set forth in all the preceding Paragraphs above.

8. Defendant denies that the date and time of the alleged meeting between Ms. Heiss and Defendant occurred on April 9, 2012, at 8:00 a.m., and demands strict proof thereof. Defendant admits that he met with Ms. Heiss, but denies that such meeting occurred on that date and time. Defendant is without sufficient information to either admit or deny the employment status of Melinda Heiss with Portamedic and therefore denies the same and demands strict proof thereof. Defendant admits the remaining allegations only as to the extent and purpose of his appointment with Melinda Heiss as contained in paragraph 8 of the complaint.

9. Defendant admits the allegations contained in paragraph 9 of the complaint, but denies that the same occurred on April 9, 2012 at 8:00 a.m..

10. Defendant denies any and all allegations contained in paragraph 10 of the complaint and demands strict proof thereof.

11. Defendant denies any and all allegations contained in paragraph 11 of the complaint and demands strict proof thereof.

12. Defendant denies any and all allegations contained in paragraph 12 of the complaint and demands strict proof thereof.

13. Defendant denies any and all allegations contained in paragraph 13 of the complaint and demands strict proof thereof.

14. Defendant denies any and all allegations contained in paragraph 14 of the complaint and demands strict proof thereof.

15. Defendant denies any and all allegations contained in paragraph 15 of the complaint and demands strict proof thereof.

Count Four: Alleged Battery

16. Defendant restates and incorporates by reference each and every response set forth in all preceding Paragraphs above.

17. Defendant is without sufficient information to either admit or deny the allegations contained in paragraph 17 of the complaint, therefore, Defendant denies the same and demands strict proof thereof.

18. Defendant denies any and all allegations contained in paragraph 18 of the complaint and demands strict proof thereof.

19. Defendant denies any and all allegations contained in paragraph 19 of the complaint and demands strict proof thereof.

Count Five: Alleged Battery

20. Defendant restates and incorporates by reference each and every response set forth in all preceding Paragraphs above.

21. Defendant denies any and all allegations contained in paragraph 21 of the complaint and demands strict proof thereof.

22. Defendant is without sufficient information to either admit or deny the allegations contained in paragraph 22 of the complaint, and therefore denies the same and demands strict proof thereof.

23. Defendant is without sufficient information to either admit or deny the allegations contained in paragraph 23 of the complaint, and therefore denies the same and demands strict proof thereof.

24. Defendant denies any and all allegations contained in paragraph 24 of the complaint and demands strict proof thereof.

25. Defendant denies any and all allegations contained in paragraph 25 of the complaint and demands strict proof thereof.

26. Defendant denies any and all allegations contained in paragraph 26 of the complaint and demands strict proof thereof.

Count Six: Alleged Intentional Infliction of Emotional Distress

27. Defendant restates and incorporates by reference each and every response set forth in all preceding Paragraphs above.

28. Defendant is without sufficient information to either admit or deny the allegations contained in paragraph 28 of the complaint, and therefore denies the same and demands strict proof thereof.

29. Defendant is without sufficient information to either admit or deny the allegations contained in paragraph 29 of the complaint, and therefore denies the same and demands strict proof thereof.

30. Upon information and belief, Defendant admits that he received a urine collection cup from Ms. Heiss. Defendant is without sufficient information to either admit or deny the

remaining allegations contained in paragraph 30 of the complaint, and therefore, denies the same and demands strict proof thereof.

31. Defendant denies any and all allegations contained in paragraph 31 of the complaint and demands strict proof thereof.

32. Defendant denies any and all allegations contained in paragraph 32 of the complaint and demands strict proof thereof.

33. Defendant denies any and all allegations contained in paragraph 33 of the complaint and demands strict proof thereof.

34. Defendant denies any and all allegations contained in paragraph 34 of the complaint and demands strict proof thereof.

35. Defendant denies any and all allegations contained in paragraph 35 of the complaint and demands strict proof thereof.

36. Defendant denies any and all allegations contained in paragraph 36 of the complaint and demands strict proof thereof.

37. Defendant denies any and all allegations contained in paragraph 37 of the complaint and demands strict proof thereof.

Count Seven: Alleged Loss of Consortium

38. Defendant restates and incorporates by reference each and every response set forth in all preceding Paragraphs above.

39. Defendant denies any and all allegations contained in paragraph 39 of the complaint and demands strict proof thereof.

Count Eight: Alleged Vicarious Liability of Defendant WVMH

40. Defendant restates and incorporates by reference each and every response set forth in all preceding Paragraphs above.

41. Upon information and belief, Defendant admits the allegations contained in Paragraph 41 of the complaint.

42. Defendant admits that he met with Ms. Heiss in the offices of WOWK-TV at 350 Quarrier Street, Charleston, Kanawha County, West Virginia 25301. Defendant denies the remaining allegations as the same relate to an entity other than this Defendant, and as such require no response. To the extent that such remaining allegations could be construed to require a response, this Defendant denies the same and demands strict proof thereof.

43. The factual assertions contained within paragraph 43 of the complaint, deal with the limited liability company of WVMH, which is a separate and distinct legal entity from this Defendant, and as such require no response. Paragraph 43 of the complaint further appears to assert legal conclusions and factual assertions regarding the limited liability company of WVMH, which entity is legally separate and distinct from this Defendant, therefore as said paragraph makes no allegations against this Defendant, no response is necessary. To the extent that Paragraph 43 could be construed to make allegations against this Defendant, the same are denied, and this Defendant demands strict proof thereof.

44. Defendant denies any and all allegations contained in paragraph 44 of the complaint and demands strict proof thereof.

Count Nine: Alleged Punitive Damages

45. Defendant restates and incorporates by reference each and every response set forth in all preceding Paragraphs above.

46. Defendant denies any and all allegations contained in paragraph 46 of the complaint and demands strict proof thereof.

47. Defendant denies any and all allegations contained in paragraph 47 of the complaint and demands strict proof thereof.

SECOND DEFENSE, RULE 12(b)(6) MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, the Defendant moves this Honorable Court to dismiss this action as plaintiffs' complaint fails to state a cause of action upon which relief may be granted. Plaintiffs' claims allege emotional distress without physical injury, and as such the same are insufficiently pled under the West Virginia Rules of Civil Procedure to sustain such a cause of action. Therefore, the complaint is insufficiently pled under Rule 8 and Rule 9 of the W.Va. Rules of Civil Procedure, and fails to state a claim against the Defendant upon which relief may be granted. Therefore, the complaint should be dismissed pursuant to Rule 12(b)(6) of the W.Va. Rules of Civil Procedure.

Wherefore, the Defendant prays this Court will dismiss this action with prejudice under Rule 12(b)(6) and award him judgment against the plaintiffs for his attorneys' fees and costs incurred in defense of this action.

THIRD DEFENSE

Defendant hereby denies each and every allegation in the complaint not specifically admitted herein.

FOURTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the applicable statute of limitations and/or doctrine of laches.

FIFTH DEFENSE

Plaintiffs' claims are barred in whole or in part, because of the doctrines of contributory negligence and/or assumption of risk.

SIXTH DEFENSE

Plaintiff, by her actions is stopped and/or has waived any right to maintain this action against the Defendant.

SEVENTH DEFENSE

Plaintiff's causes of action are barred because, during all relevant times, Defendant acted reasonably and prudently in accordance with all applicable laws and regulations.

EIGHTH DEFENSE

The alleged damages suffered by Plaintiff, if any, were not proximately caused by any act or omission of Defendant.

NINTH DEFENSE

Plaintiff is barred from recovery against Defendant because any alleged damages sustained by Plaintiff were the proximate result of her own negligence, gross negligence, wanton or reckless acts, omissions or conduct of Plaintiff or intervening third parties, or were the direct and proximate result of any superseding cause.

TENTH DEFENSE

Plaintiff, at all relevant times, failed to take reasonable action to mitigate any injuries and/or damages alleged in the complaint.

ELEVENTH DEFENSE

In the likely event that the evidence supports such a defense, Defendant asserts all defenses in equity, including but not limited to, waiver, estoppels, laches, unjust enrichment, and the doctrine of unclean hands.

TWELFTH DEFENSE

Defendant incorporates by reference each and every affirmative defense available to him, which is required or permitted to be pled affirmatively by Rule 8 and 12 of the W.Va. Rules of Civil Procedure that discovery and/or investigation may reveal applicable and pertinent to his defense in this action.

THIRTEENTH DEFENSE

Defendant reserves the right to supplement its defenses after it has had opportunity to conduct discovery in this matter. Defendant reserves and asserts any other affirmative defenses that additional discovery and/or investigation may reveal as applicable and pertinent to his defense, including, but not limited to, the doctrine of after-acquired evidence at the time of trial, and expressly reserves the right to assert such defenses as the facts become known.

FOURTEENTH DEFENSE

Plaintiffs' complaint fails to allege, and Plaintiffs cannot prove, the necessary predicates or conditions in order to establish the threshold requirements for the recovery of punitive damages.

FIFTEENTH DEFENSE

Plaintiffs' claims which seek punitive damages violate the Defendant's constitutional right to freedom of speech and further violate Defendant's right to equal protection under the law and/or are otherwise unconstitutional under the Fourteenth Amendment to the United States

Constitution and Article III, Section 1, and all other applicable provisions of the Constitution of the State of West Virginia, including but not limited to, the protection from “excessive fines” and to proportional penalties as provided in Article III, Section 5 of the Constitution of the State of West Virginia.

ASSERTION OF ADDITIONAL AFFIRMATIVE DEFENSES

Defendant hereby reserves the right to plead or assert any defenses provided pursuant to Rule 8(c) of the West Virginia Rules of Civil Procedure, and further reserves the right to assert any and all additional affirmative defense or avoidance that may become warranted as a result of discovery or the evidence adduced at trial.

Defendant is not liable to plaintiffs for any of the alleged claims contained within the complaint as the Defendant specifically denies that plaintiff Melinda Heiss suffered any physical injury or emotional distress, and Defendant further specifically denies that the plaintiffs incurred any damages. Defendant asserts the following affirmative defenses in defense of this action, including but not limited to the affirmative defenses of statute of limitations, intervening causation, superseding causation, comparative negligence of the plaintiff and/or other individuals, contributory negligence of plaintiff and/or other individuals, and failure of plaintiff(s) to mitigate damages, and all other affirmative defenses available under the West Virginia Rules of Civil Procedure.

The Defendant hereby asserts and/or reserves the right to assert the affirmative defenses of waiver, estoppel, laches, statute of limitations, unclean hands, failure of consideration, comparative negligence, failure by Plaintiff to exercise ordinary care, proximate cause, statute of limitations, assumption of risk, comparative assumption of risk, contributory negligence, illegality, license and release, failure to mitigate damages, intervening causation, superseding

cause, and any other matter constituting an avoidance or affirmative defense under Rules 8, 9, and 12 of the West Virginia Rules of Civil Procedure and/or applicable law, that may become known during the course of discovery. Further the Defendant asserts, inasmuch may be applicable, the affirmative defenses of contributory negligence, comparative negligence, and all other defenses that may become apparent during discovery. The Defendant reserves the right to raise any other defenses that may become apparent during the course of discovery or at trial.

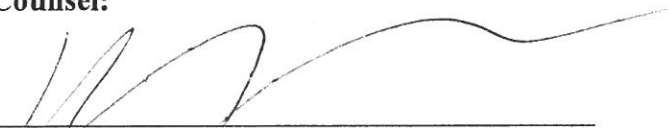
PRAYER

Defendant, Albert Bray Cary, Jr., denies that he is liable to plaintiffs for any of their claims, and Defendant further denies that plaintiffs are entitled to any of the relief prayed for in their complaint.

WHEREFORE, having answered the allegations in plaintiffs' complaint, the Defendant, Albert Bray Cary, Jr. prays that this Honorable Court will dismiss this action with prejudice, and award the Defendant judgment against the plaintiffs for reasonable attorneys' fees and expenses incurred in defense of this action, and that he be awarded such further relief as justice and equity may require.

DEFENDANT DEMANDS A JURY TRIAL ON ALL ISSUES SO TRIABLE

Respectfully submitted,
ALBERT BRAY CARY, JR., Defendant,
By Counsel:



William C. Forbes, Esquire (WVSB ID# 1238)
W. Jesse Forbes, Esquire (WVSB ID# 9956)
FORBES LAW OFFICES, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301
Phone: (304) 343-4050; Fax: (304) 343-7450

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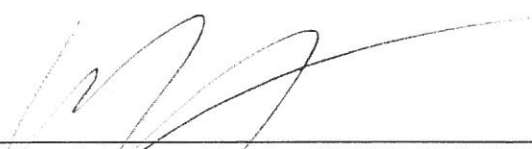
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Defendants.

CERTIFICATE OF SERVICE

I, William C. Forbes, counsel for the Defendant, ALBERT BRAY CARY, JR., hereby certify that the foregoing "*Answer of Albert Bray Cary, Jr.*" was duly served upon all interested parties, via facsimile transmission on this the 8th day of May, 2014, addressed as follows:

W. Edward Rebrook, III, Esq.
Michael T. Clifford, Esq.
Richelle K. Garlow, Esq.
723 Kanawha Blvd. East
Union Bldg., Suite 1200
Charleston, WV 25301
Phone: 304-720-7660; **Via Facsimile to: 304-720-7753**
Counsel for Plaintiffs

Benjamin Bailey, Esq.
Ricklin Brown, Esq.
Mary Pat Statler, Esq.
Bailey & Glasser, LLP
209 Capitol Street
Charleston, WV 25301
Phone: 304-345-6555; **Via Facsimile to: 304-342-1110**
Counsel for Defendant, West Virginia Media Holdings, LLC



William C. Forbes, Esquire (WVSB ID# 1238)
W. Jesse Forbes, Esquire (WVSB ID# 9956)
FORBES LAW OFFICES, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301
Phone: 304-343-4050; Fax: 304-343-7450