
The operative pleading is the fourth amended complaint filed on September 9, 2022. Plaintiff Julie DiSieno (plaintiff or DiSieno) lives in a rural area of Santa Barbara County. She operates a non-profit wildlife rescue entity on her real property named Animal Rescue Team ("ART"), which she claims is the source of the hostility between she and her neighbors. Her real property is adjacent to real property belonging to Richard Nohr and Mary Nohr ("Nohrs"). Former defendant Dennis Jay Bardessono lives at the end of the road.

The parties have a lengthy history. Based on this record, it appears that on or about April 1, 2017, the Nohrs installed a video-only security camera on the north side of their house that was adjacent to plaintiff's property; the camera pointed to the east along the common border line between the properties. (UMF No. 7.)[1] On December 1, 2017, criminal charges were filed against DiSieno alleging that she stalked and made criminal threats against both Mary and Richard Nohr. (Case No. 17CR12409.) A restraining order issued. In 2018, charges related to possession of a firearm in violation of the restraining order were filed (Case No. 18CR01950) as well as charges of assault with a deadly weapon (a truck) on Dennis Bardessono. (Case No. 18CR03961.) All cases were consolidated.[2] On May 25, 2018, she was found guilty of disobeying a court order (Penal Code §166(a)(4), possession of a deadly weapon/police baton (Penal Code §22210) and unlawful firearm activity in violation of restraining order (Penal Code §29825(b).) The court ordered probation for two years with orders not to harm, threaten, molest, or annoy Bardessono. On February 2, 2020, the court ordered formal probation to continue. It appears to remain in place.

On July 22, 2020, plaintiff filed a complaint against the Nohrs and Bardessono. The operative pleading is the fourth amended complaint (FAC), which alleges the Nohrs and Bardessono have resented the fact Plaintiff operates her non-profit animal rescue operation on her property, and they have made – and continue to date to make – a plethora of false and harassing complaints in an effort to harass, annoy and hurt Plaintiff and/or ART. She alleges the Nohrs unlawfully eavesdropped on and recorded her confidential communications in violation of Penal Code section 632(a); that the Nohrs invaded her privacy by sharing photos and videos of plaintiff "inside her house, in various stages of undress and other reposes"

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[1] The separate statement contains facts that were repeated in support of the separate issues raised therein. The court has made an effort to recite the fact from the relevant issue, but for purposes of the factual background, the court has recited the fact as it first appears in the separate statement.
[2] The court takes judicial notice of these cases on its own motion. The parties cite evidence from Case No. 17CR12409.

with Bardessono; and, that the Nohrs made false claims about her, causing her to suffer severe emotional distress.

The fourth amended complaint alleges: (1) invasion of privacy in violation of Penal Code section 632 against the Nohr defendants ;(2) invasion of privacy by public disclosure of private facts against all defendants;[3] and (3) intentional infliction of emotional distress against all defendants. Punitive damages are sought in conjunction with the third cause of action.

On June 27, 2023, the court granted former defendant Jay Bardessono's motion for summary judgment. Mr. Bardessono was named defendant only as to the second and third causes of action, and the court granted the motion because the statute of limitations bar provided a complete defense to both causes of action. Judgment was entered for Mr. Bardessono on July 28, 2023.

The Nohrs now move for summary judgment or adjudication in the alternative of each cause of action. They contend the first, second, and third causes of action fail because there are no issues of disputed fact to indicate their liability. They also contend summary judgment/adjudication is appropriate (1) as to the second cause of action because it is barred by the applicable statutes of limitations as matter of law; and (2) as to the third cause of action because the Nohrs' communications with government agencies, as alleged, are absolutely privileged per Civil Code section 47, subdivision (b). Finally, the Nohrs contend summary adjudication is appropriate as to any claim for punitive damages because there are not issues of disputed fact concerning their liability based on malice, fraud or oppression, as required under Civil Code section 3294, subdivision (a).

Opposing Separate Statement

The moving and opposing separate statements in support of a motion for summary judgment must follow a specific format. (Calif. Rules Court, rule 3.1350(h).) In particular, the responsive statement must contain two columns: one to recount the moving party's undisputed material fact and supporting evidence, and one to identify the response (e.g., disputed or undisputed) and supporting evidence, if any. (Calif. Rules Court, rule 3.1350(h).)

Here, plaintiff has submitted a document titled "Plaintiff's Statement of Undisputed Material Facts in Opposition to Defendant's Motion for Summary Judgment." In spite of the document title, this appears to be a response to the separate statement submitted in support of the motion. It has three columns as depicted below:

[3]Plaintiff is asserting more than one privacy right and a person's right to privacy can be violated in more than one way. (See CACI 1809, Directions for Use.)

Defendants' List of Undisputed Material Facts	Evidence/Source	Plaintiff's Response to Defendant's Undisputed Material Fact
1. Plaintiff filed her Original Complaint on July 22, 2020.	Plaintiff's Original Complaint	Undisputed.
2. Plaintiff filed her Fourth Amended Complaint ("FAC") on September 9, 2022.	Plaintiff's Fourth Amended Complaint	Undisputed.

This does not comply with CRC, rule 3.1350(h). "The separate statement must be in the two-column format specified in (h)." (Calif. Rules Court, rule 3.1350(d)(3).)

Turning to an example where the fact is purportedly disputed, the court finds as follows:

	MSJ.	
9. The video-only security camera never captured any images of plaintiff inside her home.	Plaintiff's Depo & Criminal Trial Transcripts; Declarations of Mary & Richard Nohr ISO MSJ; Declaration of Julia DiSieno ISO Opp to MSJ.	Disputed.
10. Neither of the Nohrs has ever taken any photographs or videos of plaintiff inside of plaintiff's home. 11. SAME	Plaintiff's Depo & Criminal Trial Transcripts; Declarations of Mary & Richard Nohr ISO MSJ; Declaration of Julia DiSieno ISO Opp to MSJ.	Disputed.
12. Neither of the Nohrs has ever shared with defendant Bardessono, or anyone else, any videos or photographs of plaintiff "inside her house, in various stages of undress and other reposes" as alleged in the FAC.	Plaintiff's Depo & Criminal Trial Transcripts; Declarations of Mary & Richard Nohr ISO MSJ; Declaration of Julia DiSieno ISO Opp to MSJ.	Disputed.

Assuming the middle column is intended to reflect evidence in support of the factual dispute, it lacks the required specificity. "Citation to the evidence in support of each material fact must include reference to the exhibit, title, page, and line

numbers." (Calif. Rules Court, rule 3.1350(d)(3).) No such specificity is found here, leaving the court to the task of identifying the location of the evidence that supposedly raises a dispute. That it will not do.

Moreover, in order to ascertain whether the evidence cited is, in fact, cited in support of the dispute, the court must compare the moving separate statement with the opposing separate statement to ascertain whether the evidence was cited in support of the motion. This is also necessary in order to locate evidence cited in support of the motion; while defendants included the required specificity in their moving separate statement, plaintiff failed to import that information into her opposing separate statement. Where the court should have been able to identify all the evidence from the opposing separate statement, it had to consult both the moving separate statement and, often, the memorandum of points and authorities in opposition or opposing declarations to locate the reference. This entirely defeats the purpose of the separate statement:

> "[T]he rules dictating the content and format for separate statements submitted by moving and responding parties 'permit trial courts to expeditiously review complex motions for ... summary judgment to determine quickly and efficiently whether material facts are disputed.' (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335, 282 Cal.Rptr. 368; see *also Parkview Villas, supra*, 133 Cal.App.4th at p. 1210, 35 Cal.Rptr.3d 411.) That goal is defeated where, as here, the trial court is forced to wade through stacks of documents, the bulk of which fail to comply with the substantive requirements of section 437c, subdivision (3), or the formatting requirements of rule 342,[4] in an effort to cull through the arguments and determine what evidence is admitted and what remains at issue. The realization of this goal is so important that the Legislature has determined '[f]ailure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion.'"(§ 437c, subd. (3).)"
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> (*Collins v. Hertz Corp*. (2006) 144 Cal.App.4th 64, 72–73.)

When a moving party makes the required prima facie showing, the opposing party's failure to comply with this requirement may, in the court's discretion, constitute a sufficient ground for granting the motion. (Code Civ. Proc. § 437c(b)(3); see *Oldcastle Precast, Inc. v. Lumbermens Mut. Cas. Co.* (2009) 170 Cal.App.4th 554, 568; *Kojababian v. Genuine Home Loans, Inc*. (2009) 174 Cal.App.4th 408, 418; *Batarse v. Service Employees Int'l Union Local 1000* (2012) 209 Cal.App.4th 820, 831-833 (collecting cases).)

[4] Rule 3.1350 was formerly Rule 342.

However, the court may not grant the motion unless it first determines that the moving party has met its initial burden of proof. (*Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1085-1086; *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 160—plaintiff's failure to file timely opposition separate statement not ground for summary judgment where defendant's separate statement did not address material fact in complaint.)

Thus, the court examines whether the moving party has met its burden of proof.

Merits

A defendant moving for summary judgment must "show" that either:

- one or more elements of the "cause of action … cannot be established"; OR
- there is a complete defense to that cause of action.

(Code Civ. Proc., § 437c, subd. (p)(2).)

Once defendant meets this burden, the burden shifts to plaintiff to prove the existence of a triable issue of fact regarding that element of its cause of action or that defense. If plaintiff is unable to do so, defendants are entitled to judgment as a matter of law. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 780-781; *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.)

1. First Cause of Action for Invasion of Privacy in Violation of Penal Code section 632

In order to prevail on this claim, plaintiff must establish (1) that the Nohrs intentionally eavesdropped on/recorded plaintiff's private conversations by using an electronic device; (2) that plaintiff had a reasonable expectation that the conversation was not being overheard or recorded; and (3) that the defendants did have consent to eavesdrop on/record it. (Penal Code, §632, subd. (a); CACI 1809.)

Here, the Nohrs argue that plaintiff cannot establish the first element, e.g., that they intentionally eavesdropped on or recorded plaintiff's private conversations by using an electronic device. The Nohrs submit evidence that the audio-video camera they installed on their property on August 5, 2017, did not amplify sounds, it only recorded it and it was only capable of recording verbal statements made by people standing very close to the border between the two properties and only if the person was talking very loudly and directed their voice towards the Nohrs' home. The only recordings of plaintiff captured by the audio-video camera were when she was yelling or screaming. (UMF Nos. 53-54, 56.) In fact, the Nohrs state they installed the audio-video camera to record plaintiff when she yelled/shouted obscenities and threats directed towards them. (UMF 55.)

The very specific question raised here is whether any audio captured by the audio-video camera was a private conversation that plaintiff had a reasonable expectation was not being overheard. "[A] conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 776-777.) The Nohrs candidly disclose that they possessed recordings of plaintiff "yelling or screaming." (UMF No. 56.) They also disclose that they had some footage involving plaintiff's interactions with Dennis Bardessono's wife, which took place on Carriage Drive, in front of the Nohrs' house. (UMF No. 23-25.)

Plaintiff submits no evidence that suggests either of these recorded conversations were intended to be private conversations. Nor can any inference be made that any privacy interest was involved. One occurred on a public street and the other involved yelling and screaming. Neither setting suggests an interest in privacy.

Plaintiff speculates that invasions of privacy occur daily simply by the presence of the equipment on the exterior of defendant's house. However, speculation is insufficient to raise an issue of fact. To defeat summary judgment, inferences must be reasonable and cannot be based on speculation or surmise. (*Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161*; Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1298-1299; *McGrory v. Applied Signal Tech., Inc.* (2013) 212 Cal.App.4th 1510, 1530—"a material triable controversy is not established unless the inference is reasonable.") In any event, the speculation was confined to the memorandum of points and authorities. The declaration of Julie DiSieno fails to identify a single private conversation that was recorded.

Plaintiff cites a single case in support of her opposition: *Hernandez v. Hillsides, Inc.* (2006) 192 Cal.App.4th 1377, 1390-91. The Cal. Supreme Court granted review of this case and its opinion subsequently superseded the appellate court opinion relied on by plaintiff. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272.) In any event, neither case addressed the specific claim for invasion of privacy in violation of Penal Code section 632.

The closest plaintiff comes to making an argument is in her opposition memorandum in support of the expectation of privacy in her conversations (as opposed to her images) is as follows: "Defendants absurdly argue that Plaintiff somehow waived her reasonable expectation of privacy when she was "yelling or screaming;" however, this is subjective (what is a yell versus a scream?) and should be interpreted by the finders of fact." (Opposition, p. 19, ll. 17-20.) The court

disagrees. Plaintiff has failed to raise any issue of fact whether the Nohrs recorded any private conversations.

For the reasons stated above, the motion for summary adjudication of this cause of action is granted.

2. Second Cause of Action for Invasion of Privacy

This cause of action is for invasion of privacy by public disclosure of private facts. The elements of this tort are ' "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern." ' The absence of any one of these elements is a complete bar to liability." (*Moreno v. Hanford Sentinel, Inc*. (2009) 172 Cal.App.4th 1125, 1129–1130; see also CACI 1801.)

The pleadings determine what issues are material in a summary judgment motion. Therefore, the moving party's evidence must be directed to the claims or defenses raised in the pleadings. (*Keniston v. American Nat'l Ins. Co*. (1973) 31 Cal.App.3d 803, 812.) Defendant may be able to "show" the absence of evidence on a crucial element of plaintiff's case by plaintiff's own admissions in discovery responses. (See *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 749.)

This cause of action is aimed at disclosure of photos and videos of plaintiff "inside her house, in various stages of undress and other reposes." (FAC, ¶ 19.) Plaintiff admits she has never seen, and does not possess, any of the photos or videos of her inside her house in various stages of undress and other reposes identified in her Fourth Amended Complaint. (UMF No. 40.) Her only knowledge of their purported existence is what her brother allegedly told their late mother, and which was allegedly relayed to plaintiff by her late mother. (UMF Nos 12, 42-43.) Plaintiff confirms this in her declaration in opposition to this motion: "I learned of these published images of me reportedly taken of me in my underwear from my mother (who was told about them by my brother) also some friends who saw them posted online reported it to me. When I went to look for the online publications in 2018 they had already been taken down by Bardessono." (DiSieno Decl., ¶ 9.)

The party opposing summary judgment must produce admissible evidence raising a triable issue of fact. Claims and theories not supported by admissible evidence do not raise a triable issue. (*Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 219 (disapproved on other grounds by *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 32—courts should not hesitate to summarily dispose of meritless litigation based on nothing more than a "smoke and mirrors" presentation; L*yons v. Security Pacific Nat'l Bank* (1995) 40 Cal.App.4th 1001, 1006,—party cannot oppose orally without separate statement or affidavits.)

Plaintiff's declaration amounts to hearsay and none of the persons who allegedly saw this video have provided a declaration in support of this opposition.

Plaintiff also identifies evidence from a criminal trial in which Mary Nohr testified that she had given Bardessono copies of footage from her cameras and from Bardessono who testified that he received copies of footage for incidents that happened with his wife and children and that he posted a video on YouTube of DiSieno yelling at his children and his wife while they were in the car. (UMF 23-25.) This evidence does not support the assertion that the Nohrs took videos of her inside her house.

In opposition, plaintiff has expanded the theory of her cause of action. She points out that the Nohrs admit to having captured the following:

- On July 18, 2017, the video-only security camera on the north side of the Nohr's house captured plaintiff, outside her home, close to the border fence on the southeast corner of her property, and she was completely naked. (UMF No. 70.)
- On July 25, 2017, the video-only security camera on the north wall of the Nohrs' again captured plaintiff, outside her home, close to the border fence on the southeast corner of her property, completely naked, and looking directly toward the Nohrs' video-only security camera. (UMF No. 71.)
- On July 28, 2017, the video-only security camera on the north wall of the Nohrs' home captured plaintiff, outside her home, near the border fence on the southeast corner of her property. It also captured her raising her shirt and exposing her bare breasts to the video only security camera. (UMF No. 72.)

Plaintiff also states there is footage of her from September 2017 (variously identified as the 9/11/2017 footage or the 9/17/2017 footage) that include visuals of her breasts and buttocks. (DiSieno Decl., ¶ 10.)

The Nohrs argue that these images are insufficient to establish this claim because they were not taken "inside her house" as the allegations in the FAC clearly allege. Moreover, they point out plaintiff admitted that she intentionally exposed her naked body to the Nohrs and their video-only security camera (UMF, No. 74), which, they argue, entirely undermines her privacy claim.

In sum, the Nohrs argue that this claim lack merit because plaintiff cannot satisfy the element of public disclosure of a private fact. They emphasize that they never took any photos or videos of plaintiff "inside her house, in various stages of undress and other reposes." (UMF Nos 8-11.) They further argue that the videos of plaintiff naked and/or exposing her breasts cannot be considered private because

plaintiff intentionally positioned and exposed herself to the cameras. (UMF Nos. 70-72.)

If plaintiff wants the trial court to consider a previously unpleaded issue in connection with a motion for summary judgment, she may request leave to amend at or prior to the hearing on the motion. (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663; *Hobson v. Raychem Corp*. (1999) 73 Cal.App.4th 614, 625 (disapproved on other grounds by *Colmenares v. Braemar Country Club, Inc.* (2003) 29 C4th 1019, 1031, 130 CR2d 662, 670, fn. 6); *Vulk v. State Farm Gen. Ins. Co.* (2021) 69 Cal.App.5th 243, 256—plaintiff could not rely on unpleaded new theory to resist summary judgment, and should have sought leave to amend if he had evidence to support new theory.) In her opposition, plaintiff has not requested leave to amend to include these images, which do not otherwise support her present theory. Even if she requested leave to amend at the hearing, it is unclear it should be granted in the present circumstance. At most, the evidence shows that defendants possess these images. There is no evidence that suggests these images were published. The FAC alleges that the Nohrs shared "the photos and videos of Plaintiff they recorded [] inside her house" with Bardessono, who published them on the internet. (FAC, ¶¶ 10-11.) This is a very specific allegation that Bardessono published photos and videos of her that were taken when she was inside her house. Indeed, Bardessono has admitted only to publishing video of plaintiff's interaction with his wife and children. If plaintiff intends to shift her theory from photos and videos taken of her inside her house to photos and videos taken in her yard, there is no longer any allegation of publication. Simply put, there is no evidence or even allegation here of publication or disclosure. The absence of that element is a complete bar to liability. (*Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, 1129–1130; see also CACI 1801.) Thus, even if a request to amend the complaint is made at the hearing, the court is unlikely to grant it on this record.

For the reasons state above, the motion for summary adjudication of this cause of action is granted.

3. Third Cause of Action for Intentional Infliction of Emotional Distress

In this cause of action, plaintiff alleges that the following conduct was outrageous: making false claims about Plaintiff; unlawfully recording her communications; and, invading her privacy. (FAC, ¶ 24.) As the court will summarily adjudicate the first and second causes of action in defendants' favor, the only remaining conduct at issue is the alleged false claims. Presumably, these false reports are aimed at the statements the Nohrs made to the Santa Barbara County Sheriff who investigated the reported criminal activity. The Nohrs assert these statements were protected by the litigation privilege.

The litigation privilege is derived from common law principles establishing a defense to defamation claims although it is now held applicable to any communication and all torts except malicious prosecution. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.) This privilege is codified in Civil Code section 47 and, as applicable here, provides that a privileged publication is one made in any "judicial proceeding" or "in any other official proceeding authorized by law." (Civ.Code, § 47, subd. (b).) Further, the privilege is absolute. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 360.)

The litigation privilege gives all persons the right to report crimes to the police or an appropriate regulatory agency, even if the report is made in bad faith. (*Brown v. Department of Corrections* (2005) 132 Cal.App.4th 520, 525–526.) Such a communication, which is designed to prompt action by that government entity, is as much a part of an "official proceeding" as a communication made after an official investigation has commenced. (*Hagberg v. California Federal Bank, supra*, 32 Cal.4th at p. 364.) In short, this unqualified privilege applies to various communications intended to instigate official investigation into wrongdoing. (*Hagberg v. California Federal Bank, supra*, 32 Cal.4th at p. 369.)

Plaintiff asserts that the litigation privilege will not apply where its purpose is not served, citing *Haneline Pacific Properties, LLC v. May* (2008) 167 Cal.App.4th 311, 320. In that case, Haneline was the lessee of land owned jointly by Carl May and a trust. The trust agreed to sell its share of the land to Haneline for $500,000, but May persuaded the trust not to proceed with the sale, arguing that if he and the trust terminated Haneline's below-market lease they could obtain a much higher price for the property. Ultimately, May's efforts caused Haneline to sue the trustee for breach of contract and, in settling that suit, to pay much more for the trust's interest in the property than its agreement with the trust had required. Haneline then sued May for interference with contract and prospective economic advantage. (*Id*. at pp. 314-316.)

May moved to strike the complaint under the anti-SLAPP statute, contending his negotiations with the trust about terminating the lease and securing a higher price for the property constituted prelitigation communications. (*Haneline, supra,* 167 Cal.App.4th at pp. 316, 317-320.) The trial court agreed, but the Court of Appeal reversed. (*Id*. at pp. 320-321.) Although the defendant contended that " '[t]he spectre of litigation "loomed" over the entire course of the parties' communications,' " the court observed that "the same could be said of nearly any high-stakes negotiation." (*Id*. at p. 320.) It concluded, "Negotiations and persuasion are part of any business deal. To suggest that nearly any attempt at negotiation is covered by the privilege, especially when attorneys are involved, is unduly overbroad." (*Ibid*.)

Haneline does not involve reports to law enforcement and is therefore inapposite. Case law is clear that such reports are protected, even if made in bad faith. Plaintiff presents no other argument in support of this cause of action.

For the foregoing reasons, the court grants the motion for summary adjudication of this cause of action.

As all causes of action are disposed of by this ruling there is no basis for punitive damages and the motion for summary judgment is granted.