IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR SARASOTA COUNTY, FLORIDA

CASE NO.: 2022 CA 1128 SC

JOSEPH PETITO and NICHOLE SCHMIDT,

Plaintiffs,

vs.

CHRISTOPHER LAUNDRIE and ROBERTA LAUNDRIE,

Defendants.
_____/

DEFENDANT STEVEN BERTOLINO'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

Defendant STEVEN BERTOLINO ("Mr. Bertolino"), by and through undersigned counsel, hereby moves to dismiss the Second Amended Complaint (DIN 60) pursuant to Florida Rule of Civil Procedure 1.140(b). For the reasons set forth below, there are no facts that could support this cause of action against Mr. Bertolino and the Court should dismiss the claims asserted against him in the Second Amended Complaint with prejudice.

I. INTRODUCTION

In their Second Amended Complaint, Plaintiffs JOSEPH PETITO and NICHOLE SCHMIDT have added Counts III and VI against a newly included party, attorney STEVEN BERTOLINO. Per paragraphs 7 and 8 of the Second Amended Complaint, Mr. Bertolino is a lawyer practicing in the State of New York who "at all times relevant to the within cause of action" was "acting as the agent for Christopher Laundrie and Roberta Laundrie," the original two defendants. The agency described reflects Mr. Bertolino's role as the Laundrie family

attorney. Within the Second Amended Complaint, Plaintiffs do not identify any facts, circumstances or conduct of Mr. Bertolino which was undertaken outside of the attorney-client relationship with the Laundrie family.

The Second Amended Complaint does not identify what specific cause of action is being pursued against Mr. Bertolino in Counts III and VI. Based upon the allegations within the Second Amended Complaint, the wrongful conduct appears to be related to statements made by Mr. Bertolino on behalf of his clients (the Laundrie family) to the public at large and statements ***not*** made by Mr. Bertolino to the Plaintiffs directly. The statements at issue were not misstatements of fact and expressed no opinion. The statements did not seek to cause embarrassment, scorn, physical harm, or intimidation. To the contrary, the two specific statements attributed to Mr. Bertolino reflect hope and prayer. See 2d Am. Compl., ¶¶ 28, 38. Plaintiffs allege Mr. Bertolino's comments about hopes and prayers were "malicious" and "go beyond all possible bounds of decency." Id. at ¶ 40.

Plaintiffs' Second Amended Complaint against Mr. Bertolino fails as a matter of law. There is no established legal precedent within Florida which sets forth the proposition that a lawyer can be sued by a non-client for expressions of hopes and prayers under any situation, any circumstance or in any context. Such a cause of action is not contemplated under section 46 of the Restatement (Second) of Torts (1965), upon which Plaintiffs' cause of action appears to be based. Going further, there is similarly no established legal precedent which imposed any duty upon Mr. Bertolino to affirmatively disclose information to the Plaintiffs, whether said information was requested or not. This theory of liability has already been dismissed by the Court. For these reasons, which will be further expanded upon below, Plaintiffs' Second Amended Complaint against Mr. Bertolino is due to be dismissed with prejudice.

II. FACTUAL ALLEGATIONS

Plaintiffs allege a cause of action based upon statements issued by Christopher and Roberta Laundrie through their attorney, Mr. Bertolino, on September 14, 2021, and September 19, 2021. See 2d Am. Compl., ¶¶ 28, 38. The statements relate to the disappearance of Plaintiffs' daughter, Gabrielle Petito, and the discovery of her remains in Wyoming. See id. at ¶¶ 37-38. Plaintiffs allege that between September 14, 2021, and September 19, 2021, they were experiencing "mental suffering and anguish" which "increased each day that Gabrielle Petito was missing." See id. at ¶ 39. That uncertainty about their daughter's wellbeing was tragically resolved when her remains were discovered.

The general allegations are set forth in paragraphs 1 through 40 of the Second Amended Complaint. A significant number of these paragraphs are devoted to introducing the parties and setting forth the basis for alleged jurisdiction. The general allegations contain a mix of facts (such as Ms. Petito's age and date of death), and beliefs (those paragraphs which speak to the various Defendants' alleged knowledge and intent). One of these beliefs is that Brian Laundrie advised his parents about the death of Ms. Petito and the date upon which such disclosure purportedly occurred. See id. at ¶ 20. There is no allegation identifying when this purported information was made known to Mr. Bertolino, or whether such was known by Mr. Bertolino before or after September 14, 2021. Of course, what Mr. Bertolino knew or did not know could not be known to Plaintiffs, and can never be known to Plaintiffs, based upon the attorney client privilege which exists between Mr. Bertolino and his clients, the Laundrie family.

Continuing with the attorney client relationship, Plaintiffs allege Mr. Bertolino issued a statement "**on behalf of Christopher Laundrie and Roberta Laundrie**[.]" See id. at ¶ 28 (emphasis added). It is not alleged that Mr. Bertolino issued the statement on behalf of himself.

Mr. Bertolino's statement cited in paragraph 28 of the Second Amended Complaint on behalf of the Laundries reads:

> It is our understanding that a search has been organized for Miss Petito in or near Grand Teton National Park in Wyoming. On behalf of the Laundrie family it is our hope that the search for Miss Petito is successful and that Miss Petito is reunited with her family.[1]

Plaintiffs assert that for Mr. Bertolino to "express hope" that Ms. Petito would be located and reunited with her family "at a time when they knew she had been murdered by Brian Laundrie" was beyond outrageous. Id. at ¶ 29. That paragraph is wholly conclusory and as noted above there are no allegations setting forth how or when Mr. Bertolino purportedly knew of Ms. Petito's murder. With that said, whatever Mr. Bertolino's knowledge was, or was not, the statement was neither misleading nor inaccurate. Several days later, Ms. Petito was located and her remains were reunited with her family and Plaintiffs sadly knew at that time that their daughter was no longer alive. In the instant litigation, Plaintiffs allege they suffered emotional distress due to their now mistaken belief that their daughter may still be alive, or was still alive, between September 14, 2021, and September 19, 2021. Implicitly, Plaintiffs claim they would not have suffered this emotional distress had they been affirmatively told on September 14, 2021, that their daughter had been murdered by Brian Laundrie and that her remains could be found at a specific location in Wyoming.

While no identification of any specific cause of action is stated within paragraphs 1 through 40, or the Counts themselves, the alleged actionable conduct is most identifiably derived from paragraph 40. Paragraph 40 applies to all Defendants even though several of the

[1] This is not the complete statement made at the time. Plaintiffs chose to omit certain portions of the statement, presumably to make it seem more inflammatory. However, because this cause of action is based upon the statement, for the sake of completeness, the statement which was published in writing should be considered in its entirety. The entire statement made on September 14, 2021 is attached as Exhibit A.

paragraphs (particularly subsections (c) and (d)) can have no application to Mr. Bertolino and, as such, are comingled. Nonetheless, paragraphs 40(a) and (b) suggest Mr. Bertolino was under some obligation to advise Plaintiffs that Ms. Petito was deceased and provide the location of her body. Paragraphs 40(e) and (f) claim that the statements made by Mr. Bertolino on Christopher and Roberta Laundrie's behalf were "shocking" and "atrocious." Again, paragraph 40(e) refers to a statement in which Mr. Bertolino referenced a "hope" and paragraph 40(f) references a statement in which Mr. Bertolino references "prayers" offered by the Laundrie family. Such is the substance of the factual allegations against Mr. Bertolino within the Second Amended Complaint.

III. LEGAL STANDARD

Under Florida law, a complaint must contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief . . . ." Fla. R. Civ. P. 1.110(b). The complaint's primary purpose "is to advise the [c]ourt and the defendant of the nature of a cause of action asserted by the plaintiff." See Connolly v. Sebeco, Inc., 89 So. 2d 482, 484 (Fla. 1956) (emphasis removed).

This requires that a plaintiff "allege ultimate facts establishing each and every essential element of a cause of action . . . ." See Sanderson v. Eckerd Corp., 780 So. 2d 930, 933 (Fla. 5th DCA 2001). "[W]here the elements of a cause of action are not pled in the complaint, they may not be inferred by the context of the allegations." Id. (finding a failure to state a valid cause of action where essential elements to causes of action had not been pled).

A motion to dismiss a complaint requests that the trial court "determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to

enter an order of dismissal." Nero v. Cont'l Country Club R.O., Inc., 979 So. 2d 263, 267 (Fla. 5th DCA 2007) (citing Huet v. Mike Shad Ford, Inc., 915 So. 2d 723, 725 (Fla. 5th DCA 2005)).

IV. APPLICABLE LAW: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The cause of action of intentional infliction of emotional distress (or "outrage" as it is sometimes called) is not well defined in Florida or in many other jurisdictions throughout the United States. It is a source of scholarly debate and the subject of a good number of law review articles. As described in a Vanderbilt Law Review Article:

> [a]s to precisely which types of conduct should meet the § 46 [Restatement (Second) of Torts] criteria, courts are mostly left to their own devices . . . . Nevertheless, courts routinely hear cases of indecent and intolerable behavior and reject the resulting [intentional infliction of emotional distress] claims.

Russell Fraker, Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED, 61 Vand. L. Rev. 983, 994 (2019).

Like most states, Florida recognizes intentional infliction of emotional distress as an independent cause of action, adopting the definition of same from section 46, Restatement (Second) of Torts (1965). Florida officially recognized the tort of intentional infliction of emotional distress and adopted this restatement section in Metropolitan Life Insurance Co. v. McCarson, 467 So. 2d 277 (Fla. 1985).

To state a cause of action for intentional infliction of emotional distress, Plaintiffs must allege four (4) elements: "(1) deliberate or reckless infliction of mental suffering; (2) outrageous conduct; (3) the conduct caused emotional distress; and (4) the distress was severe." See Liberty Mut. Ins. Co. v. Steadman, 968 So. 2d 592, 594 (Fla. 2d DCA 2007) (citing Dependable Life Ins. Co. v. Harris, 510 So. 2d 985, 986 (Fla. 5th DCA 1987)); see also Johnson v. Thigpen, 788 So. 2d 410, 412 (Fla. 1st DCA 2001) (citation omitted). The behavior forming the basis for such a

claim must be "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency." Liberty Mut. Ins. Co., 968 So. 2d at 594 (citations omitted).

"In applying that standard, the subjective response of the person who is the target of the actor's conduct does not control the question of whether the tort of intentional infliction of emotional distress occurred." Id. at 595 (citation omitted). "Rather, the court must evaluate the conduct as objectively as is possible to determine whether it is atrocious, and utterly intolerable in a civilized community." Id. (citations omitted); see also State Farm Mut. Auto Ins. Co. v. Novotny, 657 So. 2d 1210, 1212-13 (Fla. 5th DCA 1995); Matsumoto v. Am. Burial & Cremation Servs., Inc., 949 So. 2d 1054, 1056 (Fla. 2d DCA 2006).

"The standard for 'outrageous conduct' is particularly high in Florida." Patterson v. Downtown Med. & Diagnostic Center, Inc., 866 F. Supp. 1379, 1383 (M.D. Fla 1994) (citing Golden v. Complete Holdings, Inc., 818 F. Supp. 1495 (M.D. Fla. 1993)). It is not enough that the defendant acted with an intent that is tortious or even criminal, or that that defendant intended to inflict emotional distress, or even that the defendant's conduct can be characterized by "malice" or a degree of aggravation which would entitle plaintiff to punitive damages for another tort. See Eastern Airlines Inc. v King, 557 So. 2d 574, 576 (Fla. 1990) (citations omitted). To the contrary, the conduct required to establish intentional infliction of emotional distress is elevated to an entirely different category.

Section 46 of the Restatement (Second) of Torts sets forth descriptions and examples of the wrongful conduct associated with "outrageous conduct causing severe emotional distress." The Restatement provides twenty-two (22) illustrations, which are designed to assist the reader in identifying fact patterns which support, and do not support, claims based in "outrage." None of the illustrations provided are remotely similar to the allegations contained in Plaintiffs'

Second Amended Complaint. None of the examples involve an attorney acting on behalf of his or her client and none of them involve any expressions of "hope" or "prayer." Virtually all of the examples involve threats, physical conduct or willfully aggressive actions, which are clearly intentionally or recklessly injurious to the opposing party. None of the examples provided, or guidance given, suggests that a cause of action for intentional infliction of emotional distress could possibly exist in a situation where ***no*** conduct or statement occurs.

Identifying what conduct amounts to a cause of action for intentional infliction of emotional distress can also be gleaned from the Florida Supreme Court approved jury instructions relating to same. Florida Standard Jury Instruction 410.7 requires the jury to consider:

> whether (defendant) engaged in extreme and outrageous conduct; and acted with the intent to cause severe emotional distress or with reckless disregard of the high probability of causing severe emotional distress; and, if so, whether that extreme and outrageous conduct was a legal cause of severe emotional distress to (claimant).

Florida Standard Jury Instruction 410.6 advises that:

> [e]xtreme and outrageous conduct is a legal cause of severe emotional distress if it directly and in natural and continuous sequence produces or contributes substantially to producing such severe emotional distress, so that it can reasonably be said that, but for the extreme and outrageous conduct, the severe emotional distress would not have occurred.

Florida Standard Jury Instruction 410.5 states: "[e]motional distress is severe when it is of such intensity or duration that no ordinary person should be expected to endure it."

V. ARGUMENT

The allegations set forth in the Second Amended Complaint do not establish a viable cause of action against Mr. Bertolino and are due to be dismissed. There are no material facts pled which even remotely establish that Mr. Bertolino acted with an intent to cause severe

emotional distress or with reckless disregard. Alternatively, even if the Court were to find that the conduct would otherwise be extreme and outrageous, it is privileged under the circumstances, as Mr. Bertolino was doing nothing more than acting as the Laundries' attorney and exercising their legal rights in a permissible way. Additionally, as an attorney representing the Laundrie family, who was actively involved in an acute legal situation, Mr. Bertolino has an absolute privilege with respect to statements made as the Laundries' attorney on their behalf.

A. SUBJECT STATEMENTS ARE NOT ACTIONABLE AS A MATTER OF LAW

The statements contained within the Second Amended Complaint that are attributable to Mr. Bertolino (on behalf of the Laundrie Family) are clearly not outrageous on their face. As noted by Judge Carroll in his June 30, 2022 Order, "the words used by the Laundries on the surface initially do not suggest outrage." However, it is not only that the words do not suggest outrage; rather, the words themselves were nothing more than generally benign statements made by an attorney on behalf of his clients. Those clients were the Laundrie family, who found themselves thrust into a unique and unfathomable situation. For the Plaintiffs who were struggling with the uncertainty of their daughter's fate, they were also in a position that is similarly difficult to comprehend. Clearly, Plaintiffs and the Laundrie family were experiencing severe emotional distress "that no ordinary person should be expected to endure." See Fla. Std. Jury Instr. 410.5. With that said, the terrible situation that existed for both families cannot be conflated with the actual statements that form the basis for the instant cause of action.

The September 14, 2021 statement described in the Second Amended Complaint was not callous. It did not delay an opportunity to save Ms. Petito's life and it brought no disrespect to her family or her memory. The statement was clearly not intended to inflict severe emotional distress. It was not reckless. The September 14, 2021 statement was nothing more than an

expression of hope that Plaintiffs would get closure. The hope expressed therein was that the search for Ms. Petito would be "successful" and that Ms. Petito be "reunited with her family." See 2d Am. Compl., ¶ 28. It should be noted that the term "reunited" is capable of many interpretations and does not affirmatively suggest that Ms. Petito was or was not alive. See, e.g., Lori E. Baker and Erich J. Baker, Reuniting Families: An Online Database to Aid in the Identification of Undocumented Immigrant Remains, Journal of Forensic Sciences, Vol. 53, Issue 1, Jan. 2008 (describing database created to facilitate identification of deceased undocumented immigrants); Sean Kimmons, 40 Years on, Army Veteran Still Strives to Reunite Families with Fallen Heroes, Army News Service, May 23, 2018 (utilizing term "reunite" to describe return of fallen soldier's remains to their family members).

By their own admission, Plaintiffs wanted to know "where Brian left Gabby." See id. at ¶ 35. That communication was made to the Laundrie family by Plaintiffs' attorney two (2) days after the September 14, 2021 statement. There is no suggestion that the Laundries' hope that Plaintiffs would obtain closure was not genuine or that their hope was mean spirited or outrageous. To the contrary, the hope fit within the context of the underlying events and two families who were going through a situation that neither could ever have foreseen nor prepared for.

Extreme and outrageous conduct is generally found where the facts would arouse an average member of the community's "resentment against the actor, and lead him to exclaim 'Outrageous!'" See Metro. Life Ins. Co., 467 So. 2d at 279; see also Restatement (Second) of Torts § 46 cmt. d. According to the Second Amended Complaint, the Laundries purportedly knew that their son, Brian, had murdered Ms. Petito, a young woman who had lived with the Laundrie family for "over a year." See 2d Am. Compl., ¶ 35. It is difficult to imagine how the

Laundries (through their attorney, Mr. Bertolino) could possibly have picked the "right words" to say under these circumstances. Their son (Brian) was identified as a murderer in the press and "court of public opinion" and by virtue of their status as Brian's parents, the Laundries were being deemed complicit with his actions.

Before proceeding further, it is important to note both the Laundries and Mr. Bertolino are being sued for statements ***made and not made***. Such highlights the difficult situation faced by individuals like the Laundries who (in the Second Amended Complaint) are being portrayed as callous and cruel for both ***not responding*** and for the words they chose to use ***when responding***. Returning to the level of conduct necessary to bring an intentional infliction of emotional distress claim, would an average member of the community truly shout "outrageous!" when hearing the September 14, 2021 statement made on behalf of the Laundrie family understanding the context in which it was made as well as the words that were chosen? The answer to such a question is clearly "no." As such, the cause of action on the September 14, 2021 statement should not proceed further and is due to be dismissed.

Plaintiffs' claims involving Mr. Bertolino's statement made on September 19, 2021 on behalf of the Laundrie family are much less developed in the Second Amended Complaint than the September 14, 2021 statement.[2] The September 19, 2021 statement is quoted in the Second Amended Complaint as follows: "The news about Gabby Petito is heartbreaking. The Laundrie family prays for Gabby and her family." See 2d Am. Compl., ¶ 38. The Second Amended Complaint fails to identify why such a statement constitutes a basis for intentional infliction of emotional distress. The operative pleading also does not offer any explanation as to how the September 19, 2021 statement was a legal cause of severe emotional distress or how it could be.

[2] The September 19, 2021 statement was also not addressed by the Court in its Order Denying Defendants' Motion to Dismiss entered on June 30, 2022.

While there is certainly no evidence to suggest the September 19, 2021 statement was anything other than heartfelt, no matter how poorly received it was or ever could have been received by the Plaintiffs, it would never arise to the level of creating a cause of action or intentional infliction of emotional distress.

Beyond the two (2) September statements cited by the Plaintiffs as the basis for asserting (undefined) claims, Plaintiffs also claim all Defendants committed outrageous conduct by "failing to advise" and "failing to disclose" the death of Ms. Petito to her parents as well as the location of her body. See id. at ¶¶ 40(a), (b). The failure to provide information or issue a statement is not a basis for outrageous conduct or intentional infliction of emotional distress as described under section 46 of the Restatement (Second) of Torts or any of the cases interpreting same within the State of Florida. Additionally, this Court has already dismissed those causes of action against the Laundries for the reasoning set forth in Judge Carroll's June 30, 2022 Order. Mr. Bertolino adopts and asserts the basis for such as made by the Laundries in their prior Motions to Dismiss.

Before proceeding further, it is important to note that while the Florida Supreme Court in Metropolitan Life recognized the claim of intentional inflection of emotional distress, it found as a matter of law that no such violation occurred by the defendant (Metropolitan Life Insurance Company) in that matter. In its analysis, the court found that Metropolitan's conduct (which was to deny around the clock nursing care for plaintiff's spouse which purportedly led to her death) was "no more than [Metropolitan] assert[ing] legal rights in a legally permissible way." See Metro. Life Ins. Co., 467 So. 2d at 279. As such, Metropolitan's actions were "privileged under the circumstances." See id. Of great importance, the court noted that such a decision was made even drawing all reasonable inferences in favor of the surviving spouse who claimed that

Metropolitan's conduct was so outrageous in character and so extreme in degree that it went beyond all possible bounds of decency. See id.

Comment G to section 46 of the Restatement (Second) of Torts states:

> [t]he conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress. Apart from this, there may perhaps be situations in which the actor is privileged to resort to extreme and outrageous words, or even acts, in self defense against the other, or under circumstances of extreme provocation which minimize or remove the element of outrage.

Article I, section 4 of the Florida Constitution and the First Amendment to the United States Constitution stand for the proposition that speech in and of itself is generally (and overwhelming preferably) protected. As noted above, there are exceptions to this general rule and intentional infliction of emotional distress falls into this category. However, it is because of our collective constitutional rights to all have free speech and the desire not to ever take any action that has a chilling effect on same, that stringent criteria are used to define what does and does not constitute intentional infliction of emotional distress. It is also why comment g to section 46 of the Restatement (Second) of Torts exists. This comment makes clear that individuals who have exercised their rights of speech are not subject to litigation for conduct they can "never" be liable for.

The four corners of the Second Amended Complaint define Mr. Bertolino as the lawyer acting on behalf of the Laundrie family. Indeed, in its June 30, 2022 Order, the Court referred to the September 14, 2021 statement as the "Laundrie Statement" made through their attorney, Mr. Bertolino. As the attorney for the Laundrie family, Mr. Bertolino had both a legal duty and a legal right to issue a statement on Ms. Petito's disappearance in a permissible way. As such, the

statement is privileged irrespective of whether members of society may find the statement outrageous.

As lawyers, we owe fiduciary duties to our clients irrespective of whether the client is popular or unpopular, beloved or despised, guilty or innocent. In fact, it is after those individuals who face society's greatest scorn that need legal representation the most. See, e.g., Oath of Admission to The Florida Bar (obligating Florida attorneys to swear to never reject the cause of the defenseless or oppressed). In high profile matters, the "court of public opinion" renders verdicts swiftly and the lawyer of an unpopular client is placed in a difficult situation in terms of what to say or not say in an attempt to stem the tide of negative public discourse. This was particularly true in the situation of Ms. Petito, whose disappearance and subsequent death received great media scrutiny. See 2d Am. Compl., ¶¶ 31 (describing nationwide coverage of events).

The instant situation is even further exacerbated because the Laundrie Defendants did not take Ms. Petito's life. They are the "parents of the murderer," burdened with the heavy cloak of scorn and shame, irrespective of anything they may have done or anything they may have known or not known. Clearly the Laundries (through their attorney, Mr. Bertolino) had a legal right to "say something" about the events that were unfolding around them in September of 2021. Their expression of hope that Ms. Petito would be found and reunited with her family did not affirmably identify whether Ms. Petito was alive or not at the time, whether the Laundries knew of her condition or whether the Laundries knew where she may be located. Essentially, Plaintiffs allege the statement is actionable because it did not definitively answer their questions. However, there was no legal requirement for those "answers" to be given (even if known) and the Laundries did nothing more than offer "hope" for a search that was already (to their

knowledge) underway. To suggest that the Laundrie family was not legally permitted to make the statements of September 14, 2021 and September 19, 2021 would require this Court to create "new law" and in particular new law that absolutely conflicts with the Laundries' constitutional rights.

B. SUBJECT STATEMENTS ARE PRIVILEGED

Separate and apart from the privileges acknowledged by the Restatement (Second) of Torts, Mr. Bertolino's comments on behalf of the Laundrie family are also privileged because they were made in connection with his representation of the Laundrie family and are subject to absolute immunity.

Florida courts have made it "abundantly clear that any affirmative defense, including the litigation privilege, may be considered in resolving a motion to dismiss when 'the complaint affirmatively and clearly shows the conclusive applicability of the defense to bar the action.'" See Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1277 (11th Cir. 2004) (citing Reisman v. Gen Motors Corp., 845 F.2d 289, 291 (11th Cir. 1988) (quoting Evans v. Parker, 440 So. 2d 640, 641 (Fla. 1st DCA 1983)).

Absolute immunity is afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior, so long as the act has some relation to the proceeding. See Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994); see also Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380, 384 (Fla. 2007) ("[t]he litigation privilege applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a statute, or of some other origin").

The Florida Supreme Court has recognized that:

> [t]hese "absolute privileges" are based chiefly upon a recognition of the necessity that certain persons, because of their special position or status, should be as free as possible from fear that their actions in that position might have an adverse effect upon their own personal interests. *To accomplish this, it is necessary for them to be protected not only from civil liability, but also from the danger of even an unsuccessful civil action.* To this end, it is necessary that the propriety of their conduct not be inquired into indirectly by either court or jury in civil proceedings brought against them for misconduct in their position. Therefor the privilege, or immunity, is absolute and the protection that it affords is complete. It is not conditioned upon the honest and reasonable belief that the defamatory matter is true or upon the absence of ill will on the part of the actor.

Fridovich v. Fridovich, 598 So. 2d 65, 68 (Fla. 1992) (citation omitted) (emphasis in original). In fact, these principles and the public policy which underpins this privilege have been recognized by the Florida Supreme Court since 1907. See Myers v. Hodges, 44 So. 357 (Fla. 1907).

While Florida's Supreme Court has not addressed whether either absolute or qualified immunity would extend to a lawyer's comments in a situation like this, courts interpreting Florida law have made clear that the privilege extends to certain pre-litigation contexts. See, e.g., Orange Lake Country Club v. Reed Hein & Assocs., LLC, 367 F. Supp. 3d 1360, 1372 (M.D. Fla. 2019) (quoting Ange v. State, 123 So. 916, 917 (Fla. 1929)). The Florida Supreme Court has also recognized a qualified privilege, rather than an absolute privilege, in the context of statements made to police in a criminal investigation *prior* to the initiation of criminal proceedings. See Fridovich, 598 So. 2d at 65; see also DelMonico v. Traynor, 116 So. 3d 1205, 1218 (Fla. 2013) ("[w]ithout the aforementioned protective measures, we conclude that only a qualified privilege should apply to statements made by attorneys as they undertake informal investigation during pending litigation").

"In determining whether or not a communication is privilege [*sic*], the nature of the subject, the right, duty, or interest of the parties in such subject, the time, place, and circumstances of the occasion, and the manner, character, and extent of the communication, should all be considered." Colbert v. Anheuser-Busch, Inc., 2013 U.S. Dist. LEXIS 196134, at *5 (M.D. Fla. Mar. 5, 2013) (citation omitted). Mr. Bertolino's statement was issued to the press in response to numerous inquiries, including inquiries made by law enforcement and Plaintiffs, and the untenable and negative situation facing the Laundrie family.[3] In considering this context, the Laundries, through Mr. Bertolino, had a right to make a public statement and, therefore, Mr. Bertolino's statement should be absolutely, or at a minimum, qualifiedly, protected. Doing so promotes an attorney's ability to advocate for clients in public and protect them from overzealous media scrutiny. Otherwise, an attorney would have to stay silent and publicly take punches from government agencies, countless media, the victim's family and other sources making public comments that are convicting his clients. The United States Supreme Court recognized this issue and set forth that "[a]n attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation . . . including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried." See Gentile v. State Bar of Nevada, 501 U.S. 1030, 1043 (Fla. 1991).

[3] Plaintiffs may argue that in ruling on a Motion to Dismiss, the Court cannot consider matters outside Plaintiffs' allegations in the operative pleading. However, the Court is permitted to consider reasonable inferences from the facts alleged. See Haskel Realty Grp., Inc. v. KB Tyrone, LLC, 253 So. 3d 84, 85 (Fla. 2d DCA 2018). Based upon the facts alleged, it is reasonable to infer the Laundries faced a criminal investigation and media inquiries.

"The basis for such absolute or qualified privileges for lawyers is to permit a free adversarial atmosphere to flourish, which atmosphere is so essential to our system of justice." Sussman v. Damian, 355 So. 2d 809, 811 (Fla. 3d DCA 1977) (citation omitted). "In fulfilling their obligations . . . it is essential that lawyers . . . should be free to act on their own best judgment in . . . defending a lawsuit without fear of later having to defend a civil action . . . for something said or written during the litigation." Id. "A contrary rule might very well deter counsel from saying or writing anything controversial for fear of antagonizing someone involved in the case and thus courting a lawsuit, a result which would seriously hamper the cause of justice." Id. This is especially true in every criminal case, like the instant case involving the Laundrie family, when the publicity is overwhelmingly negative and defense counsel has a duty to make an attempt to stunt the negativity as best as possible.

The Florida Supreme Court has recognized that the adversarial process and the litigation privilege extends outside of the courtroom. It is essential to our system of justice that Mr. Bertolino be permitted to protect his clients from public rebuke without the fear that his words could subject his clients to liability.

VI. CONCLUSION

The "four corners" of the Second Amended Complaint do not establish a viable cause of action against Mr. Bertolino under Florida law. The purported conduct at issue is not outrageous. The statements at issue were benign on their face and not made with any intent to cause the Plaintiffs harm. The expression of hope and prayer was not reckless. There was no affirmative duty for Mr. Bertolino to provide Plaintiffs with any information. As the Laundries' attorney, Mr. Bertolino acted in a privileged context and those actions were performed in a legally permissible way.

A lawyer in Mr. Bertolino's position cannot be sued for issuing the types of statements described in the Second Amended Complaint. To allow such a lawsuit would always make "silence" the safer option for any lawyer faced with an emotionally charged situation, even when silence may be harmful to his or her client. Dismissing the claims against Mr. Bertolino is not a rejection of the Plaintiffs' grief and it does not diminish the devastating loss they have suffered. Dismissing the claims against Mr. Bertolino is simply what the law requires.

WHEREFORE, Defendant STEVEN BERTOLINO requests that this Court enter an Order granting this Motion, dismissing the claims asserted against him in the Second Amended Complaint with prejudice, and granting any further relief this Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been electronically filed with the Court this 20th day of February, 2023, which will give electronic notice to: Patrick J. Reilly, Esquire, Snyder at e-service@snyderandreilly.com, pat@snyderandreilly.com, and valerie@snyderandreilly.com; and P. Matthew Luka, Esquire, at mluka@trombleyhaneslaw.com.

s/Charles J. Meltz

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September 14, 2021

Re: Miss Petito

Statement from counsel for the Laundrie family:

"This is understandably an extremely difficult time for both the Petito family and the Laundrie family.

It is our understanding that a search has been organized for Miss Petito in or near Grand Teton National Park in Wyoming. On behalf of the Laundrie family it is our hope that the search for Miss Petito is successful and that Miss Petito is re-united with her family.

On the advice of counsel the Laundrie family is remaining in the background at this juncture and will have no further comment."

EXHIBIT A