Filing # 151584930 E-Filed 06/15/2022 04:56:40 PM

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

JOSEPH PETITO and
NICHOLE SCHMIDT,

Plaintiffs,

v.

CASE NO. 2022 CA 1128 SC
DIVISION: H CIRCUIT

CHRISTOPHER LAUNDRIE and
ROBERTA LAUNDRIE,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

COMES NOW, the Defendants, CHRISTOPHER LAUNDRIE and ROBERTA LAUNDRIE ("the Laundries"), by and through undesigned counsel, and hereby reply to Plaintiffs' Response to Defendants' Motion to Dismiss (DIN 38).

The Plaintiffs raise a number of arguments in their Response to the Motion to Dismiss (DIN 38) but at the end of the day the gist of this action is that the Plaintiffs want liability for the Laundries' silence. Plaintiffs are unable to point to any case where liability for such has been found, nor any case establishing a duty to communicate or speak in these circumstances. There is no federal nor Florida Good Samaritan law or other legal requirement that compels the Laundries to communicate or speak and which would supersede the right of every person to remain silent.

I. OUTRAGEOUSNESS

In paragraph 18 (on page 9) of the Response Plaintiffs cite to cases as examples of conduct found sufficiently outrageous to at least survive dismissal. What these cases have in common is that the defendants therein committed an affirmative act directed at the plaintiff.

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None of these cases found a cause of action based entirely on a defendant's inaction. Plaintiffs cite no such cases and counsel for the Laundries has likewise been unable to find any. Remaining silent and having no contact with the Plaintiffs, regardless of the circumstances, is not what Florida law considers outrageous behavior.

II. CAUSATION

As paragraph 26 (on page 16) of the Response makes clear, Plaintiffs' theory of causation is that their mental suffering and anguish *increased* when they did not know the wellbeing and location of Gabby Petito, and that the Laundries could have *prevented* additional suffering. To prove causation the Plaintiffs must show that "but for the extreme and outrageous conduct, the severe emotional distress would not have occurred." Fla. Std. Jury Inst. (Civ.) 410.6. By using terms such as "increase" and "prevent" to describe how the Laundries caused the distress, the Amended Complaint fails to satisfy the necessary element that the severe emotional distress would not have occurred absent the Laundries' silence. If the distress was already occurring, Plaintiffs have not alleged that "but-for" the Laundries' inaction, it would not have occurred.

III. CONSTITUTIONAL RIGHTS

Likely realizing that the Laundries' exercise of constitutional rights could never qualify as "outrageous" conduct and is a complete bar to their cause of action, the Plaintiffs attempt to weave around that problem by invoking rules limiting the Court's ability to consider the issue at the motion to dismiss stage. In doing so, Plaintiffs label the Laundries' constitutional rights as "affirmative defenses" and complain that the Laundries are asking the Court to consider facts outside the four corners of the Amended Complaint. Neither issue saves the Plaintiffs' Amended Complaint.

First, Plaintiffs cite to no case where the "exercise of legal rights in a legally permissible way" element is described as an affirmative defense. Plaintiffs cite no case that holds that the burden is on the defendant to prove this defense such that it could even be considered an affirmative defense. This is because the issue of legal rights is intertwined with the element of outrageousness.

Two cases cited by the Laundries in their motion to dismiss are illustrative. In *State Farm Mut. Auto. Ins. Co. v. Novotny*, 657 So. 2d 1210, 1213 (Fla. 5th DCA 1995), the Fifth DCA found the standard for outrageousness not difficult to apply because State Farm was merely pursuing an investigation it had a legal right to pursue, in a legally permissible way. In other words, the pursuit of legal rights is part of the outrageousness consideration. If the action that caused the emotional distress is the exercise of a legally permissible right, then it could not legally be outrageous. Also, the Plaintiffs attempt to distinguish *Associated Indus. of Fla. Prop. & Cas. Tr. v. Smith*, 633 So. 2d 543, 546 (Fla. 5th 1994), in paragraph 37 of their Response by claiming that the outcome turned on a lack of outrageous conduct and not the issue of privilege. However, the commingling of the privilege element and outrageous element is the point as legally privileged actions are not outrageous. *Associated Industries* is important for another reason. Contrary to Plaintiffs' assertion that by simply not pleading privilege they can avoid it (DIN 38, Response ¶ 36), the Fifth DCA found that to establish outrage the complaint must allege conduct that is unprivileged. *Associated Indus. of Fla. Prop. & Cas. Tr.*, 633 So. 2d at 546 ("If the complaint is supposed to establish 'outrage' based on the carrier's insistence that the employee conduct a job search, any allegations showing that the carrier's conduct was extortionate, unprivileged, unlawful or fraudulent are wholly missing.").

Finally, even if the Laundries' exercise of their legally permissible - and constitutionally protected – rights is an affirmative defense, the Court can consider an affirmative defense if it is apparent from the face of the complaint or its attachments. *Bayview Loan Servicing, LLC v. Brown*, 329 So. 3d 210, 214 (Fla. 2d DCA 2021). As alleged in paragraph 6 of the Amended Complaint (DIN 32), the Laundries are residents of Florida. As such, they enjoy the rights afforded by the Florida and United States Constitutions. Plaintiffs offer no explanation as to why the Laundries would not be entitled to such rights. The Court is not required to consider any facts outside the Complaint to make the legal determination that the Laundries had their full panoply of constitutional rights. Furthermore, where a constitutional right is a defense such as with regard to the application of privileges in defamation cases "trial courts, upon motions to dismiss, routinely make decisions as to whether a privilege applies to protect an allegedly defamatory statement." *Huszar v. Gross*, 468 So. 2d 512, 516 (Fla. 1st DCA 1985) (considering First Amendment privilege on motion to dismiss).

Despite Plaintiffs' protestations, the Court should consider the Laundries' constitutional rights on a motion to dismiss. Both because it is part of the "outrageousness" determination and because the Court does not need to consider facts outside the Amended Complaint to determine whether the Laundries have constitutional rights.[1]

As to the specific application of those rights, Plaintiffs, without any support, assert that the Laundries had an obligation to disclose whether Gabrielle Petito was alive or where the

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[1] Judicial notice may be appropriate in ruling on a motion to dismiss after the defendant properly requests judicial notice and the parties stipulate to the trial court taking judicial notice. *Bayview Loan Servicing, LLC v. Brown*, 329 So. 3d 210, 212 (Fla. 2d DCA 2021). Judicial notice does not seem necessary in this context because the application of constitutional rights is a matter of law. The Court does not need to consider any additional facts. To the extent judicial notice is necessary, the Laundries request the Court take judicial notice of their constitutional rights.

location of her body was (DIN 38, Response ¶ 41), and that the Laundries had no constitutional right to refuse to communicate or speak on the topic. (DIN 38, Response ¶ 50). Even giving the Plaintiffs the benefit of the doubt regarding the truth of the allegation that the Laundries knew that information, they had no legal obligation to disclose it. Plaintiffs' reliance on craftily avoiding mention of "state action" in the Amended Complaint does not create that obligation.

As the Laundries argue in their motion to dismiss (DIN 33), there is state action because the Plaintiffs are asking the Court to enter a judgment penalizing them for asserting constitutional rights and are using the Court's power to require them to make statements through the discovery process. Regardless, Plaintiffs' state action argument is a red herring. Even if the government is not actively trying to compel someone to do something, constitutional rights do not disappear. Plaintiffs cite no cases where communication or speech is obligated if the government is not involved.

Plaintiffs' argument regarding the Fifth Amendment is similarly flawed. Plaintiffs acknowledge going out of their way to avoid alleging a criminal investigation to try to foreclose reliance on the Fifth Amendment. However, they allege in the Amended Complaint a crime of murder (DIN 32, Response ¶ 14 on page 4) and that the Laundries hired an attorney. (DIN 32, Response ¶ 18 on page 4). Whether or not a formal criminal investigation had been initiated is of no consequence. This would create the illogical situation where a person could be compelled to speak about a crime as long as law enforcement had not yet targeted the person in an investigation and such a scenario would eviscerate the Fifth Amendment.

The Plaintiffs are also incorrect that the Laundries' Sixth Amendment right to counsel is irrelevant. (DIN 38, Response ¶ 49). The Amended Complaint alleges that the Laundries hired an attorney and thereafter they only communicated through their lawyer. Following the advice of and working through a lawyer are firmly recognized rights and Plaintiffs attempt to use that fact as a basis for their claim is unfounded. Moreover, Plaintiffs admit that the only form of communication, ostensibly by the defendants, was the general statement issued to the press and the public at large by the Laundrie attorney (DIN Response, ¶ 25 on page 5) and the content of said statement was not legally outrageous.

The Plaintiffs conclude that the Laundries acted by choice, not by right. (DIN 38, Response ¶ 50). Plaintiffs have it wrong. It is their rights which gave the Laundries the choice not to communicate or speak and they cannot be liable for that choice.

IV. PLAINTIFFS MUST BE PRESENT

As the case cited by the Plaintiffs plainly states: "in all cases we have found in Florida recognizing the tort of intentional infliction of emotional distress, the plaintiff was the recipient of the insult or abuse, or the message was clearly directed at the plaintiff through a third person." *Habelow v. Travelers Ins. Co.*, 389 So.2d 218, 220 Fla. 5th DCA 1980). (DIN Response, ¶ 52). The Amended Complaint alleges no contact between the Laundries and the Plaintiffs so Plaintiffs received no insults or abuse nor was any message directed at them.

WHEREFORE, for these reasons and the reasons set for in the Laundries' Motion to Dismiss, the Laundries' respectfully request the Court dismiss the Amended Complaint with prejudice.

Respectfully Submitted,

By: */s/ P. Matthew Luka*
P. MATTHEW LUKA
Florida Bar No. 0555630
TROMBLEY & HANES, P.A.
707 North Franklin Street, 10th Floor
Tampa, Florida 33602
Telephone: (813) 229-7918
Facsimile: (813) 223-5204
Email: mluka@trombleyhaneslaw.com
Attorney for Christopher Laundrie and Roberta Laundrie

CERTIFICATE OF SERVICE

I certify that on June 15, 2022, I electronically filed the foregoing through the Florida Courts E-Filing Portal System, thereby serving all registered parties, and served via email upon the following:

Patrick J. Reilly, Esq.
Snyder & Reilly
e-service@snyderandreilly.com