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' RESPONSE IN OPPSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

COMES NOW, Defendants Christopher and Roberta Laundrie, by and through undersigned counsel, and hereby respond to Plaintiffs' Motion for Leave to File a Second Amended Complaint (DIN 60). Plaintiffs seek to add the Laundrie's attorney, Steven Bertolino, as a co-defendant. In some cases, the addition of another defendant may not be of much concern to an existing defendant. However, in this case the joinder of Mr. Bertolino would unduly prejudice the Laundries, the amendment would be futile because he cannot be legally liable, and Plaintiffs' requested amendment comes after the deadline for amendments in the case management report. For these reasons, Defendants request the Court deny Plaintiffs' Motion for Leave to Amend.

I. Background

More than three months after the deadline set by the Court, Plaintiffs move for leave to file a second amended complaint to add the Laundrie's attorney, Steven Bertolino, as a defendant in this action. The proposed amendment adds some additional jurisdictional allegations related to Mr. Bertolino, but by and large the proposed amendment does not change the cause of action or the foundational factual allegations supporting that cause of action. The amendment alleges that Mr. Bertolino made the public statement that allegedly harmed the Plaintiffs while acting as the agent of the Laundries. Mr. Bertolino is the attorney for the Defendants, representing them from the inception of the investigation into the disappearance of Gabby Petito. Mr. Bertolino also represented Brian Laundrie in the investigation until Brian's death. Mr. Bertolino continues to represent the Laundries in many collateral matters arising out of that investigation.

Defendants do not dispute that public policy favors the liberal amendment of pleadings so that cases may be decided on their merits. *EAC USA, Inc. v. Kawa*, 805 So.2d 1, 5 (Fla. 2d DCA 2001). However, the privilege to amend is not absolute. The Court may deny the amendment if (1) the amendment would prejudice the opposing party, (2) the privilege to amend has been abused, or (3) the amendment would be futile. *Reyes v. BAC Home Loans Servicing L.P.*, 226 So. 3d 354, 356–57 (Fla. 2d DCA 2017) (citing *Laurencio v. Deutsche Bank Nat'l Tr. Co.*, 65 So.3d 1190, 1193 (Fla. 2d DCA 2011). As discussed below, the Court should deny leave to amend for all three reasons.

II. Plaintiffs Have Unreasonably Delayed Filing Their Motion to Amend

Plaintiffs have already amended their Complaint once. (DIN 32). And, Plaintiffs have known of Mr. Bertolino and all of the facts relevant to adding him as a defendant since the inception of this case. There is nothing in the proposed Second Amended Complaint revealing anything that was not publicly known at the filing of the original Complaint or in their first Amended Complaint. At the hearing on the Motion to Dismiss, Plaintiffs' counsel even commented that the only reason Mr. Bertolino was not a Defendant was because Mr. Bertolino was based in New York. Mr. Bertolino's location has not changed nor has anything else related to Plaintiffs' requested amendment, and in their motion, Plaintiffs do not offer any reason for their delay. Plaintiffs have no explanation for the tardiness of their motion.

On April 13, 2022, the parties filed an Agreed Case Management Report and the Court imposed all deadlines identified in the report (DIN 22, 25). Within that report the parties agreed to a deadline of August 26, 2022, to file a motion to add a party or amend pleadings. (DIN 22). The Plaintiffs were well aware of attorney Bertolino's statement at the time of the case management report and thereafter. That statement was the focus of the hearing on the Motion to Dismiss and was the reason the Court permitted the case to go forward. Yet, Plaintiffs did not file their Motion to Amend until December 6, 2022, more than three months after the deadline to file such motions.

Defendants recognize that this case has not reached summary judgment or trial so the amendment would not affect those proceedings. However, the Laundries and

Mr. Bertolino have been proceeding with the expectation that Mr. Bertolino would not be a defendant which governed their relationship over the course of this case. There is no reason for the Plaintiffs delay, and this delay will undoubtedly spur another round of motions to dismiss as discussed below. In light of the futility of the amendment and the prejudice to the Laundries, adding Mr. Bertolino at this stage of proceedings will only unnecessarily complicate the matter.

III. The Amendment is Futile

Courts have held that proposed amendments are futile when they are not pled with sufficient particularity or are "insufficient as a matter of law." *Morgan v. Bank of New York Mellon*, 200 So. 3d 792, 796 (Fla. 2d DCA 2016). In this case, if, as alleged by the Plaintiffs, Mr. Bertolino was acting on behalf of his clients, then he cannot be personally liable.

> It is well settled that an attorney serves as an agent for his or her client. As such, the attorney's acts are the acts of the principal, the client, and absent an express agreement, **an agent working on behalf of a disclosed principal is not personally liable for the debts of the principal**.

Richard Bertram, Inc. v. Sterling Bank & Tr., 820 So. 2d 963, 965 (Fla. 4th DCA 2002) (citing *Andrew H. Boros, P.A. v. Arnold P. Carter, M.D., P.A.,* 537 So.2d 1134, 1135 (Fla. 3d DCA 1989))(emphasis added).

The Court relied on the *Andrew H. Boros* opinion and this principle in its Order Denying Defendants' Motion to Dismiss and cited it as a reason that the Laundries would be solely responsible for the statement regardless of what Mr. Bertolino knew at the time of the statement. (DIN 42, pg. 4, section 2) (citing *Andrew H. Boros, P.A.,*

537 So. 2d at 1135 ("Generally, an attorney serves as agent for his client; the attorney's acts are the acts of the principal, the client.").

On the other hand, if Mr. Bertolino allegedly committed an intentional tort for his own purposes and not on behalf of his clients, then his clients cannot be liable for the acts of their agent and the Laundries should be dismissed. *See Dieas v. Assocs. Loan Co.*, 99 So. 2d 279, 281 (Fla. 1957) ("The liability of the master for intentional acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise where the servant has stepped aside from his employment to commit a tort which the master neither directed in fact, nor could be supposed, from the nature of his employment, to have authorized or expected the servant to do."). The Plaintiffs must choose to either proceed against the Laundries or Mr. Bertolino because they cannot both be liable.

In addition, Florida's litigation privilege protects Mr. Bertolino's statements. Absolute immunity must be 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. *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 608 (Fla. 1994). The rationale behind the immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the course of a judicial proceeding. *Id.*; *see also Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380, 384 (Fla. 2007) ("The 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."). Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct. *Id*.

> These "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)(quoting *Restatement (Second) of Torts* § 584, at 243 (Introductory Note: "Absolute Privilege Irrespective of Consent") (emphasis in original).

Plaintiffs may claim that the litigation privilege does not apply in this context because Mr. Bertolino made the statement outside the context of a judicial proceeding. The Florida Supreme Court has extended the absolute privilege in certain pre-litigation contexts. *See Ange v. State*, 123 So. 916, 917 (Fla. 1929) (absolute privilege barred an action for defamation based on statements made in the office of the county judge to whom the defendant had gone to obtain a warrant); *Robertson v. Industrial Insurance Company*, 75 So.2d 198, 199 (Fla.1954) (absolute privilege applied to defamatory statements made in a letter to the insurance commissioner used to institute license

revocation proceedings). 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 65; *see also DelMonico v. Traynor*, 116 So. 3d 1205, 1218 (Fla. 2013) ("Without 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."). Although, the *Fridovich* Court did opine that the privilege only applies to statements voluntarily made to the police or a prosecuting attorney and not to statements made to private individuals. *Id*. at 69 n. 8. To overcome a qualified privilege, a plaintiff would have to establish by a preponderance of the evidence that the statements were false and uttered with common law express malice—i.e., that the defendant's primary motive in making the statements was the intent to injure the reputation of the plaintiff. *Fridovich*, 598 So. 2d at 69; *see also DelMonico*, 116 So. 3d at 1219 (qualified privilege places the burden upon the plaintiff to then prove the additional element of express malice).

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)(citing 1 Harper and James, The Law of Torts, 427 (1956)). In fulfilling their obligations to their client and to the court, it is essential that lawyers, subject only to control by the trial court and the bar, should be free to act on their own best judgment in prosecuting or defending a lawsuit without fear of later having to defend a civil action for defamation

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*.

"In determining whether or not a communication is privileged, 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 WL 12145017, at *2 (M.D. Fla. Mar. 5, 2013) (quoting *Hartley & Parker v. Copeland*, 51 So.2s 789, 790 (Fla. 1951)). For an absolute privilege to exist, the question is not whether the statement was compelled or under oath; the question is merely whether the statement was made "in connection with" or "in the course of" an existing judicial proceeding. *Stucchio v. Tincher*, 726 So. 2d 372, 374 (Fla. 5th DCA 1999).

We cannot know for certain what proceedings, such as grand jury proceedings, search warrant applications, or other judicially supervised investigative proceedings, had been underway at the time Mr. Bertolino made the statement because those investigative proceedings are done *ex parte* and are not disclosed publicly. But, we do know Mr. Bertolino made the statement in response to multiple law enforcement inquiries for a response, to protect his clients from adverse publicity, and to calm media and protesters stationed outside their home. ABA Model Rule of Professional Conduct 3.6 contemplates an attorney making such a statement to protect his client from adverse publicity. *See* ABA Model Rule of Professional Conduct

3.6(c)("Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity."). As rules of professional conduct permit, and it could be argued his duty to his clients compelled, Mr. Bertolino to make a statement in response to criminal and civil investigations as well as public pressure, and his comments should be privileged.

IV. The Amendment Would Prejudice the Laundries and Mr. Bertolino

Whether granting the proposed amendment would prejudice the opposing party is analyzed primarily in the context of the opposing party's ability to prepare for the new allegations or defenses prior to trial. *Morgan v. Bank of New York Mellon*, 200 So. 3d 792, 795 (Fla. 2d DCA 2016). Allowing Plaintiffs to add Mr. Bertolino as a Defendant would prejudice both the Laundries' and Mr. Bertolino's ability to effectively defend this case.

This amendment would create the unusual circumstance of clients being co-defendants with an attorney who currently represents them. Generally, an attorney owes his clients duties of competence, communication, confidentiality, loyalty, and avoidance of conflicts of interest. *R.L.R. v. State*, 116 So. 3d 570, 573 n. 8 (Fla. 3d DCA 2013). The duties become tested when an attorney and client both have an interest in defending themselves in the same lawsuit.

Mr. Bertolino was Brian Laundrie's attorney as well as counsel for his parents. And, Mr. Bertolino made the statement that is the crux of the cause of action at issue in the course of his representation of all three Laundries. Mr. Bertolino did not make that statement in a vacuum, nor did it come out of the blue. That statement was within the context of an intense murder investigation by federal and multiple state authorities and a 24 hour-a-day media storm. Mr. Bertolino's position was not only to counsel and protect the Laundrie parents, but also to protect Brian Laundrie as he was the focus of the investigation. By attempting to add Mr. Bertolino as a defendant, Plaintiffs are effectively invading the attorney-client privilege by putting Mr. Bertolino in an untenable conflict between his duty to his clients and his right to defend himself in a lawsuit.

There have been no allegations nor is there any reason to suspect that Mr. Bertolino's representation of his clients was anything but appropriate under the circumstances. While there is nothing about his confidential communications with the Laundrie family that would be unexpected from a lawyer in a murder investigation, Mr. Bertolino's thought process and his communications with his clients, co-counsel, consultants, or anyone else within the attorney-client bubble are relevant for him to defend himself in this action. Although he could not reveal the attorney-client privileged communications of Brian Laundrie because the privilege survives his death, the Laundrie parents should not be put in a position where they are forced to waive their attorney-client privilege or work product protection so that Mr. Bertolino can present a defense. Plaintiffs' attempt to add Mr. Bertolino as a defendant deprives the

Laundries' of the duties Mr. Bertolino owes to them and puts them in a potential conflict with him.

The Laundries would also be extremely prejudiced by having a co-defendant who could not defend himself because he owes a duty of loyalty and confidentiality to them. Requiring Mr. Bertolino to sit on his hands at trial in order to navigate the various duties he owes to them would present an odd and prejudicial case to the jury. It would create an untenable situation at trial because the Laundries would want Mr. Bertolino to defend himself because it could inure to their benefit, but he may not be able to do so.

Pitting the Laundries and Mr. Bertolino as co-defendants undoubtedly creates a conflict because both have an interest in defending themselves to the potential detriment of the other. It invades the relationship between attorney and client which is a foundational principle of our legal system. The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. *Upjohn Co. v. United States*, 449 U.S. 383, 389–90 (1981) (citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961)). The privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). Forcing a conflict over the attorney-client privilege between Mr. Bertolino and the Laundries would violate the public policy behind that privilege.

It also cannot be ignored that Mr. Bertolino's representation of Brian Laundrie puts him in the unique of position of knowing more about this case than any person other than Brian Laundrie. Mr. Bertolino's knowledge is certainly far more than the Laundrie parents. Yet, he cannot disclose what he knows or the reasons why he took certain actions because, even after Brian Laundrie's death, Mr. Bertolino still owes a duty of confidentiality to Brian Laundrie. *See Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998) (Despite potential for loss of evidence, "[i]t has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client."). Mr. Bertolino, and by proxy the Laundries, would be at an evidentiary disadvantage because of his duty to Brian Laundrie.

The Laundries should be able to defend this case without worrying whether their attorney will take an antagonistic position against them. Their defense may very well hinge on Mr. Bertolino's counsel during the relevant period of his statement. Their ability to defend themselves should not be curtailed because Mr. Bertolino is put in a position to defend himself in the same lawsuit. And, as discussed above, creating this conflict is unnecessary because Mr. Bertolino, as an attorney, cannot be individually liable for actions he takes on behalf of his clients.

V. Conclusion

For these reasons, Defendants respectfully request the Court deny Plaintiffs Motion for Leave to File a Second Amended Complaint (DIN 60).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 3, 2023, 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:

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