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

JOSEPH PETITO and
NICHOLE SCHMIDT,

Plaintiffs,

vs. CASE NO. 2022 CA 001128 SC

CHRISTOPHER LAUNDRIE and
ROBERTA LAUNDRIE,

Defendants.
_____/

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

COME NOW, the Plaintiffs above captioned, by and through their undersigned counsel, and reply to the Defendants' Response in Opposition to Plaintiffs' Motion for Leave to File Second Amended Complaint **[DIN 72]** as follows:

I. FLORIDA RULE OF CIVIL PROCEDURE 1.190

It is the public policy of Florida to freely allow amendments to pleadings so that cases may be resolved on their merits. All doubts should be resolved in favor of allowing the amendment. Refusal to allow amendment of a pleading under Rule 1.190 (a) of the Florida Rules of Civil Procedure constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or an amendment would be futile. *State Farm Fire & Cas. Co. v. Fleet Fin. Corp.*, 724 So. 2d 1218, 1219 (Fla. 5th DCA 1998) (citations omitted).

Florida courts applying 1.190 (e) long ago established that the public policy of our state favors the liberal amendment of pleadings and that "courts should resolve all doubts in favor of allowing amendment of pleadings to allow cases to be decided on their merit."

Harrison v. Dep't of Mgmt. Servs., Div. of State Grp. Ins., 339 So. 3d 504, 505 (Fla. 1st DCA 2022), citing *Thompson v. DeSantis*, No. SC20-985, 2020 Fla. LEXIS 1486, 2020 WL 5362111, at *1 (Fla. Sept. 8, 2020) (quoting *Newberry Square Fla. Laundromat, LLC v. Jim's Coin Laundry & Dry Cleaners, Inc.*, 296 So. 3d 584, 588 (Fla. 1st DCA 2020)). Another guiding principle is that "[t]he primary consideration in determining whether a motion for leave to amend should be granted is whether the opposing party would be prejudiced by the amendment." *Id.* (quoting Phlip J. Padovano, Florida Civil Practice §7:10 n. 16 (2020 Ed.)). As such, a trial court should grant leave to amend, rather than dismiss a complaint with prejudice, unless a party has abused the privilege to amend, an amendment would prejudice the opposing party, or the complaint is clearly not amendable." *Newberry*, 296 So. 3d at 589 (quoting *Florida Nat. Org. for Women, Inc. v. State*, 832 So. 2d 911, 915 (Fla. 1st DCA 2002)).

Fla. R. Civ. P. 1.190(a) provides that when a party applies to the Court to amend the complaint after a responsive pleading has been served, "leave of court shall be given freely when justice so requires." Under this Rule, even if the trial court believes that an amended complaint fails to state a cause of action, dismissal with prejudice denying leave to amend is not justified on that basis alone. Rather, the plaintiff should be given leave to amend the complaint unless the court further finds that the privilege to amend has been abused or the complaint is clearly not amendable. *Bouldin v. Okaloosa County*, 580 So. 2d 205, 207 (Fla. 1st DCA 1991).

Plaintiffs submit that the privilege to amend has not been abused, Defendants will not be prejudiced if the amendment is allowed, and the amendment would not be futile.

II. PRIVILEGE TO AMEND HAS NOT BEEN ABUSED

The Defendants do not argue that the privilege to amend has been abused, although they do point out that the Complaint has already been amended once. That amendment was filed after the Defendants filed a Motion to Dismiss **[DIN 17]**. Defendants rather argue that the Motion to File a Second Amended Complaint **[DIN 60]** is untimely as it is beyond the Case Management Report **[DIN 22]** deadline of August 26, 2022 to file a motion to add a party or amend pleadings.

It is important to note in response to the Defendants' allegation of untimeliness that the Case Management Report was filed on April 13, 2022, before the pleadings were even closed. Although an Amended Complaint **[DIN 32]** was filed on April 28, 2022, the Defendants filed a Motion to Dismiss **[DIN 33],** and an Order was entered on June 30, 2022 **[DIN 42]** denying their Motion to Dismiss. Defendants then filed their Answers to the Amended Complaint **[DIN 43 and 44]** on July 15, 2022, about a month and a half prior to the deadline to add a party.

While admittedly the addition of a new party defendant may cause delays in the matter, the only discovery that has been conducted to date is an exchange of written discovery. No depositions have been taken. Additionally, the Plaintiffs are awaiting documents responsive to a Freedom of Information Act request that they submitted to the federal government in the summer of 2022. These documents will be utilized during the depositions of the Defendants. It is anticipated that they will be received by the end of January. The delay in receiving the documents is outside the control of the parties.

Obviously, given that discovery is only in its infancy stages, there is no motion for summary judgment filed or anticipated to be filed within the coming months. Further,

under Rule 1.190(e), amendments are permitted to the pleadings at any time in furtherance of justice, including up to the time of trial.

The plain fact is that the Plaintiffs have not abused the privilege to amend.

III. THE AMENDMENT IS NOT 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. *Farrey's Wholesale Hardware Co. v. Coltin Elec. Servs.*, 263 So. 3d 168, 181 (Fla. 2nd DCA 2018) ("to be futile, the proposed amendment must be either insufficient as a matter of law or insufficiently pled.); *Thompson v. Bank of N.Y.*, 862 So. 2d 768, 770 (Fla. 4th DCA 2003) (affirming trial court's denial of motion to amend because allegations of fraud were conclusory and lacking in any real allegations of ultimate fact showing fraud such that the proposed amended pleading was insufficient as a matter of law).

Florida courts have found "futility" of an amendment when "it conclusively appears there is no possible way to amend the complaint to state a cause of action." *Butler Univ. v. Bahssin*, 892 So. 2d 1087, 1089 (Fla. 2nd DCA 2004) (quoting *Undereducated Foster Children v. Florida Senate,* 700 So. 2d 66, 67 (Fla. 1st DCA 1997). Futility should be analyzed based upon the face of the proposed amended pleadings. See *JBJ Inv. of South Fla., Inc. v. Southern Title Grp., Inc.*, 251 So. 3d 173, 181 (Fla. 4th DCA 2018) (finding proposed amendment would not have been futile due to the existence of genuine issues of material fact); *Price v. Miller & Solomon Gen. Contrs.,, Inc.*, 104 So. 3d 1251, 1252 (Fla. 4th DCA 2013) (finding trial court abused its discretion in denying motion to amend complaint based upon futility because the record was insufficiently developed to determine a question of fact); *Posey v. Magill*, 530 So. 2d 985, 986 (Fla. 1st DCA 1988).

Any doubt with respect to futility should be resolved in favor of allowing the amendment, especially when leave to amend is sought at or before the summary judgment hearing. *RV-7 Prop., Inc. v. Stefani De La O, Inc.*, 187 So. 3d 915, 917 (Fla. 3rd DCA 2016) ("while we may share the trial court's apparent concern regarding the ultimate success of RV-7's "new" affirmative defense, we cannot say that, as a matter of law, the amendment is futile.").

Claims are insufficient as a matter of law when they are conclusory and lack any real allegations of ultimate fact. *Thompson v. Bank of N.Y.*, 862 So. 2d 768, 770 (Fla. 4th DCA 2003).

The Defendants do not suggest that the proposed Second Amended Complaint is insufficient as a matter of law because the proposed Second Amended Complaint contains any conclusory allegations or lacks any real allegations of ultimate fact supporting the cause of action for intentional infliction of emotional distress. For this reason, the Defendants have failed to establish that the Second Amended Complaint would be futile. In fact, Judge Hunter W. Carroll has already concluded that the facts of the Amended Complaint, which are virtually identical to the facts set forth in the Second Amended Complaint, were sufficient to defeat a motion to dismiss.

Rather, the Defendants instead focus upon alleged defenses that the proposed new defendant, Steven Bertolino, could raise. This is not sufficient to establish that the proposed Second Amended Complaint is insufficient as a matter of law. Nevertheless, the issues raised by the Defendants to support their motion will not establish a defense for Steven Bertolino, nor will they show that the amendment is futile.

Defendants first suggest that if Steven Bertolino committed an intentional tort for his own purposes and not on behalf of his clients, then his clients cannot be liable for the act of their agent and the Laundries should be dismissed. Dismissal of the claim against the Laundries is not the subject of the pending motion.

Generally, an attorney serves as agent for his client; the attorney's acts are the acts of the principal, the client. *Andrew H. Boros, P.A. v. Arnold P. Carter, M.D., P.A.*, 537 So. 2d 1134, 1135 (Fla. 3rd DCA 1989). In a principal-agent situation, the principal is liable if the wrongful act is done while the agent is acting within the scope of his apparent authority even though the act "was not authorized by, or was forbidden by, the employer, or was not necessary or appropriate to serve the interest of the employer," unless the act was done to accomplish his own purposes as distinct from the employer's business. *Stinson v. Prevatt*, 1922, 84 Fla. 416, 94 So. 656, 657. See also *Dieas v. Associates Loan Co.,* 99 So. 2d 279 (Fla. 1957).

Since futility must be analyzed based upon the face of the proposed amended pleading only, *JBJ Inc. of South Florida, Inc.*, *supra*, the proposed Second Amended Complaint alleges at paragraph 8 that at all times relevant to the cause of action, Steven Bertolino was acting as the agent for Christopher Laundrie and Roberta Laundrie, and it further states in paragraph 28 that Steven Bertolino was acting on behalf of Christopher Laundrie and Roberta Laundrie when he issued the statement which is the substance of the claim for intentional infliction of emotional distress. Thus, both the principal and agent are liable.

The Plaintiffs do not have to bring an action against either the Laundries or Steven Bertolino. The action can be maintained against both. An agent is individually liable to a

third person for the agent's tortious conduct. In *Sussman v. First Fin. Title Co. of Florida*, 793 So. 2d 1066 (Fla. 4th DCA 2001), the court stated:

> [I]t is almost universally held that the existence of a principal and an agent relationship is immaterial, the tort liability of the agent not being based upon the existence of any contractual relationship between the agent and a principal, but upon the common law obligation that every person must so reasonably act or use that which he or she controls as not to harm another. See *3 Am.Jur.2d, Agency §309* (1986); *Restatement Second of Agency §343*.

Id. at 1069. An agent can also be independently liable for its own fraudulent misrepresentations. *Lyle v. National Sav. Life Ins. Co.*, 558 So. 2d 1047, 1048 (Fla. 1st DCA 1990). See also, *Restat 3d of Agency §7.01* (an agent is subject to liability to a third party harmed by the agent's tortious conduct. Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment.")

The Defendants' suggestion that the Plaintiffs must choose to either proceed against the Laundries or Steven Bertolino because they cannot both be liable is simply false.

The Defendants next suggest that Steven Bertolino is afforded immunity under the litigation privilege. While this may be a defense to be posed by Mr. Bertolino, it does not address the issue of whether the proposed Second Amended Complaint is insufficient as a matter of law. Defendants are correct that statements made in the course of judicial proceedings are absolutely privileged, no matter how false or malicious the statements may be, so long as the statements are relevant to the subject of inquiry. *Fridovich v. Fridovich*, 598 So. 2d 65 (Fla. 1992). Consequently, the torts of perjury, liable, slander, defamation, and similar proceedings that are based on statements made in connection

with a judicial proceeding are not actionable. *Wright v. Yurko*, 446 So. 2d 1162 (Fla. 5th DCA 1994).

The flaw in the Defendants' argument, assuming it is appropriately raised at this point, is that there was no pending judicial proceeding when the statement which is the subject of the Plaintiffs' Complaint was made by Steven Bertolino. Defendants attempt to deflect this argument by stating: "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 . . .. " (See page 8 of the Defendants' Response in Opposition.) Again, although we are bound to review the proposed Second Amended Complaint in and of itself to determine if it is insufficient as a matter of law, Defendants ask this Court to go outside of the proposed Second Amended Complaint and assume that perhaps some sort of proceedings were pending at the time the statement was made. There is simply no factual basis for the Defendants to make this argument, and even if there were, it would be improper.

Further, without knowing what, if any, proceedings were ongoing, how can this Court determine if the statements were relevant to the subject of the proceeding? The only possible proceeding to which that absolute privilege would apply is the within matter, which wasn't filed until March 10, 2022. Nothing within the proposed Second Amended Complaint tells us when the litigation was first contemplated.

Defendants also suggest that the Florida Supreme Court has recognized a qualified privilege, rather than an absolute privilege. As the Defendants correctly point out, this privilege only applies in a criminal context.. *Fridovich v. Fridovich*, 598 So. 2d at 69, n. 8. Defendants failed to establish that allowing the proposed Second Amended Complaint to be filed would be futile, as they have failed to present any argument to the Court as to why the proposed Second Amended Complaint would be insufficient as a matter of law. Their purported defenses that Steven Bertolino can raise to the Second Amended Complaint are not relevant to the determination to be made by the Court at this time.

IV. THE AMENDMENT WOULD NOT PREJUDICE THE LAUNDRIES

Defendants seem to argue that the proposed Second Amended Complaint would prejudice both the Defendants as well as Steven Bertolino, who is not even a party at this point. Prejudice to Steven Bertolino, if any, is not an issue at this stage.

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 N.Y. Mellon*, 200 So. 2d 792, 795 (Fla. 1st DCA 2016). Defendants themselves recognize that the proposed amendment would not affect their ability to prepare for new allegations or defenses, and they state in their response "The purposed 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." (Page 2 of Defendant's Response.) In fact, there are no new allegations which the Defendants need to prepare for. The proposed Second Amended Complaint does not

change the cause of action or its underlying facts, but simply adds Steven Bertolino as a Defendant, since he is the one who made the statement which is the subject of the action.

This will not be the first action where an attorney sits side by side with his/her client as a Defendant, nor will it be the last. Despite the Defendants' arguments, that in and of itself is not sufficient to deny the request to file the Second Amended Complaint. Difficulties that the Defendants and Steven Bertolino may have in defending themselves does not mean that Steven Bertolino should not be joined as a party.

The Defendants have not presented one case to support their position that an attorney and his/her client should not be defendants in the same cause of action. Instead, the Defendants focus upon the attorney's duties to his clients, the attorney-client privilege, and a potential conflict between Defendants and Steven Bertolino. These issues would have existed had the original Complaint named Steven Bertolino as a defendant alongside the Laundries. Defendants would have had no cause to preclude Plaintiffs from filing such an action, or to have one of them removed as a defendant. While the Defendants may have established that it may be difficult for them to defend an action next to their attorney, they have not shown any prejudice in the context of their ability to prepare for new allegations, of which there are none, prior to trial.

WHEREFORE, for all of the reasons cited above, the Plaintiffs, JOSEPH PETITO and NICHOLE SCHMIDT, respectfully request this Court grant a request for leave to file a Second Amended Complaint.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been electronically filed on this 19th day of January, 2023, with the Clerk of Court via the E-Filing Portal System which will simultaneously email the same to:

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/s/ PATRICK J. REILLY, ESQUIRE