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 CHRISTOPHER AND ROBERTA LAUNDRIE'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

Defendants CHRISTOPHER LAUNDRIE and ROBERTA LAUNDRIE ("the Laundries"), by and through undesigned counsel, hereby move to dismiss the Second Amended Complaint (DIN 60) pursuant to Florida Rule of Civil Procedure Rule 1.140(b) for failing to state a cause of action for intentional infliction of emotional distress. For the reasons set forth below, there are no facts that could support this cause of action and the Court should dismiss the Second Amended Complaint with prejudice.

I. BACKGROUND

The Second Amended Complaint alleges that the Plaintiffs' daughter, Gabrielle "Gabby" Petito, and the Defendants' son, Brian Laundrie, were engaged to be married. (DIN 60, Sec. Amnd. Complaint ¶ 9). Gabby Petito and Brian Laundrie were traveling the western United States in the summer of 2021. (DIN 60, Sec. Amnd.

Complaint ¶ 10). At some point during the trip Gabby Petito went missing and there was a search for her whereabouts. Shortly thereafter, law enforcement commenced an investigation which included Brian Laundrie and the Laundrie parents as persons of interest. The investigation received tremendous media attention. Defendant Steven Bertolino was the attorney for Brian Laundrie and his parents. (DIN 60, Sec. Amnd. Complaint ¶ 7,8). The Second Amended Complaint does not allege when Gabby Petito was reported missing or when the law enforcement investigation of the Laundries began, but news reports indicate Nichole Schmidt, Gabby Petito's mother and a Plaintiff in this action, reported Ms. Petito missing to the Suffolk County (New York) Police Department on September 11, 2021. Ms. Petito was found deceased in Wyoming on September 19, 2021. (DIN 60, Sec. Amnd. Complaint ¶ 38). Brian Laundrie was found deceased, presumably by suicide, in Florida on October 20, 2021.

Plaintiffs originally filed a complaint against Defendants Christopher and Roberta Laundrie in March 2022, alleging that the Laundries, as parents of Brian Laundrie, intentionally inflicted emotional distress on them for not communicating with them about Ms. Petito's disappearance. Plaintiffs alleged in the Complaint that "Christopher Laundrie and Roberta Laundrie instructed that all contacts were to be made through their attorney, Steven P. Bertolino, and he issued 'no comment' when asked about Gabrielle Petito's well-being." (DIN 2, ¶ 28).

The Laundries moved to dismiss both the original Complaint (DIN 17) and the First Amended Complaint (DIN 33) primarily on the grounds that the Laundries had no obligation or duty to speak and they could not be sued for exercising their rights to

silence, privacy, and to have an attorney speak for them. The Court held a hearing on the motion to dismiss and agreed that the Laundries' inaction, silence, or lack of communication could not support a cause of action for intentional infliction of emotional distress. (DIN 40, 42, pg. 3-4).

However, the Court allowed the case to proceed on Plaintiffs' assertion that the Laundries' attorney, Steven Bertolino, who has been added as a defendant in the Second Amended Complaint, intentionally caused them emotional distress by issuing the following statement:

> 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 the that Miss Petito is reunited with her family.

(DIN 60, Sec. Amnd. Complaint ¶ 28). The Second Amended Complaint does not set forth the statement in its entirety, only the middle paragraph. The statement in its entirety is as follows:

> 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 the that Miss Petito is reunited 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.

The middle paragraph cited by the Plaintiffs is itself benign, and in the context of the other portions of the statement, it is particularly innocuous.

In their Second Amended Complaint, the Plaintiffs have reasserted the same allegations from their two prior complaints asserting that the Laundries' lack of communication supports their cause of action. (Sec. Amnd. Comp. DIN 60, ¶ 40). As it relates to the restatement of allegations in the Second Amended Complaint that the Laundries had a duty to communicate or otherwise refrain from exercising their constitutional rights, the Laundries ask the Court to find, as Judge Carroll did, that those actions or inactions do not support a cause of action for intentional infliction of emotional distress. (DIN 42). In support, the Laundries reassert and allege as if set forth herein their arguments from the original written motion and hearing on their Motion to Dismiss the First Amended Complaint. (DIN 33, 40).

A problem that continues to permeate the Second Amended Complaint is it does not specifically use the phrase "intentional infliction of emotional distress" nor does it recite the elements of the cause of action with individualized factual support in each count. Furthermore, each count of the Second Amended Complaint incorporates every paragraph of the general allegations as though each of those factual allegations is the basis for a single count. That makes it particularly difficult to address after Judge Carroll found most of those allegations do not support the cause of action as a matter of law. Florida Rule of Civil Procedure 1.110(b) requires that a complaint "must state a cause of action" and if a complaint is so vague, indefinite and ambiguous as to wholly fail to state a cause of action, it is subject to dismissal. *Frisch v. Kelly*, 137 So. 2d 252, 253 (Fla. 1st DCA 1962). Likewise, "[c]ommingling various claims against all defendants together may 'warrant dismissal of a complaint.'" *Taubenfeld v. Lasko*, 324

So. 3d 529, 541 (Fla. 4th DCA 2021) (citing *Collado v. Baroukh*, 226 So. 3d 924, 927 (Fla. 4th DCA 2017)).

Despite these pleading deficiencies, it appears that the Second Amended Complaint is about Mr. Bertolino's statement. As it relates to his statement, the primary basis under which Judge Carroll allowed the case to proceed, the Laundries continue to maintain that this statement is not outrageous, that the Plaintiffs have not adequately alleged causation, and that the Plaintiffs have not satisfied the element that they be present. However, there are two additional reasons the Court should dismiss the Complaint against the Laundries: 1) Mr. Bertolino's statements are privileged so the Laundries cannot be liable for them;[1] and 2) the allegations against Mr. Bertolino render the allegations against the Laundries implausible.

II. MEMORANDUM OF LAW

Florida officially recognized the tort of intentional infliction of emotional distress in *Metropolitan Life Insurance Co. v. McCarson*, 467 So.2d 277, 278 (Fla.1985), which adopted section 46, Restatement (Second) of Torts (1965). To state a cause of action, a complaint must allege four elements: (1) deliberate or reckless infliction of mental suffering; (2) outrageous conduct; (3) the conduct caused the emotional distress; and (4) the distress was severe. *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,

[1] The Laundries do not assert that Mr. Bertolino's statement is attorney-client privileged. Rather, courts use the term "privileged" in the context of the tort of intentional infliction of emotional distress to describe conduct that is legally permissible or protected.

986 (Fla. 5th DCA 1987)). Behavior claimed to constitute the intentional infliction of emotional distress must be "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.'" *Id.* (quoting *Ponton v. Scarfone*, 468 So.2d 1009, 1011 (Fla. 2d DCA 1985) (quoting *Metropolitan*, 467 So.2d at 278)).

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. Rather, the court must evaluate the conduct as objectively as possible to determine whether it is "'atrocious, and utterly intolerable in a civilized community.'" *Id.* (quoting *Metropolitan*, 467 So.2d at 278).

"The standard for 'outrageous conduct' is particularly high in Florida." *Patterson v. Downtown Med. & Diagnostic Ctr., Inc.*, 866 F. Supp. 1379, 1383 (M.D. Fla. 1994) (citing *Golden v. Complete Holdings, Inc.*, 818 F. Supp. 1495 (M.D. Fla. 1993)); *Scott v. Walmart, Inc.*, 528 F. Supp. 3d 1267, 1273 (M.D. Fla. 2021)(("While there is no exhaustive or concrete list of what constitutes outrageous conduct, Florida common law has evolved an extremely high standard."). It is not enough that the defendant acted with an intent which is tortious or even criminal, or that the 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 the plaintiff to punitive damages for another tort. *E. Airlines, Inc. v. King*, 557 So. 2d 574, 576 (Fla. 1990) (citing section 46, Restatement (Second) of Torts, comments (d) and (i) (1965)). Rather, liability is established only where the alleged conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency,

and to be regarded as atrocious, and utterly intolerable in a civilized community. *Id.* Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" *Id.*

Even if a complaint alleges facts, those facts "if proved" must "establish a cause of action for which relief may be granted." *See Maiden v. Carter*, 234 So.2d 168, 170 (Fla. 1st DCA 1970). Mr. Bertolino's statement was legally protected, ethically permissible, not outrageous, and does not give rise to any cause of action.

A. MR. BERTOLINO'S STATEMENT WAS NOT OUTRAGEOUS

Turning to the statement upon which the Plaintiffs' entire cause of action rests, Mr. Bertolino's unredacted statement is as follows:

> "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 the that Miss Petito is reunited 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."

(DIN 60, Sec. Amnd. Complaint ¶ 28)(cited in part). Plaintiffs failed to disclose the full quote, therefore, Judge Carroll's ruling on the First Amended Complaint was based on inadequate information. Judge Carroll, in his order (DIN 42), found that the middle paragraph words "on the surface initially do not suggest outrage" but that there could be context in which the statement could be outrageous. Having the benefit of

only the middle paragraph, Judge Carroll relied on Plaintiffs' assertion that the statement could be outrageous if it was made in the context of knowing that Gabby was dead, knowing the location of her body, and knowing that her parents were frantically looking for her. (DIN 42, pg. 6). Of course, that ruling was made without the benefit of the complete statement. Plaintiffs argue that the statement of sympathy is outrageous in context, but they fail to set forth the entire statement for context. The context of the first and last sentence reveal that this statement was not motivated by a deliberate or reckless intent to inflict emotional distress.

The Second Amended Complaint alleges an additional statement by attorney Bertolino after Ms. Petito's body was found in Wyoming in which he said "The news about Gabby is heartbreaking. The Laundrie family prays for Gabby and her family." (DIN 60, Sec. Amnd. Complaint ¶ 38). Regardless of whether that statement was outrageous, which it is not, the Complaint also does not allege that Mr. Bertolino made that statement on behalf of the Laundries so it should not be considered against them. Moreover, there is no context in which this statement of condolence could be outrageous.

On their face, neither statement is outrageous and there is no context in which either statement could be outrageous. If a statement by an attorney expressing sympathy, hope, or condolence is considered "utterly intolerable in a civilized community" then we have lost our way as a society.

Looking closely at Mr. Bertolino's statement in paragraph 28 of the Second Amended Complaint, the statement appears carefully worded so as not to provide

definitive information. The first sentence expresses sympathy for the difficulty of the situation. The last sentence explains that the Laundries are not speaking on advice of counsel. And, contrary to the Plaintiffs' argument at the hearing on the Motion to Dismiss the First Amended Complaint that the middle paragraph gave false hope that Ms. Petito may have been alive, it does not indicate that Ms. Petito was or was not alive. It is an ambiguous, general expression of hope.

The term "reunited" is capable of many interpretations and could be understood to mean that the person may not be alive. Indeed, both the NIH National Library of Medicine and the Department of Justice have published pieces using the term "reunited" to describe when a deceased person's remains are returned to family members. *See* 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 IS. 1, Jan. 2008(This paper describes the online database created by the Reuniting Families Project which aids federal, state, and local agencies identify deceased undocumented immigrants based on phenotypic and genotypic characteristics). The Reuniting Families Project (RFP) was founded in 2003 by Dr. Lori Baker and is part of the International Consortium for Forensic Identification. *See* https://www.reunitingfamilies.org.

The United States Army also uses the term "reunited" to describe when a fallen soldier's remains are repatriated or returned to family. *See* Sean Kimmons, *40 Years on, Army Veteran Still Strives to Reunite Families with Fallen Heroes*, ARMY NEWS SERVICE, May 23, 2018. Additionally, news agencies from around the world use

"reunited" in the same way. *See e.g.,* Andrew McRae, *'He's Finally Home': NZ Soldiers' Remains Reunited with Loved Ones*, RNZ NEWS, Oct. 8, 2018, at https://www.rnz.co.nz/news/national/368172/he-s-finally-home-nz-soldiers-remains-reunited-with-loved-ones; Sarah Fili, *Family reunited with missing soldier's remains, visits lab that identified him*, KETV OMAHA, Oct. 11, 2018, at https://www.ketv.com/article/family-reunited-with-missing-soldiers-remains-visits-lab-that-identified-him/23728599; Nicole Chettle, *Australian Soldiers Lost at War Could be Identified by Scientists Using DNA Technology*, ABC NEWS, Apr. 24, 2017, at https://www.abc.net.au/news/2017-04-24/dna-technology-used-to-identify-australian-soldiers-remains/8468484 ("The next step will see relatives asked to provide DNA samples in an effort to reunite the deceased soldiers with their families."); *Korea Remains: Pyongyang Returns US Troops Slain in Korean War*, BBC News Jul 27, 2018 at https://www.bbc.com/news/world-asia-44976947 ("Relatives of missing soldiers have waited years to be reunited with the remains of their loved ones."); Adam Herbets, *Funeral Held in Lewiston for WWII Soldier After Remains Identified*, FOX 13 SALT LAKE CITY, Nov. 24, 2019, at https://www.fox13now.com/2019/11/23/funeral-held-in-lewiston-for-wwii-soldier-after-remains-identified ("Max W. Lower was reunited with his sister and laid to rest with full military honors on Saturday in his hometown of Lewiston, Utah."); Lisa Mullins, *Remains Of Korean War Soldier Reunite A Family,* NATIONAL PUBLIC RADIO, April 7, 2016, at https://www.npr.org/2016/04/07/473022594/remains-of-korean-war-soldier-reunite-a-family.

The term "reuniting" is commonly used by federal government agencies, institutions of higher learning, news agencies, and non-government organizations to describe the circumstances of having a person's remains returned to their families. The average person reading Mr. Bertolino's statement would not regard it as atrocious and utterly intolerable in a civilized community. Nor is the first thing that comes to mind "Outrageous!" It is simply a lawyer for an accused offering the only kind of statement he could offer under the circumstances: a generalized expression of sympathy and hope. The statement certainly does not exude the malice and ill-will attributed to it by the Plaintiffs.

Also of significance, while the Plaintiffs claimed at the hearing on the Motion to Dismiss the Amended Complaint that they interpreted Mr. Bertolino's statement to give false hope that Ms. Petito was alive, their Second Amended Complaint contradicts that assertion. Mr. Bertolino made his statement on September 14, 2021. (DIN 60, Sec. Amnd. Comp. ¶ 28). Two days later, the attorney for the Petito family, Richard Safford from New York, issued a statement to the Laundries in which he said, "We believe you know the location of where Brian left Gabby." (DIN 60, Sec. Amnd. Comp. ¶ 35). Clearly, at that time Plaintiffs did not believe Mr. Bertolino's statement meant that Ms. Petito was still alive.

And, in that same statement, the Plaintiffs' attorney acknowledges the complicated situation faced by the Laundries: "We understand you are going through a difficult time and your instinct to protect your son is strong." (DIN 60, Sec. Amnd. Complaint ¶ 35). At the time, the Plaintiffs acknowledge what is apparent from Mr.

Bertolino's statement; that it said virtually nothing and what they really wanted was more information. As such, the statement did not constitute a "deliberate or reckless infliction of mental suffering." *Steadman*, 968 So.2d at 594.

Just like Mr. Bertolino's statement, there is nothing tortious about the Plaintiffs' attorney's expression of sympathy and understanding for the Laundries' unenviable position or questioning whether they had "any decency left" because it was a tragic situation for both families. Recasting Mr. Bertolino's statement as outrageously offensive is inappropriate when the Plaintiffs' real issue with the statement is that it did not provide them with the information they desired. And, as Judge Carroll found, the Laundries did not have a duty to provide information.

B. MR. BERTOLINO'S STATEMENT IS LEGALLY PROTECTED

1. A Statement is Privileged Where the Actor is Merely Exercising a Legal Right

While Mr. Bertolino's statement is not outrageous, even if it were, outrageous conduct is privileged where the actor is merely insisting on his legal rights in a permissible way. Because Mr. Bertolino's statements are protected, the Laundries cannot be liable. When a principal's liability rests solely on the doctrine of respondeat superior, a principal cannot be held liable if the agent is exonerated. *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 532 (Fla. 1985).

From the first recognition of the tort of intentional infliction of emotion distress, the Florida Supreme Court has emphasized that "[t]he conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances."

Metropolitan Life Ins. Co. v. McCarson, 467 So. 2d 277, 279 (Fla. 1985) (citing Restatement (Second) of Torts § 46 (1965)). "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." *Id*. (finding, as a matter of law, that alleged facts were not outrageous where defendant did no more than assert legal rights in a legally permissible way). This principle has been upheld many times since. *See Southland Corporation v. Bartsch,* 522 So.2d 1053, 1056 (Fla. 5th DCA), *rev. dismissed,* 531 So.2d 167 (Fla. 1988) (a convenience store called the police to have a 6 year old shoplifter arrested, an act the court found to be "clearly within [the store's] legal rights"); *Associated Indus. of Fla. Prop. & Cas. Tr. v. Smith*, 633 So. 2d 543, 546 (Fla. 5th DCA 1994)("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."); *Food Lion, Inc. v. Clifford*, 629 So. 2d 201, 203 (Fla. 5th DCA 1993); *State Farm Mut. Auto. Ins. Co. v. Novotny*, 657 So. 2d 1210, 1212 (Fla. 5th DCA 1995).

ABA Model Rule of Professional Conduct 3.6 permits an attorney to make a statement to protect his client from adverse publicity:

> 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.

ABA Model Rule of Professional Conduct 3.6(c).

Mr. Bertolino represented both Brian Laundrie and the Laundrie parents during the investigation into the disappearance of Ms. Petito and all received a great deal of publicity that they did not initiate. Mr. Bertolino had the right and duty to issue a statement to protect his clients, both Brian Laundrie and his parents, from the substantial prejudicial effect of that publicity, which included hordes of press and protestors outside of the Laundrie family home. The statement, in its entirety, is devoid of malicious content or anything that is unlawful and was issued in response to the public situation, which at the time was overwhelmingly negative toward the Laundries. As such, his statement is privileged.

2. <u>The Litigation Privilege Shields Mr. Bertolino's Statements</u>

Not only are Mr. Bertolino's statements privileged because they are an exercise of legal rights, they are also privileged under Florida's litigation privilege. 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. *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) ("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.").

> 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).

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. The Florida Supreme Court has extended the 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.").

"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)). Mr. Bertolino issued his statement in response to requests starting on September 11, 2021, from the FBI and the local police departments for comment, numerous press inquiries, and the untenable and negative situation in front of the Laundrie home. In considering the nature of the investigation by both law enforcement and the media and the fact that Mr. Bertolino had a right to make a public statement under the Model Rules of Professional Responsibility, Mr. Bertolino's statement should be protected.

As discussed above, ABA Model Rule of Professional Conduct 3.6 contemplates an attorney making such a public statement in response to adverse publicity. *See* ABA Model Rule of Professional Conduct 3.6(c). 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.

The Defendants ask the Court to extend at least a qualified privilege in this context. Doing so promotes an attorney's ability to advocate for clients in public and

protect them from overzealous public scrutiny. Otherwise, an attorney would have to stay silent and publicly take punches from government agencies, countless media, and other sources making public comments that are convicting his clients in a public forum.

"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 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.* 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.

Plaintiffs are likely to argue, in ruling on a Motion to Dismiss, that the Court cannot consider matters outside Plaintiffs' allegations in the Second Amended Complaint despite the obvious exclusion of indisputable details. However, the Court is permitted to consider reasonable inferences from the facts alleged. *Haskel Realty*

Grp., Inc. v. KB Tyrone, LLC, 253 So. 3d 84, 85 (Fla. 2d DCA 2018). Although the Plaintiffs purposefully avoid mentioning the intense law enforcement and media investigation in the Complaint, they do allege that Brian Laundrie murdered Gabby Petito, that Brian Laundrie sent text messages to hide her death, that the Laundries knew their son committed the murder, that the Laundries hired an attorney, and that their attorney's statement was intended to be disseminated nationwide through broadcast news. (DIN 60, Sec. Amnd Comp. ¶ 16-19, 20, 21, 28, 31). The Complaint also references an organized search for Gabby Petito in Wyoming. (DIN 60, Sec. Amnd. Comp. ¶ 28). Even drawing inferences in the Plaintiffs favor at this stage of the proceedings, the only reasonable inference to be drawn is that the Laundries faced a criminal investigation and media inquiries.

Thus, because Mr. Bertolino's statements are privileged in at least two different ways, the Laundries cannot be liable. *See Bankers Multiple Line Ins. Co.*, 464 So. 2d at 532 (a principal cannot be held liable if the agent is exonerated).

C. PLAINTIFFS HAVE NOT ALLEGED FACTS SUPPORTING CAUSATION

To state a claim for intentional infliction of emotional distress, a complaint must put forth factually supported allegations that a defendant's "outrageous" conduct *caused* the victim emotional distress. *Kim v. Jung Hyun Chang*, 249 So. 3d 1300, 1305 (Fla. 2d DCA 2018) (emphasis added). As any parent would be, the Plaintiffs were distraught about their daughter's whereabouts. As the Plaintiffs' wrote on September 16, 2021, "We haven't been able to sleep or eat and our lives are falling apart." (DIN 60, Sec. Amnd. Comp. ¶ 35). But that was not a reaction to Mr. Bertolino's statement.

The Second Amended Complaint alleges that the three Defendants "could prevent such additional mental suffering and anguish of Joseph Petito and Nichole Schmidt by disclosing what they knew about the well-being and the location of the remains of Gabrielle Petito…" (DIN. 60, Sec Amnd. Comp. ¶ 39). The Plaintiffs acknowledge that their mental suffering and anguish existed prior to, and independent of, Mr. Bertolino's statement.

"Extreme 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." Fla. Std. Jury Inst. (Civ.) 410.6. The term "substantially" is used throughout the instruction to describe the extent of contribution or influence outrageous conduct must have in order to be regarded as a legal cause. *Id*. (Notes on Use for 410.6, n. 6). While concurring causes of distress are possible, it cannot be said that "but for" the Laundries' silence, the Plaintiffs would not have suffered distress.

Rather than alleging that the Laundries were the legal cause of Plaintiffs' distress, the Plaintiffs allege that the Laundries' silence failed to "prevent such additional mental suffering." (DIN 60, Sec. Amnd. Comp. ¶ 35). Failing to prevent additional mental suffering is not the same as causing it. "The pleader is bound by his own allegations in the complaint," *Reid v. Bradshaw*, 302 So. 2d 180, 183 (Fla. 1st DCA 1974), and courts are "not [] bound by bare allegations which are unsupported or

unsupportable." *Other Place of Miami, Inc. v. City of Hialeah Gardens*, 353 So. 2d 861, 862 (Fla. 3d DCA 1977).

The Plaintiffs were understandably fearful about what happened to their daughter and they would have been upset about their daughter being missing regardless of anything the Laundries could have said. But that fear or sadness was not caused by the Laundries - it was an unfortunate, unavoidable part of the entire circumstances surrounding Brian Laundrie and Gabby Petito.

D. THE PLAINTIFFS MUST BE PRESENT

The Amended Complaint suffers from another fatal flaw that is further evidence as to why there is no cause of action for this factual scenario. For conduct to be actionable as an intentional infliction of emotional distress the conduct must be directed at the plaintiff and in his or her presence. *Dunkel v. Hedman*, 2016 WL 4870502, at *10 (M.D. Fla. Aug. 17, 2016), *report and recommendation adopted*, 2016 WL 4765739 (M.D. Fla. Sept. 13, 2016); *see also Baker v. Fitzgerald*, 573 So. 2d 873 (Fla. 3d DCA 1990)(appellant's claim for intentional infliction of emotional distress fails because there was no showing of outrageous conduct directed at appellant herself); *M.M. v. M.P.S.*, 556 So. 2d 1140, 1141 (Fla. 3d DCA 1989)("we are unable to conclude that learning the awful truth from M.P.S. afforded appellants grounds for recovery for their own distress"); *Habelow v. Travelers Ins. Co.,* 389 So.2d 218, 220 (Fla. 5th DCA 1980)("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."); *Crenshaw v. Sarasota County Pub. Hosp. Bd.*, 466 So.2d 427 (Fla. 2d DCA 1985);

Harrington v. Pages, 440 So.2d 521 (Fla. 4th DCA 1983) (father and children may not recover when alleged extreme and outrageous conduct was directed only at spouse/mother); *Williams v. Worldwide Flight SVCS., Inc.*, 877 So. 2d 869, 870 (Fla. 3d DCA 2004)(recognizing physical contact requirement to state a valid claim for intentional infliction of emotional distress in a workplace situation).

As set forth in the Complaint, there was no contact between the Laundries and the Plaintiffs after September 1, 2021, other than Mr. Bertolino's general public statement. (DIN 60, Sec. Amnd. Complaint ¶ 23). If there was no contact, then the Laundries certainly could not have committed any act in the presence of or directed at the Plaintiffs that would support a cause of action for intentional infliction of emotional distress.

What happened to Ms. Petito is certainly tragic. However, as the Third District Court of Appeal reasoned:

> "If courts were to allow relatives of tort victims compensation for the distress they suffer when they receive bad news about family members when there is no attendant intentional or reckless conduct directed toward them, an avalanche of litigation would ensue. Compensation is available for actual harm to the victim; only in carefully prescribed circumstances is compensation permitted for relatives who suffer emotional distress. It is not lack of compassion, but necessity, that restricts relief to the immediate victim.

M.M., 556 So. 2d at 1141."

E. THE COMPLAINT FAILS TO STATE A PLAUSIBLE CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

"[P]leadings must be something more than an ingenious academic exercise in the conceivable." *United States v. Students Challenging Regulatory Ag. Proc.*, 412 U.S. 669,

688 (1973). Florida is a fact-pleading jurisdiction. *Horowitz v. Laske,* 855 So.2d 169, 172 (Fla. 5th DCA 2003). To withstand dismissal, a plaintiff must allege more than a "naked legal conclusion." *K.R. Exch. Servs., Inc. v. Fuerst, Humphrey, Ittleman, PL*, 48 So. 3d 889, 892 (Fla. 3d DCA 2010). It is insufficient to plead opinions, theories, legal conclusions or argument. *Barrett v. City of Margate*, 743 So. 2d 1160, 1163 (Fla. 4th DCA 1999). "The quality of pleading that is acceptable in federal court and which will routinely survive a motion to dismiss for failure to state a claim upon which relief may be granted will commonly not approach the minimum pleading threshold required in our state courts." *Cont'l Baking Co. v. Vincent*, 634 So. 2d 242, 244 (Fla. 5th DCA 1994).

In federal courts "a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do … Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)(internal quotations omitted). "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). Once the complaint has been whittled down to its non-conclusory allegations, the court undertakes the second step of determining whether the complaint states a plausible claim for relief. *See id.* at 679-680. "The plausibility standard…asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. "Where a complaint pleads facts

that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'"' [2] *Id.*

Although the Second Amended Complaint lumps the three Defendants together in most of its allegations as though they all had the same knowledge and are all equally responsible for each allegation, it does allege that each Defendant individually acted willfully and maliciously toward the Plaintiffs. (DIN 60, Sec. Amnd. Complaint ¶ 42, 44, 46, 48, 50, 52). If Mr. Bertolino, as Plaintiffs alleged, harbored such malice towards the Plaintiffs to intentionally inflict emotional distress, to deliberately commit an act that goes "beyond all possible bounds of decency," he would have been acting for himself, not as an agent for the Laundries. 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

[2] In *Davis v. Bay Cty. Jail*, 155 So. 3d 1173, 1177 (Fla. 1st DCA 2014), Judge Makar, in an opinion concurring in part and dissenting in part, noted that the pleading principles more recently announced by the U.S. Supreme Court in *Ashcroft v. Iqbal,* 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007) are similar to the fact pleading standards applied by Florida courts. Of significance, Judge Makar pointed out that if legal conclusions are alleged, they are *not* deemed true for purposes of a motion to dismiss. *Id.* (citing *Papasan v. Allain,* 478 U.S. 265, 286 (1986) (emphasis in original).

have authorized or expected the servant to do."). If Mr. Bertolino harbored the mental state necessary to commit the tort, he could not at the same time fulfill his role as an attorney to the Laundries. *See, e.g., E.P. v. Hogreve*, 259 So. 3d 1007, 1012 (Fla. 5th DCA 2018) (citing *Doe v. Hughes, Thorsness, Gantz, Powell & Brundin*, 838 P.2d 804, 806-07 (Alaska 1992) (indicating that important part of attorney's duty to client is duty to advise client of action that client should take in given set of circumstances).

Furthermore, if Mr. Bertolino, as the Laundries' attorney, advised or even permitted his clients to issue a statement based on his own maliciousness, then the Laundries could not have had the mental state necessary to commit the tort. They would have simply been allowing their attorney to act as their advocate, something that is not consistent with conduct that "is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *E. Airlines, Inc.*, 557 So. 2d at 576.

If there is an "obvious alternative explanation" for the Laundries' activities, the court can choose the more plausible conclusion. *Id.* at 682. Where the conduct is "more likely explained by lawful" behavior, the Complaint does not plausibly allege a claim for relief. *Id.* at 680. There are many lawful explanations for Mr. Bertolino's statement. At the top of the list would be that the Laundries had no intent to inflict emotional distress, even if the statement could be subjectively upsetting. This is not a negligence case. The Plaintiffs have alleged that the Laundries and Mr. Bertolino shared a malice and intent to harm to Plaintiffs. That is simply not plausible. *See*

Horowitz, 855 So.2d at 172-73 ("Florida's pleading rule forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort.").

III. CONCLUSION

The Plaintiffs have not set forth plausible and unprivileged factual assertions that can be supported by evidence which gives rise to legal liability. *See Barrett v. City of Margate*, 743 So. 2d 1160, 1162-63 (Fla. 4th DCA 1999). As such, this action for intentional infliction of emotional distress against the parents of Brian Laundrie is not legally sustainable and the Second Amended Complaint should be dismissed with prejudice and without leave to amend for all of the reasons set forth above.

WHEREFORE, Defendants Christopher Laundrie and Roberta Laundrie respectfully request the Court dismiss the Second Amended Complaint with prejudice.

Respectfully submitted,

TROMBLEY & HANES, P.A.

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 February 10, 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:

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