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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' MOTION TO DISMISS AMENDED COMPLAINT

COMES NOW, the Defendants, CHRISTOPHER LAUNDRIE and ROBERTA LAUNDRIE ("the Laundries"), by and through undesigned counsel, and hereby move to dismiss the Amended Complaint (dkt. 32) 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 Complaint with prejudice.

I. BACKGROUND

The facts surrounding this case have received widespread media attention and the Court is likely at least generally aware of the events that preceded the filing of this lawsuit. The Complaint alleges that the Plaintiffs' daughter, Gabrielle Petito, and the Defendants' son, Brian Laundrie, were engaged to be married. (dkt. 32, Amnd. Complaint ¶ 7). Ms. Petito and Mr. Laundrie were traveling the western United States

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in the summer of 2021. (dkt. 32, Amnd. Complaint ¶ 8). At some point during the trip Ms. Petito went missing and there was a search for her whereabouts. Shortly thereafter law enforcement commenced an investigation which included Brian Laundrie and the Defendants. The Complaint does not allege when Ms. Petito was reported missing or when the law enforcement investigation of the Laundries began, but news reports indicate Ms. Schmidt 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. (dkt. 32, Amnd. Complaint ¶ 22). Brian Laundrie was found deceased in Florida on October 20, 2021, of suspected suicide.

II. MEMORANDUM OF LAW

The Amended Complaint should be dismissed with prejudice and the Plaintiffs should not be granted leave to amend. Although leave of court to amend a pleading shall be given freely when justice so requires, Fla. R. Civ. P. 1.190(a), leave to amend need not be given where the amendment would be futile. *Tuten v. Fariborzian*, 84 So. 3d 1063, 1069 (Fla. 1st DCA 2012). A proposed amendment is futile if it is insufficiently pled or is insufficient as a matter of law. *Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864, 871 (Fla. 2d DCA 2010)(citations omitted). The Amended Complaint is deficient as a matter of law for many reasons and those deficiencies cannot be cured by any further amendments. The gravamen of the claimed wrongdoing is that the Laundries exercised their constitutional rights and essentially made no statements to Plaintiffs or law enforcement. As a matter of law, the

Laundries' silence (conduct) could not form the basis of a claim for intentional infliction of emotional distress. The Laundries' constitutional rights and the elements necessary for such a cause of action would not change with any further amendments of the Complaint. Furthermore, the time period at issue occurred several months ago and the foundation of the Plaintiffs claimed distress, wanting to find their daughter, has been resolved. There are no more facts that could emerge that would bolster the Plaintiffs' claim. The Plaintiffs' failure to state a cause of action in the Amended Complaint provides ample basis to conclude that the Plaintiffs would not be able to add the missing—but required—information if provided with yet another opportunity to bolster their allegations. As any additional amendments to the Complaint would be futile the Amended Complaint should be dismissed with prejudice.

A. THE COMPLAINT FAILS TO STATE A 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).[1]

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, 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

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[1] 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).

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).

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). While the Plaintiffs allege some facts, those facts could never establish a claim for intentional infliction of emotional distress because the Laundries' "actions" were legally permissible, constitutionally protected, not outrageous, and do not give rise to any cause of action.

1. THE LAUNDRIES' INACTION WAS NOT OUTRAGEOUS BUT LEGALLY PERMISSIBLE AND CONSTITUTIONALLY PROTECTED.

Outrageousness is the threshold test for recovery in an intentional infliction of emotional distress claim. *Ponton v. Scarfone,* 468 So.2d 1009 (Fla. 2d DCA), *rev. denied,* 478 So.2d 54 (Fla. 1985). Whether conduct is outrageous enough to support such a claim is a question of law, not a question of fact. *Liberty Mut. Ins. Co.*, 968 So. 2d at 595 (citing *Gandy,* 787 So.2d at 119; *Ponton,* 468 So.2d at 1011).

Importantly, "[t]he 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.*

The law is clear that a pleading is insufficient if it contains merely conclusions as opposed to ultimate facts supporting each element of the cause of action. *See id.* (citing *Price v. Morgan,* 436 So.2d 1116 (Fla. 5th DCA 1983)). Although the Amended Complaint alleges the Laundries' conduct was "outrageous," the Plaintiffs' failure to provide factual support rising to the level of outrageous conduct makes that allegation nothing more than a legal conclusion. The essential allegations against the Defendants are nowhere close to meeting the necessary standard. The Amended Complaint points to five allegations that it characterizes as outrageous: (i) failing to advise the Plaintiffs that Gabrielle Petito was deceased; (ii) failing to disclose to Plaintiffs the location of Gabrielle Petito's body; (iii) taking a family vacation with their son who had murdered Gabrielle Petito while Plaintiffs were desperately seeking her whereabouts; (iv)

blocking access to their cell phone and Facebook page to preclude Plaintiffs from getting information regarding Gabrielle Petito; and (v) the Laundrie's attorney issuing a statement to the press expressing "hope that the search for Ms. Petito is successful and that Ms. Petito is reunited with her family," knowing that Gabrielle Petito was deceased. (dkt. 32, Amnd. Comp. ¶32). Although the Amended Complaint contains several accusations about Brian Laundrie's conduct, he is not a defendant in this case, nor is there any legal theory that would impute his conduct to his parents.

None of the allegations recited above, either alone or together, describe outrageous conduct. In fact, the Amended Complaint fails to allege conduct at all. Basically, the Amended Complaint alleges that the Laundries failed to have any contact with the Plaintiffs when the Plaintiffs wanted the Laundries to speak or otherwise communicate with Plaintiffs. That allegation falls so far below the "particularly high" standard for outrageous conduct that the Amended Complaint should never have been filed. The only affirmative statements alleged in the Amended Complaint were made by the attorney for the Laundries and not the Laundries themselves.

Conduct claimed to cause severe emotional distress must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Ponton,* 468 So.2d at 1011. The Laundries' decision to exercise their constitutional rights to silence, privacy, and counsel, and to have their attorney speak for them under such trying circumstances and media pressure, could not be further from conduct that is extreme or goes beyond all bounds of decency. It is what most

people would and should do in such a situation. The letter by the Plaintiffs' attorney referenced in the Amended Complaint even acknowledges the complicated conditions faced by the Laundries: "We understand you are going through a difficult time and your instinct to protect your son is strong." (dkt. 32, Amnd. Complaint ¶ 27). The Plaintiffs cannot express sympathy and understanding for the Laundries' unenviable position and then claim the Laundries caused them emotional distress by not responding in the way Plaintiffs desired. If the Laundries' "act" of doing nothing, other than maintaining their privacy and silence, is enough to subject them to this supposed cause of action then there would be virtually no limitations on the tort of intentional infliction of emotional distress and the fundamental right to remain silent under any circumstances would be obliterated.

Labeling the Laundries' silence as "outrageous" is particularly incongruous with the context of the attempt to contact the Laundries discussed in the Amended Complaint. The only attempt at contact alleged is that the attorney for the Plaintiffs issued a letter to Christopher and Roberta Laundrie asking for their help in locating Ms. Petito. (dkt. 32, Amnd. Complaint ¶ 27). Because it would be a violation of Rule 4-4.2 of the Rules Regulating the Florida Bar for the Plaintiffs' attorney to contact the Laundries knowing the Laundries were represented by an attorney at the time, the Plaintiffs' attorney presumably did not send that letter directly to the Laundries and the Amended Complaint is not specific about how the letter was "issued" - whether through the mail or some other means. The Amended Complaint says nothing about whether the Laundries actually received that letter so their lack of response is a far cry

from "outrageous" conduct that "goes beyond all bounds of decency." Furthermore, that the Laundries would not respond to a communication that may or may not have violated rules of professional conduct is hardly outrageous.

The Plaintiffs' cause of action is novel. In their response to the Laundrie's motion to dismiss the original Complaint (dkt. 19), Plaintiffs' cited no cases where a person's silence was considered outrageous, regardless of the circumstances. Accepting the allegations of the Amended Complaint as true and allowing the case to proceed further would require any person and their family to speak about an alleged crime or other tragic event of which they may or may not possess knowledge and that is simply not something that our legal system requires. Indeed the slippery slope of allowing this cause of action to proceed would require anyone with knowledge of events that are hurtful, or which cause emotional distress to another, to convey their knowledge or be exposed to liability. The underlying event or crime itself, committed by another, may be outrageous but declining to speak or communicate about it is not. Gabby Petito's death is undoubtedly tragic and her parents deserve sympathy. However, a parents' grief caused by the disappearance and ultimate loss of a child does not create a cause of action against everyone who may or may not have had information about that child's disappearance or death.

Even if this Court were to have reservations as to whether the Laundries' silence was outrageous, to permit this claim to move forward would trample the Laundries' constitutional rights. As discussed below, the Laundries' conduct was legally

protected and cannot form the basis for an intentional infliction of emotional distress claim.

2. THE LAUNDRIES ARE ENTITLED TO EXERCISE THEIR LEGAL RIGHTS.

At its core, the Amended Complaint is critical of the Laundries for "refus[ing] to respond to either Joseph Petito and Nichole Schmidt." (dkt, 32, Amnd. Complaint ¶ 28). However, compelling individuals to respond to inquiries by private citizens or law enforcement through a civil action like this would turn our entire constitutional system and the freedom afforded individuals in this country on its head. The Plaintiffs' suit, founded on their thoughts or position on what they wanted the Laundries to do, infringes on too many fundamental rights to all be discussed in this motion, but the exercise of even one right is sufficient to defeat a claim for intentional infliction of emotional distress.

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).

The Laundries had a legal right to do, or not do, everything described in the Amended Complaint. The Laundries are entitled to the right of freedom of thought protected by the First Amendment against which includes both the right to speak freely and the right to refrain from speaking at all. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." *Id.* (citations omitted); *see also Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) ("The clear implication has been that any such compulsion to publish that which reason tells them should not be published is unconstitutional.").

In their response to the original motion to dismiss (dkt. 19), Plaintiffs argued that the Laundries "have no constitutional right under the circumstances" because there is no "state action" at issue. (dkt. 19 ¶ 29). As an initial matter, while the Bill of Rights does protect against state action, constitutional rights do not disappear simply

because the government has not acted. Rights can be waived, but they always exist. Where the dispute is between two private parties, the situations where courts have found a person should have acted despite an assertion of a constitutional right is typically in the context where a defendant is bound by a contractual or other legal duty. That is not the case here as the Plaintiffs have not alleged the Laundries had any legal duty to speak and in fact there is no such legal duty.

Furthermore, this case does involve state action as the Plaintiffs are attempting to secure a judgment from the court. "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of [the Supreme Court]." *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). "The judiciary, a branch of government coequal with the executive and the legislature, is no less subject to constitutional strictures against governmental interference with First Amendment rights." *Morgan v. State*, 337 So.2d 951, 955 n. 9 (Fla. 1976).

In Florida, "[s]tate action is…a broad concept and the actions of state courts and of judicial officers performing in their official capacities have long been regarded as state action." *Franklin v. White Egret Condo., Inc.*, 358 So. 2d 1084, 1088–89 (Fla. 4th DCA 1977), aff'd, 379 So. 2d 346 (Fla. 1979)(When the appellee sought to invoke the powers of the trial court to compel a reconveyance of an interest in the condominium apartment to his brother, it invoked the sovereign powers of the state to legitimize the restrictive covenant at issue.); *see also Bush v. Holmes*, 886 So. 2d 340, 391 (Fla. 1st DCA

2004), *aff'd in part*, 919 So. 2d 392 (Fla. 2006)("[T]he trial court's ruling, not legislative or executive action, is the unconstitutional state action that is subject to review under this provision."). State action occurs when a state court is called upon to enforce the actions of private individuals permitted but not compelled by law. *Schreiner v. McKenzie Tank Lines & Risk Mgmt. Servs., Inc.*, 408 So. 2d 711, 719 (Fla. 1st DCA 1982), *approved sub nom. Schreiner v. McKenzie Tank Lines, Inc.*, 432 So. 2d 567 (Fla. 1983); *see also Gerber v. Longboat Harbour N. Condo., Inc.*, 757 F. Supp. 1339, 1341 (M.D. Fla. 1991)(judicial enforcement of private agreements constitutes state action and brings the private conduct within the scope of the Fourteenth Amendment, through which the First Amendment guarantee of free speech is made applicable to the states).

In making their "state action" argument, the Plaintiffs conspicuously fail to cite a case where a person in the Laundries' position was either compelled or later found liable for the exercise of their First Amendment rights. The Laundries were legally permitted to exercise their constitutional rights and they are not liable for doing so. "[T]he tort of intentional infliction of emotional distress is not created by a person who does no more than pursue his legal rights in a permissible way, even if he knows his conduct will cause emotional distress to the plaintiff." *State Farm Mut. Auto. Ins. Co. v. Novotny*, 657 So. 2d 1210, 1212 (Fla. 5th DCA 1995).

The Laundries have a general constitutional right to not speak on any topic and a more specific constitutional right not to speak when doing so could subject them to criminal penalties. The Laundries had, and still have, an "absolute right to remain silent." *Escobedo v. State of Ill.*, 378 U.S. 478, 485 (1964). For the Laundries to exercise

their constitutional right to refrain from speaking, and to instead hire an attorney to speak for them, is not only common practice in a civilized community, but it embodies the exercise of fundamental rights under the United States and Florida Constitutions.

In their response to the Motion to Dismiss the original Complaint the Plaintiffs argue that the Court should not consider the Laundries' exercise of their Fifth Amendment right to remain silent in defense of this action because Plaintiffs' did not allege a criminal investigation within the four corners of the Complaint. (dkt. 19, ¶ 30). The Plaintiffs did allege the Laundries "refused to respond to either Joseph Petito and Nichole Schmidt, or law enforcement" in the original Complaint which would have defeated Plaintiffs' argument, but they noticeably removed that reference in the Amended Complaint. (Compare dkt. 2, Comp. ¶27 with dkt. 32, Amnd. Comp. ¶ 28). While it is true that court is confined by the four corners of the complaint, the Plaintiffs' manipulation of the pleading rules to try to defeat a clear defense to this action does not win the day for the Plaintiffs.

First, 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 do not include the words "criminal 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 the Laundries instructed that all contacts be made through their attorney. (Amnd Comp. ¶14, 16-19, 29). The Complaint also references an organized search for Gabby Petito in Wyoming.

(Amnd. Comp. ¶ 25). Even drawing inferences in the Plaintiffs favor at this stage of the proceedings, the only reasonable inference to be drawn is that Laundries either faced, or at some time would face, a criminal investigation.

Second, there is no requirement that an individual face a formal criminal investigation in order to remain silent. There are nuances about when a person must be given *Miranda* warnings but a person always has a right to not incriminate themself. "The privilege…has always been as broad as the mischief against which it seeks to guard." *Miranda v. Arizona*, 384 U.S. 436, 459–60 (1966)(quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)). "[T]he privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Id.* at 460 (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)). "[T]he privilege has come right-fully to be recognized in part as an individual's substantive right, a right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *Id.* The Plaintiffs' attempt to preclude the Court from considering the Laundries' Fifth Amendment right is unavailing as the Laundries are free to exercise their constitutional rights without regard to a formal investigation.

The Laundries also have a right to hire an attorney to speak for them which is indisputably alleged in the Amended Complaint. (Amnd. Comp. ¶ 18, 29). Both the United States Constitution and the Florida Constitution indisputably permit retention of an attorney and on occasion they require the Government to provide the services of an attorney. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 332 (1985). "The

citizen's right to consult an independent lawyer and to retain that lawyer to speak on his or her behalf is an aspect of liberty that is priceless." *Id.* at 371 (Brennan, J., dissenting). Florida provides an even broader right to counsel than is provided by the Sixth Amendment. *Plank v. State*, 190 So. 3d 594, 601 (Fla. 2016). The right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 16 of the Florida Constitution, is among those "immutable principles of justice which inhere in the very idea of free government." *Parks v. State*, 319 So. 3d 102, 106 (Fla. 3d DCA 2021), *reh'g denied* (Apr. 8, 2021) (citing *Powell v. Alabama*, 287 U.S. 45, 68, 53 S. Ct. 55, 64, 77 L. Ed. 158 (1932)).

In addition to the federal Sixth Amendment right to counsel there is also a long-recognized First Amendment right to hire and consult an attorney. *Eng v. Cooley*, 552 F.3d 1062, 1069 (9th Cir. 2009) (citing *Mothershed v. Justices of the Supreme Court,* 410 F.3d 602, 611 (9th Cir.2005) ("[W]e recognize ... the 'right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition.'" (quoting *Denius v. Dunlap,* 209 F.3d 944, 953 (7th Cir.2000))); *DeLoach v. Bevers,* 922 F.2d 618, 620 (10th Cir.1990) ("The right to retain and consult an attorney ... implicates ... clearly established First Amendment rights of association and free speech.")).

Along with the protection afforded by the First, Fifth, and Sixth Amendments to the United States Constitution, and similar provisions in the Florida Constitution regarding speech and legal representation, the Laundries also have federal and state

constitutionally protected privacy rights. Although "(t)he Constitution does not explicitly mention any right of privacy," the Supreme Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684 (1977). Article 1, Section 23 of the Florida Constitution carries an even more powerful express right to privacy. *State v. Dean*, 639 So. 2d 1009, 1011 (Fla. 4th DCA 1994) (Florida's "express constitutional right to privacy covers more privacy interests and provides more protection for those interests than the federal constitution.").

Put simply, the Laundries have fundamental constitutional rights to silence, privacy, and representation by counsel, but the Laundrie's exercise of these rights is what the Plaintiffs claim caused their emotional distress. The Laundries' rights are inalienable and the Laundries can never be liable for exercising their legal rights in a permissible way. *Metropolitan*, 467 So. 2d at 279. Thus, as a matter of law, the Plaintiffs have not alleged any act or conduct on the part of the Laundries that would impose liability upon them which would survive a constitutional challenge.

3. 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. (Complaint ¶ 21). 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."

4. 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. But the Laundries did not cause Gabby Petito to go missing or the Plaintiffs' reaction to that news. The Amended Complaint alleges that the Laundries "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…" (dkt. 32, Amnd. Comp. ¶ 31)(emphasis added). The Plaintiffs acknowledge that their mental suffering and anguish existed prior to, and independent of, the Laundries' remaining silent.

"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." (dkt. 32, Amnd. Comp. ¶ 31). In essence, this alleges that the mental suffering was already occurring and the Laundries failed to stop it. Failing to stop distress 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 regardless of anything the Laundries could have said because everything about the situation was so sad. 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.

III. CONCLUSION

The Plaintiffs have not and cannot set forth 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, however inartfully drafted, is not legally sustainable and the 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 Amended Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 13, 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:

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