IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO: **08-CA-24573**
DIV.: 33

ZENAIDA GONZALEZ,

Plaintiff,

-vs-

CASEY ANTHONY,

Defendant.
_____/

DOMINIC CASEY'S MOTION TO STRIKE PLAINTIFF'S MOTION FOR CONTEMPT MOTION FOR PROTECTIVE ORDER MOTION FOR ATTORNEYS FEES

COMES NOW DOMINIC CASEY, by and through undersigned counsel, and hereby files this Motion to Strike, Motion for Protective Order, and Motion for Attorney's Fees in the above-styled cause of action. As grounds therefore, he would state:

MOTION FOR CONTEMPT SHOULD BE STRICKEN

1. The entirety of this litigation is a cynical and frivolous exploitation of a family's tragedy. To even treat this as a legitimate piece of litigation is an Orwellian task.

2. That being said, there cannot be a finding of contempt against Dominic Casey related to failure to attend deposition in this case.

3. Although he is not listed as a witness for either party, Dominic Casey was served a subpoena for deposition by the Plaintiff in this case in March of 2009.

4. The subpoena appears to have been signed by an attorney who is not

listed as attorney of record in this action which would be a violation of Fla. R. Civ. P. 1.410(a). See also Reedy v. Safeco,721 So.2d 803 (1st DCA 1998).

5. Even if the subpoena was proper, there is no authority for the Court to hold him in contempt. Mr. Casey informed Plaintiff's attorneys that he needed time to obtain counsel prior to deposition, and Attorney Cheney Mason also called Plaintiff's counsel prior to the deposition and informed them that he would not be appearing as all information would be privileged. It was reasonable for Dominic Casey to believe that the deposition as scheduled would not happen. He obtained counsel thereafter in the event an additional deposition was scheduled and a protective order needed. As he is unable to give testimony for reasons stated herein, there is no willful violation of a legal obligation.

6. Further, there is no authority for the Court to punish him financially. See Pevnser v. Frederick, 656 So.2d 262 (4th DCA 1995) (non party witness cannot be sanctioned with attorneys fees for failure to answer questions or appear at deposition).

MR. CASEY REQUESTS A PROTECTIVE ORDER - OR WHY THIS CIRCUS SHOULD HAVE ONE LESS ACT

7. Undersigned counsel has informed counsel for the Plaintiff that Mr. Casey has no information whatsoever about any of these issues that is not firmly covered by work product privilege as is discussed in this pleading. The Motion for Contempt has not been withdrawn.

8. The only contact that Mr. Casey has had with any of the characters in this drama has been by way of his work for various legal teams or clients regarding investigations, pending and potential litigation surrounding the disappearance and death of Caylee Anthony.

9. It is abundantly clear under the law that Mr. Casey, having only been involved in these matters related to his role as an investigator, should not be deposed. All material, information, observations, etc. of an investigator collected during their work in anticipation of potential litigation is work product and privileged. See Huet v. Huet, 912 So.2d 336 (5th DCA 2005).

10. Work done by an investigator for a non-party is also work product Zaban v. McCombs, 568 So.2d 87 (1st DCA 1990). Work product is work product, with or without specific litigation pending, and "anticipation" does not mean litigation must actually result. Ford v. Hall-Edwards, 997 So.2d 1148 (3rd DCA 2008). This privilege does not evaporate if the potential litigation does not come to fruition or if litigation terminates. Toward v. Cooper, 634 So.2d 760 (4th DCA 1994). Plaintiff counsel seems to believe that if litigation does not result, the efforts are not work product. If this were the case, the efforts attorneys spend every single day to prevent litigation would not be privileged, a ridiculous concept. Much effort is spent by most legal teams, investigators included, to prevent litigation. See also 5500 North Corp v. Willis, 729 So.2d 508 (5th DCA 1999). Failure to make an earlier motion to protect does not waive work product as to matters clearly outside permissible discovery. Id at 512.

11. The only time that, in this situation, the work product would lose its privileged character would be to the extent that the parties having the privilege actually utilized that evidence at trial, and even then the opposing side could not delve into other areas not waived by that action, or into areas that are strictly privileged, as in legal counsel's strategy or thought processes. Id.

12. The only way to get around this privilege under Fla. R. Civ. P.1.280 is upon

a showing of need for that information and a undue hardship in obtaining that information elsewhere.

NEED: HOW WOULD INFORMATION FROM DOMINIC CASEY HELP THE ZENAIDA GONZALEZ DEFAMATION CASE??

13. It wouldn't. This piece of marketing will not be aided by Mr. Casey's testimony.

14. Setting aside reality for a moment (why not), if this were a true case in controversy, the information sought would need to be relevant to the facts that Plaintiff needs to prove. Winn-Dixie v. Miles, 616 So.2d 1108 (5th DCA 1993).

15. So what are they? This is a lawsuit that claims to be aimed at statements Casey Anthony made to law enforcement during an official investigation of her missing daughter, Caylee, that she had a babysitter named Zenaida Gonzalez who was last seen with the child at a Sawgrass Apartments. Our particular Zenaida Gonzalez was questioned by law enforcement because she was the only person with a similar name they could find with any tangential connection to the apartment complex, having signed a guest book there three months prior to the child's disappearance.

16. Statements made to law enforcement during a pending investigation are absolutely privileged. Statements made regarding an ongoing investigation, no matter whether defamatory or untrue, are absolutely privileged and cannot be the basis for a lawsuit. Stucchio v. Tincher, 726 So.2d 372 (5th DCA 1999). The Fifth District Court in Stucchio discusses the history of the law in regards to the level of privilege attaching to statements made in various stages of legal proceedings and why any statements made in connection with any judicial proceeding are still absolutely privileged. Id at 373. More importantly, Stucchio draws the distinction between the situation where there is a

investigation / judicial proceeding started (in that case the investigation of a child abuse allegation) and the situation in Fridovich v. Fridovich, 598 So.2d 65 (Fla.th 1992) in which family members conspired to create an investigation out of whole cloth.

17. Ms. Anthony has filed a pleading which states Fridovich applies, but undersigned counsel believes that the stricter ruling of Stucchio will apply because the ruling is Fridovich on its face cuts out only a narrow exception to the absolute privilege, because outrageous facts and because the statements were the ultimate cause of investigation and litigation. This ruling was limited to the "egregious facts", wherein a band of siblings conspired to cut out their co-heir brother by convincing law enforcement (when an investigation was not already pending) that their brother intentionally shot their father. They prompted a second investigation and ultimately had him convicted of murder. The Court made a very limited exception in what has historically been some of our most protected speech.

18. Fridovich dealt with persons making false and specific allegations to law enforcement when no investigation had been pending. Ms. Anthony, as in the Stucchio case, having responded to law enforcement questioning in a formal investigation, which is a necessary preliminary to a criminal prosecution and is absolutely privileged speech and a bar to this lawsuit. Id at 373. Even if this were a case of a limited privilege, Gonzalez could not prevail.

19. If Fridovich applies, and this is a limited privilege case, and Gonzalez had to prove actual or "express" malice in the making of the statement, meaning that Anthony was more motivated by hurting this particular Zenaida Gonzalez than in deflecting attention away

from herself and her own personal protection. Cape v. Reakes, 840 So.2d 277 (5th DCA 2003).

20. If this were a limited privilege and actual malice case, Plaintiff would have to prove that Casey Anthony was talking about this particular Zanaida Gonzalez, something that she has denied from the very first time law enforcement showed her a photo. If she was not referring to this particular person then there can be no malice. If I accuse Dan Brown of attacking me in an alley...every Dan Brown that was minding his own business at work that day, cannot sue me for slander. EVEN if I was lying and there was no attack.

21. Judging from the evidence (which anyone can do, every salacious tidbit Plaintiff's counsel has posted, including videos of this child's grieving grandparents, on the front page of their marketing website..or sign up and get the newsletter) there is no evidence that Ms. Anthony ever met or knew of this particular Zenaida Gonzalez, which would be a complete block to proving actual malice, a legal determination to be made pre-trial by the Court. Cape at 280. See also Schreidell v. Shotter, 500 So.2d 228 (3rd DCA 1986). This actual malice cannot be implied. Pledger v. Burnup, 432 So.2d 1323 (4th DCA 1983).

22. Considering the continuing toll on the reputation of each and every lawyer in the state, the grinding away at what is left of the public's respect for our system of justice, and the Clockwork Orange effect these cases are having on the good sense of everyone related therein, this Court should do our community the service of getting to the merits of the pending Motion to Dismiss and putting a halt to continued questionable discovery until it can do so. This is a family tragedy and a death that has led to a death penalty prosecution, it should never have been co-opted as a marketing plan. The idea that Ms. Gonzalez eschews the publicity of having a similar name mentioned in a police report is somewhat

difficult to reconcile with her allowing her lawyer to sell this very connection to anyone using the internet.

BAD FAITH AND ATTORNEYS FEES

23. Even if one assumes for a moment that Plaintiff thought at the beginning of her lawsuit that Casey Anthony somehow knew her, and had fingered her specifically as having kidnaped little Caylee, had some basis for damages (as unlikely as that looks), and did not know that the law of privilege would require a dismissal....at some point this case clearly became untenable. At that point Plaintiff is liable for attorneys fees. Weatherby v. Ballack, 783 So.2d 1138 (4th DCA 2001).

24. And fees even to Dominic Casey. Fla. R.Civ.P. 1.1380(a)(4) allows for attorneys fees to be given to a non-party witness who is the subject of a "fishing expedition". Winn - Dixie at 1110. Fees are requested with the amount being determined at a separate hearing.

I HEREBY CERTIFY that a true and correct copy has been furnished via U.S. Mail/Facsimile to JOHN B. MORGAN and JOHN DILL, ESQ., P.O. Box 4979, Orlando, FL 32802-4797; JONATHAN KASEN, ESQ., 633 S.E. 3rd Avenue, Ste 203, Ft. Lauderdale, FL 33301; JOSE A. BAEZ, ESQ., 522 Simpson Road, Kissimmee, FL 34744; BRAD CONWAY, ESQ., 390 N. Orange Avenue, Ste 1630, Orlando, FL; this 11th day of June, 2009.

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