

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ESTATE OF KYLE THOMAS BRENNAN,
by and through its Administrator,
Victoria L. Britton,

Plaintiff,

vs.

Case No. 8:09-cv-00264-T-23-EAS

CHURCH OF SCIENTOLOGY
FLAG SERVICE ORGANIZATION, INC.,
DENISE MISCAVIGE GENTILE,
GERALD GENTILE, and
THOMAS BRENNAN,

Defendants.

RESPONSE TO MOTION FOR RULE 11 SANCTIONS

The Plaintiff and her counsel file their Response to the Motion for Rule 11 Sanctions filed by the Defendant, CHURCH OF SCIENTOLOGY FLAG SERVICE ORGANIZATION, INC. (FLAG). (Dkt 30). Not deterred by this court denying its Motion to Dismiss five days before it filed its Rule 11 Motion, (Dkt 28), FLAG proceeds to file its Rule 11 Motion based on its denied Motion to Dismiss, Exhibit 2 to the motion, and on the Clearwater Police Report, Exhibit 1 and 3 to the motion, which report was previously struck from the record (Dkt 28). Its motion is baseless, and more importantly, it is filed simply to disparage Plaintiff's counsel by calling him a "rogue lawyer" with a "rap sheet" in direct violation of Rule 4-8.4(d), *Rules Regulating the Florida Bar*, and Local Rule 2.04 (d) and (e), (Dkt 30, page 18). FLAG alleges matters which are completely unnecessary to a valid Rule 11

motion, but do so as part of the overall doctrine of the Church of Scientology to attack attorneys representing opposing parties. This practice must not be condoned by this court.

The grounds for its Rule 11 Motion are as follows:

1. Defendant, FLAG, states as its basis for the Rule 11 Motion that the Complaint is not warranted by existing law, or any argument to change existing law, or to establish new law, and that it is *completely barred* based on its interpretation of *Florida's Volunteer Protection Act, §768.1355, Fla. Stat.*, by making a spurious argument that a non-profit can never be liable under the Act when the volunteer engages in negligent, wanton or willful misconduct. This argument made by FLAG is without any legal or factual foundation, since there is nothing in this statute which provides immunity to the non-profit. The statute does not negate the law of agency, but establishes agency as a matter of law, whether the volunteer's actions are in good faith, negligent or willful. The only protection is to the volunteer acting in good faith, never the non-profit.

2. The second basis for the Rule 11 motion is FLAG's argument that the Complaint contains "baseless statements or deliberate misstatements as statements of fact," concerning whether or not Denise Miscavige Gentile was the Scientology Chaplain of Thomas Brennan, when in fact Defendant, Thomas Brennan, declared pre-suit that Gentile was his Scientology Chaplain. FLAG also contends that Kyle Brennan refused to take his medication, when the undisputed pre-suit fact is that the medication was locked in his father's truck, negating any voluntary act of Kyle Brennan.

3. FLAG then attacks Plaintiff's counsel as a "**rogue lawyer**" with a "**rap sheet...**" (Dkt 30, page 18). It alleges the suit is only brought for media coverage and to

obtain money. Disparagement of counsel is the real reason for the filing of its Rule 11 Motion. FLAG claims its attack is necessary to show a pattern of conduct by counsel for the Plaintiff, when in fact a pattern of conduct is not an element of Rule 11 sanctions. Therefore, its motives in disparaging counsel is sanctionable.

MEMORANDUM OF LAW

I. Rule 11 Elements.

Rule 11 sanctions are warranted when a party files an action that: (1) has no reasonable factual basis; (2) has no reasonable chance of success based on the legal theory used, or that cannot be advanced as a reasonable basis to change existing law; or (3) is filed in bad faith for an improper purpose. *Anderson v. Smithfield Foods, Inc.*, 353 F.3d 912, 915 (11th Cir.2003). In determining whether to impose sanctions, the district court determines "whether the party's claims are objectively frivolous--in view of the facts or law--and then, if they are, whether the person who signed the pleadings should have been aware that they were frivolous; that is, whether he would have been aware had he made a reasonable inquiry." *Worldwide Primates, Inc. v. McGreal*, 87 F.3d 1252, 1254 (11th Cir.1996).

Williams v. Carney, 266 Fed.Appx. 897,898-899 (11th Cir. (Fla) 2008).

There are three elements to consider in a Rule 11 motion. Nowhere does the 11th Circuit add a fourth element of "pattern of conduct" or similar conduct. FLAG accuses counsel of filing for improper purposes, acting as if this case is about refunding money or copyright infringement, its usual litigation fare, when in fact, Plaintiff's counsel was faced with a fast approaching statute of limitations in filing a very serious wrongful death case against a well known litigious defendant. Even with this immense pressure, Plaintiff's counsel satisfied his pre-suit "reasonable inquiry" duty.

The reasonableness of the pre-filing inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the underlying facts; and whether the paper was based on a plausible view of the law. *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir.1987) (en banc). The reasonableness of the

inquiry may also depend on the extent to which factual development requires discovery. *Mapco*, 958 F.2d at 1563.

Jones v. International Riding Helmets, Ltd., 49 F.3d 692, 695 (11th Cir. (Ga.)1995).

By its terms, Rule 11 imposes an obligation on counsel at the time he or she files papers in the district court. The circuit courts of appeals appear to differ on whether Rule 11 imposes a continuing duty on counsel to amend previous pleadings when their factual or legal basis dissolves. *Compare Thomas v. Capital Security Services*, 836 F.2d 866, 874 (5th Cir.1988) (in banc) (disagreeing with “earlier decisions by this Court that impose upon an attorney a continuing obligation under Rule 11. Instead, we believe that a construction of Rule 11 which evaluates an attorney's conduct at the time a ‘pleading, motion, or other paper’ is signed is consistent with the intent of the rulemakers and the plain meaning of the language contained in the rule.”)

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Associated Contractors, Inc. 877 F.2d 938, 942-943 (11th Cir (Ga.)1989). Rule 11 does not impose a "continuing obligation" on a party to amend a complaint, so long as the complaint was reasonably interposed in the first place. Therefore, the 11th Circuit is identical to the Fifth Circuit's "snapshot test" at the time the pleading is filed. "*Thomas's* 'snapshot' rule ensures that Rule 11 liability is assessed only for a violation existing at the moment of filing." *Skidmore Energy, Inc. v. KPMG*, 455 F.3d 564, 570 (5th Cir (Tex.) 2006). Therefore, since Rule 11 is determined by a snapshot at the time of filing the pleading, the position of FLAG in filing a list of matters unrelated to the instant case is unjustified and furthers the obvious point, that the motion is filed for improper purpose. Of course, there is absolutely no justification under any circumstance in calling the Plaintiff's counsel a "rogue lawyer" with a "rap sheet."

In tracking the language of Rule 11, FLAG accuses counsel of filing a case without any reasonable factual basis or having no chance of success on the legal theory expressed

in the Complaint. Although not absolutely determinative at this juncture, the denial of the Defendants' Motions to Dismiss demonstrates that the wrongful death claim is not objectively frivolous in fact or law, nor a shotgun pleading. The decedent's mental health, deprivation of his medication, and access to a loaded gun were under the exclusive control of the Defendants, resulting in death. The case need not be proved at this time, but there is certainly enough information documented to date that a reasonable person could place the liability for the death squarely upon the Defendants.

To further understand the actions of the Defendants, matters of future discovery will distinguish and highlight certain areas of the utmost importance to the Church of Scientology, such as:

- superiority over psychiatry;

- the elimination of all psycho-tropic drugs, such as Lexapro;

- superiority over the pharmaceutical industry, (example: replacing vitamin B for prescription drugs);

- disconnection of Scientologists from the church or family or friends or business if associated with those who see psychiatrists.

II. DISPARAGEMENT OF COUNSEL.

"Pursuant to the Local Rules, the Court will not tolerate inappropriate characterizations of litigants or opposing counsel as such characterizations are unprofessional, unnecessary, and hinder the efficient administration of justice." *Roger Kennedy Const., Inc. v. Amerisure Ins. Co.* 506 F.Supp.2d 1185 (M.D. Fla. 2007) (Plaintiff's characterizations of Amerisure's actions as "stubborn" is inappropriate).

FLAG's character assassination of Plaintiff's counsel is far beyond calling him "stubborn." A "rogue lawyer" is one of the worst epithets that can be leveled at a member of the bar in good standing. See *U.S. v. Stoller*, 78 F.3d 710 (1st Cir.(Mass.),1996), (rogue lawyers bilk banks); *In re Greason*, 2009WL701921,8 (Bkrcty.W.D.N.Y.,2009), (rogue lawyer is disbarred); *Morris v. Wachovia Securities, Inc.*, 2007 WL 2126344, 5(E.D.Va.,2007), (rogue lawyer may be one who alters form pleadings and files without client's consent); and *Association of American Physicians and Surgeons, Inc. v. Clinton* 989 F.Supp. 8, 16 (D.D.C.,1997), (rogue lawyers are those who intentionally mislead the court).

FLAG attempts to justify the disparagement of counsel by stating it shows a pattern of conduct by plaintiff's counsel as suggested by the committee notes in the 1993 amendments to Rule 11. However, those notes do not address a "pattern of conduct" in other cases as stated by FLAG. Rather, those comments address "similar conduct in other litigation." No pattern can be seen, however, and Plaintiff's counsel requests that if the court should entertain this motion, that counsel be given the opportunity to show the full picture of each matter listed, such as the comments by Judge Beach never resulted in disqualification of counsel, nor did the comments of Judge Baird. The truth will show that FLAG lost its case it filed before Judge Baird, settled its case before Judge Beach, and a related Scientology entity, RTC, lost its case against the Estate of Lisa McPherson before the Fifth Circuit due to a complete lack of jurisdiction. Plaintiff's counsel herein was sanctioned because his law partner filed more than one motion in the district court challenging jurisdiction, and the Fifth Circuit confirmed this legal position and held that the District Court for the Eastern District of Texas lacked personal jurisdiction over the Estate.

The litigation history of various entities of the Church of Scientology demonstrates that the instant filing is based upon Scientology doctrine to attack anyone who makes claims against Scientology, particularly the client's lawyer. The following is a snippet of just some of the policy doctrines associated with this type of attack.

"If attacked on some vulnerable point by anyone or anything or any organization, always find or manufacture enough threat against them to cause them to sue for peace." "HCO Policy Letter of 15 August 1960."

"Battle Tactics"

We ourselves fight on a basis of total attrition of the enemy. So never get reasonable about him. [the enemy] Just go all the way in and obliterate him.

One cuts off enemy communications, funds, connections. He deprives the enemy of political advantages, connections and power. He takes every enemy territory. He raids and harasses. All on a thought plane -- press, public opinion, governments, etc.

Legal is a slow if often final battle arena. It eventually comes down to legal in the end. If intelligence and PRO have done well then legal gets an easy in.

"HCO Policy letter of 16 February 1969"

The purpose of the suit is to harass and discourage rather than to win. The law can be used very easily to harass, and enough harassment on somebody who is simply on the thin edge anyway, well knowing that he is not authorized, will generally be sufficient to cause his professional decease. If possible, of course, ruin him utterly.

"Ability" The Scientologist, p. 157.

Scientology has a history of attacking attorneys. One prominent example is actions it took against Boston lawyer Michael Flynn. In *United States v. Kattar*, 840 F.2d 118 (1st Cir. 1988), where Scientology targeted attorney Michael Flynn, (who Scientology declared an enemy of the church), the court noted that the government acknowledged the continuation of Scientology's "**Fair Game**" policy, *Id.*, at 127-128, (even though it was

supposedly canceled years before), and the criminal actions which took place in pursuit of that church policy.¹

ENEMY

SP Oder. **Fair Game.** May be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. May be tricked, sued or lied to or destroyed. HCO Policy Letter of 18 October 1967, Penalties for Lower Conditions.

Other examples of instances involving attacks on attorneys can be found in *Flynn v. Hubbard*, 782 F.2d 1084 (1st Cir. 1986) (written conspiracy by Hubbard and his individual and organizational agents and employees “to destroy” Flynn.), and *Religious Technology Center v. Wollersheim*, 971 F.2d 364 (9th Cir.1992), cert. den. 479 U.S. 1103, 107 S.Ct. 1336, 94 L.Ed.2d 187 (1987), (Scientology organization sued Wollersheim’s attorneys under RICO after Wollersheim was successful in tort action against Scientology organization).

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“A more direct and substantial contradiction of Shervell's testimony was contained in a brief filed by the United States in February 1986, more than one year after the events in question here took place, in a civil case instituted by the Church against the F.B.I., *Founding Church of Scientology of Washington, D.C. v. Webster*, 802 F.2d 1448 (D.D.C.1986). In that brief (the “*Webster* brief”), the government again asserted that the illegal activities of high-level Scientologists in the 1970s were carried out under the orders of the Church hierarchy, and pursuant to explicit policy directives issued by the Church. More significantly, in a footnote, the government alleged that the Church “continues to pursue” (in 1986) the Fair Game Policy, “as the action against Flynn, Sullivan and others referenced in the text attests.” This directly contradicts Shervell's testimony, and in fact strongly suggests that the Fair Game Policy was in effect as to Michael Flynn during this time period....Shervell's testimony about the Fair Game Policy should not have been elicited by the U.S. Attorney, given that the government itself contended elsewhere that the policy remained in effect throughout the period in question...But the jury evidently believed the defense's theory that the check scheme investigation was closely associated with the Fair Game Policy.

U.S. v. Kattar, 840 F.2d 118 (1st Cir. (Mass.)1988).

The Rule 11 motion should be denied, and due to the scurrilous nature of the motion, it should be removed from the docket.

Wherefore, the Plaintiff and her counsel request that the Rule 11 motion be denied, stricken, and removed from the docket, with appropriate sanctions against FLAG and its counsel as the court deems just within its inherent authority.

I HEREBY CERTIFY that on July 10, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: LEE FUGATE, ESQ. Attorney for the Defendants, Denise Miscavige Gentile and Gerald Gentile, and F. WALLACE POPE, ESQ. and ROBERT POTTER, Attorneys for Church of Scientology Flag Service Organization, Inc.

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