

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS,

Plaintiff,

v.

KENNETH L. MILLER, *et al.*,

Defendants.

No. 2:12-cv-184-WKS

MEMORANDUM IN SUPPORT OF PLAINTIFF JANET JENKINS'S MOTION FOR SUMMARY JUDGMENT ON COUNT 1 AGAINST DEFENDANTS PHILIP ZODHI-ATES, KENNETH MILLER, AND TIMOTHY MILLER AND FOR PARTIAL SUMMARY JUDGMENT ON COUNT 1 AGAINST DEFENDANTS LIBERTY COUNSEL, RENA LINDEVALDSEN, RESPONSE UNLIMITED, VICTORIA HYDEN, AND LINDA WALL

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Plaintiff Janet Jenkins respectfully submits this memorandum of law in support of her motion for summary judgment on Count

party.”” *Coppola v. Bear Stearns & Co.*, 499 F.3d 144, 148 (2d Cir. 2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). “An

abetting theories of liability for concerted action); *Freeman v. HSBC Holdings PLC*, 57 F.4th 66, 76 (2d Cir. 2023) (“*Halberstam*

Defendants Philip Zodiates, Kenneth Miller, and Timothy Miller or pursuant to a common design with them.³

A. There is No Genuine Dispute That Lisa Violated Vermont Law by Tortiously Interfering with Plaintiff’s Parental Rights.

Liability is triggered for all members of a civil conspiracy when at least one co-conspirator commits an unlawful act in furtherance of the conspiracy. *See* Op. and Order: Pls.’ Mot. for Partial Summ. J. at 8 (Aug. 31, 2020), Doc. 555 (“The unlawful act need not be committed by each conspirator; so long as *one* conspirator causes the plaintiff damage by committing an unlawful act to further the conspiracy, *all* conspirators may be held liable for civil conspiracy.” (citing *F.R. Patch Mfg. Co. v. Prot. Lodge, No. 213, Int’l Ass’n of Machinists*, 60 A. 74, 80 (Vt. 1905)) (emphasis added)); *see also Sheple v. Page*, 12 Vt. 519, 533 (1840) (“[W]here two or more combine together for the same illegal purposes, each is to be considered as the agent of the others, and the act of one, in pursuance of the object, is, in legal contemplation the act of all.”); *Halberstam*, 705 F.2d at 481 (“A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable. He need not even have planned or known about the injurious action . . . so long as the purpose of the tortious action was to advance the overall object of the conspiracy.”).

Plaintiff seeks to hold Defendants liable for Lisa’s tortious interference with Plaintiff’s parental rights in violation of Vermont law, and there is no genuine dispute that Lisa committed that tort. “[U]nder Vermont law, a person who abducts or otherwise compels or induces a minor child to leave a parent who is legally entitled to her custody, with knowledge that the parent does not consent, is subject to liability to the parent.” Op. and Order at 41–42 (Oct. 24, 2013), Doc. 115.

³ Plaintiff is not moving

1.

115:17–19 (testifying that Lisa took Isabella into Canada via taxi); *id.* at 116:20–117:1 (testifying that Lisa took Isabella to Mexico, El Salvador, and Nicaragua via plane). As a young child, Isabella could not make her own decisions about her place of residence, secure transportation, or travel on her own. There can be no genuine dispute that, at the very least, Lisa induced (if not compelled) Isabella to leave the United States, and therefore to leave Plaintiff.

2. There is no genuine dispute that Plaintiff was legally entitled to Isabella’s custody.

On June 17, 2004, the Rutland County, Vermont Family Court recognized Plaintiff as a legal parent to Isabella. Ex. 4, November 20, 2009 Vermont Family Court Order at JENKINS15115. The court also granted her the right to liberal, unsupervised parent–child contact with Isabella through at least November 20, 2009, when it granted her sole physical and legal custody of Isabella and parental rights and responsibilities over her, with the physical transfer to occur on January 1, 2010. *See generally* Ex. 4. No court modified that order before Isabella became a legal adult. This Court has already rejected the only defense that has ever been raised by any Defendant challenging Plaintiff’s legal entitlement to Isabella’s custody, holding (without deciding whether any “superior custody” rule applied) that Defendants could be held liable for their agreement and actions in furtherance of the conspiracy that took place before the family court transferred primary custody to Plaintiff. Op. and Order at 27–30 (Sept. 29, 2017), Doc. 277.

3. There is no genuine dispute that Lisa knew that Plaintiff did not consent.

When Lisa removed Isabella from the United States, she and Plaintiff were in the midst of a five-year, highly contentious, ongoing custody dispute over Isabella. The custody battle raged in two states, with near-constant proceedings at the trial and appellate levels of both Vermont and Virginia. Ex. 2 at 41:15–42:4. Plaintiff unceasingly fought for the right to be a parent to her daughter. When Lisa repeatedly disobeyed court orders and refused to allow Plaintiff visitation with

Isabella, Plaintiff responded by moving for enforcement of the court orders (in two different state courts), moving for contempt for violation of the court orders (in the same two state courts), and

family court's orders. Ex. 2 at 157:25–158:7, 159:10–160:1, 175:12–18, 222:3–19.

That Lisa knew she was acting without Plaintiff's consent is further evidenced by the clandestine manner of the trip and Lisa's conduct thereafter, including the arrangement of her travel

completion of the illegal purpose of the conspiracy. Take, for example, a conspiracy to murder. It would be a crime under Vermont law for two or more persons to agree to murder someone (an illegal purpose) by purchasing a gun (an act that is often legal). *See* 13 V.S.A. § 1404. For criminal liability, the agreement alone would suffice for the conspirators to be charged with and convicted of a crime; the murder need not be carried out. *See, e.g., State v. Noyes*, 25 Vt. 415, 421 (1853) (“It is well settled, that the unlawful agreement constitutes the *gist* of the offence, and of course it is not necessary to charge the execution of the unlawful agreement . . . The jury may find the conspiracy, and negate the execution, and it will be a good conviction.”).

Indeed, this Court has already recognized that it is Defendants' actions in concert with Lisa fleeing the country just before she had to turn over custody of Isabella that gives rise to co-conspirator liability. *See* Op. and Order at 106–07 (Sept. 29, 2017), Doc. 277 (“The claims which Plaintiff[] assert[s] . . . center on the support that [Defendants] allegedly provided to Lisa Miller to carry out this wrongful conduct. . . . [I]t is the combination of [Defendants'] acts along with Defendants' alleged agreement with Lisa Miller to support her in unlawfully interfering with [Plaintiff's] custody over Isabella, and Lisa Miller's actions in doing so, which give rise to the claim.”). Lisa's successful custodial interference, *see supra* section I.A., suffices as the unlawful act required for civil-conspiracy liability against all Defendants.

However, even assuming for the sake of argument, that the unlawful act requirement of civil-conspiracy liability requires something more than just effectuating the illegal purpose, Lisa's conviction for international parental kidnapping is sufficient to show that *additional* illegal means were employed. Lisa pleaded guilty to violating 18 U.S.C. § 1204, which required more than the Vermont tort of custodial interference. Ex. 3 at 2. Although there is overlap between the elements of Lisa's crime and the tort, *international* kidnapping was not a necessary means to complete the tort. Lisa could have interfered with Plaintiff's custody without removing Isabella from the United States or retaining her outside the United States, as required by 18 U.S.C. § 1204. These particular illegal means, *international* kidnapping, were chosen by Lisa (and Defendants) not because it was a necessary element of the tort of custodial interference or their agreement to hide Isabella to keep Plaintiff from exercising her parental rights, but to make their conspiracy more successful.

No Defendant can genuinely dispute that Lisa committed the tort, or in the alternative that she was convicted of international parental kidnapping, and therefore Plaintiff is entitled to partial summary judgment on this element against all Defendants.

C. There Is No Genuine Dispute That Plaintiff Was Harmed by Lisa’s Tortious Act.

Plaintiff was entitled to liberal parent–child contact with Isabella and later sole physical and legal custody of Isabella and parental rights and responsibilities over her. *See supra* section I.A.2. Yet Isabella was hidden thousands of miles away from Plaintiff in Central America for eleven years, from age seven until after she became an adult, thus preventing Plaintiff from exercising her parental rights over her daughter. Ex. 2 at 175:12–176:25. Plaintiff last saw Isabella in January 2009 for court-ordered parent–child contact. Ex. 4 at JENKINS15119–22. Isabella’s kidnapping prevented Plaintiff from nurturing a relationship with her daughter and participating in decisions about her daughter’s upbringing. Plaintiff spent more than a decade searching for her daughter and worrying about her daughter and the life she was living. Plaintiff did not even know whether her daughter was alive, much less whether she was happy and fulfilled and had access to necessities like education and healthcare. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (the right to parent their children “is perhaps the oldest of the fundamental liberty interests” protected by the U.S. Constitution); *Ms. L. v. U.S Immigr. & Customs Enf’t (“ICE”)*, 310 F. Supp. 3d 1133, 1146–47 (S.D. Cal. 2018) (discussing both legal and emotional harm of separation of a parent from their child).

No Defendant can genuinely dispute that Plaintiff was harmed, and therefore Plaintiff is entitled to partial summary judgment on this element against all Defendants.

D. There Is No Genuine Dispute That Lisa Committed That Tortious Act in Concert With Defendants Philip Zodhiates, Kenneth Miller, and Timothy Miller or Pursuant to a Common Design With Them.

“Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself.” *Mansfield*

Jenkins’ parental rights” Op. and Order: Pls.’ Mot. for Partial Summ. J. at 9 (Aug. 31, 2020), Doc. 555. The same is true for Philip’s conviction on an identical charge after a jury trial. *See* Op. and Order: Pls.’ Mot. for Partial Summ. J. at 10–11 (Aug. 31, 2020), Doc. 555. Timothy and Philip were both charged with and convicted of conspiracy to commit international parental kidnapping, which necessarily included that they agreed to remove Isabella from the United States and retain her outside the United States “with intent to obstruct the lawful exercise of parental rights.” Pl. Janet Jenkins’s Mot. for Partial Summ. J. (Dec. 13, 2019), Ex. 14, Doc. 439-14; Ex.16, Doc. 439-16; Ex. 18, Doc. 439-18; Ex. 22, Doc. 439-22. Similarly, although Kenneth was convicted of aiding and abetting, rather than conspiring with, Lisa in her removal of Isabella, his conviction still required proof that he helped Lisa “with the intent to obstruct the lawful exercise of parental rights.” Pl. Janet Jenkins’s Mot. for Partial Summ. J. (Dec. 13, 2019), Ex. 7, Doc. 439-7; Ex. 10, Doc. 439-10.

Furthermore, it is undisputed that in the weeks leading up to the kidnapping, Philip and Kenneth met with Lisa to discuss whether and how to hide Isabella. Ex. 8, Philip Zodiates Dep. at 146:4–147:15, 148:23–149:5, 158:21–159:1; Ex. 9, Kenneth Miller Dep. at 133:11–15; Ex. 2 at 66:14–70:19. Then on September 21, 2009, after Lisa and Isabella retrieved their Mennonite disguises from Kenneth, Philip drove Lisa and Isabella to the U.S.–Canada border. Ex. 9 at 139:16–141:11; Ex. 8 at 153:25–154:2, 164:2–18; Ex. 2 at 109:5–20. At the same time, Kenneth was arranging for a person he knew in Canada to pick Lisa and Isabella up from the Canadian side of the border and take them to the Toronto airport. Ex. 9 at 32:1–5, 35:14–36:8. Kenneth also contacted Timothy to arrange for Lisa and Isabella’s plane tickets to Nicaragua and for Timothy to pick Lisa and Isabella up at the airport when they arrived. Ex. 9 at 14:25–15:2, 30:14–31:8, 36:23–39:10, 104:15–17; Ex. 6 at 53:21–54:20, 58:22–59:10, 59:20–60:15; Ex. 10, Timothy 32:1–5, 53:21–54:20, 59:10,

at JENKINS06963–65. Based on guidance from Kenneth, Timothy purchased one-way plane tickets for Lisa and Isabella that purposefully did not include travel through the United States, so as to make it harder to track them. Ex. 6 at 65:20–67:5, 109:23–110:23, 111:17–112:3, 113:17–114:4, 121:1–9; Ex. 10 at JENKINS06971–73; Ex. 11, Timothy Miller Dep. Ex. 9; Ex. 9 at 143:2–14. When Lisa encountered a problem with the tickets in El Salvador—the airline did not want to be responsible for them traveling to Nicaragua without a return flight—Lisa contacted Philip, who in turn contacted Timothy, who resolved the issue. Ex. 2 at 117:25–120:19; Ex. 8 at 300:12–18; Ex. 6 at 114:5–117:8; Ex. 7 at 007676. Timothy had the airline issue a sham return ticket, never to be paid for or used, solely to allow Lisa and Isabella to enter Nicaragua. Ex. 6 at 118:22–120:6; Ex. 7 at 007678–79. Kenneth then reimbursed Timothy’s family for the cost of Lisa and Isabella’s tickets. Ex. 9 at 143:22–144:16.

After spending several weeks in a different location in Nicaragua in case someone came looking for them, Lisa and Isabella moved to be close to Timothy’s family. Ex. 6 at 148:15–21, 149:14–150:5, 158:20–160:2; Ex. 7 at 007680-84. Timothy helped Lisa rent an apartment and often hosted Lisa in his home,

she was Isabella's mother; and Timothy has testified that he understood that Lisa and Isabella were traveling to Nicaragua because of the possible custody transfer and would stay in Nicaragua if the Vermont court did transfer custody. Ex. 9 at 35:5–11, 129:6–130:5; Ex. 6 at 65:4–19, 67:12–68:14, 121:1–123:3, 140:4–17; Ex. 10 at JENKINS06977–78.

The undisputed actions of Philip, Kenneth, and Timothy are more than sufficient to establish that they, along with Lisa, had an agreement to hide Isabella so that Janet could not exercise custody over Isabella. They were in significant contact with each other at critical points in the conspiracy, with many of their actions occurring close in time to each other's in a way that was complementary and designed to ensure the success of their plan. *See Halberstam*, 705 F.2d at

555 (quoting *Concord Gen. Mut. Ins. Co. v. Gritman*, 146 A.3d 882, 887 (Vt. 2016) (quoting Restatement (Second) of Torts § 876)). The elements should be evaluated together such that “the stronger the evidence of substantial assistance, the less evidence of general awareness is required.” *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 113 F.3d 1484, 1495 (8th Cir. 1997) (analyzing Restatement (Second) of Torts § 876(b)).

Plaintiff claims that Defendants are liable for Lisa’s tortious acts under the aiding-and-abetting theory because “(1) [Lisa] committed the tort of intentional interference with parental rights; (2) . . . [Defendant] knew that the intentional interference constituted a breach of duty; and (3) . . . [Defendant] substantially assisted or encouraged the person who committed the tort.” Op. and Order: Pls.’ Mot. for Partial Summ. J. at 13 (Aug. 31, 2020), Doc. 555. As an initial matter, Plaintiff is entitled to partial summary judgment against all Defendants on the first element: Lisa’s commission of the tort, *see supra* section I.A.

Furthermore, as with the civil-conspiracy theory of liability, Philip, Kenneth, and Timothy’s undisputed involvement in helping Lisa commit the tort entitles Plaintiff to summary judgment against them on the remaining elements of the aiding and abetting theory of liability on Count 1.

A. There Is No Genuine Dispute that Defendants Philip Zodhiates, Kenneth Miller, and Timothy Miller Substantially Assisted Lisa.

“Closely intertwined with the concept of ‘substantial assistance’ is the principle of proximate cause.” Op. and Order at 36 (Sept. 29, 2017), Doc. 277 (quoting *Montgomery v. Devoid*, 915 A.2d 270, 278 (Vt. 2006)). Courts following the Restatement have analyzed five factors to determine whether a defendant’s assistance or encouragement was substantial enough to support liability under an aiding and abetting theory: “(1) the nature of the wrongful act; (2) the kind and amount of the assistance; (3) the relationship between the defendant and the actor; (4) the presence or

absence of the defendant at the occurrence of the wrongful act; and (5) the defendant's state of mind." *Gritman*, 146 A.3d at 888 (citing Restatement (Second) of Torts § 876 cmt. d). Some courts also consider the duration of the assistance provided, noting that it "may afford evidence of the defendant's state of mind." *Halberstam*, 705 F.2d at 484.

Given their extensive, active involvement, *see supra* section I.D., there is no genuine dispute that Philip, Kenneth, and Timothy substantially assisted and/or encouraged Lisa's commission of the tort. Analysis of the five restatement factors supports this conclusion. In this case, most important is the second factor, "the kind and amount of assistance." All three Defendants provided significant assistance to Lisa that, viewed in totality for each individual, made the harm to Plaintiff reasonably foreseeable. In particular, Timothy purchased one-way plane tickets for Lisa and Isabella that did not travel through the United States, and connected Lisa and Isabella to the Mennonite community in Nicaragua, including finding them a place to live and providing Lisa with work in Nicaragua. Ex. 6 at 109:23–110:23, 111:17–112:3, 113:17–114:4, 148:15–21, 153:22–154:14, 160:7–161:9, 166:9–19; Ex. 11; Ex. 10 at JENKINS06977; Ex. 7 at 007687. Kenneth encouraged Lisa to hide Isabella; connected Lisa to the Mennonite community, including Timothy; paid for Lisa and Isabella's airline tickets; and, after they were gone, helped provide them with money and items left behind in the United States. Ex. 9 at 14:25–15:2, 30:14–31:8, 36:23–42:1, 97:25–99:2, 104:15–17, 130:6–14, 143:22–144:16; Ex. 6 at 53:21–54:20. Philip helped connect Lisa with Kenneth, and thus with the Mennonite community that would hide them; drove them to the U.S.–Canada border; and, after they were gone, helped provide them with money and items left behind in the United States. Ex. 8 at 146:4–13, 149:13–14, 153:25–154:2, 158:21–159:1, 164:2–18, 334:1–20, 338:17–21, 356:3–18, 360:25–363:19, 368:12–14, 381:8–383:16. Given the connection between "substantial assistance" and "proximate cause," these admitted acts of eien "p(t)-6 (i)-6 (o)-4 (u)-4 (b)-4

329:8–330:3; Ex. 21, Philip Zodhiates Dep. Ex. 36; Ex. 22, Philip Zodhiates Dep. Ex. 62.

There is no genuine dispute that Defendants Philip Zodhiates, Kenneth Miller, and Timothy Miller’s admitted actions constituted “substantial assistance” or encouragement to Lisa or that Philip and Timothy knew that interfering with Plaintiff’s parental rights constituted a breach of duty; therefore Plaintiff is entitled to summary judgment on the aiding-and-abetting theory of liability of Count 1 against them.

III. Defendants Philip Zodhiates and Timothy Miller’s False Belief that Plaintiff Abused Isabella Provides No Defense to Count 1.⁶

Philip and Timothy⁷ attempt to justify their undisputed actions based on their unreasonable and false belief that Plaintiff sexually abused Isabella. Defendants’ allegations are insufficient to

defense. The criminal law equivalent to the tort, the crime of custodial interference by a relative of the child, contains a narrow defense if “the person charged with the offense was acting in good faith to protect the child from real and imminent physical danger.” 13 V.S.A. § 2451(c). The law specifically provides that “[e]vidence of good faith shall include the filing of a nonfrivolous petition documenting that danger and seeking to modify the custodial decree in a Vermont court of competent jurisdiction” that must have been “filed within three business days of the termination of visitation rights.” 13 V.S.A. § 2451(c). Furthermore, the “defense shall not be available if the person charged with the offense has left the State with the child.” 13 V.S.A. § 2451(c). This Court has already acknowledged

improper surroundings or immoral influences, nor to afford it advantages superior to those available in its home.

Restatement (Second) of Torts § 700.

custody.⁹ There has been no allegation that Plaintiff ever physically abused Isabella, and Defendants' allegations of sexual abuse fall well short of what is required. In particular, there has been no allegation that Plaintiff ever touched Isabella inappropriately in any way. Ex. 8 at 389:18–390:5. Indeed, the limited allegations Defendants raise were litigated in the Vermont family court, the proper forum for such contentions per the justification defense under Vermont criminal law, and the family court concluded that “there was no evidence of abuse of [Isabella,]” a finding that was affirmed on appeal. Ex. 4; *Miller-Jenkins v. Miller-Jenkins*, 12 A.3d 768, 776 (Vt. 2010) (finding that the family court “correctly found the allegations of abuse to be wholly unfounded” and Lisa had no “reasonable suspicion of abuse” to justify her actions). Defendants’ “abuse” allegations amount only to a belief that Plaintiff’s home was “improper” or that Plaintiff would be an “immoral influence” on Isabella and are insufficient to justify Defendants’ actions.

CONCLUSION

The Court should grant Plaintiff’s motion for partial summary judgment against all Defendants that (1) Lisa committed the tort of custodial interference, which is required both for aiding-and-abetting liability and constitutes an unlawful act as required for civil-conspiracy liability; and (2) Lisa’s tortious acts harmed Plaintiff, as required by the civil-conspiracy theory of liability. The Court should also grant Plaintiff’s motion for summary judgment against Defendants Philip Zodhiates, Kenneth Miller, and Timothy Miller on the remaining elements of both the civil-conspiracy and aiding-and-abetting theories of liability for Count 1 of Plaintiff’s Second Amended Complaint.

⁹ Even if sufficient allegations did exist, Timothy cannot state this defense because he did not have any knowledge of alleged abuse at the time he joined the conspiracy and first assisted Lisa, and, therefore, could not have been motivated at the time by such allegations. *See* Ex. 6 at 50:17–51:6, 102:25–103:5 (indicating he had not met or spoken to Lisa when he agreed to help on September 21, 2009).

Respectfully submitted.

May 31, 2024

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