No. 130931

IN THE SUPREME COURT OF ILLINOIS

VIERA HULSH, Plaintiff-Petitioner, v. MAYA HULSH, AND OREN HULSH, Defendants-Respondent.	Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District Case No. 1-22-1521 There heard on Appeal from Circuit Court of Cook County, Illinois, County Department, Law Division Case No. 2021 CH 00831 The Honorable Patric J. Sherlock Judge Presiding

PLAINTIFF VIERA HULSHS'S JOINT REPLY TO DEFENDANTS' RESPONSE BRIEF TO PETITION FOR LEAVE TO APPEAL

Respectfully submitted,

Dated: November 26, 2024

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Plaintiff/Appellant Viera Hulsh, though counsel, for her reply brief responding jointly to the separate briefs of Defendant/Appellee Maya Hulsh, and Defendant/Appellee, Oren Hulsh, states as follows:

I. Overview

The operative assumed facts are clear. Defendants knew Viera had custody (A-26, ¶22), paid to transport the abducted Children across the world (A-25, ¶¶10-11), then hid them in Illinois (A-25, ¶¶10-17), while failing to tell their mother where they were (A-25, ¶¶16-17). Viera incurred significant expenses to reunite with her Children by borrowing funds she now must repay (A-78), while the father claims no assets while his mother, defendant, Maya Hulsh, pays for everything, including so far at least $800,000 (A-26, ¶¶19-20).

Given these facts, perhaps we should not overthink this. It constitutes a *felony* to aid and abet child abduction. 720 ILCS 5/10-5 and 10-7. We want to discourage people from aiding and abetting child kidnapping and then bringing them to Illinois where the kidnappers would be immunized from the financial damages their misconduct caused.

II. Argument

A. Public policy

Public policy should expand – and not contract -- liability to include those who acted in concert to abduct children. That comports with the case law both sides cite.

In *Vitro v. Mihelcic*, 209 Ill. 2d 76, 83-84 (2004), this Court said it would defer to the legislature on issues regarding a "filial society" claim. The Court discussed *Dralle v. Ruder*, 124 Ill. 2d 61 (1988), noting that "an important distinction" exists between "loss of filial society" resulting from a child's nonfatal injuries and financial damages caused to a parent for medical expenses when the child dies or is still alive. This case is not a loss of filial society claim; it is far more like the expense claim discussed and approved in *Vitro*, involving only money and requiring little careful navigating of difficult boundaries.

In *Vitro*, at 88-89, the Court discussed its reasoning in *Wakulich v. Mraz*, 203 Ill. 2d 223 (2003), regarding policy considerations arising from social host liability for alcohol related claims, finding that long-standing common law and statutory principals hold that an insufficient proximate link exists between a social host and the damage caused by the person drinking the alcohol.

The Court subsequently revisited *Wakulich in Bogenberger v. Pi Kappa Alpha Corp., Inc.*, 2018 IL 120951, ¶18. There the Court distinguished *Wakulich* by emphasizing practical policy distinctions: "We would be turning a blind eye if we failed to acknowledge the differences between a social host situation and an alcohol-related hazing event."

Here, defendants similarly ask this Court to turn "a blind eye" to the distinction between "loss of society" and "filial consortium" and recovering financial losses a custodial parent suffers recovering abducted

children. The concerns raised in *Vitro* regarding loss of society simply do not apply when the issue is reimbursing the money necessary to recover custody from non-custodial family, particularly when that misconduct constitutes felonious misconduct.

On page 4 of her opening brief, plaintiff cites cases around the country supporting her claim. Defendants, in contrast, fail to cite any cases they say contradict plaintiff's position about financial losses, other than *Whitehorse*, discussed below. Defendants fail to explain why this Court should do something different from other Courts and not allow recovery for financial losses.

Even the jurisdictions this Court followed previously allow such claims, despite otherwise deferring to their legislatures regarding claims for damage to the parent-child relationship. Compare *Siciliano v. Capitol City Shows, Inc.*, 124 N.H. 719, 727 (1984), in which the New Hampshire Supreme Court also deferred to its legislature whether its statutory framework would provide for a cause of action for loss of society between parent and child, with *Plante v. Engel*, 124 N.H. 213, 217 (1983), *only one year earlier*, in which the Court allowed recovery against a grandparent for expenses, including attorney fees, incurred in attempting to regain custody of kidnapped children. *Also, Silcott v. Oglesby*, 721 S.W.2d 290 (Tex. 1986), wherein the Texas Supreme Court affirmed the liability of a grandparent for expenses incurred in regaining custody of a grandchild harbored in violation of a custody order, as well as exemplary

damages. The *Silcott* Court *emphasized* that it would have affirmed even though no civil statute existed when the trial Court found the grandmother liable, id., at 292-93.

B. Stare decisis does not apply because this Court has not ruled on the specific issues presented.

Defendants put the cart before the horse. *Stare decisis* cannot apply because they assume, wrongly, that this Court has already addressed the specific issue herein. It has not. In fact, until the Appellate Court ruled in this case, no Illinois Court had addressed the specific issue plaintiff raises herein. That is, no Illinois Court had ruled whether a plaintiff may recover financial losses from non-custodians, as opposed to "psychic" injury, arising from aiding and abetting kidnapping children. Even in this case, the Appellate Court majority effectively passed the issue up to this Court to decide by saying that it was not for it, as an intermediate Court, to do so (A-10, ¶19).

Defendants misread a series of Appellate Court and federal cases by wrongly conflating them into the conclusion that Illinois does not recognize any claims at all arising from interfering with custodial relations. The cases say no such thing. The common thread running through all the Appellate Court and federal cases is that this Court has refused to recognize a cause of action for damage *to the parent-child societal relationship*. *Whitehorse v. Critchfield*, 144 Ill. App. 3d 192, 195 (4th Dist. 1986); *Zvunca v. Motor Coach Indus. Int'l, Inc.*, 2009 WL 1586020, at *2 (N.D. Ill. 2009); *Holzgrafe v. Hinsdale Bank & Tr. Co.*,

2009 WL 3824651, at *3 (N.D. Ill. 2009); *Huter by Huter v. Ekman*, 137 Ill. App. 3d 733, 734 (2nd Dist. 1985).

This Court has not addressed financial losses arising from aiding and abetting kidnapping children. *See Larson v. Dunn*, 460 N.W.2d 39 (Minn. 1990), note 3, gathering cases as of 1990; *and Alber v. Illinois Dep't of Mental Health & Developmental Disabilitie*s, 786 F. Supp. 1340, 1365 (N.D. Ill. 1992), discussing *Larson* and confirming that this Court has not decided all issues arising out of interference with custodial rights: "This Court is of course aware of *Dralle*'s having left open the precise issue just decided here." *Alber* was before *Vitro* – but, in *Vitro*, as in *Dralle*, this Court did not reach our "precise issue" of whether to allow custodial parents to recover financial losses arising from child kidnapping.

Defendants wrongly focus a great deal on *Whitehorse*, defining it as something it is not. In *Whitehorse*, 144 Ill.App.3d at 194, the Fourth District refused to recognize a cause of action for intentional infliction of emotional distress finding "the tort of outrage" derivative of the "tort of parental interference" which it said, "does not exist in this State", citing *Dralle*. However, the *Whitehorse* Court went out of its way to distinguish a slew of cases around the country by noting that those cases, unlike *Whitehorse*, "deal with child abduction by a noncustodial parent, alone or in concert with others, id., at 195. In other words, *the Whitehorse Court carefully distinguished the exact fact pattern and prayer for relief in this case*.

Also, *Whitehorse* remains highly questionable. The lower Court here refused to follow *Whitehorse* and allowed an IIED claim. The Court cited *Dralle*, reasoning that this Court's language in that case "opened the door" (C. 483-486, pp. 3-4). However, the *Whitehorse* Court refused to allow an "outrage" claim and the *Dralle* Court did not address IIED. Clearly, given the subsequent cases, the Fourth District 1986 *Whitehorse* decision is of highly questionable validity outside the specific issue of claims for loss of society or damage to filial relationships.

C. ICARA expressly states that it does not replace other causes of action.

The Hague Convention and ICARA serve a specific and limited function. Nothing in the Hague Convention or ICARA requires naming parties unnecessary to returning abducted children to the custodial parent, even if possible.

The Appellate Court dissent herein emphasized that it could locate no Hague Convention / ICARA cases where the petitioner sued third parties who were unnecessary to ordering the children returned (A. 16-17). ICARA applies to having children who were abducted internationally returned to where they belong. Viera had no reason to bring Maya and Oren before the District Court. That Court had jurisdiction over the Children and the power to have them rightly returned to Viera in Slovakia.

Also, requiring custodial parents to name third-parties unnecessary to returning abducted children in a Hague Convention / ICARA claim would

effectively render the mere possibility of doing so subsequently *res judicata* in Illinois – a result clearly not contemplated by the treaty and statute.

ICARA specifically and unequivocally states that it is *not* exclusive and therefore does *not* replace other law, including causes of action like this one:

> h) Remedies under Convention not exclusive.
>
> The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

22 U.S.C.A. § 9003.

Defendants' argument that we would somehow infringe on federal law falls in the face of ICARA's express provision. *Rigby v. Damant*, 486 F. Supp. 2d 222, 227–28 (D. Mass. 2007) (Hague Convention /ICARA does not authorize grant of exclusive jurisdiction over state law). Indeed, defendants' arguments would require petitioners like Viera, across the world, to anticipate needing to add additional parties in an ICARA suit, not necessary to have the Children returned, and hope to convince a District Court Judge to allow broad discovery anyway even if already having reobtained custody. That would effectively add requirements to the Hague Convention and ICARA not in them – *that* would be improperly infringing on federal law by rendering ICARA exclusive despite its express language to the contrary.

D. Defendants raise new arguments for the first time in this Court not addressed below, including due process and prospective application.

1. Defendants did not raise these issues in the Circuit or Appellate Courts.

Due process arguments are generally waived if not raised in the trial court. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 535-36 (1996). The rationale behind this rule is to avoid piecemeal litigation and ensure that all relevant issues are fully developed and considered at the trial level. This approach helps to maintain the efficiency and fairness of the judicial process by requiring parties to present their arguments at the earliest possible stage. *C. Capp's LLC v. Jaffe*, 2014 IL App (1st) 132696, ¶¶22 and 23. The rule is a matter of judicial administration, rather than jurisdiction, meaning it does not deprive a party of their constitutional rights but rather enforces procedural discipline. *People v. Burson*, 11 Ill. 2d 360, 370 (1957). Of course, this Court has discretion to consider the arguments regardless, id.

2. The equities do not favor defendants.

Defendants argue that they would somehow be deprived of due process if required to defend a tort they say was not previously recognized in Illinois. Defendants mix two arguments, saying that it would be unfair to have to defend themselves against a tort that supposedly did not exist because they could not have reasonably anticipated liability, and therefore the tort should be applied prospectively only (Oren's brief, p. 10; Maya's brief, p. 15).

It would have helped to have had the opportunity to develop the factual basis for their due process argument in the trial Court. One can imagine Judge Sherlock's reaction to affidavits saying that defendants somehow claimed not to have realized they might be called upon to account for their misconduct. As it is, their failure to raise the argument previously prevented plaintiff from developing a record for this Court to consider. Given their failure to make the argument previously, the responsibility for a lack of record must rest on them.

Also, again, aiding and abetting child abduction is a *felony*. 720 ILCS 5/10-7. Our Appellate Court has applied the statute to this exact scenario, *i.e.*, concealing a child from her foster mother by hiding her in a neighbor's home without telling the mother. *See People v. Williams*, 105 Ill.App.3d 372 (1st Dist. 1982). Defendants could not have said in the trial court, with straight faces, that they should have had a clearer warning that they would have to answer in Illinois for aiding and abetting child abduction. They cannot reasonably claim that knowing a tort existed would have deterred them when a felony statute did not.

3. Defendants could anticipate liability for expenses.

Defendants argue that plaintiff could have asked the District Court to have defendants pay her expenses. So defendants should have anticipated paying expenses in a federal Court in Chicago, but not a state Court down the street?

Moreover, as discussed, every Court around the nation addressing the claim has allowed common law actions to recover financial losses resulting from aiding and abetting child abduction. Unsurprisingly, defendants cite no cases addressing, better yet accepting, this argument.

As discussed, defendants committed established statutory felonies, knowing Viera had custody (A-26, ¶22), yet paid to transport the abducted Children across the world (A-25, ¶¶10-11), then hid them in Illinois (A-25, ¶¶10-17), while failing to tell their mother where they were (A-25, ¶¶16-17). In terms of equities, the purpose of calling people to account who aid and abet child abductions would certainly be retarded when it comes to Viera. She had to pay significant expenses by borrowing funds she now must repay (A-78).

4. Defendants misapply principles of issue preclusion.

Maya also argues that defendants should not have to account for a District Court Judgment because they were not litigants. Maya reads too much into Viera's claim. Plaintiff does not say that the issue of her expenses has been finally decided. Viera may or may not have trouble relitigating the amount of her expenses, but nothing would stop defendants from attacking her expenses, whether they were reasonably incurred, and whether they were the proximate cause of defendants' misconduct.

Again, it would have helped if defendants had not waited to get to this Court to first raise this issue. The issue, for example, could have been

clarified or interpreted at the trial court pleading level where it belongs. As it is, through defendants' fault, we have no record to cite regarding what exact expenses or misconduct defendants think they may or not be precluded from litigating if Viera wins this appeal.

III. Prayer for relief.

WHEREFORE, for the forgoing reasons, and for those raised in her petition for leave to appeal, Viera Hulsh respectfully requests that this Court reverse the Appellate Court and Circuit Court, remand with instructions appropriate to this Court's ruling, and grant such further relief as this Court deems proper.

IV. Certificate of compliance.

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 11 pages.

Respectfully submitted,

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Dated: November 26, 2024

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PLEASE TAKE NOTICE that on **November 26, 2024**, we filed with the Clerk of the Supreme Court of Illinois, the attached **Plaintiff Viera Hulsh's Joint Reply to Defendants' Response Brief to Petition for Leave To Appeal.**

A true and correct copy of this filing is served herewith by electronic mail.

Respectfully submitted,

Dated: November 26, 2024

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PROOF OF SERVICE

The undersigned, a non-attorney, certifies under penalties as provided by law pursuant to 735 ILCS 5/1-109, that on **November 26, 2024**, she caused this **Notice of Filing** and attached **Plaintiff Viera Hulsh's Joint Reply to Defendants' Response Brief to Petition for Leave to Appeal** to be served on counsel of record named above by electronic mail.

/s/ Daniela Ramirez