

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

JANET JENKINS \*  
ISABELLA MILLER-JENKINS, \*  
\*  
V. \* Case No: 2:12-cv-184  
\*  
KENNETH L. MILLER, ET AL. \*

MOTION FOR RECONSIDERATION AND STATUS CONFERENCE  
AUGUST 20, 2018  
BURLINGTON, VERMONT

BEFORE:

THE HONORABLE WILLIAM K. SESSIONS III  
District Judge

APPEARANCES:

Sarah Star, Esq., Beth D. Jacob, Esq., Diego A. Soto, Esq., Frank H. Langrock, Esq., Attorneys for the Plaintiffs.  
Ritchie E. Berger, Esq., Robert B. Hemley, Esq., and Hillary Borcharding, Esq., Attorneys for Defendant Victoria Hyden.

Horatio G. Mihet, Esq., Attorney for Defendant Liberty Counsel, LLC.

Norman C. Smith, Esq., Attorney for Defendant Linda M. Wall.

Brooks McArthur, Esq. and David Williams, Esq., Attorneys for Defendant Kenneth Miller.

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1 [MONDAY AUGUST 20, 2018 - 10 A.M.]

2 THE COURT: Good morning.

3 DEPUTY CLERK: This is Case Number 12-184 Janet  
4 Jenkins, et al. versus Kenneth Miller, et al. Present in the  
5 courtroom on behalf of the plaintiffs are attorneys Beth Jacob,  
6 Sarah Star, Diego Soto, and Fritz Langrock. Also present in  
7 the courtroom on behalf of the defendants are attorneys Brooks  
8 McArthur, David Williams, Hillary Borcharding, Robert Hemley,  
9 Ritchie Berger, Norman Smith, and Horatio Mihet The matter  
10 before the Court is a hearing on the motion for reconsideration  
11 and a status conference.

12 THE COURT: All right. We have the motion for  
13 reconsideration upfront as the primary motion today. Let me  
14 just begin with my -- how does one apologize for getting ill  
15 causing this necessary delay, but I certainly regret the fact  
16 that this has taken so long to address the motion for  
17 reconsideration. My thought back in the early spring was we  
18 really needed a hearing on this because I thought it was a  
19 close question and -- but then circumstances evolved and well  
20 anyway now here we are. So, Mr. Berger, are you going to be  
21 doing the argument?

22 MR. BERGER: Yes, Your Honor.

23 THE COURT: Do you want to approach?

24 MR. BERGER: Yes I would appreciate that. It's a  
25 long distance.

1 THE COURT: You think maybe it's a long way.

2 MR. BERGER: Long way, and on behalf of all counsel,  
3 Your Honor, we're glad to see you on the bench healthy and  
4 looking well.

5 THE COURT: Well total recovery. You know brain  
6 surgery isn't that big a deal.

7 MR. BERGER: I don't recommend it for everyone  
8 though.

9 THE COURT: Oh really. Well as a biker you run the  
10 risk --

11 MR. BERGER: Don't remind me. I did a 50 mile -- 60  
12 mile ride on Saturday down in Deerfield on gravel roads that  
13 were totally washed out. I was thinking of that several times.

14 Thank you, Your Honor, and thank you for scheduling this  
15 for a hearing. We obviously think it is also a close call and  
16 a call that should fall in favor of Liberty.

17 THE COURT: You didn't think it was a close call.

18 MR. BERGER: True.

19 THE COURT: You thought --

20 MR. BERGER: I thought it was a slam dunk.

21 THE COURT: Oh right. Yeah. You started your memos  
22 -- both your reply memo and regular memo this was a dramatic  
23 change in Vermont law and of course this was going to have  
24 ramifications for universities across the country. You didn't  
25 believe that this possibly could have been decided that way. I

1 think that's the way you started your memo, right?

2 MR. BERGER: True, true, yes.

3 THE COURT: So it wasn't a close call.

4 MR. BERGER: Well we'll accept it was a close call.

5 THE COURT: Go ahead.

6 MR. BERGER: Jumping right in what we're talking  
7 about here obviously is a vicarious liability claim premised on  
8 an attorney who started her representation of Ms. Miller in  
9 2004 with no affiliation with Liberty University, working in  
10 Florida for Liberty Counsel, and continuing that representation  
11 after 2006 when she joined the faculty at Liberty University  
12 Law School, and as part of that case long before she came to  
13 Liberty University she entered her appearance in the Family  
14 Court of Rutland, State of Vermont, pro hac vice, and she swore  
15 that -- in all pro hac applications -- *"I understand that I  
16 must comply with and I'm subject to the Vermont statutes and  
17 rules of the Vermont Supreme Court, including the rules of  
18 professional conduct and the rules governing establishment and  
19 operation of the professional responsibility program."*

20 In short, Ms. Lindevaldsen, like Mr. Staver, hold their  
21 sole duty of fidelity and loyalty in that custody action to  
22 their client Ms. Miller. Liberty University -- it's nowhere  
23 alleged in either the initial complaint or the amended  
24 complaint that Liberty University had exercised any control  
25 whatsoever over Ms. Lindevaldsen's representation of Ms. Miller

1 or that it had the authority or power to exercise any control  
2 over her representation of Ms. Miller in the Rutland Family  
3 Court proceeding.

4 THE COURT: So the plaintiff in their complaint made  
5 various representations about the interconnected nature of  
6 Liberty Counsel and Liberty University. For instance, Liberty  
7 University really advocated that students get involved in  
8 litigation sponsored by Liberty Counsel. They offered -- the  
9 University offered the role of Liberty Counsel as a real plus,  
10 as a recruitment tool to get students to apply. This  
11 suggestion then is that Liberty Counsel, of course housed in  
12 the same building, is very much a part of what is offered by  
13 Liberty University. So does that unto itself suggest that this  
14 interconnected nature created a control situation by Liberty  
15 University?

16 MR. BERGER: Not in the least. First and foremost,  
17 as the Court has repeatedly held in two of its decisions, this  
18 is a 12(b)6 motion judged by the allegations made in the  
19 complaint -- here in the amended complaint. There is no such  
20 allegations in the amended complaint. The sole invocation of  
21 Ms. Lindevaldsen's connection to Liberty University is the  
22 claim that she received notes from the student part-time worker  
23 Ms. Hyden at the school. Doesn't even allege any of the claims  
24 that the Court just raised, and again we're on a 12(b)6.  
25 There's no affidavit submitted. There's no allegations in the

1 amended complaint.

2 THE COURT: I know that, but of course you know that  
3 if this is granted -- if the motion to dismiss is granted with  
4 leave to amend, you're going to find an amended complaint  
5 raising the same issues that they raised in their argument.  
6 That is there's this relationship between the university and  
7 counsel which suggests a level --

8 MR. BERGER: First of all, I don't think that's the  
9 case because they would have done it long ago. We raised the  
10 lack of any right to control Ms. Lindevaldsen's representation  
11 of Ms. Miller in our initial motion to dismiss, in our motion  
12 to reconsider, and every brief thereafter, and there's been no  
13 such motion to amend, but even if there were and even if that  
14 amendment was allowed, it doesn't establish any right of  
15 control. It might go again to the jurisdictional issue, which  
16 I'll just touch on at the end in relation to what I hope will  
17 be an unnecessary request to take an interlocutory appeal, but  
18 that in no way involves any act of control by Liberty  
19 University over the representation of a client by an attorney  
20 admitted in the courts of the State of Vermont. In fact, it's  
21 the antithesis of being an attorney to be subject to control of  
22 someone like a university.

23 THE COURT: Just hypothetically let's say Liberty  
24 Counsel takes on a case, uses students of Liberty University as  
25 a part of that representation, and Liberty University decides

1 that they do not support the message that's created by that  
2 litigation. Does Liberty University have the power to control  
3 that litigation to the extent that it can order Liberty Counsel  
4 to stop litigation?

5 MR. BERGER: Unquestionably no, first of all. Second  
6 of all, that's not what we're dealing with here. This is an  
7 ongoing representation.

8 THE COURT: Well no we're not doing -- we're not  
9 dealing with that literally, but we're dealing with that in  
10 terms of the relationship between the parties, between Liberty  
11 Counsel and Liberty University. Does Liberty University have  
12 the power to tell Liberty Counsel to drop a case, and in which  
13 case -- because, you know, students of Liberty University are  
14 being used to further the litigation that becomes an issue of  
15 control, and then when you're dealing with a motion to dismiss  
16 what leeway do you give the plaintiffs to develop in discovery  
17 that issue of control?

18 MR. BERGER: Well, first of all, they wouldn't be  
19 empowered to do that because an attorney by definition has a  
20 sole duty of fidelity to his or her client. So you couldn't  
21 take instructions from a third party on whether to represent,  
22 how to represent, or how to proceed with the case, and again  
23 bringing it back to what we're dealing with here, this was an  
24 ongoing representation from 2004 that was simply carried on  
25 again through Liberty Counsel on a part-time basis by Ms.

1 Lindevaldsen after she joined the law school faculty. There's  
2 no allegation in the amended complaint -- after all of these  
3 pleadings and after all these memoranda there's zero  
4 allegations in the amended complaint that Liberty University  
5 had the right to or exercised an iota of control over Liberty  
6 Counsel, Mr. Staver, Ms. Lindevaldsen, and any other attorney  
7 that worked on the case for Liberty Counsel.

8 THE COURT: Did Liberty University say to Ms.  
9 Lindevaldsen we don't want you to use the book that you wrote  
10 about this particular case in your core curriculum?

11 MR. BERGER: I have no idea, Your Honor. It's never  
12 been on the radar screen because it has respectfully nothing to  
13 do with what brings us here, which is Liberty Counsel and Ms.  
14 Lindevaldsen's representation of a private client through a  
15 public interest law firm in the Rutland Family Court, and again  
16 turning to the allegations in the amended complaint, not just  
17 the initial complaint but the amended complaint, there is zero  
18 allegation that Liberty University had the ability to control  
19 or exercise an iota of control over Liberty Counsel, Ms.  
20 Lindevaldsen's representation of Lisa Miller. Zero. No such  
21 allegation because they can't make it.

22 Given her status as a pro hac vice attorney in the State  
23 of Vermont, a licensed attorney representing a client, she  
24 couldn't take any instructions or advice from anyone other than  
25 herself and what her client directed her to do. That's her

1 ethical and legal responsibility, and if I could, Your Honor,  
2 that gets us back to the Court's decision that we move to  
3 reconsider in part, the 9/29/17 decision; and at page 68 and 69  
4 -- I guess it's document 277 -- the Court said at the bottom,  
5 *"Finally, tortious conduct, especially her misrepresentations*  
6 *to courts and her alleged advice to Lisa Miller to flee the*  
7 *country, was not unexpected by the University because it was*  
8 *part and parcel of her representation of Lisa Miller."*

9       Respectfully that isn't true. It's totally unexpected  
10 that a private attorney representing a client is going to  
11 engage in a criminal conspiracy to either kidnap or protect the  
12 flight of that client, and to say that that was expectable  
13 given an attorney's ethical and legal obligations is just  
14 respectfully incorrect, and I think in looking at this and  
15 piecing together how we ended up here today it's why the Court  
16 immediately segued into a claim that the plaintiff never even  
17 alleged and that's the Section 219(2) (D) claim of the  
18 restatement second of the agency --

19       THE COURT: Well that's assuming she's not engaged in  
20 the scope of employment.

21       MR. BERGER: Correct.

22       THE COURT: Going to that second argument.

23       MR. BERGER: That's right, and -- that's right, but I  
24 think respectfully the Court recognized the slender read that  
25 -- the scope of employment, and if you look at Bruckner, which

1 is sort of the seminal most recent decision of scope of  
2 employment, it talks about -- and again it cites restatement of  
3 agencies 228 part -- subpart 2, *conduct of an servant is not*  
4 *within the scope of employment if it is different in kind than*  
5 *that authorized, far beyond authorized time and space limits,*  
6 *or too little actuated by a purpose to serve the master,* and  
7 the Supreme Court goes on to distinguish the decision of the  
8 2nd Circuit in *McHugh versus University of Vermont* which held  
9 that a secretary at the University of Vermont supervisor making  
10 overtly sexist and anti-Catholic remarks the University can no  
11 way be responsible for that conduct, and it distinguished that  
12 because of these concessions made by Norwich University in that  
13 case -- in that trial, but here engaging by a lawyer, taking  
14 the plaintiff at their allegations -- plaintiffs at their  
15 allegations, an attorney, an officer of the court admitted pro  
16 hac vice to the Rutland Family Court to engage in a secret  
17 conspiracy to either assist in the flight of her client and  
18 then child or to conceal that from the Court is in no way  
19 actuated by a purpose to serve Liberty University, and applying  
20 the cue in the Supreme Court's discussion in *Bruckner* that  
21 isn't within the scope of employment, and I think respectfully  
22 that's what led the Court to embark on the analysis of  
23 219(2) (D); and now -- and I apologize we didn't seem to cite  
24 it, but this morning when I'm looking again at the *Doe versus*  
25 *Forest* case and it sure looked in a 3 to 2 decision that they

1 are going to restrict -- Vermont Supreme Court is going to  
2 restrict any such claim allowed under that section of  
3 restatement of agency to law enforcement officials due to their  
4 unique power and authority and trust of that individual, well  
5 on a certified question by the 2nd Circuit to the Vermont  
6 Supreme Court Doe versus Newbury Bible Church decided in 2007  
7 -- the Court I think is familiar with that case -- the Vermont  
8 Supreme Court unanimously made incredibly clear that 219(2)(D)  
9 is in fact restricted -- is going to be restricted to law  
10 enforcement because of the unique power entrusted by society to  
11 law enforcement, and it rejected a claim against a church based  
12 upon child abuse committed by its pastor and directly and  
13 unequivocally restricted the scope of 219(2)(D). It in no  
14 sense could apply to a law professor who has a private client  
15 served pro hac vice in the Family Court of Vermont.

16 THE COURT: It's very clear that it applies to -- one  
17 that applies to law enforcement because the law enforcement  
18 organization would have given this officer such power as to  
19 conduct arrests and as a result, you know, that's a real  
20 participation. Now to what extent does the University give to  
21 a professor a platform to express their views and acceptance in  
22 a community just by virtue of the employment? So when Ms.  
23 Lindevaldsen writes a book which advocates a particular  
24 position in regard to same sex marriages I mean to what extent  
25 does the University give her credibility and a platform to

1 express those views?

2 MR. BERGER: Well anybody who has an employment  
3 position may have -- may or may not have credibility based on  
4 that employment position, but what's important for purposes of  
5 this case is what was her role. She was an attorney from 2004  
6 on through Liberty Counsel for Lisa Miller in the Rutland  
7 Family Court. That was her role pro hac vice litigating that  
8 case on behalf of her client and all that entails. The fact  
9 she might have written a book, published a book two years later  
10 about her experience, in no way can bootstrap under either Doe  
11 versus Forest or Doe versus the Newbury Bible Church a claim  
12 under 219(2)(D) of restatement.

13 THE COURT: So I just digress for a second. If I  
14 take your argument literally and if you were the judge, when  
15 Ms. Lindevaldsen would have said no personal jurisdiction over  
16 her, you would then as a judge respond well of course that is  
17 crazy because she just swore to a state court in Vermont her  
18 loyalty and her willingness to abide by Vermont rules in a  
19 Vermont court, and so personal jurisdiction clearly would apply  
20 to her as well as the Liberty Counsel as well. Is that --

21 MR. BERGER: Well --

22 THE COURT: You wouldn't want to say that?

23 MR. BERGER: -- I wouldn't because I don't think  
24 that's so clear under due process law, and in fact, if I can,  
25 I'll segue to that if it's okay with the Court on the motion

1 for interlocutory.

2 Since we've done all this briefing there has been a number  
3 of decisions that have come down that are on point to the issue  
4 raised that have been more on point to whether the Court erred  
5 in holding that Liberty University can be held in the case  
6 because of its affiliations with Liberty Counsel, the first  
7 which was decided by the 2nd Circuit. It is the Charles Schwab  
8 Corporation versus Bank of America Corporation. It's 883 F.3d  
9 68 and it was decided I think in February of 2018, and it's an  
10 interesting holding, but what's important is it says when  
11 you're dealing with multiple corporate defendants you need to  
12 look at each individual corporation as to whether they satisfy  
13 what Daimler held, that is that each of those defendants or  
14 separately did those -- did that defendant purposely avail  
15 itself of a forum by directing its agents or distributors to  
16 take action there. By directing its agents or distributors to  
17 take action there.

18 There's been no allegation in this amended complaint that  
19 Liberty University directed anyone to take any action in the  
20 State of Vermont. That's unequivocal, and there in the Schwab  
21 case the 2nd Circuit held there has to be a high standard for  
22 specificity of pleading of that, and it went on "*Though we have*  
23 *not clearly delineated the showing necessary before an agent's*  
24 *context will be imputed to its principal for purpose of*  
25 *personal jurisdiction under the due process clause, our case*

1 *law provides some guidance,"* and it goes on and says if you  
2 don't purposely avail yourself, then the fact that it's a  
3 parent subsidiary, that you dominate the subsidiary, that  
4 you're essentially one in many ways from four to whatever  
5 doesn't suffice under the due process clause.

6 THE COURT: It seems somewhat inconsistent with the  
7 Vermont case law which suggests that the 219 restatement on  
8 agency applies in Vermont and that fourth section of the  
9 restatement focuses in on the word aiding. It's not  
10 necessarily control. So is there, to some extent, an expansion  
11 when you're dealing with a non-scope of employment situation,  
12 and all you have to show is aiding, and so how broad do you  
13 interpret aiding, and what you're suggesting is that the  
14 language of those most recent cases, but also the far distant  
15 ones, suggest that control is required. You transpose aiding  
16 to some issue of control.

17 MR. BERGER: Yes and no. First I think under the Doe  
18 versus Newbury Bible Church case, again we're dealing there  
19 with what is -- and this is relevant to our motion to  
20 reconsider on the 12(b)6 obviously because it deals with when  
21 this limited exception to conduct of an employer, agent outside  
22 the scope of its employment, their employment, in which the  
23 principal or the master can still be liable in tort, and now  
24 after Doe versus Newbury Bible Church respectfully it's clear  
25 that the Court was in error in suggesting and in fact deciding

1 that 219(2)(D) could provide a hook for which the plaintiffs  
2 could keep Liberty University in the case because Vermont law  
3 obviously governs on this, and Vermont law is restricting that  
4 section -- that exception to a very, very limited class of  
5 cases involving the entrustment of unlimited authority and  
6 power as in a law enforcement setting, and it's clear as can  
7 be, and again it's a certified question by the 2nd Circuit to  
8 the Vermont Supreme Court in that case.

9 THE COURT: All right. This is very interesting  
10 because obviously Mr. Staver I granted the motion to dismiss  
11 suggesting that there's no vicarious liability even though he  
12 was, number one, dean of the law school, theoretically in  
13 charge of Ms. Lindevaldsen, and also founder of Liberty  
14 Counsel. My question is in discovery -- well you haven't got  
15 much discovery at this point, but is there any evidence of  
16 direction coming from the Liberty University to Liberty Counsel  
17 or to Ms. Lindevaldsen in regard to the litigation?

18 MR. BERGER: Zero and no such allegation in the  
19 amended complaint. In fact, they argue that she might have  
20 used incidentally e-mail at Liberty University while she was --  
21 but they don't even allege that in the amended complaint, but  
22 even if they did, it's irrelevant for analysis under the  
23 restatement of agency. The fact that an employee would be akin  
24 to, god forbid, a couple law clerks engaging in an illegal  
25 betting operation using the e-mail or phone system of chambers

1 and somebody claiming that you or the court system is somehow  
2 vicariously liable for --

3 THE COURT: You're not making that accusation.

4 MR. BERGER: Absolutely not, but it is directly  
5 analogous to what we're faced here. So again they don't allege  
6 any ability or actual control, nor could they, given what her  
7 role was, that is representing a client in a custody dispute in  
8 family court subject to all of the supervision and restrictions  
9 that are incumbent on that role. They don't allege it. They  
10 couldn't allege it and nor could the University exercise such  
11 control lawfully. Just couldn't do it. You can't do it. A  
12 lawyer has to represent the client and, again, none of the  
13 allegations allege control.

14 What they come up with in their opposition memo, again, is  
15 stuff they haven't even alleged; that Linda Lindevaldsen  
16 allegedly might have used her e-mail on occasion, and then they  
17 are relying on the allegation that Ms. Hyden passed notes from  
18 her father to Miss Lindevaldsen in which in no way is acting in  
19 furtherance of their scope of employment of Hyden much less in  
20 a 221 analysis or 219(2)(D) analysis could she be -- could we  
21 be responsible for her conduct.

22 So respectfully we believe the Court erred in not granting  
23 Liberty University's 12(b)6 motion to dismiss, and it's well  
24 briefed. I do apologize again, but refer the Court to the Doe  
25 versus Newbury Bible case really ends that issue, and I don't

1 know how we all missed it because it's a 2007, I think,  
2 decision, but we seemed to have; and then just touching again  
3 on the 1292(b) issue, in addition to the Schwab decision which  
4 was in February of 2018, I would refer the Court to Judge  
5 Reiss's decision in *Vinci versus VF Corporation*, and that's 218  
6 Westlaw 1027429 and that was actually issued 2/21/2018 just  
7 days after the Schwab decision and she got it exactly right.  
8 She didn't cite Schwab, but she did the analysis, recognized  
9 that under U.S. Supreme Court precedent every corporate  
10 defendant has to be analyzed separately with respect to the  
11 purposeful availment or directing an agent to satisfy due  
12 process, personal specific jurisdiction, and she dismissed one  
13 of the two corporations for lack of personal jurisdiction  
14 correctly as indicated by what Schwab had decided a few days  
15 earlier; and then also coincidentally Judge Conroy in *Vieira*  
16 *versus Korda* decision he issued 5/8/2018, likewise, I don't  
17 think he cited Schwab either, but he got it right on the  
18 12(b)(2) due process clause analysis, and that looking at what  
19 the -- each of the separate defendants did as far as  
20 purposefully directing any agent's activities in the forum  
21 jurisdiction and dismissed one and that's exactly what we  
22 submit should have happened here.

23 If the Court were not going to grant our motion to  
24 reconsider and dismiss the case on 12(b)(6), we sincerely and  
25 fully believe the 2nd Circuit on this case, especially looking

1 at the Schwab decision, Bank of America decision, would say you  
2 have to look at what Liberty University itself did as far as  
3 directing agents after Daimler, and there's no such allegation  
4 that it did anything because it did not. Thank you so much.

5 THE COURT: All right. Thank you. Who is going to  
6 argue on behalf -- Ms. Star.

7 MS. STAR: Thank you, Your Honor. Good morning.

8 THE COURT: Good morning.

9 MS. STAR: The question here is not whether Liberty  
10 University had control over the representation. The question  
11 is whether they had control over the acts of the conspiracy,  
12 and the conspiracy was carried out between Lindevaldsen and  
13 Hyden and others, but two Liberty University employees within  
14 the scope of their employment at Liberty University, as this  
15 Court has already correctly ruled, and there is simply no doubt  
16 Lindevaldsen and Hyden and the co-conspirators carried off  
17 their scheme to kidnap Isabella and defeat the orders of the  
18 Vermont Court using that employment relationship.

19 THE COURT: Well so how did they use the employment  
20 relationship? What evidence do you have to suggest that the  
21 allegedly improper activity was within the scope of their  
22 employment?

23 MS. STAR: So kind of going to very specific facts,  
24 but going back a ways to talk about Liberty University contains  
25 the law school. Within the law school there's Liberty Counsel

1 where the lawyers have their offices. On the campuses there's  
2 also the church and there's Liberty Christian Academy where  
3 Isabella attended school and Lisa Miller taught.

4 THE COURT: Well they are all located in the same  
5 building. They all -- theoretically you can show that, at  
6 least for a social purpose, maybe they have overlapping  
7 purposes, but how do you respond to Liberty Counsel's  
8 obligation as a law firm theoretically or lawyers in regard to  
9 their responsibility to their clients and not to the  
10 University? I mean that's what makes it sort of unique it  
11 seems to me. Liberty Counsel has an obligation to their  
12 clients above and beyond the University. So what role does the  
13 University play when in fact Liberty Counsel is dedicated to  
14 the client?

15 MS. STAR: So as President Falwell hires Matt Staver  
16 and relocates this whole law firm, Lindevaldsen included, to  
17 the Liberty campus, at this time they are litigating a high  
18 profile custody case in Vermont involving Isabella  
19 Miller-Jenkins. They not only move the lawyers in, but they  
20 relocate Lisa Miller from northern Virginia to the Lynchburg  
21 campus and give her employment. They enroll -- Isabella is  
22 enrolled in the school. Lindevaldsen brings Lisa Miller to her  
23 class as a guest speaker. She gives a final exam with the  
24 custody battle as the topic that the students have to weigh how  
25 to advise Lisa Miller in the event that the Court takes custody

1 away. What should she do? Should she follow Court orders?  
2 This is a question that's being asked of all the students.  
3 They incorporate their work into their teaching, including  
4 requiring all incoming students to read the book, and they  
5 utilize the students as administrative support in the  
6 litigation as was the express design of the University.

7 So then Lindevaldsen, as she's being directly supervised  
8 on this case by her co-counsel, Dean Staver, and supported by  
9 the Liberty University facilities, staff, students, she's  
10 legally challenging the Vermont Court's decisions, but she's  
11 also working unlawfully with the particular student employee,  
12 Victoria Hyden, to unlawfully circumvent the Vermont Court's  
13 orders through kidnapping the child at the center of the  
14 custody dispute who is also a student on their campus.

15 THE COURT: Assuming that's true, make the connection  
16 between Ms. Lindevaldsen doing those -- giving those directions  
17 and being controlled or directed by the University? How are  
18 you going to show that the University was in fact even aware of  
19 the existence of these directions and this activity or of the  
20 conspiracy in general?

21 MS. STAR: Well I think that would be direct  
22 liability if they were directing the conspiracy, and this is  
23 vicarious liability and so we do allege clearly that the  
24 University had control over its employees especially during the  
25 workday when they were engaging in the conspiracy inside the

1 law school offices and using e-mail and phones.

2 THE COURT: Okay. So do you mean to suggest that any  
3 employer -- I won't use the word master -- employer is then  
4 liable because they have a supervisory role of an employee and,  
5 therefore, they have control theoretically in an abstract way  
6 of what the employee is doing? If that's the case, then this  
7 whole subtlety of aiding or controlling becomes irrelevant  
8 because then all you have to do is show that the employer  
9 employs the employee and, therefore, as a result of that there  
10 is sufficient control to bring vicarious liability claims.

11 MS. STAR: Well I think, you know, there's some  
12 elements for that and I think that this satisfies all those  
13 elements including that the University -- that it was in the  
14 scope of their employment and that the University had an  
15 interest in this litigation that they were doing and interest  
16 in --

17 THE COURT: So what evidence do you have to suggest  
18 that the University had a real interest in this particular  
19 litigation?

20 MS. STAR: Okay. So, for example -- again I would be  
21 happy to amend the complaint with more detail. I thought it  
22 was enough detail, but, for example, President Falwell  
23 personally paid for a television commercial and a radio spot in  
24 Virginia attacking Vermont Court's decisions and calling it  
25 tyrannical and asking -- calling on public support in the

1 Lynchburg area to help protect Isabella from Janet Jenkins.  
2 Jerry Falwell personally gave money for that ad. He's the  
3 president of the university. The law school --

4 THE COURT: Did the University give money for that or  
5 did individuals give money for that? I mean this is way beyond  
6 the scope of your complaint obviously, but I'm interested to  
7 know what your theory is linking the University to the  
8 litigation.

9 MS. STAR: So the University again hires the  
10 attorneys -- this is their most high profile case -- hires the  
11 lawyers. Brings them on board.

12 THE COURT: I thought Liberty Counsel hired the  
13 lawyers and the direction of the lawsuit. Am I not right about  
14 that?

15 MS. STAR: Well Liberty University brings Liberty  
16 Counsel on board on their campus to continue -- funds and  
17 supports the litigation and supplies students and employees to  
18 help it. Clearly it has an interest in the outcome of the  
19 litigation. Also they are -- excuse me.

20 THE COURT: So the fact that Liberty University  
21 brought in Liberty Counsel into the building and provides  
22 students for Liberty Counsel to work on Liberty Counsel cases  
23 you think gives enough investment in the University's -- in  
24 Liberty Counsel from the University to warrant --

25 MS. STAR: To show that when the employees were

1 acting in the context of this custody battle they were  
2 furthering the interests of their employer, and I think that  
3 that's -- I think that's plain from the allegations. Meanwhile  
4 -- yeah. I absolutely think that the University has an  
5 interest. Why else would they have a public interest -- would  
6 they bring Liberty Counsel in and support its work if they had  
7 no interest in their cases? I'm perfectly comfortable with  
8 that.

9 THE COURT: Okay. Well go beyond interest to  
10 control. To what extent do you think Liberty University would  
11 have the ability to tell Liberty Counsel drop a case or handle  
12 it in a particular way?

13 MS. STAR: Well I don't think that's the question. I  
14 mean I think we can certainly do discovery on that topic  
15 because I do think there was involvement, especially in light  
16 of the fact that the dean of the law school was also co-counsel  
17 on the case -- actually probably lead counsel because he's the  
18 founder of the firm. So the fact we had the leader of the law  
19 school being the leader of the case I think that deals with  
20 that issue right there. I think he had total control.  
21 Lindevaldsen was his subordinate.

22 THE COURT: But then I dismissed Mr. Staver from the  
23 complaint.

24 MS. STAR: As an individual, but he still has  
25 control. He's still the employer. He's still the boss even

1 though he's not individually in the case. I don't think that's  
2 a problem at all. So, meanwhile, Lindevaldsen and Hyden are  
3 using the offices of Liberty University to circumvent the  
4 orders. Isabella is missing since 2009. The staff -- in 2009  
5 people on campus had to have known Isabella was no longer at  
6 school. Lisa Miller wasn't teaching there. Nobody told Janet  
7 Jenkins. Nobody told Isabella's lawyer, guardian ad litem, and  
8 meanwhile Lindevaldsen, Staver, and other University employed  
9 lawyers such as David Corey, who is now the general counsel of  
10 Liberty University, they submit pleadings in the wrong Vermont  
11 Family Court asking to withdraw saying we've -- Staver was on  
12 there. We lost communication with our client. They call into  
13 the Family Court and say Miss Star was the one who told us that  
14 there was no coming and going, and as a result of these -- the  
15 deceit and obfuscation and delay the Rutland Family Court is  
16 not able to issue a warrant for Lisa Miller's arrest until  
17 February of 2010 at which point they already been gone for six  
18 months, and they had actually moved to another location in  
19 Nicaragua. They had been in Managua and had moved on by then,  
20 and so the fact they were able to use these resources and use  
21 the University and secretly communicate and then directly phone  
22 in and e-mail from the Liberty University e-mail addresses with  
23 this false information created this delay that made it less  
24 likely that Isabella could be located and ensured the defendant  
25 would never see her daughter again which is exactly what has

1 happened.

2           So I think that all these facts show that the kidnapping  
3 was well within the scope of the employment at the University,  
4 and even looking outside how do you -- outside the scope how do  
5 you remove the University from this equation and say Hyden and  
6 Lindevaldsen didn't use the University to facilitate? This  
7 would require a cognitive leap that I'm just not capable of  
8 because you would have to forget the circumstances under which  
9 the lawyers became employed at the law school, the ongoing  
10 alliance and the affiliation, personal participation in the  
11 case by the dean of the -- head of the law school, and the  
12 relocation of the litigants, the complicity of the entire  
13 university community, the use of the lawyers, use of facility  
14 staff standing with the University to commit the crime misleads  
15 the Court and ensured the success of the conspiracy. So for  
16 those reasons we would ask that the Court not set aside all the  
17 clearly alleged facts and rule that the complaint adequately  
18 alleges that Liberty University is vicariously liable.

19           THE COURT: All right. Thank you. Mr. Berger, do  
20 you have any response?

21           MR. BERGER: Very briefly, Your Honor. Just to note  
22 two things. Back on October 24th of 2013 in the Court's  
23 decision that date, which is document 115, the Court recognized  
24 and I quote, "*It is undisputed that Hyden has never been an*  
25 *officer, director, manager, or authorized agent of Liberty*

1 *University. There is no indication that Liberty University*  
2 *manifested any consent that an employee should act as its*  
3 *agent." That's point one.*

4 Point two. Again, reading the amended complaint, and I've  
5 gone over it ad nauseam in anticipation of today, "*There is*  
6 *zero allegation that Liberty University either exercised or*  
7 *could have exercised any control over Lindevaldsen's*  
8 *representation of Lisa Miller,"* and again that's because as a  
9 matter of law, ethics, and practice it could not. She has a  
10 client to represent. It started in 2004 and continued through  
11 Liberty Counsel. So they throw a lot of mud into the barn  
12 wall, but nothing in the amended complaint alleges, because  
13 they can't, any control or ability to control by Liberty  
14 University over Professor Lindevaldsen in her legal  
15 representation in the Rutland Family Court. Thank you.

16 THE COURT: All right. There have been a flurry of  
17 requests to stay discovery. The Court's going to address this  
18 issue as to whether or not I reconsider the denial of dismissal  
19 of the Liberty University quickly. So it seems to me that need  
20 not be argued at this point. Is there anything else that has  
21 to be brought up?

22 MR. BERGER: No, Your Honor.

23 THE COURT: All right. Ms. Star, is there anything  
24 else?

25 MR. MIHET: Your Honor, Horatio Mihet. I'm Vice

1 President of Legal Affairs at Liberty Counsel in charge of the  
2 legal department and in charge of the clinical program at the  
3 Liberty University. I have heard a number of factual claims  
4 this morning that are just completely untrue. If the Court  
5 will permit me a couple minutes, I could perhaps shed some  
6 light --

7 THE COURT: Well, you know, this is getting into  
8 testimony, right. No. I think this is -- I mean the Court has  
9 sufficient argument on these issues. You may or may not  
10 disagree with the representation that was made about Liberty  
11 Counsel, but obviously your counsel has -- well Liberty  
12 University's counsel, not your counsel. Sorry. Liberty  
13 University's counsel has expressed, it seems to me, adequately  
14 your position.

15 MR. MIHET: Absolutely.

16 THE COURT: Yes.

17 MS. JACOB: Your Honor, Beth Jacob on behalf of the  
18 plaintiffs.

19 THE COURT: Yes.

20 MS. JACOB: I understood the Court to say with  
21 respect to Liberty University's request for a discovery stay  
22 the Court will decide that in conjunction with the request for  
23 a decision on the motion for reconsideration, but there are  
24 many other parties in this case and I would just ask the Court  
25 to direct those parties -- because my statements don't seem to

1 carry much weight -- that they are required to engage in  
2 discovery. They are required to respond to our discovery  
3 requests and they are required to enter into the, well,  
4 stipulated scheduling order. Plaintiff submitted a --

5 THE COURT: All right. The difficulty with me  
6 hearing the argument about what other defendants are doing is  
7 that other defendants may or may not be represented here or  
8 they may not be here. They certainly have been advised of it.  
9 Let me just express how I intend to address this issue.

10 The first is whether or not I reconsider. Based upon that  
11 decision, whether it goes one way or the other it doesn't make  
12 any difference. I'm going to order the discovery start  
13 immediately. This case has been going on obviously much too  
14 long and the criminal charges have been resolved I assume.

15 MR. HEMLEY: No that's not true. That is not  
16 correct. They have not yet been resolved and the Court should  
17 be aware of that, and it does very much impact the discovery  
18 that is being requested of Mr. Zodiates, Ms. Hyden whose name  
19 came up during the course of Mr. Zodiates's trial and is part  
20 of this process.

21 The case -- Mr. Zodiates' conviction, which occurred in  
22 September of 2016, was argued before the 2nd Circuit in April  
23 of 2018, has not been decided. It is a decision that depends  
24 in part on the decision of the United States Supreme Court in  
25 Carpenter which went the way of the defense and resulted in a

1 reversal of Timothy Carpenter's conviction. Obviously this is  
2 not a simple question for the 2nd Circuit. It remains under  
3 advisement and I think it's premature to assume that the  
4 criminal case is going to be resolved one way or another, and  
5 it's a matter of great concern to my clients, and I wanted to  
6 hear the arguments today, but I expect we will also be asking  
7 for a stay. I know the Court's made its position clear and  
8 ordered that discovery commence within a certain period of time  
9 after Mr. Zodiates' judgment was entered in Western District  
10 of New York. However, the landscape has changed dramatically  
11 with the decision in Carpenter and with the obvious difficulty  
12 that the 2nd Circuit is encountering in reaching a decision on  
13 an appeal that is now more than four and a half months before  
14 it up for consideration.

15 So I would ask -- we've been doing our best to cooperate  
16 to the extent that we can in talking with Ms. Jacobs and her  
17 colleagues about things that are of not direct consequence.  
18 For example, we provided them again with discovery that was  
19 provided to them three or four years ago and which was the  
20 subject of a Grand Jury subpoena which they already have, but  
21 to suggest that we are now in a position to engage in discovery  
22 I don't agree with that and obviously we haven't briefed it to  
23 the Court, but we will.

24 THE COURT: Right.

25 MS. JACOB: Your Honor, with all due respect first I

1 agree Mr. Hemley --

2 THE COURT: With all due respect to the Court or Mr.

3 --

4 MS. JACOB: With all due respect to the Court and  
5 also to Mr. Hemley. He is, on behalf of his clients, the only  
6 defendant who actually did provide responses and objections to  
7 the discovery requests and he did raise Fifth Amendment issues.  
8 I'm not saying that those should be ignored. I am saying that  
9 discovery should commence. If there are privilege objections  
10 or other objections, those should be dealt with appropriately.  
11 That's not a reason to do nothing. That's a reason to deal  
12 with the particular objections.

13 THE COURT: Well you started with the representation  
14 that there are many defendants here and discovery I guess is  
15 going nowhere. Is that -- Ms. Jacobs, is that what you're  
16 suggesting?

17 MS. JACOB: Yes, Your Honor. I mean not exactly  
18 nowhere because we served discovery requests so that means a  
19 tiny little step, but nobody else has submitted any responses.  
20 Everybody else has taken the position that a request for a stay  
21 operates as a stay. Some of them haven't even requested a  
22 stay, are just ignoring it I guess, and, you know, for example,  
23 Liberty Counsel and Rena Lindevaldsen moved for a stay on  
24 Friday and their answers were due on Monday and have taken the  
25 position the request for stay operates as a stay. There's not

1 much we can do.

2 THE COURT: Well the Court's intention is to address  
3 the issues that are outstanding now quickly.

4 MS. JACOB: Okay.

5 THE COURT: So what you're suggesting perhaps is the  
6 Court address those particular issues, then the parties can  
7 meet and figure out discovery schedules, and if there's a  
8 conflict or if there's like -- Mr. Hemley obviously has a Fifth  
9 Amendment concern. I did not know that his -- that Mr.  
10 Zodiates's conviction had not been reviewed by the 2nd  
11 Circuit. Frankly that's news to me.

12 So I address the issues that are before the Court right  
13 now. Encourage participants to begin in discovery. If there's  
14 some objection to discovery, then there will be a filing.  
15 Obviously Mr. Hemley intends to file, and then we'll have a  
16 hearing and then -- because it needs to be moving at this  
17 point.

18 MS. JACOB: Your Honor, I'm all in favor of that. I  
19 would be perfectly happy to get objections and deal with them  
20 and come back to the Court and argue them. I just want to get  
21 there.

22 THE COURT: Okay. Yes. Okay.

23 MR. SMITH: Your Honor, Norman Smith representing  
24 Linda Wall, and I talked with Attorney Langrock a while back,  
25 asked for an extension. We are in the process of trying to

1 respond to their 69 or 70 requests to produce. So we haven't  
2 asked for a stay. We're trying and I mean my client's out of  
3 Virginia so we're trying to put everything together.

4 THE COURT: Great.

5 MR. LANGROCK: That's fair. That's true, Your Honor.

6 THE COURT: Right. So we'll start with the rulings  
7 on the motions that are pending. Then if there are going to be  
8 any supplemental requested stayed discovery or to require  
9 discovery, then the Court will address that.

10 MR. BERGER: Thank you, Your Honor.

11 THE COURT: Okay. Is there anything else? All  
12 right, and again I -- you know I apologize for getting sick --  
13 actually not sick -- injured. Okay. Thank you very much.

14 (Whereupon, the proceeding was  
15 adjourned at 10:55 a.m.)

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18 C E R T I F I C A T I O N

19 I certify that the foregoing is a correct transcript  
20 from the record of proceedings in the above-entitled matter.

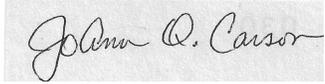
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1 Date

JoAnn Q. Carson, RMR, CRR

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