

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-04290

R.W., et al. v. J.M., et al

Ruling on:
DCF's, S.D.'s, and K.D.'s 3/20/23 Motion to Dismiss
Father's 3/30/23 Motion to Dismiss
Plaintiffs' 4/21/23 Motion to Compel
Plaintiffs' 5/26/23 Motion to Strike
Father's 5/1/23 Motion to Stay Discovery Deadlines

In this case, Plaintiffs R.W. (Mother) and A.M. (Daughter) claim that Defendant J.M. (Father))-with the assistance of Defendants M.M. (paternal Grandmother), S.D., J.B., and K.D., all employees (other than Father) of Defendant Vermont State Department for Children and Families (DCF) during the underlying events-acted in concert to undermine DCF investigations into Father's abuse of Daughter and, instead, to vilify Mother.¹ Plaintiffs assert that this undermined family court proceedings related to the parents' custody dispute over Daughter as well as a child-in-need-of-supervision (CHINS) proceeding that should have resulted in Daughter's protection from Father's abuse but was dismissed by the court. Defendants M.M., S.D., J.B., and K.D. are alleged to have achieved these ends by abusing their authority as DCF employees.

Plaintiffs seek compensatory damages from Defendants on a variety of theories framed in the complaint under 6 counts, as follows:

¹ The individual parties are referred to by initials pursuant to an order of the Court entered on March 28, 2023. Daughter is a minor who appears in this case via Mother as self-appointed "next friend."

Count 1 is asserted by Mother and Daughter against all individual defendants for wrongful interference with custodial rights under Restatement (Second) of Torts § 700.

Count 2 is asserted by Mother and Daughter against all individual defendants for “civil conspiracy.”

Count 3 is asserted by Mother against all individual defendants for the tort of intentional infliction of emotional distress.

Count 4 is asserted by Daughter against the individual defendants other than Father. The claim appears to be that custody determinations, presumably made by the family court, that have resulted in Father having custody of Daughter somehow amount to an unlawful seizure of her person in violation of Article 11 of the Vermont Constitution.

Count 5 is the same as Count 4 but is framed under the Fourth Amendment of the United States Constitution.

Count 6 is asserted by Mother and Daughter against the State (DCF) for negligent supervision and retention of its employees M.M., S.D., J.B., and K.D.

Numerous motions are pending, which the Court will address individually below. A preliminary issue, however, affects several of them. The complaint is long and contains myriad allegations, many overlapping in substance and unnecessary to “short and plain” statements of the claims. Vt. R. Civ. P. 8(a). Among them are many allegations as to what did or did not happen in the CHINS proceeding. This has raised the question of whether records from the CHINS proceeding are discoverable and may be relied upon by the parties in this case. For its part, DCF is attempting to rely on CHINS records as part of its statute of limitations defense. Mother, Daughter, DCF, S.D., and

K.D. take the position that the CHINS records are discoverable and may be used in this case because their confidentiality will be maintained and, thus, there will be no publication of those records to the public in violation of 33 V.S.A. § 5117. Father takes the position that the discovery and use of those records squarely violates § 5117. M.M. and K.D. have taken no position on the matter.

Section 5117 broadly makes records related to juvenile proceedings, including CHINS cases, confidential as follows: “Unless a charge of delinquency is transferred for criminal prosecution under chapter 52 of this title or the court otherwise orders in the interests of the child, such records and files shall not be open to public inspection nor their contents disclosed to the public by any person.” 3 V.S.A. § 5117(a). That broad confidentiality provision is subject to only a handful of narrowly drawn exceptions appearing primarily in § 5117(b)(1). Under § 5117(b)(1)(E), the child subject to the juvenile proceeding, and that child’s parents, may inspect those records, but only with the family court’s approval. Under § 5117(b)(1)(I), DCF may inspect those records. No other exceptions affirmatively permit inspection and use of those records in this case where many other persons—including the parties’ lawyers, other parties, and court staff—would have access to them even if they remain confidential. The only potentially applicable exception is the catchall need-to-know exception, which also requires permission from the family court. 33 V.S.A. § 5117(b)(1)(F). No one has sought or secured family court permission for access and use of Daughter’s CHINS records in this case.

Pursuant to § 5117, the Court concludes that use of the CHINS records in this case is foreclosed at this time. Such an interpretation of § 5117 is consistent with how the

Supreme Court construed the provision in *In re H.H.*, 2020 VT 107, 214 Vt. 1. There, DCF and HSB had improperly used CHINS records in an abuse substantiation proceeding without permission of the family court under 33 V.S.A. § 5117(b)(1)(F) and without employing any other applicable exception. The confidentiality of the HSB proceeding made no difference. *In re H.H.*, 2020 VT 107, ¶ 18, 214 Vt. 1, 10. Although the Legislature thereafter added exceptions to § 5117 ensuring that DCF and HSB could access juvenile records, doing so does not undermine the rationale of *H.H.* more generally or in any way affect how it applies here.² *See* 2021, No. 65, § 17 (adding exceptions for DCF and HSB). There is no general litigation exception under § 5117, and there is no cogent showing by anyone that any of § 5117's exceptions apply here. Until such time as the family court may say otherwise, the parties may not rely on the CHINS records in this case.

I. *DCF's, S.D.'s, and K.D.'s 3/20/23 Motion to Dismiss*

DCF, S.D., and K.D. (State Defendants) have filed a motion to dismiss. They argue that all claims in the complaint are subject to Vermont's 3-year limitation statute for personal injury, 12 V.S.A. § 512, and that limitation period expired long before Plaintiffs asserted their claims. S.D. and K.D. also argue that they could not have interfered with Mother's custody of Daughter because Mother never had custody of Daughter during the underlying events of this case. They argue that the claim makes no sense as asserted by Daughter, because as a minor child, she did not have custody of

² The exception allows juvenile records to be inspected by and disseminated to DCF. 33 V.S.A. § 5117(b)(1)(I). It does not allow DCF to further disseminate those records.

anyone. Finally, S.D. and K.D. argue that there is no “illegal act” for purposes of Plaintiffs’ civil conspiracy claim.

A. The Standard for Dismissal

The Vermont Supreme Court disfavors Rule 12(b)(6) motions to dismiss. “Dismissal under Rule 12(b)(6) is proper only when it is beyond doubt that there exist no facts or circumstances consistent with the complaint that would entitle Plaintiff to relief.” *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575, 576 (mem.) (quoting *Union Mut. Fire Ins. Co. v. Joerg*, 2003 VT 27, ¶ 4, 175 Vt. 196, 198)). In considering a motion to dismiss, the Court “assume[s] that all factual allegations pleaded in the complaint are true, accept[s] as true all reasonable inferences that may be derived from plaintiff’s pleadings, and assume[s] that all contravening assertions in defendant’s pleadings are false.” *Mahoney v. Tara, LLC*, 2011 VT 3, ¶ 7, 189 Vt. 557, 559 (mem.) (internal quotation, brackets, and ellipses omitted).

A complaint must still meet a minimum standard of pleading, however. Vt. R. Civ. P. 8 requires that a complaint’s allegations show “the pleader is entitled to relief,” and it must provide “fair notice” to defendant of the claim against him, Vt. R. Civ. P. 8, Reporter’s Notes. Further, a complaint must contain factual allegations supporting each element of the claims asserted. *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 10, 184 Vt. 1, 9.

B. Statute of Limitations

To support their limitations argument, State Defendants have submitted into the record brief excerpts of transcripts from certain hearings in Daughter’s CHINS case. They argue generally that Plaintiffs’ many references in the complaint to the CHINS proceeding should be treated as incorporating those transcripts into the complaint, they

thus are not extra-record material outside the scope of Rule 12(b)(6), and they show that Plaintiffs were sufficiently aware of the circumstances that they complain of here to have set the limitations clock running in 2016. The Court rejects this argument for two related reasons. First, as set forth above, unless and until the family division says otherwise, records from the CHINS case may not be relied upon in this case. Second, applying the rule that would permit reliance on extra-record evidence considered to be incorporated into the complaint would be patently unfair in the present circumstances, where at least one defendant (DCF) has full access to that evidence, has submitted self-selected, brief excerpts of it into the record, and Plaintiff has had no access to the complete transcripts. The statute of limitations defense cannot be established on the present record.³

C. *Interference with Custody*

In Count 1, both Plaintiffs assert “wrongful interference with custody” against all individual defendants under Restatement (Second) of Torts § 700. Under § 700: “One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent.” Even assuming Vermont might adopt that provision and recognize such a tort, the Complaint here is bereft of allegations of abduction or inducement within the contemplation of § 700. Leaving that aside, liability under § 700 can arise in favor of the one whose custodial rights were violated. The complaint is not clear on the date when Mother lost custody of

³ It is unnecessary to address the other issues raised by Plaintiffs in connection with this argument at this time.

Daughter to Father, but that presumably occurred under Court order, and the events of the complaint all occurred *after* that loss of custody when the asserted allegations of abuse arose.⁴ There is no allegation that Mother has ever had custody of Daughter since that point in time. And Daughter did not in any sensible way have custody of Mother or of herself. At a bare minimum, without actual custody, there cannot be interference with custody. The Complaint does not make such allegations.

Count 1 is dismissed as to all individual defendants.⁵

D. *Civil Conspiracy*

In Count 2, Plaintiffs claim “civil conspiracy” against all individual defendants as an independent claim. The parties’ briefing reflects some uncertainty as to the elements of such a claim. The status of independent civil conspiracy claims in Vermont is somewhat uncertain. Notably, a three-justice panel of our Supreme Court has expressed doubt whether an independent cause of action for the tort of civil conspiracy still exists. *Davis v. Vile*, No. 2002-465, 2003 WL 25746021, at *3 (Vt. Mar. 2003) (unpub. mem.) (“[a]ssuming that there continues to be an independent cause of action for the tort of civil conspiracy,” and citing cases from other states holding that civil conspiracy is not actionable in and of itself); *see also Catamount Radiology, P.C. v. Bailey*, No. 1:14-CV-213, 2015 WL 5089104, at *3 n.2 (D. Vt. Aug. 27, 2015) (stating that neither party had

⁴ The claims of the complaint arise out of allegations of abuse and resulting proceedings and conduct by the parties occurring no earlier than 2016. Though there are no allegations explaining how or exactly when Mother lost custody, Plaintiffs allege that Father “had exclusive legal custody of Daughter before, during, and after the 2016 allegations.” Complaint ¶ 17 at 19 (filed Dec. 4, 2022).

⁵ Father also moved for dismissal on this basis. The other individual defendants have not filed any motions at this time. Because the rationale of this determination extends to all individual defendants, Count 1 is dismissed as to all of them.

addressed the continuing viability of the tort but that it would assume the existence of civil conspiracy for purposes of the pending motion). The Court has similar concerns.

Plainly, the majority position of other jurisdictions is that conspiracy is *not* an independent tort. As a leading authority on tort law notes, “[c]onspiracy is not a tort in itself; it reflects the conclusion that each participant should be liable for the tortious course of conduct.” Dan Dobbs, *The Law of Torts* § 435 (discussing conspiracy under a treatise section titled “other bases for vicarious liability”); *see also Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 172 (Iowa 2002) (“Thus, conspiracy is merely an avenue for imposing vicarious liability on a party for the wrongful conduct of another with whom the party has acted in concert.”); *Agar Corp. v. Electro Circuits Intern., LLC*, 580 S.W.3d 136, 140–42 (Tex. 2019) (expressly joining the majority of states in holding that civil conspiracy is not an “independent claim,” but instead is “a vicarious liability theory that imparts joint-and-several liability to a co-conspirator who may not be liable for the underlying tort”); *Jane Doe-1 v. Corporation of President of The Church of Jesus Christ of Latter-day Saints*, 801 S.E.2d 443, 458 (W. Va. 2017) (“a civil conspiracy claim requires an underlying tort or harm resulting from the conspiracy”); *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988) (“In a tort case . . . , the function of conspiracy doctrine is merely to yoke particular individuals to the specific torts charged in the complaint.”); *but cf. Lewis v. Lead Industries Ass’n*, 178 N.E.3d 1046, 1053 (Ill. 2020) (“Illinois recognizes civil conspiracy as a distinct cause of action The function of a civil conspiracy claim is to extend liability in tort beyond the active wrongdoer to those who have merely planned, assisted or encouraged the wrongdoer’s acts. To state a claim for civil conspiracy, a

plaintiff must allege an agreement and a tortious act committed in furtherance of that agreement.” (internal citations omitted)).

Given this backdrop, it is reasonable to predict that our Supreme Court would not resurrect “civil conspiracy” as an independent tort, and, in any event, this Court makes that decision. It is dismissed on that basis.

Further, even if were a cognizable tort, Plaintiffs’ claim would have no more traction. The typical formulation of the tort under the common law is as follows: “When two or more persons agree to perform a wrongful act and carry out the plan, the law imposes civil liability on all of the persons for the resulting damages regardless of whether they actually committed the wrongful act themselves. The effect of this conspiratorial conduct is thus to implicate all who agree to the plan to commit the wrong, as well as those who actually carry it out.” *Id.* at *6 (quoting James L. Buchwalter, *Cause of Action for Civil Conspiracy*, 54 Causes of Action 2d, § 2 (2012)).

The obvious problem with Plaintiffs’ civil conspiracy claim in this case is that Plaintiffs have asserted it as though it is an independent claim, but, in substance, it is merely duplicative of their other claims against the individual defendants. It does not advance any different tort claim or include any new defendants. This claim is also dismissed as duplicative.

II. *Father’s 3/30/23 Motion to Dismiss*

Father seeks dismissal for several reasons. He argues that the complaint is wholly contingent on juvenile records that are confidential under 33 V.S.A. § 5517 without which none of the claims are viable. He also argues separately that the “family court pleadings” in the custody dispute case show that the limitations period starting running

no later than 2016 and expired well before the claims were filed. In other words, what cannot be done with the juvenile records can be done with the custody dispute records. Finally, he argues that Mother, because she does not have custody of Daughter, by definition cannot be Daughter's next friend, and thus all claims by Daughter should be dismissed.

A. *Access to Juvenile Records*

As the Court has ruled above, it agrees with Father that the CHINS records are protected by 33 V.S.A. § 5517 and, currently, may not be relied upon by the parties here. Father's argument that the parties' current inability to use those records mandates dismissal of the complaint depends on a cramped interpretation of the complaint. As the Court understands the complaint, Plaintiffs' allegations relate to substantiation proceedings, the CHINS proceeding, and the family court custody dispute. Plaintiffs' claims are not exclusively about the CHINS proceeding. If Plaintiffs' access to DCF records and files otherwise remains limited, they still presumably have access to custody dispute records and files and any other evidence they can develop. There is no clear basis for dismissal at this time.⁶

B. *Statute of Limitations*

Father argues in favor of the confidentiality of the juvenile records and, accordingly, does not seek to rely on them to show that the limitations period was triggered long ago and has expired. Instead, he relies on the "family court pleadings,"

⁶ Moreover, this is not a matter of the Court's subject-matter jurisdiction as Father suggests. If a party is unable to develop evidence supporting a claim, the cause of action will fail. That has nothing to do with the Court's power to act (subject-matter jurisdiction) in relation to the asserted claim.

referring to the custody dispute. The Court declines to go down that road under Rule 12(b)(6). No such family court pleadings are in the record, and the allegations of the complaint are insufficient to support Father's argument. To the extent that Father relies on the docket sheet from the custody dispute case, which he submitted into the record, it is far too summary for these purposes, it is not fairly "incorporated" into the complaint, and the Court declines to take judicial notice of it for these purposes.

C. *Mother as Next Friend of Daughter*

Daughter, a minor, appears in this case through Mother, her self-appointed next friend. Father argues that all claims asserted by Daughter should be dismissed because Mother cannot act as Daughter's next friend because no Court has appointed her to do so and she has no legal or physical custody of Daughter.⁷ Father cites no relevant authority in support of this argument.

Mother is not automatically disqualified to act as next friend to Daughter as a matter of law. "There are no special requirements for the person suing as next friend." 6A Mary Kay Kane, *Federal Practice & Procedure: Civ. 3d* § 1572; *see also* 43 C.J.S. *Infants* § 418 ("[A]lthough a custodial parent may maintain a legal action on behalf of a child, an award of custody in divorce proceedings does not necessarily exclude the rights of the noncustodial parent to sue on behalf of the child since the best interests of the child remain paramount."). Moreover, an inappropriate next friend likely should result in the identification of a more suitable replacement, not dismissal in the first instance.

⁷ Father has not argued that Mother should be replaced as next friend because she has a conflict of interest, is not acting in good faith, or is not advancing Daughter's best interests.

III. *Plaintiffs' 4/21/23 Motion to Compel*

In response to DCF, S.D., and K.D.'s use of excerpts of CHINS transcripts, Plaintiffs sought the complete transcripts from which those excerpts came, and DCF refused. As a result, Plaintiffs filed a motion to compel production of those records.⁸ Because those transcripts are confidential under 33 V.S.A. § 5517, the Court declines to order their production. This motion is denied.

IV. *Plaintiffs' 5/26/23 Motion to Strike*

Plaintiffs ask the Court to strike two more exhibits submitted into the record by DCF, S.D., and K.D. with their reply, each including excerpts of transcripts from the CHINS proceeding. Plaintiffs complain that it remains fundamentally unfair for the DCF Defendants to rely on "cherry picked" transcript excerpts while refusing to produce the entire documents for context and completeness. They also argue that new material filed with a reply comes too late in any event because it deprives the other parties of any fair opportunity to respond. Both arguments have merit.⁹ However, the Court grants this motion because DCF, S.D., and K.D. have submitted those documents into the record

⁸ Oddly, DCF asserts that the Court should grant Plaintiffs' motion compelling it to produce these records. To be clear, DCF takes the position that the records are discoverable and the parties can rely on them here, but that it still will not produce them unless the Court inserts itself into the discovery process and orders production. That is not how the discovery rules work, and it would seem to speak to DCF's uncertainty over its asserted interpretation of 33 V.S.A. § 5517.

⁹ The State Defendants object that in submitting the new transcript excerpts, they were simply responding to new factual allegations in Plaintiffs' opposition filing. Plaintiffs no doubt improperly made numerous factual assertions in that briefing. The more important issue remains that the State Defendants are trying to rely on evidence to which Plaintiffs have no access and which is unavailable for use here under § 5517.

in violation of 33 V.S.A. § 5517. The Court declines to take judicial notice of excerpts of transcripts from that proceeding.

V. *Father's 5/1/23 Motion to Stay Discovery Deadlines*

Noting that he was not a party to the stipulated scheduling order, which fast-tracks discovery in this case, and that substantial dismissal and related motions are pending (those considered here), Father requests that the discovery deadlines be stayed for the time being. The Court understands the request to be that discovery may continue but the parties should be relieved of the deadlines in the current scheduling order. Plaintiffs assent to Father's request, and the other parties have not taken a position.

The Court observes that, among other things, whether any parties will be able to convince the family court to grant permission to access and use CHINS materials for purposes of this case is unknown, speculative, and may have a profound effect on the litigation going forward.¹⁰ Plaintiffs take the position that they need transcripts of *all* hearings in the CHINS case (not just those excerpted by DCF, S.D., and K.D.) and once they get them, they will amend the complaint. They also may seek to amend if they learn that those materials will remain out of reach. Otherwise, the Court agrees that not all parties had a fair chance to participate in negotiating the scheduling order, and the stipulated schedule anticipates unreasonably quick discovery. This motion is granted.

The Court requests that the parties confer as to next steps and submit a new, more realistic scheduling order within 30 days. To the extent one or more parties

¹⁰ It is not clear, for example, whether the family court would need to engage in a best interests of the child analysis to release the records and whether it may place additional limitations on the use and dissemination of the records.

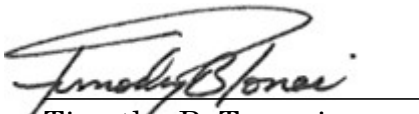
intends to seek release of records from the family division, that process should be worked into the proposed schedule.

Order

For the foregoing reasons:

- (a) DCF's, S.D.'s, and K.D.'s 3/20/23 Motion to Dismiss is granted, in part, and denied, in part;
- (b) Father's 3/30/23 Motion to Dismiss is granted, in part, and denied, in part;
- (c) Plaintiffs' 4/21/23 Motion to Compel is denied;
- (d) Plaintiffs' 5/26/23 Motion to Strike is granted; and
- (e) Father's 5/1/23 Motion to Stay Discovery Deadlines is granted. A schedule for discovery is due as noted above.

Electronically signed June 23, 2023, pursuant to V.R.E.F. 7(d).


Timothy B. Tomasi
Superior Court Judge