

Nos. 05-1815, 05-1816, 05-1821 & 05-1822

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

**STANLEY BOIM, Individually and as Administrator of the
ESTATE OF DAVID BOIM, DECEASED, and JOYCE BOIM,**

Plaintiffs/Appellees,

v.

QURANIC LITERACY INSTITUTE, et al.,

Defendants/Appellants.

On Appeal From The United States District Court
For The Northern District Of Illinois, Eastern Division
No. 00 C 2905 — Arlander Keys, Magistrate Judge

**BRIEF OF THE ANTI-DEFAMATION LEAGUE AS
AMICUS CURIAE SUPPORTING AFFIRMANCE**

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court Nos.: 05-1815, 05-1816, 05-1821 & 05-1822

Short Caption: Boim v. Quranic Literacy Institute, et al.

(1) The full name of every party that the attorney represents in the case:

Anti-Defamation League

(2) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

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i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the amicus' stock:

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I. Interest of the Amicus Curiae

The Anti-Defamation League (“ADL” or “The League”), one of the nation’s oldest civil rights organizations, was founded in 1913 in Chicago with the mission of fighting anti-Semitism and all other forms of bigotry. Since that time, ADL has dedicated itself to exposing and countering all varieties of hatred and intolerance while promoting and protecting the civil rights and liberties of all Americans.

To advance both priorities, ADL combats extremists and terrorists who spread hate and threaten the physical safety and security of Americans at home and abroad. ADL has monitored and issued reports on terrorism for decades and has been a leading advocate for tough, constitutionally sound, U.S. counterterrorism policies. Well before the tragic events of September 11, ADL called upon Congress to recalibrate the balance between security and individual rights and actively lobbied to strengthen America’s anti-terror laws.

ADL was a lead supporter of the passage of the Antiterrorism Act of 1990 (the “ATA”). The League worked closely with the Klinghoffer family and their Foundation in promoting the legislation and in pursuing their claim against the Palestinian Liberation Organization in *Klinghoffer v. Palestine Liberation Organization*, 739 F. Supp. 854 (S.D.N.Y. 1990) the case that was the catalyst for the passage of the ATA. When the Klinghoffers testified at a Senate hearing sponsored by Senator Charles Grassley, they were accompanied by ADL’s Washington counsel, Michael Lieberman. *See* Antiterrorism Act of 1990, Hearing before the Subcomm. on Courts and Administrative Practice, Senate Comm. on the

Judiciary, 101st Cong. 2d Sess. 17 (1990) [“Hearing”] (statement of Lisa Klinghoffer).

ADL was subsequently an early and strong supporter of the ban on fundraising for designated foreign terrorist organizations, enacted as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *See* 142 Cong. Record S3363 (daily ed. Apr. 16, 1996) (statement of Sen. Hatch) (“I was really pleased to see the help that we have had and the positive work that we got from the Anti-Defamation League. . . . They have been very, very concerned about [the anti-terrorism provisions in AEDPA].”). The League also filed an amicus brief in *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000), in which the Ninth Circuit upheld the constitutionality of those aspects of AEDPA addressed by ADL.

ADL strongly desires to help improve the response of the American legal system and law enforcement authorities to the plight of American victims of terrorism both domestically and abroad, while at the same time zealously fighting to maintain civil liberties for all Americans.

Pursuant to Federal Rule of Appellate Procedure 29, ADL’s interest in this case is to assert that this Court in *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002) (“*Boim I*”), and the District Court below, correctly interpreted and applied civil aiding and abetting and conspiracy law under 18 U.S.C. § 2333 (“Section 2333”).

II. In *Boim I*, This Court Articulated the Correct Standards For Liability Under Section 2333(a).

Section 2333(a) provides:

Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

18 U.S.C. § 2333 (a). In *Boim I*, this Court was asked to “consider the viability of a claim brought under th[is] never-tested” statutory provision. *Id.* at 1001. The Court held that the legislative history of Section 2333, in combination with the language of the statute itself, evidenced Congress’s intent “to codify general common law tort principles and to extend civil liability for acts of international terrorism to the full reaches of traditional tort law.” *Id.* at 1010. The Court further held that Section 2333 “clearly is meant to reach beyond those persons who themselves commit the violent act that directly causes the injury.” *Id.* at 1011. In reaching these conclusions, the Court made four primary rulings.

First, the Court held that funding a terrorist organization, without more, cannot itself create liability under Section 2333. *Id.* at 1009-12. Rather, it is necessary for a plaintiff bringing an aiding and abetting claim under Section 2333 to also establish that the defendants: 1) knew about the organization’s illegal activities, 2) desired to help those activities succeed, and 3) engaged in some act of helping. *Id.* at 1023.

Second, after undertaking a detailed analysis of the interlocking criminal and civil provisions set forth in Title 18, Sections 2331, 2333, 2339A, and 2339B, as well as Section 2 (which creates aiding and abetting liability for violations of criminal provisions), the Court concluded that Congress considered “the provision of material support” to terrorists and terrorist organizations, as defined in the criminal Sections 2339A and 2339B respectively, to constitute “an act of international terrorism” within the meaning of the civil liability section, 2333. Put another way, the Court concluded that Section 2333 provides civil liability for a defendant who provides “material support” to terrorists or terrorist organizations (so long as the elements of knowledge and intent, as noted above, are also shown). *Id.* at 1014-16.

Moreover, as the Court made clear, “material support” is a defined term that includes any amount of “currency” and other forms of assistance. *Id.* at 1013, 1027; 18 U.S.C. § 2339A(b). The word “material” in the defined term “material support” does not mean “substantial” or “considerable” as it does, for example, in the securities phrase “material misrepresentation”. *See Boim I*, 291 F.3d at 1015. Therefore, the Court concluded that the plaintiffs may establish civil liability under Section 2333 by doing nothing more than showing that defendants knowingly and willfully provided money or other defined material support, in any amount, to terrorist organizations. *Id.* at 1016.

In the third section of its decision, the Court rejected argument that Section 2333 does not include aiding and abetting liability. The Court specifically held that aiding and abetting liability is “called for by the language, structure, and legislative

history of Section 2333.” *Id.* at 1021. In reaching this result, the Court reasoned that Congress intended, in at least three ways, to import aiding and abetting liability into Section 2333. First, Congress expressed its intent to import general tort law principles, including aiding and abetting liability, into Section 2333. *Id.* at 1020. Second, Congress expressed its intent to render civil liability at least as extensive as criminal liability for terrorism, and criminal liability attaches to aiders and abettors of terrorism. *Id.* at 1020-21. Third, Congress’s stated purpose of “cutting off the flow of money to terrorists at every point along the chain of causation” further supports an interpretation of Section 2333 that includes aider and abettor liability. *Id.* at 1019.¹

Finally, in the fourth section, the Court rejected defendants’ argument that interpreting Section 2333 to permit aiding and abetting liability would impinge defendants’ freedom of association and held that “funding that meets the standard for aiding and abetting terrorist acts does not offend the First Amendment.” *Id.* at 1022-25.

¹ A central premise of the ATA was that the law would now provide for liability beyond the terrorists who directly committed the terrorist act, and would also reach the assets of enterprises that engaged in “funding terrorist acts.” Hearing, at 89 (statement of Joseph A. Morris). *See also id.* at 127 (statement of Prof. Wendy Perdue) (stating “if you want to provide victims with any meaningful remedy, liability must extend beyond the few individuals who actually execute the terrorist act”). Indeed, taking away the source of funding for terrorist operations was seen as a critical component of the ATA’s goal of defeating terrorism: “[I]t is absolutely critical to go after the funds because he who controls the funds controls the organization. It is not enough simply to go after the footmen, the soldiers, the terrorists, the individuals. One must strike at the heart of the organization, and that means going after the funding.” *Id.* at 110 (Statement of Daniel Pipes, Foreign Policy Research Inst.).

All of these holdings correctly interpret the language, structure, and legislative history of Section 2333, as well as Congress's overall intent in passing the ATA. Indeed, a contrary ruling would have effectively nullified the statute by stripping away the means for victims of international terrorism to recover for their losses and by robbing the United States of an important weapon in the war against terror.

III. The Defendants' Liability Below is Consistent with Traditional Principles of Tort Law and This Court's Holding in *Boim I*.

In their current appeal, certain defendants have asserted that in order to establish Section 2333 liability plaintiffs must prove David Boim was murdered "by reason of" a specific act of the defendants. (*See, e.g.*, American Muslim Society Brief at 18; Salah Brief at 25). In doing so, defendants attempt to reargue the law already established by this Court in *Boim I* and then further to misapply its holding by ignoring the controlling tort law principles applicable to aiding and abetting and conspiracy liability. As ADL sets forth below, the traditional tort principles to which this Court referred throughout *Boim I* do not require a showing of causation to establish *secondary*, aiding and abetting or conspiracy liability under Section 2333.

Most fundamentally, defendants' assertion that plaintiffs must prove David Boim was murdered "by reason of" a specific act *of the defendants* is contrary to the plain meaning of the statute, which attaches *primary liability* when one is injured "by reason of an act of international terrorism." 18 U.S.C. § 2333(a). Once primary liability has been established, however, traditional tort principles clearly establish that *secondary liability* can be applied to those who aided and abetted or conspired

with those directly responsible for the act of international terrorism. *See Boim I* at 1010-11 (noting that “the statute clearly is meant to reach beyond those persons who themselves commit the violent act that directly causes the injury” and in fact extends “to the full reaches of traditional tort law”). *See also Linde v. Arab Bank, PLC*, No. 04 CV 2799(NG)(VVP), 2005 WL 2108690, at *10 (E.D.N.Y. Sept. 2, 2005) (Section 2333 “does not limit the imposition of civil liability only to those who directly engage in terrorist acts”, but rather provides for both civil aiding and abetting and civil conspiracy liability).

A. Defendants’ Liability is Consistent with Aiding and Abetting Law.

As the Supreme Court has held, “Aiding and abetting is a method by which courts create secondary liability in persons other than the violator of the statute.” *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994) (citation omitted). Aiding and abetting liability has extensive coverage. “One who aids, abets or encourages a tort need not participate in it to be liable. . . .” Dan B. Dobbs, *The Law of Torts* 936 (West Group 2000). Rather, “one who counsels, advises, abets, or assists in the commission by another of an actionable wrong is responsible to the injured person for the entire loss or damage.” 86 C.J.S. Torts § 37 “[A]iding and abetting liability extends beyond persons who engage, even indirectly, in a proscribed activity; aiding and abetting liability reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do.” *Central Bank*, 511 U.S. at 175-76.

Causation is simply not a required element of aiding and abetting law. In *Boim I* this Court outlined aiding and abetting liability when it held that the Boims were required to “prove that the defendants knew of Hamas’ illegal activities, that they desired to help those activities succeed, and they engaged in some act of helping the illegal activities.” *Boim I* at 1023. Interestingly, neither “but for” nor actual causation is listed as an element under this formulation, and rightfully so, as it is also not an element under aiding and abetting law. Indeed, after examining the long history of aiding and abetting law, Judge Learned Hand noted that “all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory’s conduct.” *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). *See also United States v. Sacks*, 620 F.2d 239, 241 (10th Cir. 1980) (“Defendant’s attempt to inject a but-for causation requirement into the [aiding and abetting] statute is without merit”) (quoting *United States v. Williams* 341 U.S. 58, 64 (1951). *See especially Linde*, 2005 WL 2108690, at *10 (“there is no requirement of a finding that the [terrorist] would not, or could not, have acted but for the assistance of [the defendant]”). It is therefore clear that causation is not an element of aiding and abetting law.²

² Defendant AMS asserts that criminal cases interpreting aiding and abetting or conspiracy law are inapposite. (*See American Muslim Society Brief* at 24-25). This argument is unavailing, however, as Congress “expressed an intent in section 2333 to render civil liability *at least as extensive* as criminal liability.” *Boim I* at 1020 (emphasis added). This Court in *Boim I* described aiding and abetting as a “well known and well defined doctrine” and proceeded to use both civil and criminal cases to illustrate its reach. *Id.* In any event, ADL cites both criminal and civil aiding and abetting and conspiracy cases to support its position that causation is not a required element under either theory of liability.

Moreover, Courts have found that “[a]n alleged aider and abettor . . . need not know all the details of the primary party’s scheme for liability to attach.” *Aetna Casualty and Surety Co. v. Leahey Construction Co., Inc.*, 219 F.3d 519, 533 (6th Cir. 2000). Rather, “evidence of a ‘*general awareness* of a role in an improper activity’ will satisfy the [knowledge] element of an aiding and abetting claim.” *Id.* (quoting *Temporomandibular Joint (TMJ) Implant Recipients v. Dow Chem. Co.*, 113 F.3d 1484, 1495 (8th Cir. 1997)) (emphasis added). So long as one is generally aware of another’s role in improper activity, he or she could appropriately be held liable for the results of that improper activity.

This Court has already rejected the argument that the defendants raise here: that their money did not directly cause the injury. By stating in *Boim I* that aiding and abetting is sufficient to establish Section 2333 liability, this Court implicitly held that defendants’ act of funding Hamas need not have specifically caused David Boim’s death. The leading case on this point is *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), upon which this Court extensively relied in *Boim I*. In *Halberstam*, an aider and abettor was held liable for a murder that occurred during a burglary. The D.C. Circuit outlined the elements of civil aiding and abetting liability and observed that an “aiding and abetting action may also be more distant in time and location and still be substantial enough to create liability.” 705 F.2d at 482 (upholding the lower court’s finding that a “passive but compliant partner” of a murderer was liable for the murder under aiding and abetting and conspiracy law). And because “terrorist organizations do not maintain open books,” because “money

is fungible,” and because “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct, . . . *any contribution to such an organization facilitates that conduct.*” *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000) (emphasis added) (quoting AEDPA). *See also Boim I*, 291 F.3d at 1027. Accordingly, defendants’ liability for the murder of David Boim remains proper so long as they knew of Hamas’ well publicized terrorist activities, desired to help those activities succeed by funding Hamas, and engaged in such funding.

B. Defendants’ Liability is Consistent with Conspiracy Tort Law.

The elements of civil conspiracy are: “(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act *performed by one of the parties to the agreement*; (4) which overt act was done pursuant to and in furtherance of the common scheme.” *Halberstam*, 705 F.2d at 477 (emphasis added). Each co-conspirator is “liable for the reasonably foreseeable acts committed by his coconspirators in furtherance of that conspiracy.” *United States v. Curtis*, 324 F.3d 501, 506 (7th Cir. 2003) (citing *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946)). *See also Linde*, 2005 WL 2108690, at *8-9 (holding that defendants may be secondarily liable under Section 2333 based on civil conspiracy principles).

Like aiding and abetting liability, conspiracy liability has very broad coverage. For instance, a conspiracy agreement “does not require a showing of an express agreement between defendants, but only a common understanding or design, even if tacit, to commit an unlawful act.” *Aetna Casualty and Surety Co. v.*

Leahey Construction Co., Inc., 219 F.3d 519, 533 (6th Cir. 2000) (citation omitted). The Court in *Halberstam* also noted that “a conspiracy need not be established by direct evidence but may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purpose to be accomplished,” and that “the finding of a conspiracy would be justified if the defendants’ acts revealed that they had ‘pursued the same object, although by different means, one performing one part and another another part.’” *Halberstam*, 705 F.2d at 480 (citations omitted). Additionally, “[n]ot every conspirator must commit an overt act in furtherance of the conspiracy, so long as at least one does.” *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.*, 331 F.3d 406, 415 (3d Cir. 2003).

One commentator has summarized civil conspiracy by noting, “Those who cooperate, tacitly or expressly, in particular conduct to pursue a common illegal design (or a legal design by illegal acts) are said to be acting in concert. Each of those acting in concert is liable jointly and severally for all of the intended or foreseeable resulting harm.” Dan B. Dobbs, *The Law of Torts* 936 (West Group 2000. “[O]nce the conspiracy has been formed, all its members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy. 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.” *Halberstam*, 705 F.2d at 481. Most importantly, “[a] conspirator may

be liable for an injury even if he or she did not plan or know about the particular overt act that caused the injury, ‘so long as the purpose of the act was to advance the overall object of the conspiracy.’” *Burnett v. Al Baraka Investment and Development Corp.*, 274 F. Supp. 2d 86, 105 (D. D.C. 2003).

Defendants repeatedly point to language from *Boim I* in which this Court stated that “in tort law, a defendant will be held liable only for those injuries that might have been anticipated as a natural consequence of the defendant’s actions” and to be held liable, they must have “knowledge of the donee’s intended criminal use of the funds” and more specifically, “that murder was a reasonably foreseeable result of making a donation.” *Boim I*, 291 F.3d at 1012. (*See* American Muslim Society Brief at 20; Salah Brief at 30). This language, however, cuts against and not in favor of defendants’ argument. Had the Court intended the result that defendants now urge, it would have had to have stated not that “murder” was a reasonably foreseeable consequence of making a donation, as it did, but rather that “*this* murder” or “*Boim’s* murder” was a reasonably foreseeable result of making a donation. This language, then, does nothing more than track the knowledge and intent elements for aiding and abetting that the Court repeated throughout *Boim I*— knowledge of Hamas’ illegal activities (including murder) and intent that the monies provided help those illegal activities succeed. *Id.* at 1023.

Defendant Salah also argues that he cannot be held liable under Section 2333 because he was imprisoned at the time of David Boim's murder. (*See* Salah Brief at 32). This argument is contrary to law, however. It is well established that "[t]he arrest of one coconspirator does not necessarily terminate the conspiracy. Rather, a conspiracy is presumed to exist until there has been an affirmative showing that it has been terminated so long as there is a continuity of purpose and a continued performance of acts." *United States v. Williams*, 87 F.3d 249, 253 (8th Cir. 1996) (citations and internal quotations omitted). The *Williams* decision is just one example of the truly broad reach of civil conspiracy liability. *See also Curtis*, 324 F.3d at 506 (7th Cir. 2003) (holding one conspirator liable for the co-conspirator's murder where, as here, the conspirators "frequently resorted to violence to achieve their goals"); *United States v. Zafiro*, 945 F.2d 881, 887 (7th Cir. 1991) (defendant was liable for allowing her drug dealer boyfriend to use her apartment in his drug dealings, as long as she knew that her apartment was being used as a stash house); *Halberstam*, 705 F.2d at 488 (defendant was liable for a murder committed by her burglary co-conspirator because "[t]he use of violence to escape apprehension was certainly not outside the scope of a conspiracy to obtain stolen goods").

In interpreting the foreseeability of the September 11th terrorist attacks, the *Al Baraka* court commented, "*Any terrorist act*, including the September 11 attacks, might have been the natural and probable consequence of knowingly and intentionally providing financial support to al Qaeda." *Burnett*, 274 F. Supp. 2d at

105 (emphasis added). An identical conclusion should apply to the funding of Hamas in this case.

In sum, this Court in *Boim I* held that traditional tort law – including conspiracy law – could be used to establish a Section 2333 violation. *See Boim I*, 291 F.3d at 1021. As demonstrated above, the traditional elements of civil conspiracy law do not require a showing of causation. Rather, Section 2333 liability attaches if defendants agreed, even tacitly, to further Hamas’ terrorist activities and if David Boim was murdered by Hamas in furtherance of that agreement. *Halberstam*, 705 F.2d at 477.

IV. Conclusion

Both aiding and abetting and conspiracy law are well established theories of civil liability that have been used by courts over a long period to hold even those with attenuated relationships liable for far-reaching wrongdoing. This Court appropriately found in *Boim I* that liability under Section 2333 can be predicated on aiding and abetting terrorism or terrorists and conspiring with terrorists, in addition to actively participating in terrorism. This Court should now take the next, logical step and affirm that in accordance with “the full reaches of traditional tort law”, causation is not a required element to establish aiding and abetting liability

under Section 2333. Respectfully, the Court should affirm the judgment of the District Court.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,899 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: September 15, 2005

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CERTIFICATE OF SERVICE

The undersigned, an attorney, states that he caused a copy of the foregoing
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