

ORIGINAL

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SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

DE VRIES DAIRY, LLC,)
)
Petitioner,)
)
vs.)
)
WHITE EAGLE COOP. ASSN., et al.,)
)
Respondents.)

Case No. 2011-1995

On Certified Question from
United States District Court for the
Northern District of Ohio,
Western Division (3:09CV00207)

Petitioner's Preliminary Memorandum (Ohio S. Ct. Prac. R. 18.6)

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INTRODUCTION

DeVries Dairy, LLC (DeVries) requests that the Supreme Court of Ohio respond to the certified question from the United States District Court for the Northern District of Ohio in the affirmative, confirming that Ohio law recognizes claims for tortious acts in concert, or pursuant to a common design, with another, or for giving substantial assistance to, or encouragement for, tortious conduct of another under Section 876 of the Restatement (Second) of Torts.

First, an affirmative answer would provide an express holding consistent with the Court's implicit recognition of claims under § 876 in *Great Central Insurance Co. v. Tobias*¹ before ultimately deciding the case on other grounds. Second, an affirmative answer would resolve a conflict among Ohio appellate decisions in favor of the apparent majority of decisions. Third, an affirmative answer is consistent with Ohio's long tradition of recognizing claims included in the Restatements.² Fourth, an affirmative decision would resolve a conflict between two panels of the United States Court of Appeals for the Sixth Circuit, a conflict that is more appropriately resolved by this Court, as the final arbiter of Ohio law, than by an *en banc* review by the Sixth Circuit.

¹ *Great Central Insurance Co. v. Tobias*, 37 Ohio St. 3d 127 (1988).

² See e.g. *Welling v. Weinfeld*, 113 Ohio St.3d 464, 866 N.E.2d 1051 (2007) (adopting Restatement (Second) Torts § 652E); *Glidden Co. v. Lumbers Mut. Cas. Co.*, 112 Ohio St.3d 470, 861 N.E.2d 109 (2006) (adopting Restatement (Second) Conflict of Laws, § 1); *Kishmarton v. William Bailey Constr., Inc.*, 93 Ohio St.3d 226, 754 N.E.2d 785 (2001) (adopting Restatement (Second) Contracts § 353); *Bennett v. Stanley*, 92 Ohio St.3d 35, 748 N.E.2d 41(2001) (adopting Restatement (Second) Torts § 339); *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St. 3d 171, 707 N.E.2d 853 (1999) (Restatement (Second) Torts § 768).

Ohio has a long tradition of recognizing legal claims included in the Restatements, and given the Court's prior implicit recognition of Section 876 claims, this case should be no different. Based on this decisional background, coupled with the strong logical and policy reasons underlying § 876, DeVries Dairy, LLC requests that this Court confirm that in Ohio, a cause of action does lie for the commission of tortious acts in concert. This certified question squarely presents the Court with an opportunity to decide the issue.

STATEMENT OF FACTS

Plaintiff DeVries Dairy, LLC (DeVries) is a commercial dairy farm located in Marion County, Ohio. From approximately October 2003 through the end of April 2008, DeVries marketed its milk through Defendant White Eagle Cooperative Association, Inc. (White Eagle).

Defendant T.C. Jacoby & Co. (Jacoby) encouraged DeVries to join White Eagle, an Indiana cooperative marketing association that Jacoby was instrumental in forming and, through its subsidiary company, Dairy Support, Inc. (DSI), and Jacoby's independent contractor, is handling its day-to-day operations. Jacoby, DSI, and Jacoby's independent contractor are fully responsible for the marketing of milk for White Eagle's members, including DeVries. Jacoby and DSI determined who would purchase milk produced by White Eagle members and the terms of such sales, including the prices that White Eagle members would receive for their milk. Under Jacoby's direction, Jacoby's independent contractor handled all communications between White Eagle members and Jacoby and DSI, as well as communications between White Eagle and its members.

DeVries has pleaded claims for relief under the Restatement (Second) of Torts § 876 (for convenience, collectively called "tortious acts in concert" or "§ 876 claims"). The Plaintiff's Amended Complaint alleges that Jacoby and DSI "effectively controlled all aspects of the

operation of White Eagle, including control over the milk produced by DeVries and the proceeds due to DeVries after the marketing of its milk” and “provided substantial encouragement and assistance to White Eagle in carrying out the day-to-day operations, including payment of the proceeds due to members of White Eagle, such as DeVries Dairy.”³ Plaintiff further alleges that “both Jacoby and DSI owed a fiduciary duty to DeVries as a member of White Eagle,” and that White Eagle “was aware of all of the actions taken by Jacoby through DSI and others in, among other things, failing to pay to DeVries Dairy the amount due under the terms of the marketing agreement and bylaws and, at the same time ensuring that other members received more premiums even though they were in the same or substantially the same position as DeVries.”⁴ DeVries alleges that the Defendants are all subject to liability for the commission of tortious acts in concert under the Restatement of Torts (2d) §876.⁵

ARGUMENT AND LAW

Background of Section 876

Section 876 sensibly provides that, when multiple parties act together to accomplish a tortious act, or where an actor encourages or supports another in committing a tortious act, all of the actors are liable for the resulting damage. The Restatement identifies three circumstances under which parties should be held liable:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he:

- (a) does a tortious act in concert with the other or pursuant to a common design with him, or

³ Amended Complaint, Docket 49 at 16, ¶¶ 112-113.

⁴ Amended Complaint, Docket 49 at 16, ¶¶ 114-115.

⁵ *Id.* at 17.

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.⁶

The illustrations to § 876 further clarify. Parties act in concert when they agree, expressly or impliedly, to cooperate in their conduct or to accomplish a particular result.⁷ Encouraging another to act in a tortious manner subjects the encouraging party to liability as if he were an active participant and regardless of whether the tort is intentional or one of negligence.⁸ Finally, the comments explain that causing a particular result in accordance with an agreement with another, subjects the actor to liability for the results of the united effort if, in doing so, the actor breaches a duty and is a substantial factor in causing the result, irrespective of his knowledge that his act or the act of the other is tortious.⁹

Review of Ohio Decisional Law Applying Section 876 Claims

1. The Supreme Court of Ohio has implicitly permitted Section 876 claims.

The Supreme Court of Ohio considered a claim under Section 876 in *Great Central Insurance Co. v. Tobias*.¹⁰ There, an insurer (Great Central) sought contribution from one bar patron (Tobias) who had purchased 10 shots of whiskey for another patron as part of a wager. The patron consumed all 10 shots “in rapid succession,” was paid \$100 by Tobias, left the

⁶ Restatement (Second) of Torts § 876 (1979).

⁷ *Id.* (comment on clause (a)).

⁸ *Id.* (comment on clause (b)) Illustration 6 to clause (b) is supported in part by the decision of the Third District Court of Appeals in *Kuhn v. Bader*, 89 Ohio App. 203, 211-13, 101 N.E.2d 322, 327-28 (3rd Dist. 1951).

⁹ Restatement (Second) of Torts § 876, comment on clause (c).

¹⁰ *Great Central Insurance Co. v. Tobias*, 37 Ohio St. 3d 127 (1988).

bowling alley, and was killed instantly when the car he was driving struck a train.¹¹ Great Central premised its claim for contribution on Section 876(b), which imposes liability under a concert of action theory.¹²

The Tenth District Court of Appeals held Great Central could recover from Tobias under section 876.¹³ The Court relied on the comments to clause (b) of Section 876:

where one gives encouragement which is a substantial factor in causing an act known to be tortious, the advisor is a tortfeasor and responsible for the consequences of the other's act. Restatement of the Law 2d, Torts (1979) 317, Section 876. Illustration four of that section states that if B gives substantial encouragement to A to act in a manner which B knows is tortious toward C, B is liable to C.¹⁴

Noting that Ohio courts had adopted the Restatement Section in *Kuhn v. Bader*,¹⁵ the Tenth District concluded, “a cause of action then, will lie in this state for encouraging tortious conduct.”¹⁶

Tobias appealed to this Court. The Court noted that Section 876 was the basis for the Tenth District’s decision and determined that 876 applied “only when the principal actor’s behavior amounts to tortious conduct.”¹⁷ The Supreme Court concluded that Section 876 “cannot apply to [Tobias] **under these circumstances.**”¹⁸

¹¹ *Id.* at 128.

¹² *Id.* at 130.

¹³ *Great Central Insurance Co. v. Tobias*, 1987 WL 9624 at *5-6 (Ohio App. 10th District, April 9, 1987) (reversed on other grounds, 37 Ohio St. 3d 127 (1988)).

¹⁴ *Id.* at *6.

¹⁵ *Kuhn v. Bader*, 89 Ohio App. 203 (3rd District 1951).

¹⁶ *Tobias*, 1987 WL 9624 at *6.

¹⁷ *Tobias*, 37 Ohio St. 3d at 131.

¹⁸ *Id.* (emphasis added).

The language used in the decision implies that while a claim for relief for the commission of tortious acts in concert is valid in Ohio, the facts in *Tobias* could not sustain a judgment premised on that theory. Ohio appellate courts and one panel of the United States Court of Appeals for the Sixth Circuit have interpreted the *Tobias* opinion as an implicit recognition of § 876 claims.

2. The Ohio District Courts of Appeal have recognized claims under Section 876.

Since *Tobias*, multiple Ohio appellate courts have held that Ohio law recognizes Section 876 claims. Earlier this year, the Fourth District wrote that, “Section 876 (b) establishes liability when a plaintiff can demonstrate that the defendant did not merely fail to act, but also assisted the third party in committing the tort or criminal act.”¹⁹ In doing so, the court noted that the Supreme Court of Ohio had “cited, although not expressly adopted” Section 876 in *Tobias*.²⁰ As with this Court’s decision in *Tobias*, the Fourth District ultimately concluded that the facts presented in *Pierce* could not support a jury finding of “substantial assistance” by the defendant under a concerted action claim.²¹

The Eight District also construed Section 876 in reaching a result nearly identical to the Fourth District’s decision in *Pierce*. In *Scheurger v. Clevenger* the plaintiff claimed that the defendant, in providing an open bar tab for its employees, “provided substantial encouragement and financial motivation for a tavern to serve intoxicated patrons.”²² The court analyzed the

¹⁹ *Pierce v. Bishop*, 2011-Ohio-371, ¶26, 2011 WL 32244 at *6 (Ohio App. 4th District, January 21, 2011).

²⁰ *Id.*

²¹ *Id.* at ¶ 34, 2011 WL 32244 at *8.

²² *Scheurger v. Clevenger*, 2005-Ohio-5333, ¶15, 2005 WL 2462070 at * 3.

facts of the case under § 876, and determined that the element of “substantial encouragement” was not met.²³ In short, the opinion assumes that Ohio law recognizes claims under § 876.

In an opinion authored by Judge Petree, the Tenth District has also recognized § 876 claims, stating in *King v. Ross Correctional Institution*:

turning next to plaintiff's argument that the facts as adduced at trial regarding the alleged assault established a cause of action for civil complicity under Restatement of the Law 2d, Torts (1979) 315, Section 876, we first recognize that Ohio has adopted this section of the Restatement.²⁴

A close examination of the Tenth District's opinion in *Federated Mgmt. Co. v. Coopers and Lybrand*,²⁵ on which defendants rely, reveals that it does not support their argument that Ohio does not recognize § 876 claims. The author of the opinion in *King*, Judge Petree, concurred in the *Federated Mgmt.* decision. Clearly, based on the preceding quote from *King*, Judge Petree does not agree with defendants.

Federated Mgmt. involved a claim--pleaded and tried--as one for aiding and abetting common law fraud. In that case, the Tenth District concluded that “one who engages in any way in fraudulent behavior is liable for fraud itself, not as an aider and abettor to fraud.”²⁶

At least one Ohio appellate court has construed a Section 876 claim in the context of a products liability action. In that case, the Ninth District wrote, “Ohio has not definitively adopted this section and few Ohio cases have applied it. The Supreme Court of Ohio has never

²³ *Id.*

²⁴ *King v. Ross Correctional Institution*, 2002-Ohio-7360, ¶ 26, 2002 WL 31894913 at *5 (Ohio App. 10th District, December 31, 2002).

²⁵ *Federated Mgmt. Co. v. Coopers and Lybrand*, 137 Ohio App. 3d 366, 381 (10th District 2000).

²⁶ *Id.*

expressly approved Section 876; however, it has cited this section in two cases.”²⁷ However, the Ninth District did not reach the issue of whether the claim there was, in fact, recognized because the facts of the case would not support such a claim if it existed: “We need not determine whether Ohio recognizes Section 876 because we conclude that appellants did not prove the elements necessary to sustain a claim under that section . . . we find that the trial court did not err in concluding that appellants had not shown that Owens-Illinois knew of Owens-Corning's allegedly tortious conduct.”²⁸

3. The Sixth Circuit has conflicting decisions on the question of whether this Court would recognize a claim under Section 876.

Two panels of the Sixth Circuit have issued opinions that could be read to conflict with one another. Both acknowledge that the Supreme Court of Ohio has not expressly recognized § 876 claims. One of the decisions concluded that the facts did not support such claims if they were recognized by Ohio law.

One panel concluded that Ohio law recognizes § 876 claims based on the *Tobias* opinion, but acknowledges that the Supreme Court of Ohio has never expressly approved § 876 claims.²⁹ In *Aetna*, the plaintiffs sued a number of defendants engaged in a scheme to defraud the plaintiff surety company. One of the claims was pled under Section 876, which the Sixth Circuit concluded was viable based on *Tobias*, “By applying Section 876(b) to the facts of the case

²⁷ *Andonian v. A.C. & S., Inc.*, 97 Ohio App. 3d 572 (9th Dist. 1994) (citing *Tobias*, 37 Ohio St. 3d at 130-131; *Allstate Fire Ins. Co. v. Singler*, 14 Ohio St.2d 27, 30 (1968).

²⁸ *Andonian*, 97 Ohio App. 3d at 574-75.

²⁹ *Aetna Casualty and Surety Co. v. Leahey Construction Co. Inc.*, 219 F.3d 519, 533 (6th Cir. 2000).

before it, the *Great Central* court implicitly indicated that it considered civil aiding and abetting a viable cause of action.”³⁰

But another Sixth Circuit opinion concludes that a claim under Section 876 was not viable.³¹ The Court’s conclusion in *Pavlovich*, was not premised on whether Ohio recognized the claim. In fact, the Court expressly stated that, “[i]t is unclear whether Ohio recognizes a common law cause of action for aiding and abetting tortious conduct.”³² The plaintiff’s claims in *Pavlovich* were denied because she could not establish all of the prima facie elements of the cause of action.³³

In reaching its conclusion that Ohio law is unclear on this point, the Sixth Circuit compared its prior opinion in *Aetna* and the Tenth District decision in *Federated Mgmt. Co.*³⁴ In light of Judge Petree’s opinion in *King* and his concurrence in *Federated Mgmt. Co.*, the Sixth Circuit’s analysis is not complete, and should not be followed.

CONCLUSION

A review of all available decisional law confirms that Ohio does in fact recognize claims under the Restatement (Second) of Torts Section 876. Beginning with this Court’s opinion in *Tobias* and continuing through multiple Ohio appellate decisions, such causes of action have been recognized as valid. In the vast majority of those cases where a claim under Section 876 have not been allowed, the reason has been one of insufficient factual predicate to meet the claim, rather than the wholesale invalidity of the legal theory.

³⁰ *Id.*

³¹ *Pavlovich v. National City Bank*, 435 F.3d 560, 570 (6th Cir. 2006).

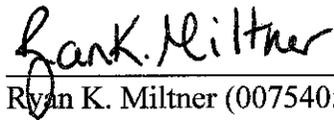
³² *Id.*

³³ *Id.* at 571.

³⁴ *Id.* at 570.

The inconclusiveness of the decisional law, however, has resulted in perceived ambiguity as to whether Ohio law recognizes Section 876. DeVries Dairy requests that this Court accept the certified question to confirm its adoption of claims for tortious acts in concert, as it has done for other claims contained in the Restatement.

Respectfully submitted this 16th day of December 2011.



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CERTIFICATE OF SERVICE

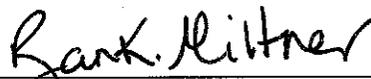
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