

ORIGINAL

IN THE SUPREME COURT OF OHIO

DEVRIES DAIRY, LLC,,	:	Case No. 2011-1995
	:	
Petitioner,	:	On Review of Certified Question
	:	from the United States District Court
v.	:	for the Northern District of Ohio
	:	
WHITE EAGLE COOPERATIVE	:	United States District Court Case
ASSOCIATION, ET AL.,	:	No.: 3:00-cv-00207-JGC
	:	
Respondents.	:	

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**PRELIMINARY MEMORANDUM OF RESPONDENTS  
T.C. JACOBY AND CO., INC. AND DAIRY SUPPORT, INC.  
IN SUPPORT OF ANSWERING THE CERTIFIED QUESTION**

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**I. CERTIFIED QUESTION**

The following question has been certified to this Court by the Hon. James G. Carr, United States District Court for the Northern District of Ohio, Western Division:

Under the applicable circumstances, does Ohio recognize a cause of action for tortious acts in concert under the Restatement (2d) of Torts, § 876?

**II. STANDARD OF REVIEW**

There is no controlling precedent from this Court answering the question certified by the federal district court. Respondents respectfully request that the Court accept the question proposed by the federal district court and answer it in the negative, thus disposing of the Seventh Claim for Relief of Plaintiff's Amended Complaint as matter of Ohio law in *Devries Dairy v. White Eagle Cooperative Association, et al.*. S. Ct. Prac. R. XVIII.

**III. STATEMENT OF THE FACTS AND CASE**

DeVries Dairy, LLC ("DeVries") is a commercial dairy farm located in Marion County, Ohio. White Eagle Cooperative Association, Inc. ("White Eagle") is a cooperative marketing association incorporated under the laws of the State of Indiana. During relevant times, White Eagle engaged T.C. Jacoby & Co. ("Jacoby"), a Missouri corporation, and its subsidiary company, Dairy Support, Inc. ("Dairy Support"), to market milk produced by White Eagle's producers. From approximately October 2003 through the end of April 2008, DeVries marketed and sold its milk through White Eagle.

On or about January 29, 2009, DeVries filed a diversity action in the United States District Court, Northern District of Ohio, against White Eagle alleging breach of contract, breach of covenant of good faith, conversion, and negligent misrepresentation. (Complaint, Docket 1). On or about December 30, 2010, DeVries filed its First Amended Complaint adding Jacoby and Dairy Support as defendants. (Amended Complaint, Docket 49).

The gravamen of DeVries' First Amended Complaint is that White Eagle underpaid DeVries producer premiums for its milk in 2007 and 2008. (Docket 49 at 4-5, ¶¶15-30). DeVries alleges that White Eagle, without any basis and in violation of the Membership Agreement between DeVries and White Eagle ("the Agreement"), made unwarranted deductions to its producer premiums in 2007. (*Id.* at 4, ¶18). DeVries also alleges that White Eagle made unwarranted deductions to its producer premiums in 2008, allegedly made because DeVries treated its dairy cows with recombinant bovine somatotropin ("rBST"), a hormone that some dairy producers use to increase milk production. (*Id.* at 5-6, ¶¶31-39). The First Amended Complaint alleges claims for relief against Defendant White Eagle for breach of contract (First Claim for Relief), breach of the covenant of good faith (Second Claim for Relief), and conversion (Third Claim for Relief). (*Id.* at 11-13, ¶¶72-88). In its breach of contract and covenant of good faith claims, DeVries seeks a minimum of \$625,000.00 in damages for the alleged underpayment of producer premiums. (*Id.* at 12, ¶¶76, 82). DeVries' conversion claim seeks damages "in an amount to be proven at trial." (*Id.* at 13, ¶88).

The First Amended Complaint alleges claims for relief against Defendants Jacoby and Dairy Support for negligent misrepresentation (Fourth Claim for Relief); breach of fiduciary duty (Fifth Claim for Relief); and negligence (Sixth Cause of Relief). (Docket 49 at 13-16, ¶¶89-110). In its claim for negligent misrepresentation, DeVries alleges that representatives of Jacoby or Dairy Support wrongly told DeVries that there would not be a financial penalty to DeVries for continuing to treat its cows with rBST; DeVries maintained its membership in White Eagle and continued to ship milk to the cooperative in reliance on the representations; and thereby DeVries Dairy was damaged in an amount to be determined at trial. (*Id.* at 13-14, ¶¶90-97). In their Fifth Claim for Relief, DeVries alleges that Jacoby and Dairy Support breached their fiduciary duty to

DeVries by entering into agreements for the sale of DeVries' milk to other clients of Jacoby and Dairy Support; by not disclosing those agreements to DeVries; and by providing certain benefits to Jacoby and Dairy Support's clients not available to DeVries. (*Id.* at 14, ¶¶100-103). In its negligence claim, DeVries alleges that Jacoby and Dairy Support breached the duties owed to DeVries by failing to fully disclose and properly account for monies due DeVries and by wrongfully withholding and manipulating the producer premiums. (*Id.* at 15-16, ¶109).

The District Court's Certified Question of State Law relates to Plaintiff's Seventh Claim for Relief, entitled "Tortious Acts in Concert," which is directed towards all Defendants. (Docket 49 at 16-17, ¶¶111-117). Plaintiff's Seventh Claim for Relief attempts to hold White Eagle liable for Jacoby and Dairy Support's alleged tortious acts and Jacoby and Dairy Support liable for White Eagle's alleged tortious acts. (*Id.*). DeVries alleges that Jacoby, through Dairy Support and others, 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. (*Id.* at 16, ¶113). Conversely DeVries alleges that White Eagle provided substantial assistance and encouragement to Jacoby with regard to its treatment of DeVries and the failure of Jacoby to ensure that DeVries was treated equitably and fairly "concerning the marketing of its milk and the proceeds to be paid as a result of that marketing." (*Id.* at 16, ¶116). In prior briefing before the Northern District of Ohio, DeVries acknowledged that its "Tortious Acts in Concert" claim for relief is based on the Restatement of the Law 2d, of Torts § 876. (Docket 67 at 2).

Jacoby and Dairy Support filed a motion to dismiss DeVries' claim in its Seventh Claim for Relief on the basis that such a cause of action is not recognized under Ohio law under the facts as alleged by DeVries. (Docket 60). Based on its review of the law cited to it by the

parties, the Northern District of Ohio was unable to determine whether the Supreme Court of Ohio has, or would likely, recognize a cause of action for tortious acts in concert, and the order certifying the question followed.

#### **IV. ARGUMENT**

##### **A. This Court Should Accept the Certified Question and Answer the Question in the Negative Since This Court Has Not Expressly Approved or Rejected Restatement of the Law 2d, Torts, Section 876 But Has Previously Indicated that It Would Not Likely Recognize a Ohio Cause of Action under Section 876.**

This Court should accept the question certified by the District Court because it has not expressly approved or rejected Section 876 claims under Ohio law. *See, e.g. Andonian v. AC & S, Inc.*, 97 Ohio App.3d 572, 574, 647 N.E.2d 190 (Ohio App. 9 Dist. 1994)(concluding that this Court has never expressly approved Section 876). This Court should then answer the question in the negative since this Court appears to have previously indicated in *Great Cent. Ins. Co. v. Tobias* that it would not likely recognize a cause of action against any of the Defendants under Section 876, if faced with the facts as alleged in Plaintiff's First Amended Complaint.

As this Court is aware, the underlying action in *Tobias* arose out of an alcohol-related death. In *Tobias*, a patron at a bowling alley had purchased multiple shots of whiskey for a fellow patron as part of a bet. *See, Great Central Insurance Company v. Tobias*, 1987 WL 9624, at \*2 (Ohio App. 10 Dist.). The fellow patron rapidly consumed multiple shots of whiskey, and thereafter, was killed when he drove his car into a train. *Id.* The insurer of the bowling alley settled a wrongful death action with the patron's widow and filed a contribution action against the patron who purchased the whiskey. *Id.* The trial court entered summary judgment in favor of the purchasing patron, finding "the facts did not constitute a cause of action in this state." *Id.*

On appeal, the Tenth District Court of Appeals reversed the trial court's judgment solely based on a theory of aiding and abetting under Restatement of the Law 2d, Torts, Section 876:

“we hold that where a patron gives substantial encouragement to a tavern keeper to continue serving liquor in violation of R.C. 4301.22(b), and the patron knows such service is tortious, he may be held jointly liable with seller for the foreseeable consequence of the violation.” *Tobias*, 1987 WL 9624 at \*6.

On appeal from the Tenth District Court of Appeals, this Court reversed the appellate court’s decision and ordered the trial court’s summary judgment reinstated. *Great Cent. Ins. Co. v. Tobias*, 37 Ohio St.3d 127, 524 N.E.2d 168 (Ohio 1988). This Court indicated in the introductory language of its decision that the Court of Appeals’ adoption of Section 876 had impermissibly expanded Ohio law:

**The issue before us is whether the facts presented below were sufficient to state a cause of action under the existing law of this state. Because we find the court of appeals inappropriately expanded our decisions in *Mason v. Roberts* (1973), 33 Ohio St.2d 29, 62 O.O.2d 346, 294 N.E.2d 884, and *Settlemyer v. Wilmington Veterans Post No. 49* (1984), 11 Ohio St.3d 123, 11 OBR 421, 464 N.E.2d 521, not only as to the standard of care of the innkeeper in these types of cases, but also by extending liability to one who purchases liquor in a tavern for a fellow patron, we must reverse the decision of that court and reinstate the summary judgment issued by the trial court. *Tobias*, 37 Ohio St.3d at 128 (emphasis added).**

Later in its decision, this Court emphasized in its holding that: 1) only the Court of Appeals (and not this Court) had “adopted” Section 876 of the Restatement; 2) Section 876 would not apply to these types of cases; and 3) the trial court was correct in ruling that the insurer failed to state a cause of action under Ohio law, even if the bowling alley had committed a tortious act:

By its own terms, this principle has application only when the principal actor's behavior amounts to tortious conduct. Since we have determined that the tavern keeper here did not breach the duty of care owed to his patrons, **the theory of joint liability for the encouragement of tortious conduct adopted by the court of appeals cannot apply to appellant under these circumstances.**

**Furthermore, even if Rainbow Lanes had engaged in tortious conduct, appellee failed to set forth any such cause of action in its complaint.**

**The trial court correctly determined that appellee stated no cognizable cause of action, and entered summary judgment in favor of appellant. The judgment of the court of appeals is reversed, and that of the trial court is reinstated.**

*Judgment reversed. Tobias, 37 Ohio St.3d at 131 (emphasis added).*

Based on the *Tobias* decision, it does not appear that this Court would recognize a cause of action against Defendants under Section 876 if squarely faced with the facts as alleged in Plaintiff's First Amended Complaint. This Court should accept the question proposed by the federal district court and answer it in the negative.

**B. This Court Should Also Accept the Certified Question and Answer the Question in the Negative Because Various Ohio Appellate Courts Have Differed in Their Treatment of Section 876 of the Restatement (Second) of Torts, and Those Courts Addressing Analogous Actions Have Concluded That a Cause of Action Under Section 876 Does Not Exist Under Ohio law.**

This Court should also accept the certified question because various Ohio appellate courts have differed in their treatment of Section 876 (Second) of the Restatement of Torts under Ohio law. This Court should ultimately answer the District Court's question in the negative because Ohio courts addressing analogous actions have held that a cause of action under Section 876 of the Restatement of Torts does not exist under Ohio law.

In *Federated*, certain investment advisers and managers, and attorneys-in-fact filed suit on behalf of purchasers of notes against creditor bank which advised the corporation, the underwriter of notes, an accounting firm, and several other defendants. *See, Federated Management Co. v. Coopers & Lybrand*, 137 Ohio App.3d 366, 374, 738 N.E.2d 842 (Ohio App. 10 Dist. 2000). The plaintiffs asserted the following claims against each defendant: violations of R.C. 1707.41 and 1707.43; common-law fraud; negligent misrepresentation; breach of fiduciary duty/acting in concert; negligence, and violations of various sections of the Securities Act of

1933. *Federated*, 137 Ohio App.3d at 374. The plaintiffs also asserted a claim for breach of contract against two of the lead underwriters in the issuance of the notes. *Id.*

On appeal, the Tenth District rejected the appellants' first assignment of error, that the trial court erred in dismissing their claims for aiding and abetting common-law fraud and for common law fraud, to the extent that the fraud claim was based on fraudulent concealment. *Id.* at 380-381. The Tenth District initially noted that the appellants may have waived any appellant challenge to the dismissal of their aiding and abetting claim by not responding to the argument in the motion to dismiss that Ohio did not recognize a cause of action for aiding and abetting fraud. *Id.* The Tenth District then proceeded to address appellants' claimed point of error anyway, holding: "assuming that appellants did not waive the issue, the trial court was correct in concluding that Ohio does not recognize a claim for aiding and abetting common-law fraud." *Id.* at 381. The Tenth District found that the Ohio courts had previously "stopped short of acknowledging that a claim for aiding and abetting fraud was recognized in Ohio." *Federated*, 137 Ohio App.3d at 381, citing *Woodworth v. Huntington Natl. Bank*, 1995 WL 723664 (Ohio App. 10 Dist. 1995)(rejecting the claim of error that the trial court improperly granted summary judgment with respect to a claim for aiding and abetting fraud); and *Andonian*, 97 Ohio App.3d at 574.

After *Federated* was decided, the Second District also concluded that Ohio law does not recognize a cause of action for aiding and abetting common-law fraud. *Collins v. National City Bank*, 2003 WL 22971874 (Ohio App. 2 Dist. 2003). In *Collins*, a property vendor who was unable to recover from a bankrupt title company funds held in an escrow account, filed a class action against the bank where the escrow funds were deposited. *Collins*, 2003 WL 22971874 at \*5. The property vendor's complaint attempted to assert various claims against the bank,

including breach of fiduciary duty, conversion, negligence, civil conspiracy, aiding and abetting common law fraud, intentional interference with a contract, and common law fraud (misrepresentation). *Id.* at \*5 (Ohio App. Dec. 19, 2003). On appeal, the Second District affirmed the trial court's dismissal of the property vendor's claim for aiding and abetting common law fraud, holding: "the court correctly held that aiding and abetting common law fraud is not cognizable in law." *Id.*

Similar to the plaintiffs in *Federated* and *Collins*, DeVries has asserted tortious claims of conversion, misrepresentation, breach of fiduciary duty, and negligence against the various defendants based on a financial dispute, and the Section 876 claims at issue are based on one or more of these alleged tortious activities, and as in *Federated* and *Collins*, this Court should conclude that Ohio law does not recognize a Section 876 claim under the facts as alleged by DeVries.

*Federated* and *Collins* also demonstrate that the Certified Question at issue not only impacts this case, but it also has a profound impact on the practice of Ohio law. An action alleging tortious acts in concert seeks to impose liability onto a civil defendant by virtue of certain knowledge and that defendant's "substantial assistance or encouragement to the primary party in carrying out the tortious act." Restatement 2d, of Torts, § 876(b). Liability is conferred upon a defendant even though that particular defendant may not have committed a tortious act. While public policy may support the application of this principle of liability in certain contexts (as outlined below), this "bootstrapping" of liability would impermissibly expose civil defendants to unwarranted liability in a variety of different business disputes, such as the instant dispute here.

**C. This Court Should Distinguish Those Appellate Decisions Recognizing Section 876 Claims Under Ohio Law From DeVries' Action.**

Petitioner will likely argue that Ohio law recognizes Section 876 claims based on three decisions: *Pierce v. Bishop*, 2011 WL 322444 (Ohio App. 4 Dist. 2011); *Schuerger v. Clevenger*, 2005 WL 2462070 (Ohio App. 8 Dist. 2005); and *King v. Ross Correctional Institution*, 2002 WL 31894913 (Ohio App. 10 Dist. 2002). The facts underlying these three Ohio appellate decisions stand in contrast to the facts present in *Federated* and *Collins* and the facts as alleged by DeVries.

In *Pierce* and *Schuerger*, the plaintiffs sought to use Section 876 in an attempt to extend liability for injuries and/or death directly caused by alcohol intoxication. See, *Pierce*, 2011 WL 322444 at \*6 (seeking to extend liability to a towing company); *Schuerger*, 2005 WL 2462070 at \*2-\*3; (seeking to extend liability to a company hosting an employee party at a bar). In *King*, a state prison inmate attempted to use Section 876 to hold a fellow inmate liable for the alleged actions of a correctional officer. *King*, 2002 WL 31894913 at \*4-\*5. This Court should distinguish *Pierce*, *Schuerger*, and *King* because the underlying facts and actions in all three of these decisions are wholly unlike DeVries' claims against the various defendants in the instant dispute. Moreover, there are certain public policy concerns implicated in *Pierce*, *Schuerger*, and *King* that are simply not present here. Finally, none of the plaintiffs in *Pierce*, *Schuerger*, or *King* ultimately prevailed with respect to their Section 876 claims.

**D. This Court Should Also Address the Certified Question to Provide Guidance to Those Federal Courts Applying Ohio Law.**

This Court should also address the District Court's certified question to provide guidance to those federal courts applying Ohio law. The Sixth Circuit initially concluded that this Court

would recognize aiding and abetting liability, if squarely faced with the issue, based on this Court's *Tobias* decision.<sup>1</sup> *Aetna Casualty and Surety Company v. Leahey Construction Company, Inc.*, 219 F.3d 519, 533 (6<sup>th</sup> Cir. 2000).

More recently, however, the Sixth Circuit Court of Appeals refused to affirm its prior *Aetna Casualty* decision in *Pavlovich v. National City Bank*, 435 F.3d 560, 570 (6<sup>th</sup> Cir. 2006). Instead, the Sixth Circuit denied a claim under Section 876, in part, because "it is unclear whether Ohio recognizes a common law cause of action for aiding and abetting tortious conduct." *See Pavlovich*, 435 F.3d at 570. This Court should accept the Certified Question to promote clarity on the subject and provide guidance to federal courts applying Ohio law and answer the Certified Question in the negative, with respect to this Section 876 claim brought in the context of this commercial dispute.

## V. CONCLUSION

This Court should accept the question certified by the United States District Court for the Northern District of Ohio because this Court has not expressly approved or rejected Section 876 claims under Ohio law; various Ohio appellate courts have differed in their treatment of Section 876 claims under Ohio law; and the Sixth Circuit Court of Appeals has issued differing decisions regarding whether this Court would recognize such claims. This Court should then answer the certified question in the negative since this Court previously indicated in *Great Cent. Ins. Co. v. Tobias* that it would not likely recognize such a cause of action under Ohio law, and Ohio appellate courts addressing analogous actions have held that a cause of action under Section 876 of the Restatement of Torts does not exist under Ohio law.

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<sup>1</sup> Respondents respectfully disagree with the Sixth Circuit's characterization of *Tobias* in *Aetna Casualty* based on the highlighted language from *Tobias*, as outlined above.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 16<sup>th</sup> day of December, 2011, a copy of the foregoing was served via United States Mail upon the following:

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