

IN THE SUPREME COURT OF OHIO

DeVries Dairy, LLC,)
)
 Petitioner,)
)
 v.)
)
 White Eagle Cooperative Association, et al.,)
)
 Respondents.)

Case No. 2011-1995
 On Review of Certified Question
 from the United States District Court
 for the Northern District of Ohio
 United States District Court Case
 No. 3:09-CV-207

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STATEMENT OF FACTS

The United States District Court for the Northern District of Ohio, Western Division has certified the following question of Ohio law to the court:

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

The court has relied upon the statement of facts provided by the order certifying a question of state law and on other facts not disputed by the parties. *Stetter v. R. J. Corman Derailment Serv., L.L.C.*, 125 Ohio St. 3d. 280, 2010-Ohio-1029, ¶ 2, *Pilkington N. Am., Inc. v. Travelers Cas. and Sur. Co.*, 112 Ohio St. 3d 482, 2006-Ohio-6551, ¶¶ 8, 15.

Petitioner, plaintiff in the district court, 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 respondent-defendant White Eagle Cooperative Association, Inc. (“White Eagle”), an Indiana cooperative marketing association that respondent-defendant T.C. Jacoby & Co. (“Jacoby”) had been instrumental in forming.

White Eagle engaged respondents-defendants Jacoby & Co. and its subsidiary, Dairy Support, Inc. (“DSI”) to handle White Eagle’s day-to-day operations. Jacoby, DSI, and Jacoby’s independent contractor are solely 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.

Respondent Jacoby encouraged DeVries to join White Eagle.

The request before the court arises out of a motion to dismiss, i.e., whether the allegations in the Amended Complaint are sufficient, not whether the facts have been proved.

DeVries has pleaded claims for relief for wrongful reductions in, and deductions from, payments by White Eagle to DeVries, including claims under the Restatement (Second) of Torts § 876 (for convenience, collectively called “tortious acts in concert” or “§ 876 claims”). DeVries’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.” Amended Complaint, District Court Docket 49 at 16, ¶¶ 47-71, 112-113. DeVries 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.” *Id.* at 16, ¶¶ 114-115.

These allegations establish that the respondents are all subject to liability for the commission of tortious acts in concert under Restatement §876. *Id.* at 17. The respondents argue that Ohio does not recognize such claims.

ARGUMENT

I. Proposition of Law

* Under Ohio law, one is subject to liability for harm resulting to a third person from the tortious conduct of another if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other, or (c) or 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. This proposition of law is based upon Restatement of the Law 2d, Torts, Section 876 (1979) ("Restatement § 876").

II. Summary of Argument

Ohio courts have decided cases involving claims based on tortious acts in concert. None have rejected the law, but each has found that the facts of the case did not support the claim. The only decision by this court considering such a claim is typical. *Great C. Ins. Co. v. Tobias*, 37 Ohio St. 3d 127, 524 N.E.2d 168 (1988). The court did not reject the law itself, but, instead, explains that the injured party failed to prove that the principal actor engaged in tortious conduct, a necessary element of such a claim. *Id.* at 130-31. Similarly, most Ohio appellate courts have treated the law of tortious acts in concert as though it were the law of Ohio, but have held that the injured party failed to establish all the necessary elements of the claim.

Because *Tobias* did not *expressly* adopt Section 876, Ohio appellate courts have split as to whether the cause of action is recognized in Ohio or whether the issue is unclear.

This Court should affirm Ohio's recognition of Section 876 claims to resolve any uncertainty perceived by the federal and other lower courts, to place Ohio in line with its Sixth Circuit counterparts and its other neighboring states, to maintain consistency with Ohio's general position to adopt the common law claims articulated in the Restatement; and to further the important policy of providing a meaningful legal remedy to those injured by the wrongful actions of others.

The allegations of the Amended Complaint cover all three types of conduct that will result in liability to a third person for tortious acts committed by someone else, the principal actor. The first type (Section 876(a)) is committing the tortious act in concert with the principal actor or pursuant to a common design with him. The second type (Section 876(b)) is giving "substantial assistance or encouragement" to the principal actor knowing that the principal actor's conduct constitutes a breach of duty. The third type (Section 876(c)) is giving substantial assistance to the principal actor where the substantial assistance itself constitutes a breach of duty. Ohio courts considering the third type have held that the person acting in concert would be liable for that person's independent tortious conduct. Thus, independent liability has also been alleged in the Amended Complaint in this case.

III. Expressly recognizing Restatement of the Law 2d, Torts, Section 876 (1979) recognizes that Ohio courts have been treating it as the law.

Two decisions by this court addresses claims under Restatement § 876. *Great C. Ins. Co. v. Tobias*, 37 Ohio St. 3d 127, 524 N.E.2d 168 (1988); *Allstate Fire Ins. Co. v. Singler*, 14 Ohio St. 2d 27, 30, 236 N.E.2d 79 (1968). They both concern subrogation claims by an insurer. In *Tobias*, the court held that the insured (the principal actor) had not committed a tort. Thus, there could be no concerted activity to commit a tort, and Restatement § 876 could not apply. In

Singler, the court relied on Restatement § 876 as one of several authorities to hold that, where there was no evidence of participation or agreement with respect to the tort, there was no joint liability with the tortfeasor.

The insurer in *Tobias* sought contribution for a settlement under Restatement § 876(b) (liability for assisting or encouraging). The case turns on Ohio's dram shop statute. The insured, Rainbow Lanes, had a bar. Tobias, a patron at Rainbow Lanes, offered to pay Steve Wagner \$100 if Wagner would drink ten shots of whiskey. Wagner agreed. Tobias purchased 10 shots of whiskey, which Wagner consumed. Tobias paid Wagner \$100, and Wagner left the bowling alley. He was killed instantly when his car struck a train. *Id.* at 127. Rainbow Lanes' insurer, Great Central, settled claims by Wagner's widow and children, and sought contribution from Tobias.

The Tenth District Court of Appeals had held that Great Central could recover from Tobias, noting that Ohio courts had adopted Restatement § 876 in decisions dating back to the 1950's, the Tenth District concluded, "a cause of action then, will lie in this state for encouraging tortious conduct." *Great C. Ins. Co. v. Tobias*, 10th Dist. No. 86AP-820, 1987 WL 9624 at *6 (Apr. 9, 1987) (relying on *Kuhn v. Bader*, 89 Ohio App. 203, 101 N.E.2d 322 (3rd District 1951)).

This court reversed because the facts did not support such a claim. The decision explains that Restatement § 876¹ applies "only when the principal actor's behavior amounts to tortious conduct." *Tobias*, 37 Ohio St. 3d at 131, 524 N.E.2d 168. Under the dram shop statute, Rainbow Lanes (the principal actor) had no liability because it did not sell the whiskey to Wagner; i.e., Rainbow Lanes had not engaged in tortious conduct. Therefore, Section 876

¹ The court quotes Restatement § 867(b): "For harm resulting to a third person **from the tortious conduct of another** one is subject to liability if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." *Id.* at 130-31 (emphasis in the Court's quotation).

“cannot apply to [Tobias, the secondary actor] **under these circumstances.**” *Id.* (Emphasis added).

Apparently because *Tobias* did not expressly reject the appellate court’s holding that Ohio law recognized Restatement § 876, one appellate court stated that “[W]e first recognize that Ohio has adopted this section of the Restatement [876].” *King v. Ross Correctional Instn.*, 10th Dist. No. 02AP-256, 2002-Ohio-7360 at ¶ 26. The decision is discussed below.

The insurer in *Singler* sought to recover from two minors amounts that it had paid its insured for fire damage. The opinion explains that the evidence was that one of the two minors trespassed on the insured’s property to set the fire, but there was no evidence that the second minor “actively participated or agreed with” the first minor. *Singler* at 30. Therefore, the second minor could not be held liable, citing Restatement § 876 as one of several authorities. *Id.* Thus, the court relied, in part, in Restatement § 876.

Thus, this court has neither rejected Restatement § 876 nor expressly adopted it.

IV. Appellate Decisions Consistently Apply Section 876 as Ohio’s Law in Analyzing Concerted Action Claims, Rejecting Claims that Lack the Factual Predicate for Success.

A. Ohio Courts of Appeal recognize tortious acts in concert under Restatement §876.

After this Court’s opinion in *Tobias*, Ohio courts of appeal decided multiple cases involving claims for concerted action. None of the decisions reject Restatement § 876. An honest review reveals that, where such claims have failed, they have failed on the facts, not the law. Assuming that Restatement § 876 is the law of Ohio, the cases demonstrate that the appellate courts of Ohio have handled such claims sensibly.

One case involved an assisting or encouraging with knowledge claim under Restatement §876(b). *Andonian v. A.C. & S., Inc.*, 97 Ohio App. 3d 572, 647 N.E.2d 190 (9th Dist. 1994). One of the required elements to be proven was that the secondary actor knew that the principal actor's conduct constituted a breach of duty. The trial court concluded "that appellants had not shown that Owens-Illinois knew of Owens-Corning's allegedly tortious conduct" *Andonian*, at 575. Thus, they had not shown that Owens-Illinois had knowledge of Owens-Corning's breach of duty. The court of appeals found no error in the trial court's conclusion. The court explained that it "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." *Id.* at 574.

In *King v. Ross Correctional Institution*, in an opinion authored by Judge Petree, the Tenth District expressly states "[W]e first recognize that Ohio has adopted this section of the Restatement [876]." *King v. Ross Correctional Instn.*, 10th Dist. No. 02AP-256, 2002-Ohio-7360 at ¶ 26. The *King* court cited to the case history of *Tobias*, stating that this court had overruled *Tobias* on other grounds. The *King* court then held that the claim had been waived because it had not been raised in the trial court.

Judge Petree's opinion in *King* was written two years after he sat on the panel that decided *Federated Mgmt. Co. v. Coopers and Lybrand*, 137 Ohio App. 3d 366, 381, 738 N.E.2d 842 (10th Dist. 2000), on which respondents have relied. A close examination of the *Federated Mgmt.* opinion reveals that it does not support the broad argument that Ohio does not recognize § 876 claims. Rather, 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." *Id.* The decision does not reject wholesale Restatement § 876, or even all claims for aiding and abetting, as confirmed by a later decision by the Tenth District.

In *Scheurger v. Clevenger*, 8th Dist Nos. 85128, 85129, 2005-Ohio-5333 the court applied Restatement § 876(b) (liability for assisting or encouraging), holding that dismissal of the claim was warranted because the secondary actor's conduct was "not substantial encouragement". *Id.* at ¶ 15. There was no discussion of whether or not Restatement § 876(b) was the law of Ohio.

Scheurger was another bar case. Litehouse was hosting a party at a bar. Scheurger was assaulted by one of Litehouse's intoxicated employees. Scheurger argued that Litehouse, the secondary actor, "provided substantial encouragement and financial motivation for a tavern to serve intoxicated patrons" by providing an open bar for the Litehouse employees. The court determined that an open bar tab, without more, is not "substantial encouragement." *Id.* at ¶ 15.

The Fourth District, *sua sponte*, applied Restatement § 876 to a case. *Pierce v. Bishop*, 4th Dist. No. No. 10CA6, 2011-Ohio-371, ¶26 et seq. The decision notes that the "section has been cited, although not expressly adopted, by the Supreme Court of Ohio" and "has been applied on several occasions by courts in Ohio." *Id.* at ¶ 26, 29. The opinion explains 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." The Fourth District ultimately concluded that "no reasonable jury could find that [the secondary actor's] actions amounted to 'substantial assistance.'" *Id.* at ¶ 34.

Finally, in December 2011, the Eleventh District considered a subsection (b) aiding and abetting claim where the harmed party alleged that an insurance company, here the secondary actor, substantially encouraged its Vice-President to conceal material facts and provide false statements during a deposition. *Whelan v. Vanderwist of Cincinnati, Inc.*, 11th Dist. No. 2010-G-2999, 2011-Ohio-6844. After reviewing the same district court of appeals decisions cited

above, as well as the two principal decisions of the United States Court of Appeals for the Sixth Circuit addressing Section 876 claims, the *Whelan* court concluded that, “it remains unclear whether The Supreme Court of Ohio would adopt the doctrine of liability for civil aiding and abetting as derived from [Restatement § 876].” *Id.* at ¶ 23. But the Court proceeded to analyze the claim, ultimately determining (as this Court did in *Tobias*) there was no tortious predicate by the principal actor to support the claim. *Id.* at ¶ 31. Once again, the failure to prove all elements of the concerted action claim decided the issue.

B. Cases cited by Respondents are distinguishable or do not discuss Restatement § 876.

To date Respondents have relied on two cases involving aiding and abetting fraud, neither of which address Restatement § 876. The principal case, *Federated Mgmt. Co. v. Coopers and Lybrand*, 137 Ohio App. 3d 366, 381, 738 N.E.2d 842 (10th Dist. 2000), was decided by a panel that included Judge Petree who two years later wrote “[W]e first recognize that Ohio has adopted this section of the Restatement [876].” *King* at ¶ 26. Judge Petree’s *King* opinion does not mention *Federated Management*.

Federated Management itself does not mention Restatement § 876 or any cases considering. Thus, if it stands for anything, it is limited to aiding and abetting common law fraud. Especially in light of Judge Petree’s later *King* opinion, the case means nothing with respect to Restatement § 876.

The case of *Collins v. Natl. City Bank*, 2nd Dist. No. 19884, 2003-Ohio-6893 also cited by Respondents simply cites *Federated Mgmt.*, providing no further help.

C. Similarly, Opinions of the United States Court of Appeals for the Sixth Circuit Follow § 876.

Two Sixth Circuit opinions address Ohio's recognition of claims under Restatement § 876. While those opinions could be read to conflict with one another, in fact, their analyses are entirely consistent. Both opinions acknowledge that the Supreme Court of Ohio has not expressly recognized § 876 claims. One opinion concludes that this court would recognize aiding and abetting liability if squarely faced with the question. *Aetna Cas. and Sur. Co. v. Leahey Constr. Co. Inc.*, 219 F.3d 519, 533 (6th Cir. 2000). This opinion refutes Respondents' contention that Restatement §876 should be limited to alcohol intoxication cases. The other opinion concluded that the facts did not support such claims if they were recognized by Ohio law. *Pavlovich v. Natl. City Bank*, 435 F.3d 560, 570 (6th Cir. 2006).

In *Aetna*, the court concluded that Ohio law recognizes Restatement § 876(b) (assistance or encouragement) claims based on *Tobias*, but acknowledged that the Supreme Court of Ohio has never expressly adopted Restatement § 876. *Aetna*, 219 F.3d at 533. *Aetna* involved fraud (not alcohol intoxication), and used aiding and abetting terminology instead of assistance or encouragement. The harmed party, a surety company, sued the bank, banker, and accountant of a construction company for aiding and abetting fraud. *Id.* at 524. The court concluded that the subsection (b) aiding and abetting claim was recognized, "By applying Section 876(b) to the facts of the case before it, the *Great Central* court implicitly indicated that it considered civil aiding and abetting a viable cause of action." *Id.* The court concluded that the evidence supported the jury's finding of liability for the claim.

The second Sixth Circuit opinion likewise did not involve alcohol intoxication, using "aiding and abetting" terminology instead of "assistance or encouragement". The court states

that “[i]t is unclear whether Ohio recognizes a common law cause of action for aiding and abetting tortious conduct.” *Pavlovich*, 435 F.3d at 570. It based this conclusion on a comparison of its prior decision in *Aetna with Federated Mgmt. Co.* In light of Judge Petree’s opinion in *King* concluding that Ohio recognized claims under Restatement § 876 and his concurrence in *Federated Mgmt. Co.*, the Sixth Circuit’s analysis is not complete, and should be questioned.

V. Opinions of our sister states recognize the viability of claims brought under § 876.

Restatement § 876 is recognized in other jurisdictions. For example, the Supreme Court of Kentucky held that a bank could be liable for civil aiding and abetting a breach of fiduciary duties. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 484-85 (Ky. 1991). Steelvest was harmed when one of its officers established a competing company while still employed by and owing fiduciary duties to Steelvest. *Steelvest*, 807 S.W.2d at 479. Steelvest sued its bank, the secondary actor, for aiding and abetting the employee, the principal actor, in the formation and financing of a competing company. *Id.* See also, *Farmer v. City of Newport*, 748 S.W.2d 162, 164-65 (Ky. Ct. App. 1988) (overturning a trial court’s dismissal for failure to state a claim since Kentucky recognizes concerted action under Restatement § 876).

The Sixth Circuit has acknowledged Kentucky’s recognition of Restatement § 876 on at least two occasions. *Miles Farm Supply, LLC v. Helena Chem. Co.*, 595 F.3d 663, 666 (6th Cir. 2010); *Bariteau v. PNC Fin. Serv. Group, Inc.*, 285 Fed. Appx. 218, 224, 2008 WL 2669688 at *6 (6th Cir., July 9, 2008).

Unlike Kentucky, the Michigan Supreme Court has never cited Restatement § 876 directly. But Michigan courts have adopted and endorsed claims in the civil conspiracy context, *El Camino Resources, Ltd. v. Huntington Natl. Bank*, 722 F. Supp. 2d 875, 900-01 (W.D. Mich. 2010) (citing *McCoy v. DeLiefde*, 135 N.W.2d 916, 920-21 (Mich. 1965). *Cousineau v. Ford*

Motor Co., 363 N.W.2d 721, 729 (Mich. App. 1985); *Kefuss v. Whitley*, 189 N.W. 76 (Mich. 1922), as well as in the aiding-abetting context, *El Camino Resources*, 722 F. Supp. 2d at 905-08 (finding that the Michigan Supreme Court is likely to adopt Restatement § 876(b) and its knowledge provision).

In one such case, the Michigan Court of Appeals stated:

Michigan law does provide for a cause of action for aiding and abetting the breach of a fiduciary duty. Our Supreme Court has stated that a person who “knowingly joins a fiduciary in an enterprise where the personal interest of the latter is or may be antagonistic to his trust becomes jointly and severally liable with him for the profits of the enterprise.”

Echelon Homes, L.L.C. v. Carter Lumber Co., 683 N.W.2d 171, 183 (Mich. App. 2004) (quoting *Hayes-Albion Corp. v. Kuberski*, 364 N.W.2d 609 (Mich. 1984)).

Tennessee recognizes concerted action claims. The Tennessee Court of Appeals concluded that, “The courts of this state have recognized that ‘when two or more persons engage in an unlawful act and one of them commits a serious civil injury upon a person not engaged therein, all are equally liable for damages to the injured party.’ ” *Bryant v. McCord*, 1999 Tenn. App. LEXIS *26 (quoting *Huckeby v. Spangler*, 521 S.W.2d 568, 573 (Tenn.1975)).

In setting forth the elements of a claim for concerted action, the Tennessee Court adopted the entirety of Section 876. *Bryant*, 1999 Tenn. App. LEXIS at *34-35. Tennessee’s course of action has likewise been noted in its federal court decisions. See, e.g. *Blackburn v. Oaktree Capital Mgt., Ltd.*, 2006 WL 261742 (M.D. Tenn. Sept. 11, 2008); *Lawyers’ Title Ins. Corp. v. United Am. Bank of Memphis*, 21 F. Supp. 2d 785, 795-96 (W.D. Tenn. 1998).

An appellate court in Indiana has applied Restatement § 876. *Buchanan v. Vowell*, 926 N.E.2d 515, 521-22 (Ind. App. 1998). This truly presents an unjust situation if Ohio law does not recognize Restatement § 876. White Eagle members in Indiana (White Eagle's home state) and Michigan would be protected from such conduct, but its members in Ohio would not.

The neighboring states of Pennsylvania, in *Skipworth by Williams v. Lead Indus. Assoc., Inc.*, 690 A.2d 169, 174-75 (Pa. 1997), and West Virginia, in *Hough v. Hough*, 519 S.E.2d 640 (W.Va. 1999), have recognized Restatement § 876 claims. Thus, Ohio would be a regional minority of one if it did not recognize such claims. Ohio citizens would receive less protection against entities from neighboring states operating in Ohio than citizens from neighboring states would receive from the same entities operating in their home states.

VI. Arguments about the Commercial Context of this Case Are a Red Herring

Respondents have argued that Restatement § 876 should be limited to cases involving personal injury, and should not be applied in to other torts. But that is not what Restatement § 876 says, and no case has said that either.

In the Ohio opinions involving what could be categorized as commercial cases, it was the ability or inability of the plaintiffs to prove the distinct elements of their claim, not the general nature of the case that drove the disposition of the matter. *See Andonian*, 97 Ohio App. 3d 572, *Aetna*, 219 F.3d 519, and *Pavlovich*, 435 F.3d 560.

VII. Explicit Recognition of Section 876 Is Consistent with Ohio's Historic Practice.

Ohio has a long tradition of recognizing the common law claims included in the Restatements. This is evident in numerous cases where provisions of the Restatement of Torts have been adopted.

In *Welling v. Weinfeld*, Ohio adopted the tort of false light invasion of privacy, outlined in Restatement § 652E. *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051, syllabus. Before that, Ohio adopted the provisions of §339 dealing with attractive nuisance. *Bennett v. Stanley*, 92 Ohio St.3d 35, 36 748 N.E.2d 41 (2001). Prior to *Bennett*, the Court held that Ohio would recognize the Restatement's articulated basis for adjudging tortious interference with contract. *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St. 3d 171, 172, 707 N.E.2d 853 (1999) (paragraphs three and four of the syllabus, adopting Restatement (Second) Torts §§ 767-68).

In addition to *Tobias*, the general issue of liability of multiple actors for a single harm was addressed by the Court in another context, where the Restatement was expressly adopted. In *Pang v. Minch*, the Court confronted a case where a plaintiff suffered permanent back injury following a series of three car accidents. *Pang v. Minch*, 53 Ohio St. 3d 186, 559 N.E.2d 1313 (1990). Evidence at trial demonstrated that the single indivisible injury was caused by the three distinct accidents. *Id.* at 198-99. This Court adopted the provisions of Restatement (Second) of Torts § 433(B)(2) which provide for a defendant in such a situation to introduce evidence to apportion liability. *Id.* at 136 (Paragraphs 5-7 of Syllabus).

Six years prior, this Court adopted Restatement (Second) of Torts § 433(B)(3), holding that when one is injured by one of multiple actors, but the specific actor causing harm cannot be determined, the actor bears the burden of demonstrating that he did not cause the resulting harm. *Minnich v. Ashland Oil Co. Inc.*, 15 Ohio St. 3d 396, 473 N.E.2d 1199 (1984) (paragraph one of syllabus).

Confirming Ohio's position on Section 876 would be wholly consistent with the express adoption of Restatement provision in these cases.²

VIII. Public Policy Favors the Explicit Adoption of § 876 Claims

The logic behind each of the subsection of Section 876 is similar--when multiple persons act together to harm another, each should be liable for the damages caused. This basic premise of tort law, that a harmed party should be entitled to recompense for injury suffered, lies at the root of concerted action claims. As Professor Prosser explained the common law origins of concerted action, "All persons who acted in concert to commit a trespass, in pursuance of a common design, were held liable for the entire result." Prosser, *Law of Torts* § 46, 291 (4th ed. 1971). Judge Wald expounded on Professor Prosser's comment and illustration in the *Halberstam* opinion, "[Prosser's] illustration portrays a standard situation . . . combined action by tortfeasors on the scene together--'one might have battered the plaintiff, while another imprisoned him, and a third stole his silver buttons.' Each was responsible for the others' actions." *Halberstam*, 705 F.2d at 476-77 (internal citations omitted).

The rationale behind Section 876 is identical, "to hold accountable those who seek to bring about wrongful conduct by assisting or encouraging its commission." Combs, *Civil Aiding and Abetting Liability*, 58 Vand. L.R. 241, 290 (2005). The specifics of the Restatement apply, as Judge Wald described, "for concerted action to less obvious situations, covering tortfeasors whose relationship was more subtle than Prosser's 'highwaymen.' The two variations significant here are (1) conspiracy, or concerted action by agreement, and (2) aiding-abetting, or concerted action by substantial assistance." *Id.*

² Among those sections outside the Restatement of Torts, see e.g.; *Glidden Co. v. Lumbers Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553 (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).

The comments to each clause of Section 876 further illuminate that Section 876 is but a means the reach proper end of holding those accountable who work in conjunction with others to cause harm.

“Whenever two or more persons commit tortious acts in concert, each becomes subject to liability for the acts of the others, as well as for his own acts. The theory of the early common law was that there was a mutual agency of each to act for the others, which made all liable for the tortious acts of any one.” Restatement (Second) of Torts § 876, comment on clause (a).

“Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act.” Restatement (Second) of Torts § 876, comment on clause (b).

“When one personally participates in causing a particular result in accordance with an agreement with another, he is responsible for the result of the united effort if his act, considered by itself, constitutes a breach of 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.” Restatement (Second) of Torts § 876, comment on clause (c).

IX. Summary and Conclusion

Decisions of this court, other Ohio appellate courts, and federal courts applying Ohio law implicitly recognize the acceptance of Restatement Section 876. While some opinions have expressed question as to whether the claim has been adopted by this court, other have unequivocally held that Restatement Section 876 is the law of this State. Where claims for

tortious acts in concert have not been allowed, the reason has been one of insufficient factual predicate to meet the claim.

Further, our sister states have expressly recognized concerted action claims, and public policy supports their acceptance. DeVries Dairy requests that this Court confirm that Ohio recognizes claims for tortious acts in concert, as it has done for other claims contained in the Restatement.

Respectfully submitted,



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APPENDIX

1. Certifying Order from The United States District Court for the Northern District of Ohio, Western Division (November 21, 2011)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

DeVries Dairy, LLC,)	Case No. 3:09cv207
)	
Plaintiff,)	ORDER
)	
Vs.)	JUDGE JAMES G. CARR
)	
White Eagle Cooperative Assoc., et al.,)	
)	
Defendants.)	

ORDER CERTIFYING STATE LAW ISSUE

Upon consideration of the parties' memoranda regarding dismissal of Plaintiff's cause of action for the commission of tortious acts in concert under the Restatement (Second) of Torts § 876, the Court enters this Order certifying questions of law to the Supreme Court of Ohio, pursuant to Ohio S. Ct. Prac. R. 18.1 and 18.2.

STATEMENT OF FACTS

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

White Eagle is a cooperative marketing association incorporated under the laws of the State of Indiana. To perform the marketing functions of the cooperative, White Eagle engaged Defendants T.C. Jacoby & Co. (Jacoby) and its subsidiary company, Dairy Support, Inc. (DSI) to handle the day-to-day operations of the cooperative. Jacoby and DSI held full responsibility for the marketing of milk for members of White Eagle, including DeVries. Jacoby and DSI determined who would purchase milk produced by White Eagle member farms, the terms of such sales, and set the prices that White Eagle members would receive for their milk.

DeVries has pleaded a cause of action under the Restatement (Second) of Torts § 876 for tortious acts in concert. 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." Amended Complaint, Docket 49 at 16, ¶¶ 112-113. 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." Amended Complaint, Docket 49 at 16, ¶¶ 114-115. 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. *Id.* at 17. Jacoby and DSI have filed a motion to dismiss DeVries' claims asserted on this basis arguing that, at least in these circumstances, such a cause

of action is not recognized under Ohio law. Based on its review of the law cited to it by the parties in briefing the defendants' motion to dismiss, this Court is unable to determine whether the Supreme Court of Ohio has, or would likely, recognize a cause of action for tortious acts in concert.

QUESTION OF LAW TO BE ADDRESSED

Given these facts and the lack of controlling precedent from the Supreme Court of Ohio on legal issues important to the proper determination of the case presently before it, this Court certifies the following question to the Supreme Court of Ohio:

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

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DESIGNATION OF THE MOVING PARTY

Although both sides of this dispute have indicated that this question is appropriate for certification, the Rules of Practice of the Supreme Court of Ohio clearly require designation of one of the parties as the moving party. Ohio S. Ct. Prac. R. 18.2(E). Because DeVries Dairy, LLC is the party asserting a claim under §876, for purposes of this Certification Order, the Plaintiff is hereby designated as the moving party.

In accordance with Rule 18 of the Rules of Practice of the Supreme Court of Ohio, the Clerk of the United States District Court for the Northern District of Ohio, Western Division, is hereby directed to serve copies of this certification order upon counsel for the parties and to file this certification order, under the seal of this Court, with the Supreme Court of Ohio, along with appropriate proof of service.

IT IS SO ORDERED.

s/ James G. Carr

JAMES G. CARR
SENIOR UNITED STATES DISTRICT JUDGE

11/21/2011

Date

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief was served upon the following counsel by United States first-class mail on March 23, 2012:

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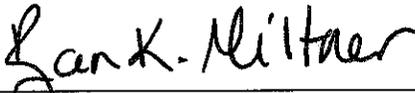
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