

ORIGINAL

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

REPLY BRIEF OF PETITIONER, DEVRIES DAIRY, LLC

Ryan K. Miltner (0075405)
(Counsel of Record)
The Miltner Law Firm, LLC
100 North Main Street
P.O. Box 477
Phone: 866-740-5219
Fax: 866-740-4123
ryan@miltnerlawfirm.com

David W. Wicklund (0012109)
John N. MacKay (0002801)
Shumaker, Loop & Kendrick, LLP
1000 Jackson Street
Toledo, OH 43624
(419)241-9000
(419) 241-6894 Fax
dwicklund@slk-law.com
jmackay@slk-law.com

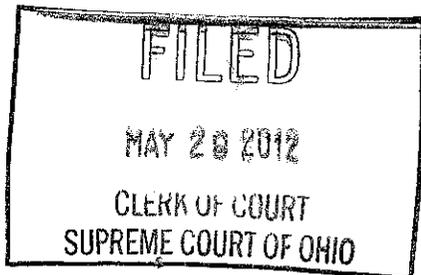
Counsel for DeVries Dairy, LLC

Jeffrey M. Stopar (006640)
(Counsel of Record)
John M. Carey (0006248)
Jared J. Lefevre (0085931)
Eastman & Smith, Ltd.
24th Floor
One SeaGate
P.O. Box 10032
Toledo, OH 43699
419-247-1461
419-247-1777 (fax)
jmstopar@eastmansmith.com
jmcarey@eastmansmith.com
jjlefevre@eastmansmith.com

John H. Vetne
311 George Cole Road
P.O. Box 15
New Portland, ME 04961
207-628-2005 (phone and fax)
johnvetne@gmail.com

Counsel for White Eagle Coop. Assn.

[Counsel for additional Respondents on
following page]



Richard M. Kerger (0015864)
Kerger & Hartman
33 South Michigan Street, Ste. 100
Toledo, OH 43604
419-255-5990
419-255-5997 (fax)
rkerger@kergerlaw.com

Philip C. Graham (PHV)
Kimberly Means Steuterman (PHV)
Helfrey, Neiers & Jones, P.C.
120 South Central Avenue, Ste. 1500
St. Louis, MO 63105
314-725-9100
314-725-5754 (fax)
pgraham@hnjlaw.com
ksteuterman@hnjlaw.com

Counsel for T.C. Jacoby & Co., Inc. and Dairy Support, Inc.

TABLE OF CONTENTS

Tale of Authorities ii

Argument

I. Proposition of Law 1

II. Summary of Reply 1

III. Respondents incorrectly argue allegations of facts rather than whether Ohio law recognizes claims under Restatement § 876. 2

IV. Respondent White Eagle confuses the liability of the principal and secondary actors under Section 876. 3

V. Respondent White Eagle attempts to expand the Tenth District’s opinion in *Federated Management* from one addressing fraud into one applicable to all aiding and abetting claims. 5

VI. The application of the economic loss doctrine is not before the Court, but, if it were, it would not preclude application of Restatement § 876. 6

VII. DeVries has pled a claim under each subsection of 876, including subsection (a). 7

VIII. Conclusion. 8

TABLE OF AUTHORITIES

Ohio Supreme Court Cases

Allstate Fire Ins. Co. v. Singler, 14 Ohio St. 2d 27, 236 N.E.2d 79 (1968) 2

Great C. Ins. Co. v. Tobias, 37 Ohio St. 3d 127, 524 N.E.2d 168 (1988)..... 2, 5

Ohio Appellate Cases

Federated Mgmt. Co. v. Coopers and Lybrand, 137 Ohio App. 3d 366, 738 N.E.2d 842 (10th Dist. 2000)..... 5, 6

King v. Ross Correctional Instn., 10th Dist. No. 02AP-256, 2002-Ohio-7360 1, 5

Federal Cases

Aetna Cas. and Sur. Co. v. Leahey Constr. Co., Inc., 219 F.3d 519 (6th Cir. 2000) 6

Grindstaff v. Green, 133 F.3d 416 (6th Cir. 1998) 3

Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983). 3, 4

Other State Cases

Norman v. Brandt, 929 N.E.2d 14 (Ill. App. 2010).. 4

Rules

Ohio Rule of Civil Procedure 9(B) 5

Federal Rule of Civil Procedure 9(b) 5

Federal Rule of Civil Procedure 12(b)(6). 1, 3, 6

Federal Rule of Civil Procedure 12(d). 3

Federal Rule of Civil Procedure 18(a) 7

Other Authorities

Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 Wm. & Mary L.R. 1789 (2000). 7

Restatement of the Law 2d, Torts, Section 876 (1979) passim

ARGUMENT

I. Proposition of 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 Reply

Respondents make extensive arguments on alleged facts that are not before the Court, or the district court, and should be disregarded. The question certified by the District Court is a question of law - whether Ohio recognizes Restatement § 876. The matter is before the District Court on a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure (“FRCP”) 12(b)(6). No matters outside the pleadings have been submitted to the District Court under the Motion to Dismiss.

All Ohio courts considering the matter have treated Restatement § 876 as though it were the law, except for one. The lone decision not following Restatement § 876 was limited to the circumstances of the case and was followed two years later by a decision from the same appellate district stating, “[W]e first recognize that Ohio has adopted this section of the Restatement.” *King v. Ross Correctional Instn.*, 10th Dist. No. 02AP-256, 2002-Ohio-7360 at ¶ 26.

The Ohio judicial history includes this Court's opinion in *Allstate Fire Ins. Co. v. Singler*, 14 Ohio St. 2d 27, 236 N.E.2d 79 (1968), that cited Restatement § 876 as authority for dismissing a defendant because no participation or agreement with the other defendant was proved. Similarly, the more recent opinion in *Great C. Ins. Co. v. Tobias*, 37 Ohio St. 3d 127, 524 N.E.2d 168 (1988), used Restatement § 876(b) to dismiss a claim because the "other's conduct" did not "constitute[] a breach of duty." *Id.* at 131, 524 N.E.2d at 172.

Respondent's confusing terminology ("principal", "primary", and "secondary") are not used by Restatement § 876, and should be ignored, as should the confusing misapplication of agency law.

Finally, the affirmative defense of the economic loss doctrine is not before the court. If it were, the Respondents have misapplied it under the facts.

III. Respondents incorrectly argue allegations of facts rather than whether Ohio law recognizes claims under Restatement § 876.

The sole issue is whether Ohio recognizes liability under Restatement § 876. If this Court answers the certified question in the affirmative, the district court will apply the answer to the pending motion to dismiss and to evidence subsequently presented to determine whether "the applicable circumstances" exist for liability under Restatement § 876.

Rather than address the question, Respondents argue facts allegedly underlying the causes of action, potentially causing confusion. Such argument should be disregarded. No factual issue or evidence is before this Court or the district court.

It is clear that the District Court could not have certified factual issues to this Court. The question certified to this Court arises out of a motion to dismiss causes of action under Restatement § 876 for failure to state a claim under Federal Rule of Civil Procedure ("FRCP")

12(b)(6). No matters outside the pleadings have been submitted to the District Court. Thus, the Motion to Dismiss is not being treated as a motion for summary judgment under FRCP 12(d).

In deciding motions under Rule 12, the federal courts “must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiffs.” *Grindstaff v. Green*, 133 F.3d 416, 421 (6th Cir. 1998). Accordingly, the district court was entirely proper to provide this court with the limited statement of facts based on the allegations of DeVries Dairy’s complaint without more. But the Respondents repeatedly argue their factual contentions well beyond the scope of the allegations in the Complaint. These attempts to expand the scope of the allegations to facts not properly before the court should be rejected.

IV. Respondent White Eagle confuses the liability of the principal and secondary actors under Section 876.

White Eagle, Jacoby, and DSI confuse matters by using confusing terminology that is not part of Restatement § 876 (“primary actor” and “secondary actor”) and confusing principal and agent under agency law. They argue that they cannot be held liable as secondary actors under Section 876 because (1) the secondary actor can only be held liable where an underlying tort has been committed by the principal actor, and (2) there is no tort claim pending against White Eagle. White Eagle also argues that it cannot be held liable as a secondary actor under Section 876 because White Eagle cannot be considered to be a secondary actor in this case. White Eagle’s argument is apparently premised on the conflation of “principal actor” under Section 876 and “principal” under agency law. Here is what Restatement § 876 actually says.

The case of *Halberstam v. Welch*, 705 F.2d 472, 476-78 (D.C. Cir. 1983) explains liability under clauses (a) and (b) of Restatement § 876. The explanation may be summarized.

1. Liability for “acting in concert” under clause (a) arises where one (1) does a tortious act (i) with the other person or (ii) pursuant to a common design. *Id.* Clause (a) is sometimes called, less accurately, “civil conspiracy”.
2. Liability for assisting or encouraging under clause (b) arises where one (1) knows the conduct of another is a breach of duty and (2) gives either (i) substantial assistance or (ii) substantial encouragement. *Id.* Clause (b) is sometimes called, less accurately, “civil aiding and abetting”.
3. The Illinois Court of Appeals explains that liability under clause (c) “requires that (1) the party's own actions, separately considered, constituted a breach of duty and (2) the party gave substantial assistance in accomplishing a tortious act.” *Norman v. Brandt*, 929 N.E.2d 14, 21 (Ill. App. 2010).

Claims pled under any of the three subsections of Section 876 require three persons. First, there is the harmed party. Second, there is an actor referred to in the Restatement as “the other” or “another”. Third, there is another actor, who is the person to whom the Restatement assigns liability, referred to as “one subject to liability”. For claims brought under subsection 876(b), the predicate for assigning liability acting in concert with, or encouraging or giving substantial assistance to, another who commits tortious conduct, or actually engaging in tortious conduct.

Neither the pleadings nor the facts are before the Court. However, it should be noted that as pled by DeVries, Jacoby and DSI operate virtually all of White Eagle’s operations and, in so doing, committed tortious acts (including breach of fiduciary duty) with White Eagle or pursuant to a common design, and provided substantial assistance and substantial encouragement to White Eagle in committing tortious acts. DeVries was injured by the tortious acts. This is clearly

acting in concert with each other as well as under a common design. It is also both substantially assisting and encouraging each other. Although, White Eagle is the principal in an agency relationship, in which Jacoby and DSI are the agents, agency law does not somehow import concepts of primary and secondary actors into Restatement § 876.

V. Respondent White Eagle attempts to expand the Tenth District’s opinion in *Federated Management* from one addressing fraud into one applicable to all aiding and abetting claims.

All but one Ohio decision considering the matter treat Restatement § 876 as Ohio law. Respondents focus on the one decision arising out the Court of Appeals for the Tenth District, ignoring a later decision from the same District expressly recognizing Restatement § 876.

Respondents cite *Federated Mgmt. Co. v Coopers and Lybrand*, 137 Ohio App. 3d 366, 738 N.E.2d 842 (10th Dist. 2000), holding that claims for fraudulent activity cannot be brought under an aiding and abetting theory, using the less accurate terminology instead of “assisting or encouraging” terminology. The opinion speaks only to aiding and abetting fraud and not to all aiding and abetting claims. Respondents ignore a more recent opinion from Court of Appeals for the Tenth District that states, “[W]e first recognize that Ohio has adopted this section of the Restatement.” *King v. Ross Correctional Instn.*, 10th Dist. No. 02AP-256, 2002-Ohio-7360 at ¶ 26.

It is possible to reconcile the two decisions. Both the Ohio Rules of Civil Procedure and the Federal Rules of Civil Procedure require that claims for fraud be pled with particularity rather than the notice pleading standard applicable to other civil actions. Ohio R. Civ. P. 9(B), Fed. R. Civ. P. 9(b). To permit claims for aiding and abetting common law fraud to be pled under a concerted action theory could provide an end run around the requirement that fraud

claims be particularly pled. The cases cited by DeVries in its merit brief, beginning with *Tobias* and extending through numerous district court opinions and the Sixth Circuit Court of Appeals' decision in *Aetna Cas. and Sur. Co. v. Leahey Constr. Co., Inc.*, 219 F.3d 519, 533 (6th Cir. 2000), indicate that *Federated Management* is limited in its application to concerted action claims rooted in fraud.

Even if it were not possible to reconcile the decisions, in view of the numerous other cases applying Restatement § 876, and taking into consideration that the *King* decision recognizing such claims is later than *Federated Management* decision, it appears that all of the courts of Ohio that have considered the matter have recognized Restatement § 876.

VI. The application of the economic loss doctrine is not before the Court, but, if it were, it would not preclude application of Restatement § 876.

Respondents' argument regarding the economic loss doctrine should be made in the District Court by a motion for summary judgment (as distinct from a motion to dismiss) or through evidence at a trial. Application of the economic loss doctrine is a factual issue that is not part of the certified question or even the Rule 12(b)(6) motion to dismiss before the District Court. If Ohio does recognize Section 876 claims, then the economic loss doctrine can be raised by the Respondents as an affirmative defense in the District Court to be decided at the appropriate procedural juncture. The certified question is whether Ohio law recognizes Section 876 claims, not whether the specific claim pled by DeVries is barred by the economic loss doctrine.

Although delving into matters not in the certified question, the requirement to a defense based on the economic loss doctrine does not exist in this case. Claims must be entirely contractual in nature for the doctrine to apply. DeVries has pled claims for breach of fiduciary

duty, which is a tort, not a contract. Applying the economic loss rule to business torts is not only inconsistent with the initial intent of the doctrine to prevent the overlap of product liability law with contract law but would obviate torts that expressly provide for the recovery of purely economic damages. See Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 Wm. & Mary L.R. 1789, 1794-95 (2000).

In addition, Jacoby and DSI argue that because DeVries might recover on one of its other legal theories, that permitting a claim under Section 876 is “superfluous and should not be recognized.” White Eagle Merit Brief at 16. This is contrary to FRCP 18(a) which permits joinder of alternate claims and “as many claims as [a party] may have against an opposing party.”

Nothing prohibits plaintiffs from pleading their case under all available legal theories, and to preclude pursuit of recovery under one theory on the premise that recovery under another theory might occur only underscores the folly of this argument. In fact, the very contract theories that White Eagle refers to in its argument make no mention of the fiduciary duty claims pleaded against Jacoby and DSI. Recovery from Jacoby and DSI on the breach of fiduciary duty claim would, of course, expose White Eagle to liability for its concerted action as a secondary actor, if the facts pleaded by DeVries Dairy are true (which is to be assumed at this stage of litigation).

VII. DeVries has pled a claim under each subsection of 876, including subsection (a).

Claims under subsection 876(a) require (1) that one participate in a tortious act with the another or pursuant to a common design; and (2) injury to the harmed party resulting from the conduct. Looking to DeVries Dairy’s First Amended Complaint, while the words “pursuant to a

common design” do not appear, there are multiple allegations describing the inextricably intertwined relationship of all respondents. See ¶ 50-64, 112, 115. If respondents do not believe that a claim under Restatement § 876 has been pled, such an argument is for the district court. The argument is not part of the certified question.

VIII. Conclusion

The certified question should be answered affirmatively. As explained in DeVries Dairy’s merit brief, a thorough review of the decisions of this Court and other courts of Ohio have treated Restatement § 876 as though it were the law of the state. Further, the Respondents’ arguments are misplaced and should be disregarded. 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,



Ryan K. Miltner (0075405)
(Counsel of Record)
The Miltner Law Firm, LLC
100 North Main Street
P.O. Box 477
New Knoxville, OH 45871
(866)740-5219
(866) 740-4123 Fax
ryan@miltnerlawfirm.com

David W. Wicklund (0012109)
John N. MacKay (0002801)
Shumaker, Loop & Kendrick, LLP
1000 Jackson Street
Toledo, OH 43624
(419)241-9000
(419) 241-6894 Fax
dwicklund@slk-law.com
jmackay@slk-law.com

Counsel for DeVries Dairy, LLC

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief was served upon the following counsel by United States first-class mail on May 29, 2012:

Jeffrey M. Stopar, Esq.
John M. Carey, Esq.
Jared J. Lefevre, Esq.
Eastman & Smith, Ltd.
24th Floor
One SeaGate
P.O. Box 10032
Toledo, OH 43699

John H. Vetne, Esq.
311 George Cole Road
P.O. Box 15
New Portland, ME 04961

Counsel for White Eagle Coop. Assn.

Richard M. Kerger, Esq.
Kerger & Hartman
33 South Michigan Street, Ste. 100
Toledo, OH 43604

Philip C. Graham, Esq.
Kimberly Means Steuterman, Esq.
Helfrey, Neiers & Jones, P.C.
120 South Central Avenue, Ste. 1500
St. Louis, MO 63105

Counsel for T.C. Jacoby & Co., Inc. and
Dairy Support, Inc.

Thomas R. Houlihan
Amer Cunningham Co., LPA
159 South Main Street
Suite 100
Akron, OH 44308

Counsel for Amicus Curiae,
Ohio Association for Justice



Ryan K. Miltner
Counsel for DeVries Dairy, LLC