

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,	:	

**BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION FOR JUSTICE,
IN SUPPORT OF PETITIONER, DEVRIES DAIRY, LLC**

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III. AMICUS CURIAE IDENTIFIED

The Ohio Association for Justice (“OAJ”) is Ohio’s largest victims’ rights advocacy association, comprised of 1,500 attorneys dedicated to promoting the public good through efforts to secure a clean and safe environment, safe products, a safe workplace, and quality health care. The OAJ is devoted to strengthening the civil justice system so that deserving individuals receive justice and wrongdoers are held accountable.

IV. INTRODUCTION AND STATEMENT OF CERTIFIED QUESTION

Judge James G. Carr of the United States District Court for the Northern District of Ohio has certified the following question to this Court for resolution:

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

The question before this Court is a moral question: is a party who participates with, or provides assistance to, a tortfeasor in causing harm shielded from liability to the victim? In the briefing surrounding the acceptance of this certified question, Respondents T.C. Jacoby & Co. and Dairy Support, Inc. expressly argued that this Court should accept the certified question and find that Ohio does not recognize civil liability for providing assistance to a wrongdoer. Respondent White Eagle Cooperative Association, Inc. argued that no such claim should be recognized in the commercial context.

But Ohio must recognize such liability, especially in the commercial context, in order to prevent abuses and gamesmanship. If there were no liability for concert of action or aiding and abetting, it would be easy for a corporate malefactor to insulate itself from liability. The wrongdoer could create a shell company, then provide substantial assistance to the shell company in committing business torts against competitors and others, and enjoy immunity by allowing the shell company to collapse when sued by its victims. In such a scenario, relief against the wrongdoer could only be had if the victims could successfully demonstrate the elements to pierce the corporate veil of the shell company. There is no justification in law or logic to further burden the victim of a tort by piling proof problems in his or her way.

V. LAW AND ARGUMENT

Restatement (Second) Torts §876 contains three subsections: Subsection (a), which addresses concert of action theory; subsection (b), which sets forth aider and abettor liability; and subsection (c), which holds a party liable when it breaches a duty to a victim and also provides substantial assistance to a principal tortfeasor. All three of these subsections are variations on a theme – one should not help another do something that is wrong.

Regarding subsection (a), concert of action has long been recognized as a basis of liability under Ohio law. In several early cases, this Court stated the converse of the rule – that two independent tortfeasors could not be liable for the harm inflicted by one

another without a concert of action. *Little Miami R.R. Co. v. Hambleton*, 40 Ohio St. 496, 498–499 (1884), *City of Mansfield v. Brister*, 76 Ohio St. 270, 281–282, 81 N.E. 631, 633–634 (1907), and *Vill. of Mineral City v. Gilbow*, 81 Ohio St. 263, 272–273, 90 N.E. 800, 801 (1909). This Court then stated the rule affirmatively by noting that joint liability is imposed by “concert of action in pursuit of a common intent.” *Bello v. City of Cleveland*, 106 Ohio St. 94, 104, 138 N.E. 526, 529 (1922). The doctrine of concert of action remains alive in Ohio's common law, although admittedly this Court has not broadened it to encompass industry-wide or market-share liability theories. See, e.g., *Sutowski v. Eli Lilly & Co.*, 82 Ohio St.3d 347, 350, 696 N.E.2d 187, 189 (1998). This Court has also embraced the related tort of civil conspiracy. *Williams v. Aetna Fin. Co.*, 83 Ohio St. 3d 464, 475, 700 N.E.2d 859, 868 (1998).

Subsection (b) of Restatement (Second) Torts §876 addresses a slightly different situation, where a party provides knowing assistance or encouragement to another in harming a third party, but stops short of actually participating in a conspiracy. This sort of aider and abettor liability has long been recognized in the Ohio courts. Years ago, this Court noted in dicta that “[a]ll who actively participate in any manner in the commission of a tort, or who command, direct, advise, encourage, aid or abet its commission, are jointly and severally liable therefor.” *City of Mansfield v. Brister*, 76 Ohio St. 270, 281, 81 N.E. 631, 633–634 (1907) quoting 1 *Cooley on Torts*, 244, 246 (3d Ed, 1906). The district courts have applied this rule for generations. *Wall v. Glass*, 6th Dist. No.

2282, 1930 WL 2104, *1 (Feb. 17, 1930); *Kuhn v. Bader*, 89 Ohio App. 203, 212 (3rd Dist. 1951); *LeCrone v. Ohio Bell Tel. Co.*, 120 Ohio App. 129, 134 (10th Dist. 1963). Thus this Court's act in formally recognizing aider and abettor liability is not expanding the tort landscape in Ohio – it is merely expressly clarifying the common law that has existed for generations.

Subsection (c) of Section 876 addresses the somewhat unusual situation where a party assists another in committing a tort, without necessarily knowing he or she has done so, and the party's actions are also a breach of duty to the victim. *In re Evans*, — B.R. —, 2011 WL 6258835, *16 (Bankr. S.D. Miss. 2011). While this rare scenario has not lent itself to much interpretation by the courts, it is notable that this Court embraced the related concept of alternative liability – where the negligence of two independent tortfeasors combine in a single harm. *Minnich v. Ashland Oil Co.*, 15 Ohio St.3d 396, 473 N.E.2d 1199 (1984), syllabus.

All three of the subsections found in Restatement (Second) Torts §876 address a very simple principle – that one who helps another cause harm is equally responsible for the harm. This is an idea that is well ensconced in society, and a lesson we learn by the time we reach kindergarten. If Tommy hands Dick a rock and urges him to throw it at Jane, both Tommy and Dick get punished. It should be no more complicated in the courts, and in fact, it has traditionally not been so. Early authorities recognized that liability attaches by "encouraging or exciting" wrongful conduct through "words,

gestures, looks, or signs," or other similar means. 2 Hillard, *Law of Torts*, 243 (4th ed. 1874). Early cases from across the country recognized that "the authorities abundantly support the proposition that all persons actually present aiding, abetting or counselling an assault are guilty as principals." *Sellman v. Wheeler*, 95 Md. 751, 758, 54 A. 512, 515 (1902).

By expressly adopting Restatement (Second) Torts §876, this Court would join the vast majority of states in recognizing this section as accurately restating the common law. The section has been expressly adopted and applied in holding an assister or abettor liable in ten states.¹ The highest courts in twelve other states have applied the rule without commenting on the propriety of adopting the rule, with six courts finding liability² and six others finding no liability under the circumstances presented in each

¹ Arizona, *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 485, 38 P.3d 12, 23 (2002) (en banc); Illinois, *Simmons v. Homatas*, 236 Ill. 2d 459, 476, 925 N.E.2d 1089, 1100 (2010); Iowa, *Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994); New Mexico, *GCM, Inc. v. Ky. Cent. Life Ins. Co.*, 124 N.M. 186, 190, 947 P.2d 143, 147 (1997); Oregon, *Granewich v. Harding*, 329 Or. 47, 53–54, 985 P.2d 788, 792 (1999); Vermont, *Montgomery v. Devoid*, 181 Vt. 154, 169, 915 A.2d 270, 281 (2006); West Virginia, *Price v. Halstead*, 177 W. Va. 592, 597, 355 S.E.2d 380, 386 (1987); Pennsylvania, *Skipworth by Williams v. Lead Indus. Ass'n*, 547 Pa. 224, 236, 690 A.2d 169, 175 (1997); Kansas, *Yount v. Deibert*, 282 Kan. 619, 632, 147 P.3d 1065, 1075 (2006); Montana, *Sloan v. Fauque*, 239 Mont. 383, 386, 784 P.2d 895, 897 (1989).

² Alaska, *Beal v. McGuire*, 216 P.3d 1154, 1174 (Alaska 2009); Arkansas, *Cobb v. Indian Springs, Inc.*, 258 Ark. 9, 16, 522 S.W.2d 383, 387 (1975); Connecticut, *Lamb v. Peck*, 183 Conn. 470, 473, 441 A.2d 14, 16 (1981); Minnesota, *Olson v. Ische*, 343 N.W.2d 284, 289 (Minn.1984); South Dakota, *Chem-Age Indus., Inc. v. Glover*, 652 N.W.2d 756, 773 (S.D. 2002); Wisconsin, *Richards v. Badger Mut. Ins. Co.*, 309 Wis. 2d 541, 565, 749 N.W.2d 581, 593 (2008).

particular case.³ Eight more states cited to Restatement (Second) Torts §876 in support of existing common-law rules,⁴ and another used the section to interpret its statutes.⁵ Only two states, Texas and North Dakota, have expressed any doubt that Restatement (Second) Torts §876 is the appropriate law to follow.⁶ The section has not been considered by the highest courts of 16 states.⁷

Accordingly, the highest courts of 31 states have favorably cited to Restatement (Second) Torts §876, it remains an open question in two other states, and 16 states have not considered the issue. None of these courts have flatly rejected the Restatement section, as urged by T.C. Jacoby & Co. and Dairy Support, Inc.

³ Missouri, *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 245 (Mo.1984) (en banc); Rhode Island, *Ames v. Oceanside Welding & Towing Co.*, 767 A.2d 677, 681 (R.I.2001); California, *Sindell v. Abbott Labs.*, 26 Cal.3d 588, 604, 163 Cal.Rptr. 132 (1980); Washington, *Martin v. Abbott Labs.*, 102 Wash.2d 581, 599, 689 P.2d 368, 379 (1984) (en banc); Nevada, *GES, Inc. v. Corbitt*, 117 Nev. 265, 271, 21 P.3d 11, 15 (2001); Tennessee, *Carr v. United Parcel Serv.*, 955 S.W.2d 832, 836 (Tenn.1997), *overruled on other grounds by Parker v. Warren Cnty. Util. Dist.*, 2 S.W.3d 170, 176–178 (Tenn.1999).

⁴ Maryland, *Alleco Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 340 Md. 176, 200, 665 A.2d 1038, 1050 (1995); Delaware, *Empire Fin. Servs., Inc. v. Bank of N.Y. (Delaware)*, 900 A.2d 92, 97 fn. 16 (Del. Supr.2006); Idaho, *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 342, 986 P.2d 996, 1008 (1999); Kentucky, *Vitale v. Henchey*, 24 S.W.3d 651, 659 (Ky.2000); Maine, *Barnes v. McGough*, 623 A.2d 144, 145 (Me.1993); Massachusetts, *Arcidi v. Nat'l Ass'n of Gov't Employees, Inc.*, 447 Mass. 616, 624, 856 N.E.2d 167, 174 (2006); New York, *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 295, 582 N.Y.S.2d 373 (1992); South Carolina, *Future Group, II v. Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996).

⁵ New Jersey, *Tarr v. Ciasulli*, 181 N.J. 70, 84, 853 A.2d 921, 929 (2004).

⁶ Texas, *Juhl v. Airington*, 936 S.W.2d 640, 643 (Tex.1996); North Dakota, *Hurt v. Freeland*, 589 N.W.2d 551, 558 (N.D.1999).

⁷ Alabama, Colorado, Florida, Georgia, Hawaii, Indiana, Louisiana, Michigan, Mississippi, Nebraska, New Hampshire, North Carolina, Oklahoma, Utah, Virginia, and Wyoming.

Ohio should join this vast majority of states which have approved of Restatement (Second) Torts §876, not just because it is the majority rule, but also because Ohio's constitution "protects the right to seek redress in Ohio's courts when one is injured by another." *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 466, 639 N.E.2d 425 (1994). Article I, Section 16 of the Ohio Constitution guarantees that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law * * *." In applying this section, this Court has noted that "[w]hen the Constitution speaks of remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner." *Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 47, 512 N.E.2d 626, 628 (1987). Here, the opportunity to hold an assister or abettor liable for supporting or encouraging wrongful acts would not be meaningful without the express recognition of a legal theory under which to do so.

As the parties have noted, this Court has previously cited to Restatement (Second) Torts §876 without expressly adopting or rejecting the section. *Great Cent. Ins. Co. v. Tobias*, 37 Ohio St. 3d 127, 524 N.E.2d 168 (1988). In *Tobias*, Tobias and Wagner were patrons of Rainbow Bowling Lanes, when Tobias purchased Wagner ten shots of whiskey and bet him \$100 that Wagner could not finish them. Wagner did the shots, then left the bar and killed himself in a car accident. Rainbow Lanes' insurer

incautiously paid a claim to Wagner's widow to absolve Rainbow Lanes from liability, then pursued Tobias for contribution.

This Court determined that Rainbow Lanes was not a tortfeasor. While Rainbow Lanes may have had liability to a third party under the dram shop statutes if Wagner had caused harm to another, no claims lay when Wagner harmed himself. *Id.* at 129-130. This Court then turned its attention to Tobias' liability, and found that if Rainbow Lanes was not a tortfeasor, then Tobias could not have aided and abetted its tort. *Id.* at 131. This was not a rejection of §876, but rather a proper application of the section.

Expressly adopting Restatement (Second) Torts §876 would provide clarity in enforcing society's expectation that each citizen should refrain from encouraging harm upon another. It is supported by long-standing common law principles from both within this state and without, by good policy, and by moral codes. It is good law that should be expressly made the law of Ohio.

VI. CONCLUSION

Based upon the foregoing law and argument, this Court should answer the certified question in the affirmative, and adopt Restatement (Second) Torts §876 as the law of Ohio.

Respectfully submitted,

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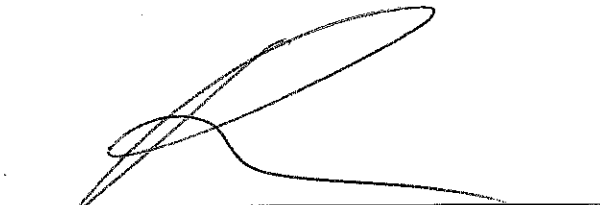
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