

Supreme Court No. 84855-6

SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF WASHINGTON

IN

CHAD M. CARLSEN and SHASTA CARLSEN;
husband and wife, individually and on behalf of
a Class of similarly situated Washington families; and
CARL POPHAM and MARY POPHAM,
husband and wife, individually and on behalf of
a Class of similarly situated Washington families,

Plaintiffs,

vs.

GLOBAL CLIENT SOLUTIONS, LLC, an Oklahoma limited
liability company; ROCKY MOUNTAIN BANK & TRUST,
a Colorado financial institution; et al.,

Defendants.

PLAINTIFFS' RESPONSE TO BRIEF AMICUS CURIAE OF THE
WASHINGTON ATTORNEY GENERAL'S OFFICE

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INTRODUCTION

The Washington Attorney General's Amicus Curiae Brief sheds instructive light on questions certified by the Federal District Court. The arguments advanced can be placed into meaningful context by examining Plaintiffs' underlying liability claims and their relationship to the questions certified by the Federal District Court.¹

PLAINTIFFS' THEORIES OF PRIMARY AND SECONDARY LIABILITY

A. GLOBAL CLIENT SOLUTIONS' AND ROCKY MOUNTAIN BANK AND TRUST'S PRIMARY LIABILITY UNDER CHAPTER 19.86 RCW.

The questions certified by the Federal District Court touch upon two distinct underlying claims of primary liability. The Attorney General's Amicus Brief does not discuss certified questions number one or two. For clarity, it may be observed in passing that certified questions one and two concern a claim of primary liability as against Global Client Solutions (GCS) only. The claim is premised on GCS being a "debt adjuster" subject to chapter 18.28 RCW, together with GCS having

¹ Not discussed here are Plaintiffs' liability claims and requests for relief not directly implicated by the questions certified.

violated provisions of that statute, giving rise to a “per se” unfair and deceptive business practice claim under chapter 19.86 RCW.²

Additionally, Plaintiffs advanced a second and conceptually distinct primary liability claim against both GCS and RMBT. Its central premise is that the debt settlement companies with whom GCS and RMBT collaborate are “debt adjusters” subject to chapter 18.28 RCW and that GCS and RMBT engaged in unfair and deceptive business practices by actively facilitating and providing substantial assistance to those debt settlement companies in carrying out violations of chapter 18.28 RCW. The claim asks whether GCS’s and RMBT’s conduct, separately considered, constitutes an unfair and deceptive business practice within the meaning of chapter 19.86 RCW. *See, e.g., FTC v. Neovi*, 604 F.3d 1150 (9th Cir. 2010).³ This primary liability claim is not dependent on

² “A violation of this chapter constitutes an unfair or deceptive act or practice in the conduct of trade or commerce under chapter 19.86 RCW.” RCW 18.28.185.

³ *See FTC v. Neovi* at 1156 (“Although Wholesale did not itself make any misrepresentations or initiate the fraudulent scheme, the court found Wholesale liable under the FTC Act because it ‘facilitated and provided substantial assistance to [a] ... deceptive scheme,’ resulting in substantial injury to consumers. [citation omitted] This conduct was enough to find Wholesale primarily liable – as opposed to liable as an accomplice – under the Act.”); *see also Allen v. Am. Land Research*, 95 Wn.2d 841, 846, 631 P.2d 930 (1981) (“It has long been held under federal law that one may not escape liability by putting into the hands of another the means and instrumentalities by which to defraud others.”).

GCS's status as "debt adjuster." This primary liability theory under chapter 19.86 RCW is distinct from Plaintiffs' theory of secondary liability grounded on common law aiding and abetting.⁴

The Attorney General's amicus brief pointedly discusses this important theory of primary liability in addressing certified question number three. Certified question number three tackles a key premise underlying this theory of liability by asking whether the debt settlement companies with whom GCS and RMBT collaborate are "debt adjusters" within the meaning of RCW 18.28.010(1). The Attorney General's important observations regarding the current vulnerability of Washington consumers to predatory practices of modern day debt settlement companies and the applicability of chapter 18.28 RCW to such practices underscores the correctness of holding that the business practices identified in certified question number three constitute "debt adjusting." The Attorney General also correctly observes that GCS's and RMBT's

⁴ See *FTC v. Neovi*, 604 F.3d at 1157 ("To be clear, none of this is to say that Qchex is liable under a theory of aiding and abetting. Qchex engaged in behavior that was, *itself*, [emphasis in original] injurious to consumers. Qchex's business practices might have served to assist others in illicit or deceptive schemes, but the liability under the FTC Act that attaches to Qchex is not mediated by the actions of those third parties. Qchex caused harm through its own deeds—in this case creating and delivering unverified checks—and thus § 5 of the FTC Act easily extends to its conduct.").

briefing fails to address the important question of statutory law posed by the Federal District Court.

B. GLOBAL CLIENT SOLUTIONS' AND ROCKY MOUNTAIN BANK AND TRUST'S SECONDARY LIABILITY AS AIDERS AND ABETTERS.

Plaintiffs' Complaint also involves claims of secondary liability against both GCS and RMBT. Among these is a common law "aiding and abetting" claim as generally set forth in the RESTATEMENT (SECOND) OF TORTS § 876(a).

Titled "Persons Acting in Concert," the RESTATEMENT (SECOND) OF TORTS § 876, provides:

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
- (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 accomplish a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Concert of action is not a tort in itself, but a theory of liability. *Westview Invs., Ltd. v. U.S. Bank, N.A.*, 133 Wn. App. 835, 138 P.3d 638 (2006). "Aiding and abetting" is a species of concerted action liability set

forth in sub-provision (b).⁵ Its signature elements are 1. knowledge that the conduct of another constitutes a breach of duty and 2. giving substantial assistance.⁶ This form of concert of action liability is distinct from concerted action based on “agreement,”⁷ see RESTATEMENT (SECOND) OF TORTS § 876(a), or predicated on substantial assistance that itself constitutes a breach of primary duty, see RESTATEMENT (SECOND) OF TORTS § 876(c).⁸ In each case the defendant’s liability is secondary to the

⁵ See *El Camino Res., Ltd. v. Huntington Nat’l Bank*, 2009 U.S. Distr. LEXIS 128084 at *46 (W.D. Mich. 2009) (“Although not using the words ‘aiding and abetting,’ section 876(b) is generally recognized as describing a concept of secondary liability similar to the criminal concept of aiding and abetting a crime.”); *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 485, 39 P.3d 12, 23 (2002) (“Arizona recognizes aiding and abetting as embodied in Restatement § 876(b), that a person who aids and abets a tortfeasor is himself liable for the resulting harm to a third person.”).

⁶ See *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983); see also *Bariteau v. PNC Fin. Servs. Group, Inc.*, 285 Fed. Appx. 218, 224-25 (6th Cir. 2008) (“A claim under § 876(b) has ‘two elements: (1) knowledge that the primary party’s conduct is a breach of duty and (2) substantial assistance or encouragement to the primary party in carrying out the tortious act.’”) (quoting *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 533 (6th Cir. 2000) (internal quotation marks omitted)).

⁷ See RESTATEMENT (SECOND) OF TORTS § 876, Comment on Clause (a) (“Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result.”).

⁸ The Restatement’s Comment on subsection (c), as point of contrast, states: “[w]hen 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

liability of a primary tortfeasor and secondary liability affixes through application of common law principle.

The thrust of Plaintiffs' opening brief is that secondary "aiding and abetting" liability is established in Washington common law, which operates when its elements are satisfied. It is not a right of action that must be established by or implied from a statute.⁹

Certified question number four asks whether an implied civil action for aiding and abetting arises from Washington's Debt Adjusting statute owing to the statute's criminalization of aiding and abetting violation of the act. For the reasons stated above and advanced in Plaintiffs' Opening Brief, Plaintiffs respectfully submit that the correct theoretical construct within which to place aiding and abetting liability is as a doctrine of secondary liability; as a form of concert of action; and as a principle of liability applicable when the elements of sec 876(b) are met.

Article III courts confronted with federal statutory questions and lacking meaningful federal common law, approach civil aiding and

knowledge that his act or the act of the other is tortious." [emphasis added].

⁹ Whether a party who has bears such liability become jointly and severally liable with respect to the party with whom he consorted, is resolved by reference to RCW 4.22.070(1)(a) and case law interpreting that provision. See, e.g. *Young Tao v. Heng Bin Li*, 140 Wn. App 825, 166 P.3d 1263 (2007).

abetting as a statutorily implied right of action.¹⁰ The Washington Attorney General aptly discusses the common law counterpart to this enterprise of inferring a civil right of action from statute. In essence, a court may find civil remedies implied in statutes that afford protections to discernible classes but afford no corresponding civil remedy when that protection is breached.¹¹ For the reasons advanced by the Washington Attorney General, a civil remedy as against one who aids and abets the violation of chapter 18.28 RCW may also be implied under the three-part test set forth in *Bennett*. Indeed, because RCW 18.28.190 itself expressly makes unlawful aiding and abetting violation of any provision of the act, it may be said that aiding and abetting is statutorily made an unfair and deceptive business practice by operation of RCW 18.28.185.

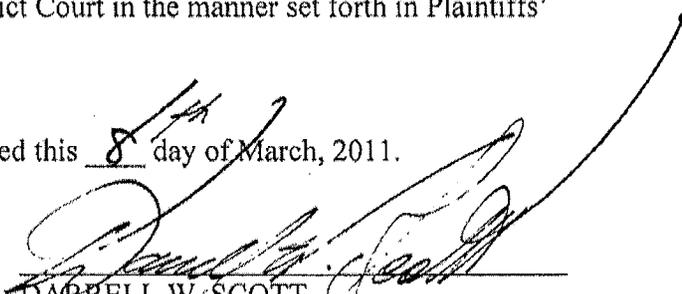
¹⁰ “. . . securities cases involve federal law; consequently, the vast body of aiding and abetting precedent from federal securities law case [sic], not only fails to bind any state courts, but also fails to apply any state tort law. Therefore, applying securities law precedent to other forms of civil aiding and abetting claims presents obvious hazards given the special nature of securities fraud actions.” Nathan Isaac Combs, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, at pp. 263-264 (2005).

¹¹ See *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990).

CONCLUSION

Plaintiffs, therefore, respectfully request that this Court answer the questions posed by the District Court in the manner set forth in Plaintiffs' Opening Brief.

Respectfully submitted this 8th day of March, 2011.



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