IN THE SUPERIOR COURT THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

GUARDIAN INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	CASE NO. ST-08-CV-189
	)	
v.	)	
	)	
ESTATE OF VALERIE KNIGHT-DAVID, EUSTON DAVID, JESSICA GRELL, MYRTLE KNIGHT, AND E.D. PLUMBING CONTRACTORS, INC.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION IN SUPPLEMENT TO THE ORDER DENYING MYRTLE KNIGHT'S MOTION IN LIMINE

In her Motion *in Limine*, Myrtle Knight sought to bar the Plaintiff from making any reference to "the purported cause of action"...in Count V", asserting that the Court cannot recognize a cause of action of aiding and abetting a tort in the civil context in the absence of a *Banks*[1] analysis. While the Court denied that portion of the motion as an untimely dispositive motion made in an apparent attempt to inject potential error into the record on the eve of trial and thereby delay the proceedings, and although the Court noted that, because of the extreme delay in asserting this argument after repeated opportunities to do so, Knight deprived the Court of an adequate opportunity to address Knight's arguments in the first instance, the Court feels compelled to supplement that Order by conducting at least a truncated analysis to determine whether civil aiding and abetting, as expressed in Restatement (Second) of Torts §876, should be recognized as a cause of action in the Virgin Islands.

[1] *Banks v. International Rental & Leasing Corp.*, 55 V.I. 976 (V.I. 2011).

The three factors the Court must consider in performing a *Banks* analysis are:

1. Whether any Virgin Islands courts have previously adopted a particular rule;
2. The position taken by a majority of courts of other jurisdictions; and
3. Most importantly, which approach represents the soundest rule for the Virgin Islands.[2]

Decisions of Virgin Islands courts

The Court's search of previously published opinions in the Virgin Islands has not revealed any decisions specifically addressing civil liability in tort through the use of aiding and abetting. It thus appears that this is an issue of first impression, raised on the eve of trial, after the cause of action as alleged in the Complaint and Amended Complaint has been pending for ten years without challenge or comment. Thus, the Court is at a severe time disadvantage in conducting an analysis while simultaneously deciding other aspects of the parties' motions *in limine*, preparing *voir dire* questions, and drafting preliminary and final instructions for the jury in order to provide those instructions to counsel on the first morning of trial.

Decisions in other jurisdictions

While aiding and abetting is not uniformly utilized in the civil context in all fifty States[3], at least 28 jurisdictions have recognized that cause of action at some point in their jurisprudential histories. Even some States that reject the doctrine in particular contexts indicate the general existence of the cause of action.[4] Consequently, it appears that civil aiding and abetting of a tort has been utilized by a clear majority of States.

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[2] *Matthew v. Herman*, 56 V.I. 674 (V.I. 2012).

[3] *See, for example, Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 181 (1994) (stating that aiding and abetting was an ancient criminal law doctrine, asserting that the Restatement (Second) of Torts § 876 (b) accepted the civil version of aiding and abetting with a similarity roughly akin to criminal aiding and abetting, and detailing the variances between the civil aiding and abetting regimes discussed in Maine, Pennsylvania, Virginia, and Montana case law).

[4] *See, for example, Connecticut Nat. Bank v. Giacomi*, 233 Conn. 304, 307, 318-331, 345 (The majority opinion of the Connecticut Supreme Court, while holding that the Connecticut Uniform Securities Act "§ 36-472 does not provide for any implied form of aider and abettor liability" as to statutory actions identified in and enabled by that

Those States adopting the cause of action generally fall into three categories: (1) States that have explicitly adopted the Restatement (Second) of Torts; (2) States in which a cause of action for civil aiding and abetting has developed through the evolution of the State's own jurisprudence; and (3) States that have adopted the Restatements and have also had their own claims evolve over time.

An example of the former is Montana, whose Supreme Court has specifically incorporated aiding and abetting a tort as a civil cause of action through its recognition of Restatement (Second) of Torts §876(b). In fact, Montana courts go so far as to hold that silence can be interpreted as encouragement sufficient to create liability as an aider and abettor if from the silence it can be shown that the aider and abettor is acting in concert with the primary tortfeasor.[5]

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section of the Act, (1) indicated that Connecticut's common law provided actions under which aggrieved parties may collect damages in lieu of a statutory claim, (2) stated that aiding and abetting was a possible route to establish third party tort liability outside of the statutory regime, and (3) pointed to the Restatement (Second) of Torts § 876 when illustrating the point. The dissenting opinion stated that Connecticut's Uniform Securities Act was to be interpreted along with existing legislation and common law principles addressing similar subject matter, and when doing so, highlighted that Connecticut has "long recognized the tort principle, embodied in 4 Restatement, Torts § 876 (1939), and 4 Restatement (Second), Torts § 876(b) (1977), that a person who aids and abets a tortfeasor is himself liable for the resulting harm to a third person."). *See also Carney v. DeWees*, 136 Conn. 256, 262 (Conn. 1949) (holding that "[t]he evidence warranted the jury in finding . . . facts which established a sequence of improper conduct by the two drivers, that on the part of DeWees serving to incite and encourage the misconduct of Valentino, . . . [and which] afford[ed] a basis of liability within the following principle: 'For harm resulting to a third person from the tortious conduct of another, a person is liable if he...(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. . . . 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...'") (citing Restatement (Second) of Torts § 876 (b) and the comment on clause (b)).

[5] *Sloan v. Fauque*, 239 Mont. 383, 385-86 (Mont. 1989) (holding that passengers in two racing cars that ultimately crashed were liable for aiding and abetting the civil tort claims arising from the accident, even though these individuals were not driving either car and did not make encouraging statements to either driver, because these individuals did (1) "knowingly join[] in committing the tort" and (2) "by [their] *silence* encouraged the tort"). *Accord, Schiller v. Strangis*, 540 F.Supp. 605, 623-24 (D. Mass. 1982) (finding that a defendant who "knowingly joined in committing the tort of false imprisonment, and by his *silence* encouraged [the principal tortfeasor] to commit subsequent tortious acts" liable under Massachusetts law addressing joint liability for civil torts claims).

Regarding the second approach, a long line of case law in Tennessee has addressed civil aiding and abetting and held: 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."[6] In fact, when discussing the civil tort at issue in *Huckeby v. Spangler*, the Tennessee Supreme Court discussed at length a nineteenth century case, *Kirkwood v. Miller*,[7] in which three individuals captured and bound a slave, and one of the three individuals killed the slave as he was trying to escape.[8] When affirming a judgment which found all three individuals liable for civil damages upon the slave's death, the Tennessee Supreme Court stated that it did not matter that the slave's death

> was not intended by any of [the three tortfeasors]. . . . They are all answerable for any injury done by either, in the common enterprise. It is no defence [sic] against a claim, for the damage done in such a case, for anyone to say that the injury was greater, and the particular act done was not contemplated or intended by him. They embark in a common cause, and their liability is common.[9]

Similarly, jurisprudence in Virginia, in addition to allowing aiding and abetting a tort claim, also allows a third party to be liable for another party's breach of fiduciary duty when the third party knowingly participated in the breach. Under *Halifax Corp. v. Wachovia Bank*,[10] a party can recover on a claim for aiding and abetting a breach of fiduciary duty if it shows that the aider and abettor (1) had actual knowledge of another's breach of the relevant fiduciary duty and (2) participated in the breach of that fiduciary duty.[11] When addressing participation, the

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[6] *Huckeby v. Spangler*, 521 S.W.2d 568, 573 (Tenn. 1975).
[7] 37 Tenn. 455, ___ (Tenn. 1858).
[8] *Huckeby*, 521 S.W.2d at 573 (discussing *Kirkwood v. Miller*, 37 Tenn. 455, ___ (Tenn. 1858)).
[9] *Huckeby*, 521 S.W.2d at 573 (quoting *Kirkwood*).
[10] 268 Va. 641, 660-62 (VA 2004).
[11] *Id.* 268 Va. At 660 ("aid given with *mens rea* is abetment").

Virginia Supreme Court opined that, in the aiding and abetting context, it entails "purposeful conduct" or the defendant's actually "know[ing] a breach of duty is occurring and participat[ing] with *mens rea* in the commission of the breach."[12] When addressing knowledge in the aiding and abetting context, the court held that "actual knowledge of a fiduciary duty is not tantamount to alleging actual knowledge of a breach of the duty."[13]

Representative of the final set of jurisdictions is Texas, where elements of the cause of action have evolved through the state's common law jurisprudence as well as the Restatement (Second) of Torts § 876(b). In a case centering on aiding and abetting partnership fraud and breach of fiduciary duty claims, the elements of an aiding and abetting claim were listed as: (1) the primary actor committed a tort; (2) the defendant had knowledge that the primary actor's conduct constituted a tort; (3) the defendant had intent to assist the primary actor; (4) the defendant gave the primary actor assistance or encouragement; and (5) the defendant's conduct was a substantial factor in causing the tort.[14] In other cases from that jurisdiction, aiding and abetting civil tort claims were required to show "the actor, with unlawful intent, [gave] substantial assistance and encouragement to a wrongdoer in a tortious act."[15] Yet, when addressing the application of the elements of this latter rule, the Texas court cited the Texas Supreme Court's invocation of the Restatement (Second) of Torts § 876 (b) as support for its holding that "the type of conduct implicated by [a civil] aiding and abetting [tort claim was]

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[12] *Id.* 268 Va. at 664.
[13] *Id.*
[14] *Immobiliere Jeuness Establissement v. Amergy Bank National Association*, 525 S.W.3d 875 (Tex. App. 2017) (finding that "[c]ausation plays into the analysis twice, once as an element of proof required for the underlying tort and once in establishing that the defendant's conduct has been a substantial factor in the underlying tort" and that "[t]he damages would be those caused by the underlying tort").
[15] *West Fork Advisors, LLC v. SunGard Consulting, LLC*, 437 S.W.3d 917, 921-22 (Tex. App. 2014).

highly dangerous, deviant, or anti-social group activity . . . likely to cause serious injury or death to a person or certain harm to a large number of people."[16]

Also reflective of the third set of jurisdictions is Arizona, which relies on Section 876 as the basis for the state's civil aiding and abetting claim, but has fashioned its own elements: (1) the primary tortfeasor must commit a tort that causes injury to the plaintiff; (2) the defendant must know that the primary tortfeasor's conduct constitutes a breach of duty; and (3) the defendant must substantially assist or encourage the primary tortfeasor in the achievement of the breach.[17] In addition, the state has developed its own case law specifying that "aiding and abetting liability is based on scienter . . . . [thereby requiring t]he defendants [to] *know* that the conduct they are aiding and abetting is a tort."[18]

Another example of this final line of cases is Colorado, which, although not *explicitly* adopting Section 876, has acknowledged that "liability for aiding and abetting a tortious act will be found if the party whom the defendant aids performs a wrongful act that causes an injury [and] the defendant is generally aware of his role as part of an overall illegal or tortious activity at the time he provides the assistance."[19] The state also recognizes that the same rule applies when allowing a party to bring a civil aiding and abetting the breach of fiduciary duty claim.[20] When addressing the application of this latter claim in a limited partnership context, the Colorado court held: "In jurisdictions which have recognized the tort of aiding and abetting a breach of fiduciary duty, the plaintiff must prove each of the following elements: '(1) breach by

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[16] *Id.*
[17] *Wells Fargo Bank v. Arizona Laborers, Teamsters, and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 485 (Ariz. 2002).
[18] *Id.* (emphasis in original).
[19] *Holmes v. Young*, 885 P.2d 305, 308-09 (Colo. App. 1994).
[20] *Id.*

a fiduciary of a duty owed to plaintiff, (2) defendant's knowing participation in the breach, and (3) damages.'"[21]

The Soundest Rule

Finally, the Court must determine which of these approaches, if any, form the soundest rule for the Virgin Islands. In determining whether this jurisdiction should recognize aiding and abetting a tort as a civil cause of action, the question raised is: what type of activities engaged in by a third party should produce concurrent vicarious liability for the tortious acts or omissions of a primary wrongdoer?

The concept of joint liability for tortious conduct is not new. Joint and several liability in tort has long been established, as evidenced in Tennessee's jurisprudence. In perhaps the seminal tome on the subject, Prosser noted that "the original meaning of 'joint tortfeasor' was that of vicarious liability for concerted action." [22] All who committed acts "in concert to commit a [tort], in pursuance of a common design, were held liable for the entire result."[23] To give life to the concept, Prosser employed the illustration of a case involving highwaymen. While each had his own, disparate role to play in a tortious battery, each was ultimately held responsible for the others' actions in a scenario under which "one might have battered the plaintiff, while another imprisoned him, and a third stole his silver button."[24] The notion embodied in this scenario has become known as the principle of vicarious liability, through which joint tortfeasors are held responsible for their concerted actions causing harm to others. More precisely,

[21] *Id.* (holding that "we perceive no reason why the tort of aiding and abetting a breach of fiduciary duty should not be recognized in a limited partnership situation").
[22] W. Prosser, *Law of Torts*, §46 (4th ed. 1971),
[23] *Id.*
[24] *Id.*

jurisprudence has developed two causes of action to achieve this end, conspiracy and aiding and abetting.[25]

Each cause of action has its own essential qualities allowing shared wrongdoing to create liability. Conspiracy depends on the existence of "an agreement to participate in a wrongful activity."[26] Aiding and abetting claims turn on "whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct, not whether the defendant agreed to join the wrongful conduct."[27]

Important to discerning the soundest rule for the Virgin Islands regarding whether to allow a claim for aiding and abetting a tortious act is the fact that "[i]n some situations, the trier of fact cannot reasonably infer an agreement from substantial assistance or encouragement." [28] Consequently, the law of a conspiracy alone does not provide redress to residents of the Virgin Islands when persons or entities give substantial assistance or encouragement to those engaging in tortious conduct.

It is in the public interest to permit injured parties to assert claims for all types of injurious concerted tortious activity, not just those in which the party suffering the harm can prove an explicit or implied agreement to engage in a tort. That public interest is advanced by including, as a basis for recovery, liability in those who offer substantial assistance to another who causes harm. Moreover, increasing the scope of liability for a tortious act increases the likelihood that a party suffering harm will actually be compensated for the injury it has suffered. Recognizing aiding and abetting liability as a means of spreading damages among several

[25] *See Halberstam v. Welsh*, 705 F.2d 472, 477 (D.C. Cir. 1983).
[26] *Id.*, at 478.
[27] *Id.*
[28] *Id.*

persons who have given substantial assistance to the primary wrongdoer in committing a tort advances the public interest by helping to avoid that circumstance in which a primary wrongdoer either does not have assets sufficient to compensate an injured party for a tort or transfers assets, in order to avoid the collection of a judgment for money damages, to others who knowingly rendered assistance in the commission of the tort.

CONCLUSION

While the Court acknowledges that the Supreme Court has rejected unwavering reliance upon the Restatements in an effort to determine the expression of the common law in the Virgin Islands, it appears in this particular instance Virgin Islands courts lack jurisprudential history of sufficient length to permit the natural development of a civil cause of action for aiding and abetting outside the framework presented by the Restatement (Second) of Torts § 876 (b). But, adopting the cause of action expressed in the Restatement (Second) of Torts offers a version of the law that has been tested over time in multiple jurisdictions across the United States. Accordingly, in the public interest, the Court finds it appropriate, as the soundest rule for the Virgin Islands, to adopt the statement of the rule addressing civil aiding and abetting liability as expressed in Restatement (Second) of Torts §876 (b) and (c), as follows:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he:
>
> (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 accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

The Court having already issued an appropriate Order denying Knight's Motion *in Limine*, no additional order will issue as a result of this Memorandum Opinion.

Dated: May 29, 2018

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

Attest: Estrella H. George
Clerk of the Court ___/___/___

by: __________
Lori Boynes-Tyson
Court Clerk Supervisor 5/30/2018