[Cite as *Whelan v. Vanderwist of Cincinnati,* 2011-Ohio-6844.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

EUGENE WHELAN, EXECUTOR OF THE ESTATE OF EDWARD WHELAN, DECEASED,	:	**O P I N I O N**
Plaintiff,	:	**CASE NO. 2010-G-2999**
- vs -	:	
VANDERWIST OF CINCINNATI, INC., et al.,	:	
Defendants,	:	
THE NETHERLAND INSURANCE CO., et al.,	:	
Intervening Plaintiffs-Appellees,	:	
- vs -	:	
VANDERWIST OF CINCINNATI, INC., et al.,	:	
Defendants,	:	
EUGENE WHELAN, EXECUTOR OF THE ESTATE OF EDWARD WHELAN, DECEASED,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 05 P 786.

Judgment: Affirmed.

Daniel A. Richards, Weston Hurd, L.L.P., 1900 The Tower at Erieview, 1301 East Ninth Street, Cleveland, OH 44114-1862 (For Intervening Plaintiffs-Appellees).

Thomas M. Wilson and *Jennifer L. Mancino*, Kelley & Ferraro, L.L.P., 2200 Key Tower, 127 Public Square, Cleveland, OH 44114 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Eugene Whelan, Executor of the Estate of Edward Whelan, deceased ("Whelan"), appeals the judgment entered by the Geauga County Court of Common Pleas. The trial court granted The Netherland Insurance Company and Indiana Insurance Company's ("Netherland/Indiana Insurance") motion to dismiss Whelan's counterclaim, pursuant to Civ.R. 12(B)(6), for failure to state a claim upon which relief can be granted. For the following reasons, we affirm.

{¶2} This case stems from an incident on December 22, 2004, where Todd Kinsey, an employee of Vanderwist of Cincinnati, Inc. ("Vanderwist"), attended a company Christmas party, became intoxicated, and drove his personal vehicle. Edward Whelan was a passenger in Kinsey's vehicle. Shortly after leaving the Vanderwist garage, Kinsey's vehicle hit a patch of ice, went left-of-center, and was struck by an on-coming vehicle. Edward Whelan died as a result of the accident.

{¶3} Whelan filed a complaint for wrongful death against Kinsey, Vanderwist, and various unknown defendants. Whelan's amended complaint raised three causes of action against Vanderwist: (1) negligence pursuant to the doctrine of respondeat superior; (2) negligence under a "business host" theory; and (3) a claim for negligent hiring, supervision, and retention.

{¶4} Vanderwist's motion for summary judgment was granted by the trial court. Whelan filed an appeal from the trial court's judgment entry. This court issued its

opinion in *Whelan v. Vanderwist of Cincinnati, Inc*., 11th Dist. No. 2007-G-2769, 2008-Ohio-2135, reversing, in part, the trial court's granting of Vanderwist's motion for summary judgment as it pertained to Whelan's claims for negligence under the doctrine of respondent superior and negligent hiring, supervision, and retention. The matter was remanded to the trial court for proceedings consistent with the opinion of this court.

{¶5} Netherland/Indiana Insurance intervened and filed a complaint for declaratory judgment. Netherland/Indiana Insurance requested the court to enter a declaratory judgment in their favor declaring that they owe no duty to defend or indemnify Todd Kinsey or Vanderwist of Cincinnati, Inc. under the insurance policy for any allegations or causes of action asserted against Todd Kinsey and Vanderwist of Cincinnati, Inc. in the case of *Whelan v. Vanderwist of Cincinnati, Inc.*

{¶6} Upon remand, Whelan filed a Notice of Deposition pursuant to Civ.R. 30(B)(5) to take the "examination of the corporate representative" of Vanderwist. Vanderwist produced its co-owner and Vice President, Diane Baumgartner, as its Civ.R. 30(B)(5) representative. During the deposition of Ms. Baumgartner, Netherland/Indiana Insurance was present through its legal counsel and questioned Ms. Baumgartner regarding the status of Kinsey as an excluded driver under the insurance policy.

{¶7} On May 7, 2010, Whelan filed an answer and counterclaim against Netherland/Indiana Insurance alleging two counts: (1) aiding and abetting, and (2) civil conspiracy/fraud. Both counts of the counterclaim were based on Ms. Baumgartner's deposition as the Civ.R. 30(B)(5) representative.

{¶8} Netherland/Indiana Insurance filed a Civ.R. 12(B)(6) motion arguing that all of the allegations contained in the counterclaim are within Ohio's doctrine of witness

immunity and that Whelan failed to plead the elements of fraud. The trial court granted the motion to dismiss.

{¶9} Appellant filed a timely notice of appeal and asserts the following:

{¶10} "The trial court committed reversible error when it improperly dismissed the counterclaim of the Estate of Edward Whelan for fraudulent concealment pursuant to Ohio Civil Rule 12(B)(6) and the Witness Immunity Doctrine."

{¶11} "'"An appellate court's standard of review for a trial court's actions regarding a motion to dismiss is de novo."' *** The '"[d]ismissal of a complaint for failure to state a claim upon which relief can be granted is appropriate if, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in [the nonmoving] party's favor, it appears beyond doubt that [the nonmoving] party can prove no set of facts warranting relief."' *** While a complaint attacked by a Civ.R. 12(B)(6) motion to dismiss does not need detailed factual allegations, the plaintiff's obligation to provide the grounds for his entitlement to relief requires more than conclusions, and a mere recitation of the elements of a cause of action without factual enhancement will not suffice. ***." (Internal citations omitted.) *Hoffman v. Fraser*, 11th Dist. No. 2010-G-2975, 2011-Ohio-2200, at ¶21.

{¶12} "Since Ohio is a notice-pleading state, Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity." *Cincinnati v. Beretta U.S.A. Corp*., 95 Ohio St.3d 416, 2002-Ohio-2480, at ¶29. Civ.R. 8(A)(1) requires a complaint to include only "(1) a short and plain statement showing that the party is entitled to relief and (2) a demand for judgment for the relief to which the party claims to be entitled."

{¶13} The exceptions to Civ.R. 8(A) are outlined in Civ.R. 9(B), which provides when a complainant alleges a claim for fraud or mistake, "the circumstances constituting fraud or mistake shall be stated with particularity." "In order to meet this obligation, the complaint must include '(t)he "circumstances constituting fraud" [which] include the time, place and content of the false representation; the fact represented; the identification of the individual giving the false representation; and the nature of what was obtained or given as a consequence of the fraud.'" *Brown v. Sasak*, 11th Dist. No. 2009-A-0054, 2010-Ohio-2676, at ¶16, quoting *Aluminum Line Prods. Co. v. Brad Smith Roofing Co.* (1996), 109 Ohio App.3d 246, 259.

{¶14} On appeal, Whelan presents two issues for our review. First, Whelan claims the trial court's findings placed a heightened pleading standard on Whelan, contrary to Civ.R. 12(B)(6). Second, Whelan maintains the trial court erred in its application of the Witness Immunity Doctrine, as that doctrine is inapplicable to matters involving fraudulent concealment.

{¶15} **Aiding and Abetting**

{¶16} With respect to Count One, the trial court found that "the Estate provided no factual details to support its claim that the Companies 'substantially assisted and/or encouraged Diana Baumgartner' to conceal material facts or make false statements. Even if the Companies did, they still incur no liability because there is no action arising out of any false testimony given by Ms. Baumgartner."

{¶17} Whelan bases his claim on the Restatement of the Law 2d, Torts (1979), Section 876(b), which provides: "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[.]"

{¶18} Aiding-abetting includes the following elements: "'(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.'" *Chester Twp. Bd. of Trustees v. Bank One, N.A.*, 11th Dist. No. 2007-Ohio-3365, at ¶65. (Citation omitted.)

{¶19} As observed by the Twelfth District Court of Appeals in *Andonian v. A.C. & S., Inc.* (1994), 97 Ohio App.3d 572, 574, "Ohio has not definitively adopted this section and few Ohio cases have applied it. The Supreme Court of Ohio has never expressly approved Section 876; however, it has cited this section in two cases. *See Great Cent. Ins. Co. v. Tobias* (1988), 37 Ohio St.3d 127, 130-131, 524 N.E.2d 168, 171-173; *Allstate Fire Ins. Co. v. Singler* (1968), 14 Ohio St.2d 27, 30, 43 O.O.2d 43, 45, 236 N.E.2d 79, 81." In *Andonian*, the Court did not determine whether Ohio recognized Section 876, as it concluded that the appellant did not prove the elements to sustain such a claim. Id.

{¶20} Moreover, the Tenth and Second District Courts of Appeals have held that Ohio does not recognize a claim for aiding and abetting common-law fraud. *Federated Mgt. Co. v. Coopers & Lybrand* (2000), 137 Ohio App.3d 366, 381 ("Ohio does not recognize a claim for aiding and abetting common law fraud"). See, also, *Collins v. Natl. City Bank*, 2d Dist. No. 19884, 2003-Ohio-6893 (One is not liable as an aider and

abettor but as an active wrongdoer. Such person would be liable under a claim for fraud—not as an aider and abettor of fraud.).

{¶21} The court in *Newby v. Enron Corp.* (S.D.Tex. 2006), 465 F.Supp. 2d 687 discussed at length whether Ohio has recognized aiding and abetting common-law fraud. The court cited to the Sixth Circuit's opinion in *Pavlovich v. Natl. City Bank* (C.A.6, 2006), 435 F.3d 560, 570. In *Pavlovich*, the Sixth Circuit opined, "[i]t is unclear whether Ohio recognizes a common law cause of action for aiding and abetting tortious conduct." Id. The Sixth Circuit noted that regardless of whether Ohio recognizes such a claim, the appellant failed to prove the elements of aiding and abetting. Id. Thus, the court affirmed the district court's granting of summary judgment. In determining that the appellant had not proved the elements of such a claim, the court stated that "the basis for 'modern application of civil aiding and abetting' *** requires 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.' ***." (Internal citations omitted.) Id.

{¶22} Citing to, inter alia, *Pavlovich*, the *Newby* Court noted that "[i]n Ohio cases that have allowed such a cause of action, depending on the stage of the litigation the courts have focused on whether the plaintiffs had pled and/or proved the elements of aiding and abetting fraud." *Newby v. Enron Corp.*, 465 F.Supp. 2d at 728.

{¶23} Therefore, it remains unclear whether The Supreme Court of Ohio would adopt the doctrine of liability for civil aiding and abetting as derived from the Restatement of the Law 2d, Torts (1979), Section876(b). However, we find that even if an aiding and abetting claim was recognized in Ohio, the facts as alleged in Whelan's

complaint fail to state a viable claim upon which relief could be granted against Netherland/Indiana Insurance.

{¶24} In his complaint, Whelan alleges that Vanderwist is a defendant in the underlying case. It further alleges that Baumgartner appeared for deposition on behalf of Vanderwist as its co-owner and vice president. The complaint claims Baumgartner made "false statements knowingly and willfully *** under oath" during her deposition as a corporate representative under Civ.R. 30(B)(5). Whelan further alleges in his complaint that Netherland/Indiana Insurance had knowledge of Baumgartner's false sworn testimony and that Netherland/Indiana Insurance "substantially assisted and/or encouraged [Baumgartner] by intentionally concealing material facts and/or otherwise allowing false statements[.]" Whelan states that Baumgartner's false statements were a violation of R.C. 2921.13 (falsification) and R.C. 2921.11 (perjury). Therefore, Whelan claims that "Netherland/Indiana Insurance intentionally aided and abetted" Baumgartner's false deposition testimony "in order to affect the outcome of an official proceeding for its own pecuniary interest and benefit."

{¶25} In order to sustain a claim for aiding and abetting, Whelan was first required to demonstrate that Baumgartner engaged in tortious conduct. See Restatement of the Law 2d, Torts (1979), Section 876(b) ("For harm resulting to a third *person from the tortious conduct of another*"). (Emphasis added.) In the "Comment on Clause (b)," the authors of the Restatement state:

{¶26} "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 consequence of the other's act." Restatement of the Law 2d, Torts (1979), Section 876, Comment d.

{¶27} The allegations in the complaint establish that the basis for Whelan's claim is Baumgartner's allegedly false deposition testimony, which was made in the course of litigation. Netherland/Indiana Insurance is a party to that litigation. It is well established that claims of perjury, subornation of perjury, and conspiracy to commit perjury, although punishable under criminal statutes, may not form the basis of a civil lawsuit. *Costell v. Toledo Hosp.* (1988), 38 Ohio St.3d 221, 223-224. For example, in *Morrow v. Reminger & Reminger Co., L.P.A.*, 183 Ohio App.3d 40, 2009-Ohio-2665, the court held that "'giving of false testimony in a judicial proceeding *** does not give rise to a civil action for damages resulting from the giving of the false testimony' even when it is alleged that the witness knew the testimony to be false." Id. at ¶16. (Citation omitted.) See, also, *Masek v. Marroulis*, 11th Dist. No. 2007-T-0034, 2007-Ohio-6159, at ¶43-44.

{¶28} Further, Whelan claims that Baumgartner's statements were made in violation of R.C. 2921.13 and 2921.11. Both of these are criminal statutes that do not give rise to a civil cause of action. See *Howard v. Supreme Court of Ohio*, 10th Dist. Nos. 04AP-1093 & 04AP-1272, 2005-Ohio-2130, at ¶17, and *Masek v. Marroulis*, 2007-Ohio-6159, at ¶44.

{¶29} In addition, the complaint does not state with particularity the essence of the alleged fraudulent conduct. It asserts that "based upon information and belief" Netherland/Indiana Insurance "substantially assisted and/or encouraged" Baumgartner; but it fails to assert any facts that, if believed, might form the basis for a finding of

liability. Allowing a claim to proceed under such circumstances would be tantamount to ignoring the dictates of Civ.R. 9(B).

{¶30} At oral argument, Whelan's attorney requested this court to make a distinction between Netherland/Indiana Insurance's knowledge that Baumgartner's testimony was false and Netherland/Indiana Insurance assisting and/or encouraging Baumgartner by "intentionally concealing material facts." Whelan's attorney argued that the Witness Immunity Doctrine, although applicable under the first scenario above, is not germane to a situation when a party "materially hides documents." Whelan's counsel maintained it was error for the trial court to dismiss the aiding and abetting cause of action solely on the Witness Immunity Doctrine. Upon completion of the oral argument, Whelan's attorney invited this court to review this portion of the complaint based on a Civ.R. 12(B)(6) standard.

{¶31} In his complaint, Whelan argues that Netherland/Indiana Insurance "substantially assisted and/or encouraged [Baumgartner] by intentionally concealing material facts" in order to gain an advantage in another case, *Whelan Estate v. Vanderwist*. Even if this court utilized Civ.R. 12(B)(6), the complaint fails to state a claim upon which relief can be granted. In order to state a claim for aiding and abetting, one must initially allege unlawful intent, i.e., that Netherland/Indiana Insurance had knowledge that Baumgartner was performing a wrongful act. However, the underlying "wrongful act" that Whelan's complaint is based upon is Baumgartner's allegedly false deposition testimony, which, by law, cannot form the basis of a civil lawsuit. Simply put, Baumgartner did not engage in tortious conduct and, thus, Whelan has not set forth

facts that allege Netherland/Indiana Insurance engaged in knowing actions that substantially aided such tortious conduct.

{¶32} It is apparent from the record and oral argument that appellant's counsel is claiming what he perceives as a variety of failures to fully or adequately respond to discovery in the underlying case. However, our rules of civil procedure provide appropriate clarification and/or sanctions for such failure. No court has recognized a separate, independent cause of action in this circumstance. We believe to do so would have the potential of one case giving birth to new litigation each time a party was aggrieved by its perceived failure of another party, or even non-party, to provide proper discovery. Based on the foregoing, the complaint fails to state a claim that Netherland/Indiana Insurance is liable on a theory of civil aiding and abetting.

{¶33} **Civil Conspiracy/Fraud**

{¶34} In the second count, Whelan alleges that "Netherland/Indiana Insurance acted in an intentional and malicious combination with Vanderwist and [Baumgartner] to procure, provide and submit statements which [Baumgartner] and Netherland/Indiana Insurance knew to be materially false[.]" Whelan further alleges that "Netherland/Indiana Insurance acted in an intentional and malicious combination with Vanderwist and [Baumgartner] to fraudulently conceal material information from the Whelan Estate and/or falsely represent material information to the Whelan Estate with the malicious intent that the Whelan Estate would rely on the false statement and/or fraudulent concealment."

{¶35} In dismissing Count Two, the trial court stated the following: the "basis for Count Two is still false testimony which gives rise to no claim for damages[.] Further,

the Counterclaim with respect to Fraud is void of operative facts and therefore falls short of the requirements of Rule 9(B)."

{¶36} A cause of action for a civil conspiracy claim includes allegations of "(1) a malicious combination, (2) involving two or more persons, (3) causing injury to person or property, and (4) the existence of an unlawful act independent from the conspiracy itself." *Gibson v. City Yellow Cab Co.* (Feb. 14, 2001), 9th Dist. No. 20167, 2001 Ohio App. LEXIS 518, at *9. (Citation omitted.) An action for civil conspiracy cannot be maintained unless an underlying unlawful act is committed. *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 219-220.

{¶37} A case for common law fraud requires proof of the following elements: "'(1) a representation or, where there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance.'" *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 169. (Citation omitted.)

{¶38} "To prevail on a claim of fraudulent concealment, the injured party must establish: (1) actual concealment of a material fact; (2) with knowledge of the fact concealed; (3) and intent to mislead another into relying upon such conduct; (4) followed by actual reliance thereon by such other person having the right to so rely; (5) and with injury resulting to such person because of such reliance." *Chamar v. Schivitz*, 11th Dist. No. 2002-L-181, 2004-Ohio-1957, at ¶13. (Citation omitted.)

{¶39} The complaint fails to allege that Whelan relied on either the false statements or the concealment of material fact(s). The complaint merely states that the statements were made "with the malicious intent that the Whelan Estate would rely on the false statements and/or fraudulent concealment." Further, the complaint fails to plead any injury which was proximately caused by such reliance. Therefore, as Whelan failed to demonstrate the "existence of an unlawful act independent from the conspiracy itself," his claim for civil conspiracy must fail.

{¶40} On appeal, Whelan also maintains that the trial court improperly extended the Witness Immunity Doctrine to issues involving the fraudulent concealment of documents and other material information. A review of the complaint reveals that we need not address the issue as to whether the Witness Immunity Doctrine applies to the fraudulent concealment of documents, as Whelan's complaint did not state a proper cause of action for civil conspiracy upon which relief could be granted.

{¶41} Whelan's assignment of error is without merit.

{¶42} Based on the opinion of this court, the judgment of the Geauga County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.