IN THE SUPREME COURT OF IOWA
Nos. 15-0471, 15-0780

WESTCO AGRONOMY COMPANY, LLC,
Plaintiff-Counterclaim Defendant
Appellant-Cross-Appellee

v.

WILLIAM S. WOLLESEN a/k/a BILL WOLLESEN; KRISTI J. WOLLESEN; WILLIAM S. AND KRISTI J. WOLLESEN REVOCABLE TRUST; JOHN W. WOLLESEN; IOWA PLAINS FARMS; and CHAD A. HARTZLER,
Defendants-Appellees

IOWA PLAINS FARMS,
Counterclaim Plaintiff Third-Party Plaintiff/Cross-Appellant

v.

WEST CENTRAL COOPERATIVE,
Third-Party Defendant, Appellant-Cross-Appellee

APPLICATION FOR FURTHER REVIEW

On Appeal from the District Court for Story County
Honorable Michael J. Moon

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Questions Presented

I. In *Hensler v. City of Davenport*, 790 N.W.2d 569, 587 (Iowa 2010), this Court struck down a city ordinance that created a rebuttable presumption requiring the defendant to disprove negligence. Under Iowa's private right of action for Negligent Empowerment of Specified Unlawful Activity, the defendant has the burden to disprove its negligence. Is that statute constitutional under *Hensler*?

II. Iowa's Ongoing Criminal Conduct statute provides for a civil remedy against someone who commits a "specified unlawful activity," which is defined as an indictable offense under Iowa law. The only indictable offense the court instructed the jury on was commercial bribery (which takes two parties), but the jury found that only one defendant committed an unlawful activity. Because a person cannot bribe himself, the Court of Appeals surmised that the jury must have found liability based upon a federal (not Iowa) crime for which the jury was not instructed. Can a court go that far to save an inconsistent verdict?

III. Iowa Code sections 611.4 and 611.10 state that a party has a *right* to try an equitable claim to the court, and that a case "must so proceed" where equity courts had the exclusive jurisdiction of the claim "before the adoption" of the Iowa Code. Based on over a century of Iowa Supreme Court case law, Westco argued that its claims (which were based on an alleged breach of the duty of loyalty by an agent) fell within the exclusive jurisdiction of equity courts before the adoption of the Code, but the Court of Appeals ruled that the district court did not "abuse its discretion" by trying the case in law, to a jury. Does a district court have discretion to decide how to try a claim (in law or in equity) when a statute contains a specific directive on when a case should be tried in equity?

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Statement Supporting Further Review

This case is about a Westco Agronomy Company sales agent, Chad Hartzler, who accepted direct payments from the Wollesen family who, in return, received steep discounts on Westco agricultural products (seed, fertilizer, etc.). Westco alleged—and its sales agent, Hartzler, admitted—that the payments from the Wollesens to Hartzler were to get better deals on Westco's products. The Wollesens, on the other hand, claimed that they were the victim: they knew nothing of what Hartzler was doing; they assumed their great deals were just that; and they were damaged when Westco did not honor some of those "deals."

This application presents three issues for the Court's review. All three were important coming out of the district court, and all three have become more so as a result of the Court of Appeals's ruling.

1. The first issue addresses the constitutionality of Iowa's private right of action for Negligent Empowerment of Specified Unlawful Activity, Iowa Code section 706A.2(5). The statute makes it "unlawful for a person to negligently allow" their

property "to be used to facilitate specified unlawful activity," but it puts the burden on the defendant to *disprove* negligence. Under *Hensler v. City of Davenport*, 790 N.W.2d 569 (Iowa 2010), that rebuttable presumption of negligence violates the Due Process Clause. The district court agreed and struck down the statute, but the Court of Appeals reversed.

Even though the statute unambiguously puts the burden on the defendant (and all parties agreed on that), the Court of Appeals avoided the constitutional question by stating, *without explanation*, that the burden is on the *plaintiff*. The Court of Appeals cited to the Model Act and its commentary to support that proposition (that the burden is on the plaintiff), but here's the twist: the commentary to the Model Act simply explains why the burden is on *the defendant*.

So we don't know where the burden lies, and the parties must now go back to trial with the constitutional question left unanswered. The confusing status of the law will complicate the trial and create problems in cases to come. This Court should weigh in.

2. The second issue involves an inconsistent jury verdict and the length the Court of Appeals went to reconcile it.

Westco brought an Ongoing Criminal Conduct claim against its agent, Chad Hartzler, and each member of the Wollesen family (Bill, Kristi, and John) based upon the allegation that the Wollesens bribed Hartzler. To succeed against any individual defendant, Westco had to prove that they committed an indictable offense *under Iowa law*. *See* Iowa Code § 706A.1(5).

The only indictable offense (Iowa or otherwise) that the jury was instructed on was commercial bribery, which required the participation of at least two defendants. The jury found against Hartzler but—inexplicably—for each of the Wollesens. That is an inconsistent verdict: if Hartzler committed commercial bribery, so did one of the Wollesens. Neither the instructions nor the evidence left any other option.

The Court of Appeals recognized the problem ("At first blush, these findings would appear inconsistent." Slip Op 11) but it attempted to reconcile the verdict by theorizing that *maybe* the jury had found that Hartzler committed "unlawful activity"

because he pleaded guilty in *federal* court to *federal* wire fraud. That is an inference too far. Wire fraud is not an indictable offense under *Iowa* law, so the Court of Appeals's theory doesn't solve the problem. And even if there is some Iowa crime similar to wire fraud, the jury was not instructed on its elements.

If a court can go that far in reconciling a verdict—if it can assume that the jury based its finding on insufficient evidence (wire fraud is not an Iowa crime) or by going outside the instructions—the public will lose confidence in the jury system. The Court should grant review.

3. The third and final issue is whether Westco's claims should have been tried in equity by the court (as Westco requested) or in law by the jury (which is what happened). This issue, too, is an important one, and the Court of Appeals's method of deciding it makes this Court's review all the more necessary.

The right to a jury trial is such an exalted part of the justice system that we (lawyers, judges, the public) often overlook that there is a countervailing right—indeed, command—that some cases by tried by the court in equity. Iowa Code section 611.4

states that "in all cases where the courts of equity, before the adoption of [the Iowa] Code, had jurisdiction," a plaintiff "may" prosecute the action in equity and "*must so proceed* in all cases where such jurisdiction was exclusive."

Each of the claims that Westco tried in this case (and the unjust enrichment claim that was wrongly dismissed before trial) derives from the allegation that Westco's sales agent, Hartzler, breached his duty of loyalty by accepting bribes from the Wollesen family in exchange for lower prices on Westco products. Westco asked for appropriate equitable relief. The district court nevertheless denied Westco's request to try the claims in equity, ruling that they were not "equitable" claims and Westco sought only "damages."

That was error, but the Court of Appeals compounded the problem by holding that the district court's decision was a discretionary one. It was not, and it is important for this Court to say so. Iowa Code clearly delineates when a party has a right to try a claim in equity, and when it *must* do so. That is a legal, not discretionary, function. The Court of Appeals's ruling to the

contrary undermines the *right* to try equitable claims in equitable proceedings. To be sure, the distinction between law and equity is sometimes murky; but that is precisely why this Court's guidance is needed.

Statement of the Case

In the Spring of 2011, Westco's manager of agronomy sales, Chad Hartzler, resigned and confessed that he had been engaged in a six-year scheme with the Wollesens that cost Westco millions of dollars.

Hartzler was Westco's sales manager for seed, chemicals, and fertilizer. According to Hartzler, sometime in 2005 Bill Wollesen, the head of family-owned Iowa Plains Farms (IPF), began making personal payments to Hartzler in exchange for steep discounts on Westco products. Instead of paying the market rate of $190-$200 per bag of seed corn, for instance, IPF was paying Westco $120-125 per bag. Over the six-year period, IPF paid $487,315 directly to Hartzler get these "deals."

Hartzler kept the bribes a secret by operating a fraudulent scheme in Westco's books. He would list the IPF sales at prices

that were designed to deflect Westco's attention. Westco's books would show a debt owed to Westco by IPF throughout most of the year. He would then pay down that debt with payments made later in the year by IPF, purportedly as "prepayments" for the next year's products. Account statements mailed by Westco to the Wollesens over a period of years reflected that "prepayments" were not being made. But the Wollesens claimed they did not receive these statements.

The Wollesens, after being confronted, claimed that they had no knowledge of what Hartzler was doing. They thought that Hartzler had his own inventory of products to sell (hence the direct payments to him) and despite being a highly sophisticated farming operation (IPF farmed 6,000 acres) the Wollesens saw nothing strange about their discounts—even though they were well below market rates and even below Westco's costs.

Not believing them, Westco filed suit against the Wollesens, IPF, and Hartzler. It alleged several claims, but only two were ultimately tried: (1) breach of Hartzler's fiduciary duty of loyalty,

with the Wollesen's being conspirators and (2) Ongoing Criminal Conduct, Iowa Code 706A.

In addition to denying the allegations, IPF filed counterclaims against Westco and a third-party petition against its parent, West Central Cooperative, because the companies were no longer honoring the "deals" that Hartzler struck with them. IPF alleged multiple claims, including breach of contract and negligent empowerment under section 706A.5.

The district court ruled that IPF's 706A.5 claim for negligent empowerment was unconstitutional, because it placed the burden on Westco (the counter-claim defendant) to disprove its negligence. The case went to trial on IPF's remaining claims.

Before trial, Westco requested that the case be tried in equity because its claims against Hartzler, the Wollesens, and IPF were equitable. The district court denied the request, concluding as a matter of law that Westco's remaining claims were legal in nature.

The jury awarded Westco $485,315 against Hartzler—which was equal to the check payments he received from IPF—and awarded IPF $576,189 from Westco.

Both parties appealed, and the Court of Appeals affirmed the district court in all respects, except on its ruling regarding IPF's negligent empowerment claim. As it stands now, the case will return for trial on that issue alone.

Brief in Support of the Request for Further Review

I. By requiring the defendant to disprove negligence, Iowa's Negligent Empowerment statute, section 706A.2(5), violates the Due Process Clause.

Iowa Code section 706A.2(5) makes it "unlawful for a person to negligently allow" their property "to be used to facilitate specified unlawful activity," and it allows a private party to sue for such a violation and collect damages *without* proving negligence: "The *defendant* shall have the burden of proof by a preponderance of the evidence as to the circumstances constituting *lack of negligence*"; the plaintiff need only show that the unlawful activity was indeed facilitated with the defendant's property. Iowa Code § 706(5)(b)(4).

Under this Court's decision in *Hensler v. City of Davenport*, 790 N.W.2d 569 (Iowa 2010), that presumption of negligence violates the Due Process Clause. Indeed, as far as the constitutional analysis goes, there is no material difference between the statutory scheme in *Hensler* and the one here.

The ordinance in *Hensler* penalized the parents of a delinquent child, unless the parents could prove that they were *not* negligent in exercising their supervisory role. That was arbitrary and irrational, this Court held, because there are "multiple factors that can cause" a juvenile to be delinquent that have no causal connection to a parent's negligence. *Id.* at 588-89.

The same is true here. Criminals—white-color and otherwise—often use someone else's property to facilitate their crimes, and the reasons for doing so often (or usually) have nothing to do with the property owner's negligence. Indeed, businesses often have less control over their property than parents do of their children, so the burden-shifting scheme here is even more problematic.

The Court of Appeals disagreed—or so it seems. Without elaboration, the panel declared that "section 706A.2(5)(b)(4) requires the *plaintiff* to prove the defendant's negligence by a preponderance of the evidence." Slip Op. 19 (emphasis added). That does seem to take care of the problem: if the burden is on the plaintiff, there is no due process violation. But it is not clear if that is what the Court of Appeals meant. For one thing, the statute says the very opposite—and unambiguously so. It puts the burden on the plaintiff to prove that the unlawful activity was facilitated with the defendant's property, but it puts the burden on the *defendant* to prove it was not negligent in allowing it to happen.[1] By shifting requiring the defendant to prove its lack of

[1] The relevant provision states in full:

> The plaintiff shall carry the burden of proof by a preponderance of the evidence that the specified unlawful activity occurred and was facilitated by the property or services. The defendant shall have the burden of proof by a preponderance of the evidence as to circumstances constituting lack of negligence and on the limitations on damages in this subsection

Iowa Code § 706A.2(5)(b)(4).

negligence by a "preponderance of the evidence," the statue appears to shift not merely the burden of production but also the burden of persuasion. The parties agreed the statute shifted the burden of proof; they just disagreed on whether the statute is constitutional.

But that is not the only confusing part of the Court of Appeals's ruling. As authority for the proposition that the burden is on the plaintiff, the Court of Appeals cited the Model Act (which is identical to the Iowa statute) and the accompanying commentary. That is confusing because the commentary simply explains why the drafters placed the burden *on the defendant*. Citing to Wigmore's treatise on evidence, the drafters of the Model Act wrote that shifting the burden to the defendant is "in conformance with the normal rule" because the defendant in negligent empowerment cases "presumably has peculiar means of knowledge" about its negligence (or lack thereof). Slip Op. 19. The drafters misapplied what Wigmore wrote—which is to say that Wigmore would not likely have supported shifting the burden in

cases like this[2]—but the point is that the drafters did exactly that; the comment just explains why.

So here's where that leaves us:

(1) The Negligent Empowerment statute, 706A.2(5), unambiguously places the burden on the defendant to disprove its negligence.

(2) The parties here have always agreed that the burden is on the defendant; the only issue is whether that is constitutional.

(3) Without explanation, the Court of Appeals stated that the burden is on the plaintiff to prove negligence, so there is no constitutional problem.

(4) To support that theory, the Court of Appeals cited authority that explains why the burden is on the defendant.

That does not compute. The Court of Appeals either (a) left the burden with the defendant but left the constitutional question unanswered, or (b) rewrote the statute. Neither alterative is satisfactory to the parties or to anyone else who brings or defends a Negligent Empowerment claim. The law should not remain uncertain, especially when constitutional rights are in play. The

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[2] *See* 9 J. Wigmore, Evidence 2486, at 275 (3d ed. 1940) (explaining that this burden-shifting rule should be applied on a case-by-case basis).

Court should therefore grant review and address the constitutional question.

II. To reconcile an inconsistent verdict, courts should not assume that the jury went outside the instructions or made a finding that would violate due process.

When asked whether Westco had proven Hartzler engaged in ongoing unlawful activity—meaning that he was liable under the Ongoing Criminal Conduct statute—the jury said *yes*. When asked the same question for each of the Wollesens, the jury said *no*. That is an inconsistent verdict; there is no way around it.

The jury was instructed, correctly, that "specified unlawful activity"—the key element for an Ongoing Criminal Conduct claim—is an indictable offense under Iowa law, and commercial bribery was the only indictable offense instructed. The jury was also instructed, consistent with the evidence, that Bill, Kristi, and John Wollesen were the only potential bribers. So the jury had two choices: either one of the Wollesens bribed Hartzler, or he was not bribed.

The Court of Appeals recognized the problem (slip op. 10), but because jury verdicts should be "liberally construed" and

reconciled "if it is possible," the court went searching for some other explanation. Slip Op.11 (quoting *Hoffman v. Nat'l Med. Enters., Inc.*, 442 N.W.2d 123, 126 (Iowa 1989). It landed on this one: the jury heard that Hartzler pleaded guilty in federal court to federal wire fraud, so *maybe* the jury found Hartzler liable based on wire fraud. Slip Op. 12.

That was an improper attempt at reconciliation. Federal wire fraud is *not* an indictable offense under Iowa law, so it cannot form the basis for an Ongoing Criminal Conduct claim. Also, the jury was not instructed on the elements of any *Iowa* crime that is similar to wire fraud, nor was it instructed on the definition of *indictable offense*. (Not all crimes are indictable. *See* Iowa Code § 801.4(8)). So by assuming that the jury based its decision against Hartzler on the fact that he pleaded guilty to federal wire fraud, the Court of Appeals had to assume that the jury ignored the instructions and the law.

That is not proper—at least it shouldn't be. We assume that juries follow the instructions; we assume they base their verdicts on the evidence. If a court must do the opposite to save a jury

verdict—if it has to assume that the jury did *not* follow the instructions or made its decision on something other than the evidence—then the verdict is not worth saving. Indeed, doing so would likely create constitutional problems. *See State v. Halstead*, 791 N.W.2d 805, 815 (Iowa 2010).

It would also undermine integrity of the jury system by sending the message that the courts care more about finality than whether justice was done. That is a significant issue—and could be a significant problem. The Court should grant review to make clear that there are limits to what a court can do in reconciling an inconsistent verdict.

III. Whether a party has a right to try a claim in equity (and whether it *must* do so) is a legal issue upon which district courts do not have discretion.

Whether Westco's claims should have been tried in equity is, by itself, worthy of this Court's attention. The dichotomy between law and equity is an issue that often confuses courts and litigants, and that confusion seems to have infected this case. That alone is reason for this Court's review. Indeed, if Westco's claim for breach of loyalty by a fiduciary agent is a tort rather than an equitable

claim (as IPF argues) then this case is the first recognition of that tort under Iowa law.

The broader problem, though, is that the Court of Appeals did not make any definitive legal rulings, because it concluded that district court's decision to try a claim in law rather than equity is reviewed for an abuse of discretion. Slip. Op. 6 (standard of review); *id.* 7 ("We discern no abuse of discretion" in trying the claims at law.). That holding is wrong and should be reversed.

Iowa Code section 611.4 states that "in all cases where the courts of equity, before the adoption of [the Iowa] Code, had jurisdiction," a plaintiff "may" prosecute the action in equity and "*must so proceed* in all cases where such jurisdiction was exclusive." Section 611.10 also gives "either party" the right to have equitable issues tried in equity, even if the remaining issues are at law. *First Nat'l Bank in Sioux City v. Curran*, 206 N.W.2d 317, 321 (Iowa 1973).

Whether a claim fell within the jurisdiction or exclusive jurisdiction of the equity courts "before the adoption" of the Code is a legal question requiring an historical inquiry, and the answer

is either right or wrong; it is not a discretionary one for the district court.

Because the Court of Appeals's opinion establishes a discretionary standard of review, it conflicts with the plain terms of sections 611.4 and 611.10. It also undermines the important, if overlooked, right to try equity claims in equitable proceedings. Indeed, "the right to the application of the principles of equity to causes exclusively equitable, and the right to a trial by the chancellor and to trial *de novo* by the appellate bench, are rights as sacred as the right to have causes at common law" tried by a jury and "revised only for errors of law." *McAnulty v. Peisen*, 208 Iowa 625, 226 N.W. 144, 150 (1929). The Court should grant review to address this important issue.

Conclusion

- What is the constitutional status of Iowa's Negligent Empowerment claim after the Court of Appeals's decision? (We don't know.)

- To save an inconsistent verdict, can a court assume that the jury ignored the instructions or based its decision on insufficient evidence? (We hope not.)

- Does a court have discretion when it comes to deciding whether a party can exercise its *right* to try its claims in equity? (Surely, no).

Each of these questions is important and worthy of further review. Westco respectfully requests the Court grant this application.

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I hereby certify that on January 12, 2016, I electronically filed the foregoing Application for Further Review with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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