

IN THE SUPREME COURT OF IOWA

NO. 15-1766

JEFFREY ANDERSON
Appellant,

vs.

ANDERSON TOOLING, INC., DEAN E. ANDERSON, and
CAROL A. ANDERSON,
Appellees.

ANDERSON TOOLING, INC.
Appellee,

vs.

LORI J. ANDERSON and FABRICATION AND CONSTRUCTION SERVICES, INC.
Appellants

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR JEFFERSON COUNTY
(THE HON. MYRON L. GOOKIN)

APPLICATION FOR FURTHER REVIEW
BY, APPELLEE ANDERSON TOOLING, INC.
(COURT OF APPEALS DECISION FILED FEBRUARY 7, 2018)

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QUESTION PRESENTED FOR REVIEW

DID THE IOWA COURT OF APPEALS APPLY A NARROW DEFINITION OF "CONSPRIACY" IN CONFLICT WITH ESTABLISHED IOWA LAW IN REVERSING THE JUDGMENTS ENTERED AGAINST LORI AND FABCON?

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STATEMENT SUPPORTING FURTHER REVIEW

The Iowa Supreme Court should grant further review in this matter for two reasons. First, "[t]he court of appeals has entered a decision in conflict with [] decision[s] of this court or the court of appeals on an important matter." Iowa R. App. P. 6.1103(1)(b)(1) (2018). Second, "[t]he case presents an issue of broad public importance that the supreme court should ultimately determine." Iowa R. App. P. 6.1103(1)(b)(2).

STATEMENT OF THE CASE

Appellant Jeffery Anderson ("Jeff") filed his Petition at Law and Jury Demand against Anderson Tooling, Inc. ("ATI"), Dean Anderson ("Dean"), and Carol Anderson ("Carol") asserting several theories of recovery. (App. at 1-9). ATI filed an Answer and Counterclaim seeking recovery for conversion, contracts, intentional interference with prospective business advantages, breach of fiduciary duty, and misappropriation of trade secrets. (App. at 10-28). ATI brought a separate action against Lori Anderson ("Lori") for conversion and against Lori and Fabrication and Construction Services, Inc. ("FabCon") for conversion, intentional interference with contracts, interference with prospective business advantages and conspiracy. (App. at 30-45). The parties filed responsive pleadings denying the assertions in the petitions and counterclaim.

The actions were consolidated for trial. (App. at pp. 46-48). All claims were tried to a jury in the Iowa District Court in and for Jefferson County beginning May 14, 2015. (App. at 226). With respect to ATI's claims, the jury returned the following verdict:

1. Interference with prospective business relationships by Jeff - \$336,072.54. (App. at 109).
2. Breach of fiduciary duty by Jeff - \$436,225.18. (App. at 112).
3. Conspiracy by Lori and FabCon to help Jeff appropriate funds and projects belonging to ATI's damage - no further damages awarded. (App. at 114).

After hearing various post-trial motions, the District Court entered judgment in favor of ATI and against Jeff, Lori and FabCon, jointly and severally, in the amount of \$772,297.72. (App. at 205-23).

Jeff, Lori and FabCon appealed. The Iowa Court of Appeals affirmed the judgments against Jeff on February 7, 2018, but reversed the judgments against Lori and FabCon for conspiracy. (Decision pp. 14-17).

STATEMENT OF THE FACTS

Dean Anderson ("Dean") and Carol Anderson ("Carol") started Anderson Tooling, Inc. ("ATI") in 1986. (Tr. at 1313, 1637). "Tooling" includes cutting tools, drill bits, and items to hold them. (Tr. at 1638-39). ATI evolved into an enterprise focused on providing low-priced surplus tooling, turnkey machine installation, trucking, rigging (moving heavy manufacturing machines), buying and selling industrial machines, and on-site machine repair. (Tr. at 1644-45, 1648; App. at 232).

Dean and Jeffery Anderson ("Jeff") are brothers. (App. at 384). As ATI grew over the years, Dean needed help running ATI. (Tr. at 1666). Recognizing Jeff's MBA and professional success, Dean approached Jeff, and Jeff came to work for ATI in 2005 several times about coming to work for ATI. (App. at 937-38). Jeff's wife, Lori Anderson ("Lori") also came to work for ATI as a bookkeeper. (App. at 767). Jeff and Lori both admitted that a fiduciary relationship existed between each of them and ATI during the time they were employed. (App at 24, 12, 33, 50).

Jeff worked exclusively for ATI from 2005 until around 2009, when he started a new company called Fabrication and Construction Services, Inc. ("FabCon"). (App. at 403-404). Jeff operated FabCon and continued to work for ATI. Dean supported Jeff's efforts, but he cautioned Jeff about entering a fiercely competitive industry. (App. at 976, 981). More than anything, Dean was very direct and very clear

with Jeff - still ATI's General Manager and CFO - about what FabCon was not to do. Dean specifically and unequivocally warned Jeff not to do any rigging:

I think the words I used was, "Don't you dare step into my business. Because that's where I make money is rigging. You guys go right ahead and get into fabrication, you go into that bridge crane stuff, you find something to specialize in, but don't you dare step into the footsteps of my business."

(App. at 977-978). Dean repeated this warning at other times. (App. at 978). Despite these warnings, Jeff and FabCon acquired rigging equipment and performed rigging jobs - unbeknownst to Dean. (App. at 979, 1094). Others told Jeff this competition in rigging was wrong. (Tr. at 1146-47).

During summer 2011, while Dean and Carol were away, FabCon performed rigging jobs for Dr. Pepper in Ottumwa and River Bend Plastics in Victor. (App. at 653-669, 1439-1452, 636-638, 1453, 1454). Lori submitted the paperwork for FabCon. (App. at 1446-1449, 1454).

Jeff's formation of FabCon and engaging in rigging jobs created confusion in the marketplace and cost ATI work. ATI customers did not know if they were dealing with Dean and Jeff at ATI or dealing with Jeff at FabCon. Dean described conversations with several ATI customers, including Whirlpool Corporation and Sivyer Steel, who believed ATI and FabCon to be one and the same. (App. at 267-68, 280, 982, 992-93) Lori FabCon quotes to ATI customers. (App. at 1490-1493). ATI's bookkeepers had trouble determining whether receipts

were intended for ATI or FabCon. (App. at 1575). Lori handled the email communication for FabCon, but Jeff - FabCon's owner and ATI's CFO - called the shots on where the money went: "Jeff said [the customer] only wanted to do one wire transfer . . . so I was supposed[d] to apply ATI's portion to the oldest ATI invoice." (App. at 1575).

Dean heard from more customers about the confusion and FabCon's rigging activity, including John Deere, Sivyer Steel, River Bend Plastics, and Whirlpool. (App. at 981-986, 992-993). When Dean confirmed that Jeff was involved in rigging, he fired Jeff - on October 23, 2011. (App. at 993-994, 407).

After Jeff was fired, he approached another Fairfield businessperson, Greg Vorhies, about purchasing FabCon as a going concern - a fabrication company. (App. at 677). Vorhies owns Schaus-Vorhies Manufacturing and related companies that specialize in steel fabrication, painting, and paint stripping. (App. at 675-676). Vorhies declined because, after looking at the FabCon financials Jeff provided, he concluded there was no viable fabrication business. (App. at 677, 680-682). But Vorhies noticed from FabCon's profit and loss statement that its rigging business "was where the money was". (App. at 682, 1497-1502). So, Schaus-Vorhies Rigging was created; it purchased FabCon's rigging assets from Jeff, and ATI had a competitor right down the street. (App. at 682-684). Lori, who owned no part of FabCon and contributed no assets or anything else, became a 25

percent owner of Schaus-Vorhies Rigging. (App. at 685-686, 688). Vorhies bought FabCon's assets to acquire Jeff and Lori's knowledge of the rigging business and its customer base because his company lacked experience in rigging. (App. at 689).

ARGUMENT

THIS COURT SHOULD GRANT FURTHER REVIEW BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH EXISTING PRECEDENT DEFINING "CONSPIRACY," AND THIS COURT SHOULD DETERMINE AN ISSUE OF SUCH BROAD PUBLIC IMPORTANCE.

In its decision, the Iowa Court of Appeals erroneously concluded that record evidence did not support the conspiracy judgment against Lori and FabCon. (Decision, pp. 14-17). Contrary to applicable Iowa Supreme Court case law, the Court of Appeals applied an unreasonably restrictive definition of "conspiracy" that focused exclusively a marshalling instruction, ignoring other instructions that explained and defined "conspiracy." (Decision, pp. 14-17; App. at 132-33 (Instruction No. 46)). Abundant record evidence supports the conspiracy verdict and judgment when the instructions are viewed as a whole and when this Court's conspiracy jurisprudence is applied. See Thavenet v. Davis, 589 N.W.2d 233, 236 (Iowa 1999) ("Instructions must be considered as a whole[.]"); (App. at 116 (Instruction No. 1) ("You must consider all of the instructions together[.]")); Basic Chems., Inc. v. Benson, 251 N.W.2d 220, 232 (Iowa 1977) (defining "conspiracy"); (App. at 132-33 (Instructions No. 46-48) (defining and explaining "conspiracy")).

The Trial Court's three conspiracy instructions as follows:

INSTRUCTION NO. 46

ATI claims that Lori Anderson and FabCon acted in conspiracy with one another and with Jeffery Anderson in carrying out the wrongful acts alleged against Lori

Anderson and FabCon. In order to recover on this claim, ATI must prove all of the following:

1. Jeffery Anderson committed the wrongs of conversion, intentional interference with a prospective business advantage, breach of fiduciary duty, or misappropriation of trade secrets as defined in Instruction Nos. 30, 32, 36 and 41, respectively.
2. Lori Anderson and Fabrication and Construction Services, Inc. participated in a conspiracy with Jeffery Anderson to appropriate funds and projects belonging to ATI.
3. The nature and extent of damage.

If ATI has failed to prove any of these propositions, it is not entitled to damages. If ATI has proved all of these propositions, it is entitled to damages in some amount.

3500.1

INSTRUCTION NO. 47

A conspiracy is an agreement of two or more persons to commit a wrong against another. The agreement can be oral or written, informal or formal, and need not be detailed. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself. It may be proved by direct or circumstantial evidence. Merely because two or more persons associate with each other, or meet to discuss common interests or goals does not, by itself, establish a conspiracy

3500.2

INSTRUCTION NO. 48

A person participates in a conspiracy when the person joins the agreement with the intention to accomplish the wrongful act. A participant need not know all the details of the agreement nor all of the other participants. One who innocently furthers wrongful conduct by another does not participate in a conspiracy.

3500.3

(App. at 132-33).

The instructions accurately define "conspiracy" under Iowa law: "A conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish by unlawful means some purpose not in itself unlawful." Basic Chems., 251 N.W.2d at 232. In its decision, however, the Iowa Court of Appeals applied a much more restrictive (and inaccurate) definition of "conspiracy". (Decision, pp. 14-17). The Court focused solely on the conspiracy marshalling instruction - Instruction No. 46. Ignoring Instructions No. 47 and No. 48, the Court reasoned that the jury found a conspiracy only based upon Lori and FabCon's appropriation of funds and projects belonging to ATI. Thus, the Court continued, unless the judgments against Jeff for interference with prospective business relationships and breach of fiduciary duties themselves involved appropriation of ATI's funds and projects, substantial evidence does not support a conspiracy finding.

The jury found that Jeff committed the wrongs of interference, breach of fiduciary duty, and misappropriation of trade secrets, awarding damages on the first two. (App. at 108-109, 112-14 (Verdict Form No. 2, Questions 10-15, 28-30, 34-36, 38)). The jury was then asked whether Lori and FabCon "participate[d] in a conspiracy with [Jeff] to appropriate funds and projects belonging to [ATI]?" (App. at 114 (Verdict Form No. 2, Question 39)). The jury answered "yes".

Abundant record evidence supports the jury's conspiracy finding:

- Lori worked for ATI and later for FabCon. She helped Jeff with the paperwork to quote and bill ATI's customers for work diverted to FabCon. She used her ATI email address (lori@usedtooling.com) when communicating for FabCon with entities she knew were ATI customers. (App. at 767, 665, 1439-41, 1575).
- While working for FabCon, she saw the jobs Jeff was steering away from ATI. Lori helped FabCon become a company attractive enough for a competitor to purchase FabCon's rigging assets. (App. at 677-82, 1446-49, 1454, 1490-91, 1497-1502).
- FabCon was Jeff's company. Acting through Jeff, FabCon was the knowing beneficiary of jobs that should have been directed to ATI.
- Through Jeff, FabCon knowingly received Cincinnati Insurance checks for work accomplished with ATI labor and equipment for which FabCon did not pay. (App. at 963-70); see Soults Farms, Inc. v. Schafer, 797 N.W.2d 92, 102 (Iowa 2011) (entity is bound by president's actions where president has complete autonomy).
- Jeff and Lori decided to make FabCon the beneficiary of Jeff's tortious conduct. In the end, Jeff and Lori built FabCon's business up to the point that a competitor wanted to buy its rigging assets. When that competitor completed the purchase, Lori became a 25 percent shareholder of the new entity, even though she owned no part of FabCon or its equipment before the sale, and even though she made no capital contribution. (App. at 677-82, 1497-1502).

This evidence clearly supports the conspiracy verdict and judgment. An agreement existed to harm ATI and benefit FabCon. Lori and Fabcon's conduct shows they joined the agreement - Lori by helping create confusion and working to sell FabCon as a rigging business and FabCon by using ATI equipment and personnel to perform jobs, then not paying ATI for those contributions. The Iowa Court of Appeals too narrowly defined "conspiracy." Even using the narrow

definition, substantial evidence shows Lori and FabCon helped Jeff take "funds" - in the form of cash and equipment - and "projects" - in the form of work - from ATI. Iowa law requires no more to support the conspiracy verdict and judgment.

Iowa law is clear that liability for a civil conspiracy must be based on an underlying tort; conspiracy itself, without an underlying the tort, does not give rise to an action or independent damages. Hall v. Swanson, 201 Iowa 134, 206 N.W. 671, 672 (1926). Instead, conspiracy is a method for imposing joint and several liability upon those who act in concert with a principal tortfeasor. See Ezzone v. Riccardi, 525 N.W.2d 388, 402-03 (Iowa 1994) (defendants jointly and severally liable for damages from another's tort where they acted in concert). Iowa law requires that only one party to a conspiracy be found to have committed an actionable, underlying tort. Wright, 652 N.W.2d at 172 ("[T]he wrongful conduct taken by a co-conspirator must itself be actionable.") (emphasis supplied). Those helping are liable for conspiracy because they helped. Id.; Ezzone, 525 N.W.2d at 392.

Here, Jeff committed the torts of interference with business relationships and breach of fiduciary duty. Lori and FabCon joined the conspiracy and helped him. The Court of Appeals narrow focus on what constitutes a "conspiracy" is contrary to existing law.

CONCLUSION

For the reasons set forth, this Court should accept further review in this matter, and reverse the Iowa Court of Appeals decision that reversed the judgments against Lori and FabCon. This Court should enter a decision affirming those judgments.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS
AND TYPE-VOLUME LIMITATION

This application complies with the typeface and type-volume requirements of Iowa. R. App. P. 6.1103(4) because:

[X] this application has been prepared in a monospaced typeface using Courier New in size 12 font, and contains 291 lines of text, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Steven E. Ballard
Signature

02/27/18
Date