

**IN THE SUPREME COURT OF IOWA**  
**No. 22-0259**

---

BRIAN HORA and GREGG HORA, Individually and On Behalf Of  
Hora Farms, Inc.,

Plaintiffs-Appellants/Cross-Appellees,

vs.

KEITH HORA Individually and In His Capacity As A Shareholder,  
Director, and Officer of Hora Farms, Inc. and as Trustee of the Celeste  
N. Hora Trust; KURT HORA; HEATHER HORA; HK FARMS, INC.;  
and HORA FARMS, INC.,

Defendants-Appellees/Cross-Appellants.

---

On Appeal from the Iowa District Court for Washington County,  
Business Court Case No. EQEQ006366,  
The Honorable Sean McPartland

---

**FINAL REPLY BRIEF OF APPELLEE/CROSS-APPELLANT**  
**KEITH HORA**

---

Stephen J. Holtman, AT0003594  
Abram V. Carls, AT0011818  
SIMMONS PERRINE MOYER BERGMAN PLC  
115 3rd Street SE, Suite 1200  
Cedar Rapids IA 52401-1266  
Telephone: 319-366-7641  
Facsimile: 319-366-1917  
[sholtman@spmbllaw.com](mailto:sholtman@spmbllaw.com)  
[acarls@spmbllaw.com](mailto:acarls@spmbllaw.com)

ATTORNEYS FOR APPELLEE/CROSS-APPELLANT KEITH HORA

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES.....	3
STATEMENT OF ISSUES PRESENTED FOR REVIEW .....	3
ARGUMENT.....	4
I.    THE LEGISLATURE INSTRUCTED COURTS TO DETER OMNIBUS AND FAMILY DISPUTES THROUGH FEE SHIFTING.....	4
A.    Standard of Review .....	4
B.    Argument .....	4
1. Plaintiffs Confuse Statutory Meaning With The Burden Of Proof, Which Is A Preponderance Standard.....	4
2. Plaintiffs’ Arguments Do Not Satisfy The Objective And Subjective Prongs of Iowa Code § 490.746(2) .....	5
3. Keith “Incurred” Fees.....	7
II.    PLAINTIFFS ARE OVERLENGTH .....	8
CONCLUSION.....	9
CERTIFICATE OF ELECTRONIC FILING AND SERVICE .....	10
CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS .....	11

**TABLE OF AUTHORITIES**

<b><u>STATUTES</u></b>	<b><u>Page</u></b>
IOWA CODE § 490.746 .....	4-5, 7-8
IOWA CODE § 490.831 .....	6
IOWA CODE § 490.853 .....	7-8
IOWA CODE § 490.858 .....	8
 <b><u>RULES</u></b>	
IOWA R. CIV. P. 1.431 .....	9
IOWA R. APP. P. 6.903 .....	9
IOWA R. APP. P. 6.907 .....	4

**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

**VIII. Whether the District Court should have awarded Keith fees under Iowa Code Sections 490.746 and 633A.4507.**

- Iowa Code § 490.746
- Iowa Code § 490.831
- Iowa Code § 490.853
- Iowa Code § 490.858
- Iowa R. Civ. P. 1.431
- Iowa R. App. P. 6.903
- Iowa R. App. P. 6.907

## ARGUMENT

### **I. THE LEGISLATURE INSTRUCTED COURTS TO DETER UNREASONABLE AND IMPROPER FAMILY DISPUTE FILINGS THROUGH FEE SHIFTING.**

#### **A. Standard of Review.**

As to the denial of Plaintiffs' affirmative request for an award of attorneys' fees under section 490.746, Plaintiffs assert a de novo standard of review. Plaintiffs' Proof Brief at 78; Plaintiffs' Proof Reply Brief at 66 ("P-Reply"). As to the denial of Keith's request for fees under the same statute, Plaintiffs aver review should be for abuse of discretion. P-Reply at 83. Plaintiffs do not explain why the party who makes the request should alter the standard of review. Section 490.746 makes no such distinction.

Keith maintains that the denial of his fee application was a slice of derivative and trust matters that are equitable proceedings subject to de novo review. Iowa R. App. P. 6.907.

#### **B. Argument.**

##### **1. Plaintiffs Confuse Statutory Meaning With The Burden Of Proof, Which Is A Preponderance Standard.**

By partially quoting the definition of "improper" that Keith provided to evidence the plain meaning of Section 490.746, Plaintiffs mistake a statutory standard with the quantity or quality of evidence

needed to meet it. Keith has not argued for a “good manners’ standard” as Brian and Gregg suggest. P-Reply at 84. He argued that the meaning of “improper” in Section 490.746(2) is not ambiguous.

Plaintiffs extend this error by likewise arguing that Section 490.746(2) is a “stringent standard” that parallels Federal Rule 11, which, in practice, results in sanctions for only the most egregious attorney misconduct. P-Reply at 84 (citing a Connecticut case). The text of Section 490.746(2) stands in contrast to this assertion too. None of its words or the statutory scheme around it evidence any intention by the legislature to depart from the civil preponderance proof burden, whether to loosen it or as Plaintiffs (must) advocate, make it more “stringent.”

## **2. Plaintiffs’ Arguments Do Not Satisfy The Objective And Subjective Prongs of Iowa Code § 490.746(2).**

The deputization of shareholders to act on behalf of a corporation imputes a duty to pursue actions that have objective merit and do so with subjective good faith. This is the meaning of Section 490.746(2). Where a preponderance of the evidence shows that a shareholder failed to uphold either prong—reasonable cause and proper purpose—in “commenc[ing] or maintain[ing]” suit, then the shareholder bears the cost of his action. Iowa Code § 490.746(2).

Counsels’ discretionary decision to not seek a lengthy summary

judgment is not probative that the claims against Keith have “reasonable cause” as Brian and Gregg contend. P-Reply at 84. Nor do disagreements over business judgments indicate that a reasonable violation of Iowa law has occurred. Saying that there are “problems” or that a disagreement exists over “Keith’s past management style or practices,” P-Reply at 84-85, says nothing about whether Plaintiffs’ challenge to these business judgments was objectively reasonable under Iowa law. As iterated throughout Keith’s principal brief, Plaintiffs’ failed to adduce a genuine question on Keith’s honestly and good intentions and specifically failed to admit evidence (or argument) on certain elements of their Section 490.831 contentions.

Challenging the payment of expenses because the form of the transaction is in their eyes wrong, but that has not caused any damage, is unreasonable. *See* App. Vol. II 584-85 at 111:2-112:7. Challenging in-kind trade practices used during Plaintiffs’ farm tenure, subsequently accepted by Hora Farms’ accountant, and for which there has been no damage, is unreasonable. Arguing that Keith was biased in his treatment of Kurt, which mirrored the treatment that Brian and Gregg previously received, is unreasonable. Plaintiffs knew all about Hora Farms’ practices in the 1990’s. Challenging those practices fifteen or more years after the fact is

unreasonable. In sum, the “proceeding” that Plaintiffs’ both “commenced” and “maintained” lacked “reasonable cause.” Iowa Code § 490.746.

Brian and Gregg do little to repel the facts and conclusion that this case was “commenced” and “maintained” as a result of their subjective and improper purposes. *See* P-Reply at 85-86 (arguing conclusions and not citing evidence of proper purposes). Accordingly, Keith relies on his principal briefing and will not repeat all the evidence of his sons’ impropriety here.

### **3. Keith “Incurred” Fees.**

The incongruity found in Plaintiffs’ positions continues in their claim that Keith “does not have expenses incurred in defending this proceeding.” P-Reply at 86. When it comes to their offensive liability theory, Plaintiffs argue Hora Farms inappropriately reimbursed expenses incurred by Keith in connection with this case. Plaintiffs’ Proof Brief at 79 (citing Iowa Code § 490.853 (“A corporation may, before final disposition of a proceeding, advance funds to pay for or reimburse expenses incurred in connection with the proceeding by an individual who is a party to the proceeding because that individual is a director . . .”). But when it comes to Plaintiffs’ defensive positions, they argue that Keith did not pay and

therefore incur fees at all. P-Reply at 86.

Logically, Plaintiffs cannot argue this issue from both ends. And statutorily, which is ultimately what matters, Keith only has to “incur[]” fees for them to be shifted, Iowa Code § 490.746(2), not “[pay]” them as Brian and Gregg advocate, P-Reply at 86-87. Otherwise the point of providing indemnification is superfluous for the exact sorts of frivolous claims it was designed to most guard against. *See* Iowa Code §§ 490.853, 490.858. Of course, Keith has a reciprocal obligation to reimburse Hora Farms for sums that he collects from Brian and Gregg for their unreasonable and improper actions.

## **II. PLAINTIFFS ARE OVERLENGTH.**

The hundreds of pages of pre-trial, post-trial and post-judgment briefings in this case gave Plaintiffs notice of what was coming on appeal and the ability to anticipate and address Keith’s arguments. They did this, or at least were given the opportunity to do this, in the forty-four pages of argument that Plaintiffs included in their opening proof brief. For Plaintiffs to then submit fifty seven pages of argument on these same issues in reply is an exhausting rehash and violates the spirit if not the letter of

appellate rules.<sup>1</sup> Keith does not object to his sons' right to submit a "reply brief" pursuant to Appellate Rules 6.903(4)-(5). What Keith objects to is their decision to exceed "reply brief" length limitations, Iowa R. App. P. 6.903(g)(1), by tens of pages and several thousand words, and to cite new but previously available authorities in a re-argument of prior positions.

Keith defers to the Court's discretion on how to handle this issue. Because Keith takes the position that his sons' re-arguments fare no better than their initial arguments, he does not now ask the Court to strike or for an opportunity to sur-reply. But in the event the Court is inclined to materially consider one of Plaintiffs' new authorities or positions, Keith requests that he be given notice and an opportunity to submit argument.

### CONCLUSION

Defendant Keith Hora maintains the positions stated in his Opening Proof Brief, and for the foregoing reasons respectfully requests that the judgment denying his fee application be reversed, with all sums requested therein assessed against Plaintiffs.

---

<sup>1</sup> Civil practice rules instruct that reply briefs should be "concise" and "assert newly decided authority or [] respond to new and unanticipated matters." Iowa R. Civ. P. 1.431(5). Reply briefs "should not reargue points made in the opening brief." *Id.*

Dated: October 6, 2022

Respectfully submitted,

SIMMONS PERRINE MOYER BERGMAN  
PLC

/s/ Abram V. Carls

Stephen J. Holtman AT 0003594

Abram V. Carls AT0011818

115 Third Street SE, Suite 1200

Cedar Rapids, IA 52401-1266

Telephone: (319) 366-7641

Facsimile: (319) 366-1917

Email: sholtman@spliblaw.com

acarls@spliblaw.com

ATTORNEYS FOR APPELLEE/CROSS

APPELLANT KEITH HORA

**CERTIFICATE OF ELECTRONIC FILING AND SERVICE**

I certify that, on October 6, 2022, I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following counsel. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

John Lorentzen  
Sarah Gayer  
Joseph Younker  
Matthew Barnd

/s/ Abram V. Carls

## **CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS**

This brief complies with the limitation on the volume of type set forth in Iowa R. App. P. 6.903(1)(g)(1). It contains 1,217 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the type-face requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f). It has been prepared in a proportionally spaced typeface, using Microsoft Word 2013 in 14-point Calisto MT.

/s/ Abram V. Carls \_\_\_\_\_