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IN THE SUPREME COURT OF IOWA

Supreme Court Case Nos. 22-0259

BRIAN HORA and GREGG HORA, as Shareholders of HORA FARMS, INC. and as Beneficiaries of THE CELESTE N. HORA TRUST,
Plaintiffs-Appellants/Cross-Appellees,

vs.

KEITH HORA, Individually, as Director and Officer of HORA FARMS, INC., as a Shareholder 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.

APPEAL FROM THE IOWA DISTRICT COURT
WASHINGTON COUNTY, IOWA
BUSINESS COURT CASE NO. EQEQ006366

THE HONORABLE SEAN MCPARTLAND

FINAL BRIEF OF APPELLEES/CROSS-APPELANTS KURT HORA, HEATHER HORA and HK FARMS, INC.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. As Operations Manager, Kurt followed the template Gregg and Brian established. Year after year, Kurt presented Keith with lengthy settlement sheets regarding production, expenses, and services. Lenders and others were clear in their trial testimony that Kurt provided them with accurate information that was neither false nor misleading. Given these facts, was the District Court correct in dismissing claims against Kurt for an alleged breach of his duty of loyalty to Hora Farms?

Cases

Clinton Land Co. v. M/S Assoc., Inc., 340 N.W.2d 232 (Iowa 1983)
Dix v. Casey's Gen. Stores, Inc., 961 N.W.2d 671 (Iowa 2021)
DeBower v. Cty. of Breman, N.W.2d 20 (Iowa Ct. App. 2014)
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Whitfield & Eddy, P.L.C v. Mitchell, 710 N.W.2d 257 (Iowa Ct. App. 2005)

Rules

Iowa R. App. P. 6.904(3)(g)

II. Given that scant evidence was offered at the time of trial, or discussed in the parties' briefs, establishing any grounds for liability of either Heather individually or HK Farms, did the District Court correctly rule that Heather or HK Farms can not be liable for Kurt's alleged breach of his duty of loyalty?

Cases

Rowen v. Le Mars Mut. Ins. Co. of Iowa, 282 N.W.2d 639 (Iowa 1979)

III. Plaintiffs have been aware of—and complaining about—Hora Farms' operation for nearly three decades. Was the District Court correct in applying Iowa Code § 614.1(4) to bar pre-2012 claims?

Cases

Jones v. Univ. of Iowa, 836 N.W.2d 127 (Iowa 2013)

Statutes

Iowa Code § 614.1(4)

IV. Iowa Code § 490.746(2) allows the court to order the plaintiff in a derivative proceeding to pay any defendant's expenses—including attorney's fees—when the proceeding was commenced or maintained for an improper purpose or without reasonable cause. Were the actions of Gregg and Brian to force their father and brother out of the family farming operation to gain control of it "improper" so as to support an award of expenses? Given that Gregg and Brian established the template for many of the practices about which they complain, did the District Court correctly determine that they did not lack "reasonable cause" so as to support an award of Defendants' expenses under Iowa Code § 490.746(2)?

Cases

EMC Ins. Grp., Inc. v. Shepard, 960 N.W.2d 661 (Iowa 2021)
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Statutes

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Other Authorities

For Better or for Worse?: Marriage of the Texas and Model Business Corporation Act's Derivative Action Statues and What it Means for Corporations,

35 Tex. Tech L. Rev. 347 (2004)
Model Bus. Corp. Act Ann. § 7.46(2)

V. Do HK Defendants' equitable defenses provide an alternative basis to affirm the District Court's ruling?

Cases

Lara v. Thomas, 512 N.W.2d 777 (Iowa 1994)
Liken v. Shaffer, 64 F. Supp. 432 (N.D. Iowa 1946)
Matter of Voss, 553 N.W.2d 878 (Iowa 1996)
Schlegal v. Ottumwa Courier, a Div. of Lee Enterprises, Inc., 585 N.W.2d 217 (Iowa 1998)
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Vinson v. Linn Mar Cmty. Sch. Dist., 360 N.W.2d 108 (Iowa 1984)
Weede v. Bechtel, 56 N.W.2d 173 (Iowa 1952)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues presented do not fall within the retention guidelines of Iowa R. App. P. 6.1101(2). Additionally, this matter involves application of existing legal principles which requires transfer to the Court of Appeals pursuant to Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

This case involves two minority shareholders attempting to force their father and brother out of the family farm to gain control of the operation. Gregg Hora ("Gregg") and Brian Hora ("Brian") (collectively, "Plaintiffs" or "Gregg and Brian") initiated their lawsuit on August 18, 2017 by filing their Petition ("Petition"). After a change in counsel, Plaintiffs filed their Amended

Petition in Equity ("Amended Petition") in November of 2018. (App. Vol. I pp. 0289-0306.) Defendants Kurt Hora ("Kurt"), Heather Hora ("Heather"), and HK Farms, Inc. ("HK Farms") (collectively, "HK Defendants") timely answered both the Petition and the Amended Petition. (App. Vol. I pp. 0289-0304, 0307-0333.)

Nearly two years into this case, Defendant Keith Hora ("Keith") moved for partial summary judgment. (App. Vol. I pp. 0334-0345.) HK Defendants joined Keith's motion. (HK Defendants' Joinder, 6/6/19.) Plaintiffs resisted the motion. (App. Vol. I pp.0360-0362.) The District Court, applying the limitations period in Iowa Code § 614.1(4), ruled that "[a]t the time of trial, Plaintiffs may proceed only with evidence to support claims dating from August 18, 2012 forward." (App. Vol. I p. 0375.)

The parties tried this case to the District Court over eleven days from July 27, 2020 through August 10, 2020. (App. Vol. I p. 0541.) During the course of the proceedings, the District Court heard from numerous witnesses, and received hundreds of exhibits totaling thousands of pages. (App. Vol. I p. 0541.) The parties submitted written closing arguments, and the case was deemed submitted on October 22, 2020. (App. Vol I p. 0539.) On September 20, 2021, "[h]aving considered the court file, including the written presentations of the parties, the evidence at the time of trial, including exhibits and the testimony and credibility of the witnesses, and the authorities

governing these matters," the District Court entered its ruling and dismissed all of Plaintiffs' claims. (App. Vol I pp. 0539, 0575.)

Plaintiffs filed an expansive, forty-page motion under Rule 1.904 on November 11, 2021. (App. Vol. I pp. 0582-0621.) Keith and the HK Defendants each resisted the motion. (App. Vol. I pp. 0622-0631.) The District Court declined to "engage in a rehash of the factual or legal issues already decided" and "[b]ased upon review of the Ruling and for the reasons set forth in Defendants' resistance pleadings," concluded that "the Ruling reflects the Court's ultimate determination regarding each substantive issue presented at trial." (App. Vol I p. 0658.)

On February 25, 2022, Keith filed an application for fees. (Keith's Application for Costs and Fees.) Plaintiffs resisted. (App. Vol. I pp. 0673-0688.) The District Court denied Keith's application. (App. Vol. I pp. 0689-0691.)

On March 8, 2022, HK Defendants filed a fee application. (App. Vol. I 0692-0836.) Plaintiffs' resisted the application. (App. Vol. I pp. 0837-0839.) The District Court denied HK Defendants' application. (App. Vol. I pp. 0840-0841.) HK Defendants filed a timely notice of appeal regarding the denial of their request for fees. (App. Vol. I pp. 0849-0856.)

STATEMENT OF FACTS

Under Appellate Rule 6.903(3), HK Defendants omit a separate statement of the facts and include their discussion of the evidence with their arguments.

ARGUMENT

I. Kurt misappropriated no property—corn, inputs, labor, or otherwise; the District Court correctly dismissed the claims against Kurt.

Q. Is Kurt worth to Hora Farms what he received?
A. He's worth a lot more than he received. (App. Vol. II p. 0903; Keith Hora, Tr. Vol. X 78:5-6.)

Gregg and Brian claim that Kurt breached his duty of loyalty to Hora Farms arising from his employment by stealing corn, and overcharging for inputs and labor. Throughout the duration of this case, however, their theory has been long on assertion and short on proof. Gregg and Brian's appellate argument is consistent in this regard. Their argument fails.

A. Error preservation.

The HK Defendants do not dispute that Plaintiffs have preserved error on this issue.

B. Scope and standard of review.

The standard of review in this case is *de novo*. While reviewing cases *de novo*, the Court gives "deference to the factual findings of the [district] court but are not bound by them." *Dix v. Casey's Gen. Stores, Inc.*, 961 N.W.2d 671, 681

(Iowa 2021) (*quoting In re Est. of Johnson*, 739 N.W.2d 493, 496 (Iowa 2007)). "In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the district court, but is not bound by them." Iowa R. Civ. P. 6.904(3)(*g*); *see Petition of Chapman*, 890 N.W.2d 853, 856 (Iowa 2017), *as amended* (May 8, 2017) ("[u]nder a de novo standard of review, we are not bound by the trial court's conclusions of law or findings of fact, although we do give weight to factual findings, particularly when they involve the credibility of witnesses").

In this case, the District Court made several key factual findings with respect to witness credibility, which will be discussed in detail below. (*See, e.g.*, App. Vol. I pp. 0548, 0556 ("The Court agrees, and found Brian's lack of knowledge or recall regarding rent not to be credible, given the extensive and lengthy litigation involving these parties and the significance of such information to issues in the case") ("Although the Court did not disagree with all of their [Gregg and Brian's experts'] opinions, the Court found their testimony to be less credible than other expert testimony in the case")).

C. Kurt stole no corn.

Gregg and Brian's case against Kurt distills to an assertion that Kurt stole corn from Hora Farms. (Plaintiffs' Brief, p. 49 (alleging "Kurt's taking of the corn sometime after 2008…was simply theft"), p. 50 (alleging "Kurt

wrongfully took hundreds of thousands of bushels of HFI's corn.").) Kurt did not.

1. Plaintiffs bear the burden to prove Kurt stole corn; bringing a fiduciary claim does not make it otherwise.

As a threshold matter, the burden remains with Gregg and Brian to prove their claim. *See, e.g., Whitfield & Eddy, P.L.C v. Mitchell*, 710 N.W.2d 257, *4 (Iowa Ct. App. 2005) (Table Opinion) ("[i]n order to show conversion, plaintiff must show [the elements of conversion]") (emphasis supplied); *DeBower c. Cty. of Bremer,* 852 N.W.2d 20 (Iowa Ct. App. 2014) (Table); *see also, Larew v. Hope Law Firm, P.L.C.,* 977 N.W.2d 47, 61-63 (Iowa 2022) (recognizing "the intentional tort of conversion is the civil counterpart to theft").

Being short on proof, however, Gregg and Brian attempt to flip the burden. They wrap their theft allegations in a fiduciary duty claim (duty of loyalty) and assert "Kurt has the burden of proof regarding discharge of his duties." (Plaintiffs' Brief, p. 37.) As with their proof on the merits, the legal authority they cite in support of this proposition comes up short.

In *Clinton Land Co. v. M/S Assoc., Inc.,* the Iowa Supreme Court affirmed the lower court's decision to leave the burden with plaintiffs. 340 N.W.2d 232, 235 (Iowa 1983). Further, the fiduciary at issue was that of a real estate broker.

In *Matter of Mt. Pleasant Bank & Tr. Co.*, the duties at issue were that of a trustee. 455 N.W.2d 680, 683 (Iowa 1990.). Plaintiff alleged the prior trustee

"acted to favor collecting [one of its customer's] debt for operating capital by sacrificing the interests of the bondholders." Kurt was an employee of Hora Farms, not a trustee. This case does not support Plaintiffs' proposition.

In *Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639, 648 (Iowa 1979), the fiduciaries were "officers and directors" of plaintiff company. The district court also found in that case that the fiduciaries had "actively concealed important characteristics of the transaction from the parties in interest." *Id.* The district court made no such findings here and Kurt was not an officer or director of Hora Farms.

Tellingly, Plaintiffs cite no authority for the proposition that an employee bears the burden to prove that he did not steal from his employer. This makes good sense. Plaintiffs' argument is akin to shouldering the burden of proof on a cashier whose cash drawer doesn't balance at the end of the day to prove she did *not* steal.

Even if this burden shifting analysis was accurate, the burden would not shift to Kurt here. "The key is access to the proof; the burden of proof ordinarily rests on the party who possesses the facts on the issue in dispute." *Id.* at 685. As discussed below, Keith had the same access to all of the facts and information that Kurt had. Moreover, Keith approved of all of Kurt's corn payments.

But even if Kurt somehow did have the burden to prove he did not steal corn, he has carried it. As described below, Kurt testified at length and provided detailed accounting of the factors that affected the difference in corn shown as harvested and corn that was ultimately sold by Hora Farms.

The District Court was correct in leaving the burden with Plaintiffs—and in deciding that Plaintiffs failed to meet their burden. (App. Vol. I p. 0573.)

2. Kurt was entitled to all of the Hora Farms corn he used in his operation or received as compensation.

Just as his older brothers before him, Kurt had an agreement to receive part of his compensation in-kind. (App. Vol. II p. 0251; Tr. Vol. I 163:3-23; 202:24-203:17; App. Vol. II pp. 0888-0889; Tr. Vol. X 61:8-62:22; App. Vol. IV pp. 0139, 0251, 0181-0235; Exs. 304, 507(a).) In Kurt's case, in-kind compensation took the form of grain, which Kurt fed to the hogs in his own operation. To backfill their bare allegations of theft, Plaintiffs claim that Kurt "underreported the amount of [Hora Farms'] corn he used" (Plaintiffs' Brief, p. 38) and present a distorted version of the disposition of approximately 85,000 bushels of corn. (Plaintiffs' Brief, pp. 45-49.)

To support their "underreported" argument, Plaintiffs point to the agreed-upon assumption that Kurt was feeding nine bushels of corn per hog sold. Before addressing the assumption, some context. Initially, to account for the corn he received from Hora Farms, Kurt weighed the corn and reported

the amounts on his annual settlement sheets. (*See, e.g.,* Ex. 331.) At trial, Kurt testified in detail about how he would mix his hog rations and weigh the corn. (*See* App. Vol. II pp. 0647-0654; Tr. Vol. VIII 74:9-76:22; 77:7-81:5.) Since this is farming, however, there were practical problems with this method. The process was time consuming. Records were hand written in all kinds of weather. Various employees recorded the weights and completed the necessary conversions. Multiple opportunities for errors existed with this method. (App. Vol. II pp. 0675-0678; Tr. Vol. VIII 133:21-134:24; 135:22-136:14.)

Given the risk of error and mindful of his responsibility to maintain records (App. Vol. II p. 0678; Tr. Vol. VIII 136:8-13), Kurt considered switching methods. Specifically, Kurt suggested—and Keith agreed—to move to an assumption of nine bushels of corn per hog sold by Kurt. (Tr. Vol. VIII 137:25-138:20; App. Vol. II p. 0679; Tr. Vol. VII 139:12-14.) The assumption was based on the actual ration Kurt fed to his hogs and the recommendation of the feed company he used, Big Gain, Inc. ("Big Gain"). (App. Vol. pp. 0660, 0676-0677; Tr. Vol. VIII 90:16-24; 134:12-13; 134:20-135:13.) Kurt and Keith began using the nine bushel assumption in 2003 or 2004. (Tr. Vol. VIII 138:21-24.)

In support of their challenge to the nine bushels assumption, Plaintiffs do not rely on a swine nutrition expert. They do not rely on a hog producer. Rather, Plaintiffs rely on a fraud examiner, Kerry Bolt, with no significant

experience with a hog operation. (Plaintiffs' Brief, pp. 40-42.) Mr. Bolt's lack of a swine nutrition frame of reference was apparent at trial.

Mr. Bolt did not understand, or know how to use, the Iowa State University ("ISU") documents he relied on in forming his opinions.[1] Notably, one document was so important to Mr. Bolt that he tucked it in his suitcoat pocket, brough it to trial, and produced it—for the first time—on the stand. The document, Exhibit 358, is an ISU budget template. Apparently, Mr. Bolt thought that this document would tell him how many bushels of corn it would take to bring a hog to the market weight of 250 pounds. It does not. As demonstrated during cross examination, the form simply provides a template for how to create a budget. The cells in the spreadsheet are not live cells; typing in a given market weight does not indicate the amount of corn it would take to bring a hog to that weight. (Tr. Vol. IX 117:18-124:15; Tr. Vol. VII 6:23-19:8; App. Vol. II p. 0096; Exs. 360-361.)

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[1] It is worth noting that, as discussed below, representatives from Big Gain, the company that developed Kurt's hog ration and sells feed to Kurt, testified that Big Gain does not rely on ISU data in general, or the specific ISU documents received into evidence at trial, in creating its feed rations, including Kurt's ration. (App. Vol. II p. 0606, 0662-0663; Tr. Vol. VII 105:11-17.; Tr. Vol. VIII 96:16-97:7.)

Kurt, on the other hand, presented evidence regarding the actual rations used to feed his hogs. Kurt uses a feed ration developed by Big Gain, and buys his hogs from a related entity. (App. Vol. II pp. 0625-0626, 0657-0659; Tr. Vol. VIII 5:21-6:5; Tr. Vol. VIII 85:8-87:5.) Big Gain representative Mark Goehring provided experienced-backed, credible testimony that, using the Big Gain ration and knowing Kurt's hogs, it would take just over nine bushels of corn to take a hog to market weight. (App. Vol. II p. 0660; Tr. Vol. VIII 90:16-20; *see also* Ex. 359.) Specifically, Mr. Goehring testified that the nine bushels assumptions is based on a market weight of approximately 270 pounds (App. Vol. II p. 0660; Tr. Vol. VIII 90:16-24), undermining Plaintiffs' assertion that the nine bushels assumption is tied to a 250 pound market weight. (Plaintiffs' Brief, p. 39.) Mr. Goehring also testified that the nine bushels assumption accounts for death loss. (App. Vol. II pp. 0660-0661; Tr. Vol VIII 90:21-91:16), undermining Plaintiffs' assertion that Kurt "ignored the fact he fed [Hora Farms'] corn to hogs that died before sale." (Plaintiffs' Brief, p. 39.) The nits Mr. Bolt, the accountant-turned-fraud-examiner, picks over the nine bushels assumption do not stand up to the experience-backed, credible testimony of Mr. Goehring. Perhaps that is why the District Court found Mr. Bolt's testimony "to be less credible than other expert testimony in the case." (App. Vol. I p. 0556.)

In September of 2015, Kurt, with Keith's approval, returned to weighing the Hora Farms corn he was including in the feed for his own hogs. Kurt did this because he had installed—at his own expense—a new scale on his feed mill. By tracking the weights digitally, the new systems eliminated much of the potential for human error associated with the old system. (App. Vol. II pp. 0696-0698; Tr. Vol. VIII 167:13-169:24.)

After Kurt returned to weighing corn, the actual weights for 2016 and 2017 show more than nine bushels of corn used per hog sold. (App. Vol. II p. 0765; Tr. Vol. IX 67:17-20.) Kurt addressed this at trial. During those years, HK Farms' herd experienced unusually high death loss, which was much higher than the average death loss baked into the nine bushels assumption. (App. Vol. II pp. 0770-0771; Tr. Vol. IX 72:24-73:7.) Further, the herd was hit with county-wide disease, which not only increased death loss but also substantially decreased feed efficiency for the hogs that lived and were later sold. (App. Vol. II pp. 0767-0769; Tr. Vol. IX 69:25-70:18; 71:6-16.) Furthermore, Hora Farms stopped cleaning corn in 2015, meaning that the non-nutritive bits of the corn—known as foreign matter or FM—were no longer being taken out prior to being fed to Kurt's hogs. Consequently, as Kurt testified, the nutrition per bushel decreased, contributing to an increase in bushels fed per hog to achieve the same nutrition as the cleaned corn used prior to 2016. (App. Vol. II pp. 0765-0766; Tr. Vol. IX 67:17-68:24.)

When set against the actual practice of farming and testimony from agricultural professionals, Plaintiffs' "underreported" argument appears underdeveloped. The District Court was correct in rejecting it.

Similarly, Plaintiffs failed to prove that Kurt was not entitled to the 85,000 bushels.[2] Kurt agrees with Plaintiffs on one point. In their Brief, Gregg and Brian state that Kurt "*admits* to having taken 84,902 bushels of [Hora Farms'] corn sometime between 2008 and 2013." (Plaintiffs' Brief, p. 46. (emphasis original)) Kurt did take this corn. He took it because he was entitled to it.

Trial Exhibit 190 substantiates Kurt's receipt of the 85,000 bushels. (App. Vol. III p. 0368; App. Vol. II pp. 0708, 0723; Tr. Vol. IX 9:8-15, 24-10:2.) At trial, Kurt explained Exhibit 190 at length. (App. Vol. II pp. 0709-0716, 0723; Tr. Vol. IX 10:3-17:20; 24:7-14.) Simply put, under the compensation arrangement, the 85,000 bushels represented corn that Kurt was entitled to and could draw on after September 30, 2008. (App. Vol. II p. 0733; Tr. Vol. IX 34:8-14.)

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[2] Claims regarding these 85,000 bushels pre-date 2012. (*See* App. Vol. III p. 0368; App. Vol. II p. 0732; Tr. Vol. IX 33:19-23.) Consequently, as below in § III, they are barred by the statute of limitations.

In response to Gregg and Brian's accusations of "stolen" or "missing" corn, Kurt created Exhibit 245 to account for the corn at issue. (App. Vol. II pp. 0699-0700, 733; Tr. Vol. VIII 173:2-7; 174:19-22; Tr. Vol. IX 34:21-25.) Kurt used the accounting of the 85,000 bushels outlined in Exhibit 190 in creating Exhibit 245. (App. Vol. II pp. 0702-0703; Tr. Vol. IX 175:2-176:20.) Kurt testified about Exhibit 245 extensively at trial. (App. Vol. II pp. 0754-0763; Tr. Vol. IX 56:10-65:2.)

Kurt's testimony included detailed descriptions of "shrink" both in terms of "unaccounted for bushels" and "moisture shrink." (App. Vol. II p. 0734; Tr. Vol. IX 36:13-22.) Regarding "unaccounted for bushels" Kurt gave detailed testimony about the life of a kernel of corn from harvest to sale. Kurt testified that combine yield monitors—which measure the flow of grain as it is being harvested via a pressure plate—are known to be inaccurate. (*See* App. Vol. II p. 0737-0741; Tr. Vol. IX 39:23-43:21; *see also* App. Vol. II p. 0668-0669; Tr. Vol. VIII 123:17-124:10 (Greg Griffin's testimony explaining how a combine yield monitor works.)) But the Court does not have to take Kurt's word for it. Greg Griffin, a certified crop specialist with Agriland FS who has no interest in this case (*see* App. Vol. II p. 0665; Tr. Vol. VIII 120:6-18), testified that when he calibrates a combine yield monitor, he tries "to get it within 3 or 4 percent...I try to get it within 96 percent or whatever." (App. Vol. II p. 0671; Tr. Vol. VIII 126:1-4.)

Kurt also testified that the cleaning and storage process is tough on corn. (*See* App. Vol. II pp. 0741-0753; Tr. Vol. IX 43:22-55:8.) Kurt explained to the District Court that a grain auger and a too-steep downspout resulted in damaged corn. (*See* App. Vol. II pp. 0745-0752; Tr. Vol. IX 47:18-54:23.) Kurt offered testimony on how he oversaw efforts to address these issues with the decades-old grain system. (App. Vol. II pp. 0749-0752; Tr. Vol. IX 51:4-54:23.)

Kurt also testified to the fact that corn kernels shrink due to water evaporation, and that moisture shrink continues through the storage process. (App. Vol. II pp. 0734-0737; Tr. Vol. IX 36:23-39:15.) In other words, the number of bushels decreases as the corn dries. In fact, Hora Farms' grain tickets document this moisture shrink, resulting in a significant loss of bushels compared to the yield monitor data. (*See* App. Vol. V pp. 0533, 0543, 0547, 0555.)

Kurt's explanation shows that after Hora Farms' sales, Kurt's compensation, monitor error, damaged corn, and moisture shrink are accounted for, the "missing corn" is but a small fraction of Hora Farms' annual production of more than 150,000 – 200,000 bushels of corn. In other words, the kernels Gregg and Brain accuse Kurt of stealing do not exist and Plaintiffs did not prove their case.

D. Kurt did not "overcharge" for inputs or labor.

On appeal, Brian and Gregg also claim that "Kurt wrongfully caused HFI to pay $131,534 in crop input expenses" and "Kurt improperly caused HFI to pay for 6,730 hours of HK Farms' labor it did not receive, amounting to $67,305." (Plaintiffs' Brief, pp. 52-54.) They call these payments "unfair." Brian and Gregg then make the legal leap—without explanation or analysis—that this alleged unfairness amounted to "misappropriation" of Hora Farms' assets.

It is unclear what legal theory upon which Brian and Gregg rely to try and hold Kurt, an employee, liable for "wrongfully causing" his employer to pay him. There is no allegation Kurt defrauded or misled Keith. Nor could there be. Keith had the same access to Kurt's records as Kurt did and, as detailed herein, Keith approved the year end settlements each year, which accounted for both inputs and expenses. *See* § I.F.

Tellingly, this theory of overpayment is *entirely* based on Mr. Bolt's hired expert reports. The testimony at trial revealed that Mr. Bolt did not understand or misread the records upon which he relied.[3] For instance, Mr. Bolt

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[3] Ironically, it is the "woefully lacking records" about which Brian and Gregg complain that undergird the "forensic accounting" Mr. Bolt completed. Mr. Bolt, notably, has little farming experience.

interpreted PC Mars Code 481 as only including Kurt charging Hora Farms for Labor. (App. Vol. 4 p. 0038; App. Vol. 4 p. 0092.) ("the HK Farms record, which is account 481, which is the account where he kept track of the number of hours that his hired hands worked at Hora Farms. As you can see, there's a significant difference between the amount of reimbursement he requested on the settlement sheet and the amount of hours actually worked per his own HK Farms records").

In reality, Code 481 was used as a catch all, containing entries for miscellaneous expenses Kurt incurred expenses on behalf of Hora Farms, including labor, hired help meals, expenses Kurt advanced, and equipment and parts Kurt purchased for Hora Farms.

> Q. You mentioned a PcMars 481 code. What is that? A. That is a special code I set up as Hora Farms, Inc. I tried to put things in there -- Heather and I would input stuff into it. And I would remember to tell her that I picked up whatever parts at a certain store and put it on the credit card. I would try to remind her to put it under the 481 code so that we had that. We usually put it under the code and then tried to write a description of what it was…. And then we were trying to put in there -- if I made some purchases, like we said earlier, in some of the stores around town, as much as we could remember to get in the thing, we tried to do it to the best of our ability and track what our expenses -- like we were paying for Hora Farms that way…And there would be times when we might have four or five guys there working, and it's -- you call Casey's and get three pizzas and 12-pack of pop, and that comes out. And just a lot of that going on. Heather would cook for them at times and lots of times. And so we just tried to capture -- we knew we were giving that benefit to these guys. They were working on the Hora Farms operation. And it [code 481] was just a way to track where that money was going

(App. Vol. II pp. 0685-0688; Tr. Vol. VIII 151:24-154:20; *see* App. Vol. II p. 0646; Tr. Vol. VIII 58:13-17: ("And if I had to pick up parts or supplies that I needed that those places didn't have, then I would just pay for them, write it down in the notebook with the hours, and then at the end of the year we would put it down on this document so I could show what I had paid for for (*sic*) them."))

Kurt and Keith settled input expenses, too, at the end of each year. Importantly, Hora Farms paid for some of HK Farms' inputs, but so did HK Farms pay for some of *Hora Farms' inputs*. (App. Vol. II pp. 0644-0645; Tr. Vol. VIII 53:24-54:6.) Any input payments that resulted in a net gain to Kurt or HK Farms reduced the compensation Kurt would otherwise receive at the end of each year and is reflected in the year end settlement sheets. (Tr. Vol. I 173:15-18; App. Vol. IV pp. 0182-0235; App. Vol. II pp. 0680-0683; Tr. Vol. VIII 143:25-146:5.) In his report, Mr. Bolt did not understand that fact. (Ex. 13, pp. 16-17.) This caused Mr. Bolt—Brian and Gregg's paid expert—to reach the erroneous and unsupported conclusion that Hora Farms overpaid for Kurt's inputs.

E. Lenders and consultants who worked closely with Keith and Kurt and who the District Court found testified "objectively, reasonably and credibly" see no efforts to mislead.

The witnesses whom the District Court found most credible and who worked most closely with the Defendants never had any reason to doubt the honesty of Keith or Kurt. The District Court took care to identify those witnesses it found credible. Importantly, those witnesses, which included the lenders and consultants that worked with Keith and Kurt in their daily operations, testified that they had no concerns that Kurt and Keith were ever misleading, dishonest, or withholding in their dealings and when they provided information.

Alan Buckert is a financial services officer for Farm Credit Services of America, and was one of Brian and Gregg's witnesses. Mr. Buckert has worked with Keith and Hora Farms for 34 years. (App. Vol. II pp. 0293, 0304; Tr. Vol. II 81:13-17; Tr. Vol. II 167:7-14.) Mr. Buckert also worked extensively with Kurt and HK Farms. (App. Vol. II p. 0303; Tr. Vol. II 166.) "The Court found Mr. Buckert's testimony to be careful, reasonable, objective and credible in substance and demeanor." (App. Vol. I p. 0549.) Importantly, Buckert trusted Kurt and HK Farms and had no reason to doubt the veracity of the information Kurt provided. "Buckert also testified that, in connection with Farm Credit Service's loans to Kurt and Heather and HK Farms, he received all of the information he needed and felt that the information provided was

credible and had no reason to doubt." (*Id.*; *see* App. Vol. II p. 0340; Tr. Vol. II 167: 7-15.)

The Court found another one of Brian and Gregg's witnesses who was satisfied with the information she received from Hora Farms, Keith, and Kurt—Sue Basten—equally credible. At the time of trial, Ms. Basten was a senior lender and executive vice president at Washington State Bank[4] and HFI's principal operational lender. The Horas had worked with Washington State Bank since 1975. (App. Vol. II pp. 0313-0314; Tr. Vol. III 27:12-13.) Ms. Basten had no reason to believe any of the information Kurt and HK Farms provided was not accurate with respect to so called "missing corn." (App. Vol. II p. 0317; Tr. Vol. III 92:5-17.) "Both Basten and Buckert testified objectively, reasonably and credibly that they relied upon information provided by Keith and Kurt, and that they had no indication that they had received inaccurate, false or misleading information from Keith or Kurt." (App. Vol. I p. 0556.)

Importantly, these two credible witnesses questioned Gregg's methods and motives at trial. In fact, the email campaign of Gregg Hora—which included accusing Mr. Buckert of being an "enabling partner" (App. Vol. II p. 0312; Tr. Vol. III 10: 13-16) and imploring Mr. Buckert to keep these communications secret from co-director Keith (Appl Vol. II p. 0310; Tr. Vol.

[4] Ms. Basten is now president of Washington State Bank.

III 8:10-13) and will be discussed in more detail below—made Mr. Buckert uncomfortable. (App. Vol. II p. 0306; Tr. Vol. II 180: 5-6; App. Vol. II p. 0312; Tr. Vol. III 10:17-20.) He testified numerous times that he found Gregg's behavior "unusual" (App. Vol. II p. 0299; Tr. Vol. II 155:8) and disagreed with Gregg's characterization of the Defendant's actions (App. Vol. II p. 0305; Tr. Vol. II 179:4-9).

Like Buckert, Basten was also made uncomfortable by Gregg's attempts to gather information and influence HFI's lenders. (App. Vol. II p. 0315; Tr. Vol. III 89:19-20.) Moreover, Ms. Basten even questioned whether Gregg's intent was to actually help Hora Farms. (App. Vol. II p. 0329; Tr. Vol. III 118:16-20.)

In sum, the testimony the district court found "careful, reasonable, objective and credible"—and which came from Brian and Gregg's own witnesses—indicated that Kurt and Keith were trustworthy and forthcoming. Moreover, these same witnesses were both made uncomfortable by Gregg's clandestine attempts to influence their communications and decisions with respect to Hora Farms, disagreed with Gregg's opinions, and—most importantly—questioned his intent. The Court should give deference to the district court's findings regarding these witnesses. *See* Iowa R. Civ. P. 6.904(3)(*g*).

F. Hora Farms approved of and ratified each of the very transactions about which Brian and Gregg complain.

Hora Farms, through director and president Keith, approved of all of the corn that was paid to Kurt as compensation and otherwise ratified each of the actions about which Gregg and Brian complain. This is significant for two reasons. First, it further evidences the fact that nothing Kurt did was improper—he did not steal corn. All corn he received was compensation for work done—or expenses incurred—for Hora Farms. Secondly, this fact bars the relief Brian and Gregg seek because Hora Farms—having approved of the very transactions that are the subject of this case—would be barred from bringing these claims against Kurt

In their proof brief, Brian and Gregg concede what the undisputed evidence at trial proved: Keith ratified and approved of every one of Kurt's actions that Brian and Gregg complain about in this case: "Keith knew Kurt was feeding HFI's corn to his pigs. Keith also knew HFI was not selling a substantial portion of its produced corn…However, Keith did nothing to address the significant shortfall in HFI's corn…Keith never questioned Kurt's year-end settlement sheets and never asked for additional documentation. Keith allowed Kurt to use the 9-bushel estimate rather than weighing the corn he used." (Plaintiffs' Brief p. 59.) "Keith Allowed HFI to Pay HK Farms' Crop Inputs…. Keith Allowed HFI to Overpay for Labor." (*Id.* pp. 62-63.) "It was

unreasonable for Keith to simply rely on Kurt's inaccurate year-end settlement sheets." (*Id.* p. 67.) "Keith unfairly used HFI's money to pay HK Farms' expenses and his own expenses." (*Id.* p. 68.) Brian and Gregg do not attempt to argue—nor could they—that Kurt lied or hid items from Keith. Rather, as Brian and Gregg admit, Keith and Kurt had access to—and reviewed and discussed in detail at the end of each year as discussed below—the same information.

The evidence at trial showed this repeated ratification unequivocally. At the outset, Keith testified that regardless of what Kurt actually received from HFI in compensation, "[Kurt's] worth a lot more than he received." (App. Vol. II p. 0903; Tr. Vol. X 78: 2-6. ("Q. Is Kurt worth to Hora Farms what he received? A. He's worth a lot more than he received"). In 1991, three years after Kurt came back to work at Hora Farms after college, Kurt entered into a work agreement with Hora Farms. (App. Vol. II p. 0632; Tr. Vol. VIII 18:19-22.)

Kurt's work and compensation was governed by that agreement until Kurt entered into a new work agreement in 2000, which lasted only a portion of that year until Brian quit the operation and Kurt was fired. (App. Vol. p. 0635; Tr. Vol. VIII 37: 22-23; *see* Ex. 304.) Kurt returned in the winter of 2000 at Keith's request. Kurt and Keith negotiated Kurt's work arrangement at that point. (App. Vol. II pp. 0642-0644; Tr. Vol. VIII 51:10-53:6.) Both agreed that

they would use a settle-up process at the end of each year to account for Kurt's labor, the use of Kurt's equipment, Kurt's purchasing of items for Hora Farms (such as tools and machine parts), fuel, the use of Hora Farm's equipment and storage, inputs, and the use of Hora Farm's grain. (*Id.*) Kurt and Keith agreed that Kurt would be paid—each year—in grain. (*Id.*; Tr. Vol. VIII 65-68.) Keith and Kurt would meet at the end of each year to "settle up," a process by which they went over Kurt's settlement sheets and confirmed compensation and grain inventory. (App. Vol. II pp. 0643-0644; Tr. Vol. VIII 52:22-53:6; *See* Ex. 331.) Any issues or discrepancies from the prior years would be discussed then, and the prior year would be closed out. All compensation Kurt received—and the method for determining the same—were agreed to by Hora Farms. (App. Vol. II pp. 0642-6043; Tr. Vol. VIII 51:13-52:21 (post 2001 work agreement); App. Vol. II pp. 0655-0656; Tr. Vol. VIII 82:22-83:2 (grain hauling); App. Vol. II p. 0679; Tr. Vol. VIII 139:12-14 (9 bu assumption); App. Vol. II p. 0684; Tr. Vol. VIII 148:1-7 (hours assumption); App. Vol. II p. 0689; Tr. Vol. VIII 157:10-16 (inventory management fee); App. Vol. II p. 0691; Tr. Vol. VIII 161:17-19 (use of Iowa State custom farming rates)).

Because Keith as director of Hora Farms ratified each of the Kurt transactions that are the subject of this suit, Hora Farms would be barred from bringing these claims against Kurt. (*See id.*) Therefore, the derivative claims,

too, are barred. Brian and Gregg cannot bring claims *on behalf of* Hora Farms which Hora Farms could not *itself* bring.

"When a stockholder institutes a derivative suit, it is the same in legal effect as if the corporation itself had sued." *Liken v. Shaffer*, 64 F. Supp. 432, 441 (N.D. Iowa 1946) (applying Iowa law). "The corporation's rights in connection with a claim asserted in its behalf in a stockholder's derivative suit are the same as if the corporation sued direct… Where a claim belonging to a corporation would be barred if sued upon directly by the corporation, it is also barred when asserted in its behalf in a stockholder's derivative suit." *Id*; *see Outing v. Plum*, 235 N.W. 559, 560 (Iowa 1931) (holding that member of corporation that ratified expenditures made by former officer, could not maintain action against former officer on behalf of corporation and declaring "[i]t is, of course, of necessity true that, if the corporation did not have a cause of action against appellee in its own right, no cause of action would lie in favor of a member or stockholder of such corporation").

When analyzing these claims as if the corporation had brought them—as is required in a derivate case—Brian and Gregg's case completely unravels. Here, Hora Farms—year over year—ratified the transactions about which Brian and Gregg complain. They assert that the nine-bushels assumption based on Kurt's hogs sold resulted in Kurt underreporting the amount of grain he received from Hora Farms. Even if this were true—which it is not, as discussed

in detail above—Hora Farms agreed to this contractual arrangement. Hora Farms ratified this arrangement every single year thereafter through the settle-up process. This finally changed in 2015 when Kurt began weighing corn with his new mixing system that he purchased. Kurt and Hora Farms both acknowledged that the nine-bushels assumption was not necessarily precise down to the kernel, but it amounted to a close estimation that Hora Farms agreed was sufficient for the purposes of tracking the grain Kurt received and was a reasonable—if not the best—method to track grain given the logistical realties and technology available at the time. Indeed, Kurt testified that it was likely more accurate than the previous method of calculation, which required real time pencil and paper recording—often by high school aged employees—of thousands of different transactions.

Manifestly, a company cannot seek to recover perceived salary overpayments it approved and paid to an employee annually fifteen years after the fact. Because Hora Farms could not bring such a claim, neither can Brian and Gregg purportedly on Hora Farms' behalf. For similar reasons, Hora Farms' laches also bars these claims. *See, e.g.*, *Garrett v. Huster*, 684 N.W.2d 250, 255 (Iowa 2004). The prejudice caused by Hora Farms' failure to question this practice for 15 years could scarcely be more prejudicial to Kurt. Had Kurt known in 2002 that the party with whom he was contracting would sue him 15 years later—*not for breach of that contract but for performance of its exact terms*—Kurt

surely would have negotiated a different contract. In fact, Kurt willingly entered into custom farming agreements to, in part, improve transparency regarding his contractual relationship with Hora Farms. (App. Vol. II pp. 0774-0779; Tr. Vol. IX 91:2-96:96:9; Exs. 306-307.)

Hora Farms' failure to ever question the arrangement until Brian and Gregg's lawsuit constitute laches and bars the derivative claims.

II. Neither Heather, nor HK Farms, can be liable for Kurt's alleged breach of his duty of loyalty.

A. Error preservation.

The HK Defendants agree Brian and Gregg preserved error on this issue.

B. Scope and standard of review.

See § I(B).

C. Gregg and Brian presented no evidence to extend liability to Heather or HK Farms.

Throughout the five plus year life of this case, Heather has and continues to be collateral damage to Gregg and Brian's crusade to wrest control of Hora Farms from Keith and punish Kurt through prolonged litigation. Brian and Gregg have submitted precious little ink in their numerous briefs and filings and even less evidence at trial to try and establish liability against Heather. As a result, the court summarily dismissed Brian and Gregg's claims against her:

> Although Plaintiffs' amended petition includes reference to and contention against Heather Hora individually, little if any evidence was offered at the time of trial, or discussed in the briefs of the parties, establishing any grounds for liability of Heather individually. Accordingly, the Court finds and concludes that Plaintiffs have not met their burden of proof with respect to claims stated against Heather Hora.

(App. Vol. I p. 0572.)

In their Brief, Brian and Gregg attempt to foist liability on Heather based on the following facts: She is a shareholder of HK Farms, she is married to Kurt, she signed her and Kurt's tax returns, and she came to her husband's defense when his brothers accused him of stealing from the family farm. (*See* Plaintiffs' Brief pp. 55-56.) The undisputed evidence at trial was that she was not actively involved in the day-to-day operations of HK Farms or Hora Farms. (App. Vol. II pp. 0779-0880; Tr. Vol. IX 96:15-97:11.) These facts fall far short of establishing any sort of co-conspirator liability.

Moreover, the cases cited by Plaintiffs do not help their claim. The *Rowen* case featured facts monumentally different than those before the Court. In *Rowen*, the "co-conspirator" at issue was the organization's long-time attorney, incoming director, and had independent duties to the corporation's shareholders. *Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639, 654 (Iowa 1979). The court held his "duty is to the entire body of shareholders, or, in this case, policyholders. His obligation, indeed, is similar to, if not identical with, that of a director." *Id.* p. 654. The court also found the defendant "actively

assisted and cooperated in accomplishing the illegal sale of control of Le Mars to Iowa Mutual. He must be held liable for that conduct." *Id*. Heather has no such independent duties to Hora Farms. Nor is there any evidence that she "actively assisted" anything. In fact, trial testimony from various witnesses indicated that Heather's role in both Hora Farms and HK Farms was limited.

Plaintiffs claim against Heather provides a concise example of the larger issues with their claims. The claim is "supported" by bare assertions and distinguishable cases. The weakness of the claim against Heather causes one to view the remaining claims with an even larger grain of salt. The district court's rejection of these misplaced theories should be affirmed.

III. The statute of limitations cuts off Plaintiffs' pre-2012 claims.

A. Error preservation.

HK Defendants agree that Plaintiffs have preserved error on this issue.

B. Scope and standard of review.

HK Defendants agree that review is *de novo*.

C. Plaintiffs do not—and cannot—allege any prejudicial error regarding the Summary Judgment Ruling.

The District Court granted summary judgment in Defendants' favor, and applied the five-year statute of limitations in Iowa Code § 614.1(4) to bar claims before August 18, 2012. (App. Vol. I p. 0372.) At trial, however, Plaintiffs were allowed to present evidence regarding pre-2012 claims, subject to Defendants'

continuing and standing objection. (App. Vol. II pp. 0182-0183; Tr. Vol. I 11:20-12:19.) Over the course of eleven days and through thousands of pages, Gregg and Brian were allowed to present their case. They point to no document or testimony that was excluded. They point to no prejudicial error. They point to no reason for this Court to disturb the District Court's summary judgment ruling. *Jones v. Univ. of Iowa,* 836 N.W.2d 127, 140 (Iowa 2013) ("It is well-settled that nonprejudicial error is never ground for reversal on appeal) (citations omitted).

To avoid what is really an uncomplicated application of the statute of limitations, Plaintiffs argue that their "claims did not accrue until an independent director, who did not participate in the subject conduct, had actual or imputed knowledge of all elements." (Plaintiffs' Brief, p. 78.) As a general proposition, this makes sense enough. Applied to the facts of this case, it is absurd. Plaintiffs themselves had inside knowledge of the operation and management of Hora Farms for decades before bringing their lawsuit.

In the 1990s, for example, Brian 1) had the ability to request his compensation in-kind (App. Vol. II pp. 0251-0252; Tr. Vol. I 163:18-164:3); 2) comingled his corn in Hora Farms' bins (App. Vol. II pp. 0261-0262; Tr. Vol. I 175:22-176:2); 3) used Hora Farms' equipment in his own farming operation without paying for it (App. Vol. II p. 0261; Tr. Vol. I 175:2-10); and 4) engaged in the annual process of "settling up" with Hora Farms (App. Vol. II p. 0263;

Tr. Vol. I 182:12-15). Gregg admitted that "26 years ago the problem existed, just like it did in 2015, in traceability, no measurables, and obviously from 1994 to 2015 nothing had changed." (App. Vol. II p. 0446; Tr. Vol IV 173:11-14.) In fact, the *entire Hora family* had knowledge of the operation and management of Hora Farms, and aired their criticisms at a family meeting in 1994 regarding many of the same issues Plaintiffs allege in this case. (App. Vol. II pp. 0265-0268; Tr. Vol. I 191:10-194:9.)

After trial, the District Court declined to reconsider its summary judgment ruling. (App. Vol. I pp. 0560-0562.) Rather, the District Court concluded that "even in consideration of the evidence presented at the time of trial, Plaintiffs have failed to meet their burden of establishing grounds for the Court to disturb its earlier ruling." (App. Vol. I p. 0562.) Similarly, this Court should also not disturb the summary judgment ruling.

IV. Iowa Code section 490.746 authorizes an award for attorney fees to the HK Defendants from Brian and Gregg.

The District Court erred in failing to find Brian and Gregg commenced and maintained this action for an improper purpose or without reasonable cause. The trial record in this case demonstrates that Brian and Gregg—two minority shareholders owning a total of 7% of Hora Farms stock—commenced and maintained this action to force their father and brother out of the family farm to gain control of the operation for themselves. To achieve

their goal, Brian, and Gregg—over a period of years—attempted to cut off Hora Farms' financing, failed to investigate their allegations against Kurt in good faith, and actively worked to tarnish the reputations of Defendants through defamatory statements. Brian and Gregg engaged in these actions despite benefitting from the *same* behaviors they take issue with in this litigation. For these reasons, the Court should order Brian and Gregg to pay the HK Defendants' attorney fees pursuant to § 490.746.

A. Error preservation.

The HK Defendants preserved error on this issue. (*See* App. Vol. I pp. 0692-0836.)

B. Scope and standard of review.

See § II(B).

C. Plaintiffs commenced and maintained this proceeding with improper purpose.

Brian and Gregg commenced this derivative action with the improper purpose of gaining control over Hora Farms, harming Keith, Kurt, and HK Farms, and out of personal animus toward the Defendants. Iowa Code § 490.746(2) provides, in relevant part, that the Court in a derivative proceeding may order Plaintiffs "to pay any defendant's expenses incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose." "Expenses' means

reasonable expenses of any kind that are incurred in connection with a matter." Iowa Code § 490.140(16). Attorneys' fees fall within the scope of "expenses" as that term is used in § 490.746. *Gill v. Vorhes*, 885 N.W.2d 829, 2016 WL 4051643, at *14 (Iowa Ct. App. 2016) (unpublished table decision). Further defined, "reasonable expenses" are those which "pertain to the investigation, commencement, and [litigation] of the shareholder derivative action," and not expenses related to "legal advice and representation" that was provided to the client in their individual capacity, not as a party to the derivative action. *Id.*

Chapter 490 does not define "improper" within the context of a defendant's request for fees in a derivative action. Iowa Code § 490.746, however, was modeled after the Model Business Corporation Act ("MCBA"), the commentary to which states, "[t]he phrase 'for an improper purpose' has been added to parallel Federal Rule of Civil Procedure 11 in order to prevent proceedings which may be brought to harass the corporation or its officers." *See* Model Bus. Corp. Act. Ann. § 7.46(2); *see EMC Ins. Grp., Inc. v. Shepard*, 960 N.W.2d 661, 672 (Iowa 2021) ("Our holding comports with the Model Business Corporation Act (Model Act), upon which the IBCA is based"). An improper purpose under Federal Rule of Civil Procedure 11 means to "harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. R. Civ. P. 11(b)(1).

Courts from other jurisdictions have had occasion to interpret the phrase "improper purpose" in the context of derivative proceedings. The Texas Court of Appeals found a derivative suit was commenced for an improper purpose when there was "some evidence that [plaintiff] filed the derivative suit due to personal animus, which is an improper purpose for filing a shareholder derivative suit." *Moody v. Nat'l W. Life Ins. Co.*, 634 S.W.3d 256, 285 (Tex. App. 2021) (holding probative evidence supported the award of $1,314,053.73 of trial attorney fees and expenses and up to $505,000 in appellate attorney fees if defendants succeeded on appeal). The court highlighted plaintiff's pre-suit text messages expressing his anger over being excluded from a position, his preoccupation with serving in a high position of the corporation, his frustration over certain business decisions, and his threats to bring a derivative action. *Id.* Plaintiff also sent a letter to the company and to a board member, accusing the board member of unlawful conduct, asking questions about family-related entities and communications between other family members, and again threatening a derivative lawsuit. *Id.* at 285.

Delaware courts also provide some insight to the definition of "improper purpose" in a similar context. In *Schwartzberg v. CRITEF Assocs. Ltd. P'ship*, the court held the improper purpose test is satisfied when a shareholder seeks corporate business records when the purposes are 1) personal to the individual seeking access and 2) adverse to the interests of the partnership

considered jointly, or from the perspective of all partners. 685 A.2d 365, 374 (Del. Ch. 1996). In *Schwartzberg*, the court held the plaintiffs had an improper purpose as their motivation was 1) to attempt to replace the defendants as general partners, and in the process 2) gain leverage against them, for plaintiffs' personal financial advantage and at considerable risk to the financial welfare of the company. *Id.*

Gregg and Brian's actions in this case mirror and even exceed those in *Moody*. Unsurprisingly, the district court determined that "the specific actions of Gregg and Brian, set forth in detail at page 22-24 of Kurt's [post-trial] brief, clearly represent some conduct of which the Court does not approve . . . ." App. Vol. I p. 0564.)

If there was any doubt about the purpose for bringing this lawsuit, Gregg's motivations were laid bare in a letter he authored that was delivered to the Hora Farms shareholders. On June 30, 2016, prior to an upcoming Board of Directors' meeting, Gregg unabashedly tried to coerce Keith to cede control of Hora Farms to Gregg and Brian and terminate Kurt (the same remedies sought by this lawsuit), asking Keith to, *inter alia*:

- "Provide verbal and electronic access to Gregg as BOD officer with [Washington State Bank] and [Farm Credit Services of America] loan officers"
- "Terminate all existing verbal and written work agreements dealing with Kurt as operations manager of HFI"

- "Turn over management of HFI to Gregg"
- "The BOD of HFI will accept the resignation of Keith as the President of HFI and member of the BOD. Gregg will serve as President, as the remaining board member will then appoint a replacement"
- "The authority to sign checks and handle all financial authorities will be assigned to Gregg and the new BOD."
- "Keith will assign all his voting rights in all class A stock for all future elections of BOD members to be split 50/50 to Gregg and Brian."
- "Keith will endorse the new plan to family members and explain the reasons for the needed change."

(App. Vol. II pp. 0051-0052.)

Gregg's attempt to take over control of Hora Farms—which not only called for him to be appointed to the board but also would have granted him sole authority to choose another board member and assign all of Keith's Class A voting rights to Brian and Gregg—could scarcely be expressed any bolder or barer. What's more, Gregg even called for Keith to "endorse the new plan" and "explain the reasons for the change." (*Id.*) In other words, to make it appear as if the installation of Gregg and Brian was Keith's idea. When Gregg did not get his way—like in *Moody*—he turned to derivative litigation.

However, the breadth of Gregg's campaign to obtain control of HFI is where the facts of this case diminish the impropriety of even those in *Moody*. These actions, of which the district court expressly did not approve, included:

- In September of 2015, while a director, Gregg persuaded Sue Basten to send a letter to Keith threatening to pull Hora Farms

financing, and actin which she regrets. (App. Vol. II pp. 0316, 0328; Tr. Vol. III 90:1-5; 114:14-15; *see* App. Vol. II pp. 0151-0154.)

- On September 27, 2015, Gregg sent an email to shareholders in which he accused Keith of lying to Hora Farms' bankers, called Keith "deceiving," and accused Keith and Kurt of intentionally dishonest financial reporting. (Ex. 350.)
- On March 28, 2016, Gregg emailed Mr. Buckert accusing Keith and Kurt of dishonesty and asking Mr. Buckert to keep the information discreet from codirector Keith. (Ex. 356.)
- On March 29, 2016, Gregg sent an email to Hora Farms' lenders in which Gregg accused fellow-director Keith of dishonesty, mismanagement, and lack of credibility and further accused Kurt and Keith of "inside deal[s]…not on the books" and intentionally inaccurate reporting of grain and financial information. (App. Vol. IV pp. 0238-0239.)
- On April 25, 2016, Gregg emailed Hora Farms' lenders and accused Keith of only providing partial financial information to Hora Farms' lenders and accused Kurt and Keith of incompetence and dishonesty, all done with the aim to convince Hora Farms' lenders to cut off lending to Hora Farms. (Ex. 351.)
- On May 3, 2016, Gregg sent an email to Hora Farms lenders in which Gregg accused Keith and Kurt of dishonest financial reporting and accused Kurt of "extorting money" from Keith. (App. Vol. IV pp. 0236-0237.)
- In July 2016, Gregg co-authored with his wife, Liddy, an "anonymous letter" that disclosed confidential Hora Farms documents, purported to speak for all shareholders, and accused Keith of mismanagement in an attempt to get Washington State Bank to pull its lending with Hora Farms. (Ex. 316.; *see* App. Vol. pp. 0325-0326; Tr. Vol III 108:23-109-1).
- On September 6, 2016 Gregg wrote to Buckert and accused Kurt and Keith of "questionably [sic] financial dealings" and "untruthfulness of financial disclosure…and overall inappropriate and unethical business practices." (App. Vol. IV p. 0240.)
- Finally, like in *Moody*, Gregg threatened the lawsuit he ultimately brought. Keith testified at trial about these threats:
  "Dad -- Dad, there's going to be a lawsuit. I says, what are you talking about? What are you talking a lawsuit? Yeah, I've got the papers right out there in the car. I've got the papers. I said, well,

> let me see the papers. No, no. You're not going to see them today, but I've got the papers. There's going to be a lawsuit. It's going to be Hora vs. Hora. The president of the Iowa Corn Growers and the past president of the Iowa Corn Growers is going to be sued by the president of the Iowa Pork Producers. It's going to be all over. Everyone in the Midwest is going to know that." (App. Vol. III pp. 0957-0958; Tr. Vol. X 182:21-183:5.)

These subversive tactics threatened the decades-long relationships of Hora Farms with some of its closest business partners. The defamatory statements also irreparably tarnished the reputations of Hora Farms, Keith, and Kurt. Moreover, some of these actions occurred while Gregg was himself a director of Hora Farms and owed to Hora Farms and its shareholders fiduciary duties of care and loyalty. (*See* App. Vol. II p. 0328; Tr. Vol. III 113:1-3.)

The years-long litigation process has only served as a detriment to the company. (App. Vol. II p. 0959; Tr. Vol. X 200:19-20.) The negative impacts which were sure to occur as a result of a suit should have been easily understood by Brian and Gregg, who were well aware of the company's finances, and were also well aware that the other shareholders refused to join the action. Hora Farm's other shareholders, who make up for slightly over 93% of Hora Farms' total shares (compared to Brian and Gregg's 7%), did not join in the derivative action. Had Brian and Gregg truly been concerned for the best interests of the company, they would have accepted the many changes being made in the operation of the farm prior to commencing the action.

Importantly, Ms. Basten, one of the witnesses to district court was careful to call credible, questioned Gregg's intent to benefit Hora Farms. (App. Vol. II p. 0329; Tr. Vol. III 118:16-20.)

Thus, the trial record displays that Brian and Gregg were motived by the improper purpose of gaining power over their family members whom they disagreed with. Brian and Gregg chose not to accept the positive changes being made at the farm, and instead chose to seek control through commencing litigation. This Court should find this purpose "improper" for purposes of Iowa Code section 490.746 and order Brian and Gregg to pay the HK Defendants' attorney fees.

D. Plaintiffs did not have reasonable cause to commence or maintain this proceeding.

Iowa Code § 490.746 does not define "reasonable cause." The Iowa Court of Appeals, however, has found lack of reasonable cause when a shareholder has "knowledge of the affirmative defenses asserted by defendants," and plaintiffs "could have determined that reasonable cause did not exist to commence a derivative action on these claims." *Kelly v. Englehart Corp., No.* 1-241, 2001 WL 855600, at *10 (Iowa Ct. App. July 31, 2001). While applying § 490.746 in *Englehart Corp.*, the Iowa Court of Appeals upheld a fee award to defendants in a derivative case where "the defendants apprised [plaintiffs] before the litigation commenced of many of the defenses they

intended to raise and of their intent to seek statutory attorney fees." In *Englehart Corp.*, one of the defenses raised by the defendant was the statute of limitations, which barred the plaintiff's allegations, which the court found could have been discovered with a straightforward application of the rules. *Id.* at *3.

Brian and Gregg also sought damages for conduct beginning as far back as 2000, despite the fact straightforward application of the statute of limitations barring those claims that predated *2012*. (*See* App. Vol. I p. 0371.) This information could have been easily ascertained by Brian and Gregg prior to commencing litigation as Iowa Code § 614.1(4) explicitly states that actions founded on unwritten contracts, for injuries to property, or for relief on the ground of fraud "in cases heretofore solely cognizable in a court of chancery," must be brought within five years from the time the cause accrued.

In *Moody*, the court held the plaintiff was without reasonable cause to bring suit as a reasonable inquiry would have revealed the suit would not be successful. *Moody*, 634 S.W.3d at 286. The court in *Moody* held there was sufficient evidence to support an award of attorney's fees supported a finding the suit was brought without reasonable cause as a reasonable pre-suit inquiry would have revealed there was no basis in fact for the shareholders allegations, the shareholder was aware the board decided bringing a claim was not in the best interests of the business, and the shareholder was aware that bringing a

suit would in fact not be in the best interests of the business, as it could contradict the company's position in a pending suit. *Id.* at 284-285.

Brian and Gregg were aware of the fact that no other shareholder supported their decision to bring an action. Given the growing expense litigation was costing the company, and the fact that many positive changes had been instituted regarding the operation of the farm since 2015, it should have been obvious to them that the suit would not be in the best interests of the company. Additionally, Brian and Gregg did not engage in a reasonable pre-suit inquiry, or even any inquiry at all. Gregg failed to even speak with Kurt regarding the allegations of missing corn and Kurt's explanations of it. (Tr. Vol IX 66:12-67:12.)

Further, even minimal introspection by Brian and Gregg would have alerted them that they themselves engaged in the exact same behavior when they worked for Hora Farms about which they now sue. (*See* § I, *supra*.) Gregg was compensated in corn, was solely responsible for tracking his own compensation, and was paid in kind. *Id.* Brian engaged in yearly settle ups with the company, was paid in kind, and rented land for below market rents. *Id.* In fact, Kurt's employment contract was authored by Brian. *Id.* It is plainly unreasonable for one to commence a shareholder derivative action containing

allegations based upon conduct the plaintiffs themselves engaged in and for which they set the template.

For the foregoing reasons, this Court should find Brian and Gregg Hora commenced this action without reasonable cause and award the HK Defendants their attorney fees.

E. The policies supporting Iowa Code § 490.746 suggest a finding that the Brian and Gregg acted without reasonable cause and for an improper purpose in bringing this lawsuit.

The commentary to the Model Business Corporation, which Chapter 490 was designed to mirror, explains that the test for an improper purpose is similar to the test relating to dissenters' rights (that plaintiff "acted arbitrarily, vexatiously, or not in good faith"), but states, "[t]he derivative action situation is sufficiently different from the dissenters' rights situation to justify a different and *less onerous* test for imposing costs on the plaintiff." Model Bus. Corp. Act Ann. § 7.46(2) (emphasis added). This fee shifting provision was included to prevent derivative actions from being brought for the purpose of harassing a corporation or its officers, and to deter "strike suits." Bryan Stanfield, *For Better or for Worse?: Marriage of the Texas and Model Business Corporation Acts' Derivative Action Statutes and What It Means for Corporations*, 35 Tex. Tech L. Rev. 347, 373–74 (2004).

As a result of Brian and Gregg instituting a derivative action, the corporation has been forced to waste time and money and has in no way benefited. Brian and Gregg sought to strategically use this derivative action to gain power and control of the company, thereby harassing the company and its board members, when their prior attempts to supplant Keith and Kurt failed. This type of improper, self-serving litigation is precisely what the legislature sought to discourage by allowing for fee-shifting.

V. Unclean hands bar Plaintiffs' claims.

The District Court determined that Plaintiffs' disjointed factual dots do not connect to create a picture of liability for the HK Defendants. The HK Defendants' equitable defenses, including unclean hands, present an alternative basis for affirming the District Court's ruling. *See Matter of Estate of Voss,* 553 N.W.2d 878, 879, n. 1("Although the district court did not rely on this ground for its decision, we will affirm a trial court on any basis in the record urged by the prevailing party.") (citation omitted).

A. Error preservation.

HK Defendants asserted their equitable defenses, raised them at trial, and received a ruling on them from the District Court. (App. Vol. I pp. 0249-0288, 0307-0333, 0482-0510, 0531-0538, 0562-0564.)

B. Scope and standard of review.

Review is *de novo.* Iowa R. App. P. 6.907.

C. Gregg and Brian come to Court with unclean hands and participated in or oversaw the wrongs complained of.

"[T]he specific actions of Gregg and Brian, set forth in detail at page 22-24 of Kurt's brief, clearly represent some conduct of which the Court does not approve…." (App. Vol. I p. 0564.)

Not only did Brian and Gregg have similar arrangements to Kurt's with Hora Farms when they were employees, they have also engaged in self-serving and even tortious conduct with respect to the subject matter of this lawsuit. Therefore, even if Plaintiffs had stated claims, they are not the proper shareholders to bring them. "A stockholders' derivative action is an invention of equity to supply want of adequate remedy at law to redress breaches of fiduciary duty of corporate manages, and the cause of action is not the stockholders', but the corporation's, which is the real party in interest." *State ex rel. Weede v. Bechtel*, 244 Iowa 785, 804, 56 N.W.2d 173, 183 (1952). "A party seeking equitable remedies must show the remedies are appropriate under the circumstances." *Tope on behalf of Peripheral Sols., Inc. v. Greiner*, 912 N.W.2d 499 (Iowa Ct. App. 2017) (citing Iowa Code § 490.831(2)(c)). "Courts of equity, in ordinary cases, will refuse relief to those suitors who do not come into equity with clean hands, or who have ratified or acquiesced in the wrong complained of. Both of these rules of law are applicable to stockholder's derivative suits."

Liken v. Shaffer, 64 F. Supp. 432, 442–43 (N.D. Iowa 1946) (applying Iowa law, holding "[a] stockholder's derivative suit may also be abated because of the conduct or situation of the particular stockholder or stockholders instituting the action.") In a corporate derivative suit, as here, "equity will not grant relief at the behest of suitors whose conduct has offended equitable principles." *Id.*

Applying these principles, the Iowa Court of Appeals recently barred portions of a derivate plaintiff's claim after finding that the shareholder-plaintiff acted with unclean hands. *See Tope on behalf of Peripheral Sols., Inc. v. Greiner*, 912 N.W.2d 499 (Iowa Ct. App. 2017) ("Equity requires that a shareholder derivative action cannot be maintained if the nominal plaintiff has unclean hands in connection with the transactions which are the bases for the litigation or has participated or acquiesced in, or benefited from the conduct of which he now complains") (citation omitted). In *Tope*, the court found the nominal plaintiff acted with unclean hands "when he took money from the corporations' bank accounts then closed those accounts…forwarded the corporations' mail to his house where it was not accessible for the operations of the businesses…[and] collected $40,000, which was meant for [the corporation], using it to compensate himself, pay legal fees, and purchase office supplies." *Id.* In reversing the trial court, the court of appeals held "[w]e find [plaintiff's] actions arise out of the same set of circumstances and during the same time period as his complaint about [defendant] on this issue….Because

the nominal plaintiff, *Tope*, does not have clean hands, we determine the corporations are not entitled to relief for the time period from October 1, 2010…until April 1, 2011." *Id.* The reversal resulted in a damages reduction of $297,871.48, and the court remanded for further proceedings. *Id.* at 5, 8.

Trial testimony revealed Gregg engaged in a comprehensive campaign to defame Keith, Kurt and Hora Farms aimed at cutting off Hora Farms' financing, through which he hoped to wrest control of the corporation for himself and Brian. *See* §IV.C. In doing so, Gregg breached his fiduciary duties to Hora Farms (while a director) and committed the intentional torts of defamation (and defamation per se) against Hora Farms, Keith, Kurt, and HK Farms. *See, e.g.*, *Lara v. Thomas*, 512 N.W.2d 777, 785 (Iowa 1994) ("Slanderous imputations affecting a person in his or her business, trade, profession, or office are also actionable without proof of actual harm"); *also see Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 116 (Iowa 1984) ("it is libel per se to make a published statement accusing a person of being a liar"); and *Schlegel v. Ottumwa Courier, a Div. of Lee Enterprises, Inc.*, 585 N.W.2d 217, 222 (Iowa 1998) ("The existence of damage to reputation is conclusively presumed from the publication of the libel….In case of statements that are libelous per se, damages for mental anguish or hurt feelings are allowed because damage to reputation is presumed").

This undisputed and systematic pattern of behavior shows that Gregg not only comes to this Court with unclean hands, but downright filthy ones. Gregg engaged in the same employment relationship and practices of which he now complaints about Kurt, breached his fiduciary duty of care while a director by failing to investigate in good faith the claims against Kurt, breached his fiduciary duty of care and loyalty by attempting to deplete Hora Farms' financing and tarnish the reputation of Hora Farms and co-director Keith, and committed the intentional tort defamation against Keith, Kurt, Hora Farms, and HK Farms.

Brian, on the other (unclean) hand, participated in and benefited from the very actions about which he now complains. *See* § I, IV.D. His participation in the wrongs complained of bars him from asserting those claims on behalf of the corporation. *Liken v. Shaffer, 64 F. Supp.* at 442–43 (holding, "[t]hus, a particular stockholder who institutes a stockholder's derivative suit, may have participated in the wrong complained of…or may have ratified the wrong complained of or acquiesced in it, or have had knowledge of the wrong complained of under circumstances which would make him guilty of laches. In such cases, a court of equity will not recognize him as a proper suitor in a court of equity and will abate the action without reference to the merits of the claim sought to be asserted in behalf of the corporation").

The Plaintiffs' come to this Court seeking equitable relief but have not themselves acted equitably. The Court should apply the principals set forth in *Liken v. Shaffer* and *Tope* as an alternative basis to affirm the District Court**.**

CONCLUSION

For the reasons stated above, the District Court should be affirmed in all respects.

STATEMENT REGARDING ORAL ARGUMENT

HK Defendants believe that oral argument is unnecessary. The underlying record is extensive and complete.

Dated: October 3, 2022

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/s/ Joseph W. Younker
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CERTIFICATE OF SERVICE

I certify that on October 3, 2022, I served the foregoing Final Brief of Kurt Hora, Heather Hora and HK Farms, Inc. by electronically filing the document with EDMS, which will notify the following parties of the electronic filing:

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CERTIFICATE OF COSTS

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Final Brief of Kurt Hora, Heather Hora and HK Farms, Inc. was $N/A and that the amount has been paid in full by HK Defendants.

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