IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 22-0259

BRIAN HORA AND GREGG HORA, AS SHAREHOLDERS OF HORA FARMS, INC. AND AS BENEFICIARIES OF THE CELESTE N. HORA TRUST,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT for WASHINGTON COUNTY, IOWA
BUSINESS COURT CASE No. EQEQ006366
The Honorable Sean McPartland

APPLICATION FOR FURTHER REVIEW OF APPELLEE/CROST-APPELLANTS KURT HORA, HEATHER HORA, and HK FARMS, INC.

(COURT OF APPEALS DECISION FILED FEBRUARY 8, 2023)

JOSEPH W. YOUNKER (#AT0008668)
Direct Dial: (319) 358-5569
Fax: (319) 358-5560
Email: jyounker@bradleyriley.com
MATTHEW G. BARND (AT#0013360)
Direct Dial: (319) 861-9824
Fax: (319) 363-9824
Email: mbarnd@bradleyriley.com
of
BRADLEY & RILEY PC
Chauncy Building
404 East College Street, Suite 400
Iowa City, IA 52240-3914
Phone: (319) 466-1511
Fax: (319) 358-5560
Attorneys for Kurt Hora, Heather Hora and HK Farms, Inc.

QUESTIONS PRESENTED FOR REVIEW

I. Under de novo review, the appellate court gives weight to the findings of the district court—especially with regard to witness credibility—but is not bound by them. In this fact-sensitive case, the District Court made extensive and pivotal determinations. In reversing the District Court, the Court of Appeals appears to have disregarded these findings. Did the Court of Appeals give sufficient weight to the findings of the District Court?

II. The Court of Appeals reversed the district court and found Kurt breached his employee's duty of loyalty by misappropriating corn under *Condon Auto Sales & Serv., Inc. v. Crick*. The Court of Appeals rejected the explanation that Kurt received much of this corn as compensation pursuant to his employment agreements with Hora Farms because the corn was not reported property to the IRS. Was it error for the Court of Appeals to reject the corn-as-compensation explanation and find Kurt breached a duty of loyalty to Hora Farms simply because Plaintiffs claimed there was corn that was not accounted for?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

STATEMENT SUPPORTING FURTHER REVIEW

This case involves a dispute over the operation of a family farm. For decades, Keith Hora ("Keith") took a consistent approach to farm management. Now, his two eldest sons—minority shareholders in the farming operation—are attempting to force him, along with their younger brother, Kurt, out of the family farm to gain control of the operation. The eldest sons' claims distill to assertions that Kurt wrongfully took corn from Hora Farms and Keith let him get away with it. After an eleven-day bench trial in the Iowa Business Specialty Court, the District Court dismissed Plaintiffs' claims. The Court of Appeals, however, has reversed on the claims related to alleged "missing corn."

This application presents two issues for review. First, under de novo review, did the Court of Appeals give appropriate weight to the Business Court's findings of fact? When placed side by side, the Court of Appeals' opinion and Business Court's ruling present quite different factual narratives. The Business Court made specific, non-conclusory findings material to the issue of alleged "missing corn." The Business Court's findings are particularly important because there is conflicting testimony that may be dispositive to deciding the case, namely, Kerry Bolt's ("Bolt") (Plaintiffs' expert) testimony regarding "indicia of fraud" on one hand, and Kurt's testimony and "settle up

sheets" outlining his accounting for the corn on the other. The District Court assessed the conflicting evidence and dismissed each of Plaintiffs' claims.

Without explanation, however, the Court of Appeals ignores the District Court's detailed findings on key factual matters such as witness credibility (including a specific finding that one of the Plaintiffs was not credible on at least one point), the operation of Hora Farms over time, the operation of Hora Farms compared to other family farms, the realities of farming, Defendants' relationships with various professionals, the terms of Kurt's employment and compensation, and improvements and changes made to Hora Farms' operation, among others. And in some cases, the Court of Appeals made factual findings irreconcilable with the district court's findings. *Compare* Opinion at 3 ("In fall 2000… Kurt ended up quitting HFI, and Brian was fired.") *with* Ruling at 7 ("Brian quit during the 2000 harvest.").

The contours of de novo review are unclear. Did the Court of Appeals give appropriate weight to the District Court's specific findings of fact on material issues by disregarding them without explanation? This Court should weigh in. *See* Iowa R. App. P. 6.1103(b)(2), (3).

Second, whether the Court of Appeals properly applied the law regarding an employee's duty of loyalty. Kurt was a mere employee of Hora Farms, owing only a common law duty of loyalty to his employer.

The Court of Appeals found Kurt breached this duty by "misappropriating corn." The Court of Appeals, however, made no factual findings about when, where and how the alleged "misappropriation" occurred. Rather, the Court of Appeals backed into its conclusion by taking Plaintiffs' allegations that Hora Farms produced more corn than it sold and rejecting Kurt's explanations for the difference. Notably, the Court of Appeals found that Kurt was not entitled to *any* corn as compensation for his 2,000 annual hours spent working for Hora Farms, instead finding that all corn Kurt received from Hora Farms was "misappropriated." This conclusion despite the fact the Kurt's employment agreement stated that he would be compensated *in corn*.

In rejecting Kurt's explanations, the Court of Appeals significantly expands the scope of an employee's duty of loyalty under *Condon Auto* and ignored key pieces of the record. Under the Court of Appeals' reasoning, an employee may liable for a breach of duty of loyalty for compensation agreed to be paid by the employer. The Court of Appeals found the parties' tax reporting dispositive, despite the fact that the tax consequences of these transactions was not an issue in this case. This Court should reign in the Court of Appeals' application of *Condon Auto*.

BRIEF IN SUPPORT OF APPLICATION FOR FURTHER REVIEW

I. Background.

Each of the siblings involved in this case—Gregg and Brian on one hand, Kurt on the other—have worked for Hora Farms at various points in time. Each of them received compensation for his work in the form of grain or in-kind payments. (App. 545-547, Ruling, pp. 7-9.) Each engaged in the process of year end "settle-ups" with Keith to account for their compensation. (*Id.*) Each comingled their corn in the same grain system. (*Id.*) In short, Hora Farms' compensation practices have remained the same for decades.

That is not to say that the operation of Hora Farms is perfect. The trial record reflects that changes have been made to improve the operation. The context of Hora Farms' compensation practices, however, mattered to the District Court, as it made substantial and significant findings of fact related to this issue. This context, though, did not factor into the Appellate Court's analysis. As outlined below, this was error.

II. The Court of Appeals inappropriately second guessed the District Court's Ruling on review of a cold transcript.

De novo review "means that the district court's findings of fact are not binding, but the [appellate court] will 'give deference to those findings because the district court had the opportunity to assess the credibility of witnesses." *Horsfield Materials, Inc. v. City of Dyersville,* 834 N.W.2d 444, 452 (Iowa 2013) (*quoting Hensler v. City of Davenport*, 790 N.W.2d 569, 578 (Iowa 2010); *see also*

Iowa R. App. P. 6.904(3)(g); *Hadsall v. West,* 246 Iowa 606, 620 (1954) ("While an appeal in an equitable action is reviewed anew ...the findings of fact and conclusions of law of the trial court should receive serious consideration. This is especially true with respect to the probative value of testimony. The trial court sees and hears the witnesses and is in an advantageous position to judge their interest of lack of interest, and to appraise the worth of their testimony.").

Beyond witness credibility, there are other reasons to exercise de novo review with deference to the district court, such as: "notions of judicial comity and respect; recognition of the appellate court's limited function of maintaining the uniformity of legal doctrine; recognition of the district court's more intimate knowledge of and familiarity with the parties, the lawyers, and the facts of a case; and recognition there are often undercurrents in a case—not of record and available for appellate review—the district court does and should take into account when making a decision." *In re P.C.*, 886 N.W.2d 108 (Iowa Ct. App. 2016).

Given the allegations in this case and conflicting evidence, witness credibility is of particular importance. Notions of judicial comity (this case was tried in the Business Court) and recognition of the undercurrents of this case (a family farming operation) are also important.

Trial in this matter spanned eleven days. As the District Court noted, the "evidence and argument of the parties involve determination and resolution of

numerous and complex factual and legal issues." (App. 539, Ruling 1). After considering the "court file, including the written presentations of the parties, the evidence at the time of trial, including the exhibits and the testimony and credibility of the witnesses, and the authorities governing these matters," (*id.*) the District Court issued its Ruling, a 37-page, single-spaced ruling dismissing each of Plaintiffs' remaining claims.

The Ruling contains detailed factual findings on material issues such as:

- witness credibility, or lack thereof (*see* App. 548, Ruling 10 (finding Brian not credible on a point);
- the terms of Kurt's (and Brain and Gregg's) employment with Hora Farms and corresponding compensation (*see* App.546-48, Ruling 7-10); and
- the experiences of the professionals with whom Kurt and Keith dealt (*see* App. 571, Ruling, 34 ("Indeed, the representatives of financial institutions with whom [Hora Farms], Keith and Kurt dealt testified that they always believed Keith and Kurt provided information requested and that such information was accurate.").

Notably, while the District Court was critical of Kurt's record keeping (*see* App. 558, Ruling 20), *it made no determination that Kurt "misappropriated" any corn.*

The Court of Appeals, however, concludes that Kurt misappropriated corn. Not only does the Court of Appeals conclude that Kurt misappropriated corn, but it implies that he engaged in civil conversion or criminal theft. (Opinion 22). This conclusion stands in stark contract with the District Court's fact-intensive Ruling and the record below. The Opinion and the Ruling appear based on different evidentiary records.

More to the point, the Court of Appeals does not show its work. It ignores District Court findings that do not support its conclusion. For example, the Opinion makes no mention of the District Court's determination that corn was comingled for storage purposes. (*See* App. 545, Ruling 7.) The Court of Appeals barely addresses the District Court's finding and record evidence that "Kurt and other witnesses opined such shortage of documented corn use was due to factors including shrinkage, the cleaning process and yield monitor issues. There was extensive testimony with respect to how such issues might affect corn and why it may appear corn was missing." (App. 548, Ruling 10.) The Court of Appeals did not address Kurt's employment agreements. The Court of Appeals concluded Kurt misappropriated corn, despite the trial record establishing that Hora Farms agreed to pay him the very corn he allegedly misappropriated (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).)

These, and similar, factual finding by the District Court and accompanying record evidence go directly to the issue of whether Kurt "misappropriated" corn—and they are at odds with the Court of Appeals' conclusion. The Court of Appeals cannot be said to have given weight to the District Court's findings when the Court of Appeals appears to have not considered those findings. Under these circumstances, the Court of Appeals should "not second guess the district court's ruling on appellate review of a cold transcript." *In re Marriage of Hoffman,* 867 N.W.2d 26, 38 (Iowa 2015)(Waterman, J., dissenting).

A. The Court of Appeals failed to give sufficient weight to the District Court's findings regarding witness credibility.

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 ("Buckert") is a financial services officer for Farm Credit Services of America, and was one of Brian and Gregg's witnesses. 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.) 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 ("Basten")—equally credible. At the time of trial, Basten was a senior lender and executive vice president at Washington State Bank and Hora Farm'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.) 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, Gregg's email campaign—which included accusing Buckert of being an "enabling partner" (App. Vol. II p. 0312; Tr. Vol. III 10: 13-16) and imploring Buckert to keep these communications secret from co-director Keith (Appl Vol. II p. 0310; Tr. Vol. III 8:10-13) made 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, Basten even questioned whether Gregg's intent was to actually help Hora Farms. (App. Vol. II p. 0329; Tr. Vol. III 118:16-20.)

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.

In addition to noting the credibility of witnesses who questioned Gregg's intent, the District Court questioned Brian's credibility. Brian testified that, for fifteen years, his company rented 115 acres from Hora Farms. He testified that he did not know and/or did not recall what rent he paid in certain of those years. Buckert testified that Brian should have known what he paid for rent. On this point, the Ruling provides "[t]he 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 the issues in his case." (App. 548, Ruling 10.)

Plaintiffs offered two experts at trial—Thomas Schnurr and Kerry Bolt ('Bolt"). In fact, Plaintiffs' "misappropriated" corn theory hinges on the opinions of Bolt. The District Court made specific findings regarding Bolt's credibility:

> Both Mr. Schnurr and Mr. Bolt testified that they have no farm experience or experience managing a farm. Both testified that they relied upon information from Plaintiffs, from websites and some other sources, resulting in assumption of some facts not in evidence or not consistent with the procedures actually followed by Hora Farms. Although the Court did not disagree with all of their opinions, the Court found their testimony to be less credible than other expert testimony in the case. (App. 555, Ruling 18.)

The Court of Appeals must give weight to the District Court's findings regarding witness credibility. Iowa R. App. P. 6.904(3)(g). *See, e.g., Horsfield,* 834 N.W.2d at 452*; In re Marriage of Rademacher* , 808 N.W.2d 756 (Iowa Ct. App. 2011. The Court of Appeals erred in ignoring District Court's credibility determinations regarding key witnesses on the issue of "misappropriated" corn.

B. In this close Business Court case, deference to the District Court's findings is especially important.

Kurt maintains that he misappropriated no corn. There is, however, conflicting evidence on this important point. In such close cases, this Court's opinion in *Thompson v. Thompson,* 240 Iowa 1162, 1163, 39 N.W.2d 132, 133 (Iowa 1949) is instructive. In *Thompson,* the plaintiff brought a suit to quiet titled to her residence and farm property. After her son and only child died, his wife, as administrator of the estate, listed the plaintiff's property as estate property "subject to the life estate" of plaintiff. The question before the trial court, and on appeal, was one of fact—was there a delivery of the deeds by the plaintiff to the decedent at any time with the intention on her part to immediately pass title to him? The trial court found there was not and this Court affirmed, noting that while there was "much undisputed evidence there was some evidence in sharp conflict[,] and "recognize[d] the better opportunity of the trial court, from seeing and hearing the witnesses, to more accurately pas upon their veracity, and the credibility of testimony. For that reason this court

and all courts have always accorded much weight to, and reliance upon, the findings and decree of the trial court when the testimony is conflicting, and disturb them with reluctance." *Id.; see also Blum v. Keene,* 245 Iowa 867, 899, 63 N.W.2d 197, 214 (Iowa 1954); *In re Marriage of Rademacher*, 808 N.W.2d 756 (Iowa Ct. App. 2011)(noting that "[w]hen faced with close cases like this, we give careful consideration to the findings of the trial court.")(internal citations omitted). The Court of Appeals erred in ignoring the findings of the District Court in light of conflicting evidence.

III. The Court of Appeals' employee duty analysis is contrary to *Condon Auto* and would materially expand every employee's duty to their employer.

The Court of Appeals' analysis of Kurt's duty—the only theory on which the Court found Kurt liable—is unsupported by the record and conflicts with existing law. Even if Plaintiffs proved there was "missing corn," Kurt—as a mere employee of Hora Farms—cannot be liable to Hora Farms under a breach of duty of loyalty theory based on the record and existing law because Kurt received most of the "missing" corn under his employment contract with Hora Farms. The Court of Appeals' opinion is irreconcilable with the District Court's ruling and results in a substantial expansion of an employee's common law duty. This Court should grant further review and hold—as the District

Court did—that Plaintiffs failed to prove Kurt breached a duty to Hora Farms. In the alternative, the Court should resolve an issue it did not reach in *Condon Auto*—whether there is an independent cause of action for breach of an employee's duty of loyalty.

Plaintiffs' missing corn claim boils down to this: the amount of corn Hora Farms produced each year (measured at harvest by a combine yield monitor, which measures corn flow using a pressure plate) was less than the amount Hora Farms ultimately sold (measured by weigh scale tickets). Throughout this case, Plaintiffs have offered shifting legal theories to hold Kurt liable for this difference, ultimately settling on fraud and breach of fiduciary duty during appeal. (*See* Appellant's Brief, p. 36).

The Court of Appeals affirmed the District Court in finding that Plaintiffs failed to prove fraud. The Court of Appeals reversed, however, on the breach of fiduciary duty claim. In doing so, the Court of Appeals significantly expanded the scope of an employee's duty of loyalty—making it look much more like a director's duty of care—and overlooked important findings by the District Court.

A. Kurt's only duty to Hora Farms was a common law duty of loyalty.

As a mere employee of Hora Farms, the only duty Kurt owed to his employer was a common law duty of loyalty—the same basic duty any

employee owes to its employer. *Condon Auto Sales & Serv., Inc. v. Crick,* 604 N.W.2d 587, 598 (Iowa 1999), *as amended on denial of reh'g* (Feb. 4, 2000) ("[w]e recognize the existence of a common law duty of loyalty which is implied in employment relationships"). Kurt owed no duty of care or other fiduciary duty arising out of director status. The Court of Appeals recognized this. (Opinion 22)[1].

This Court has written that an employee's duty of loyalty is "not precisely defined", but has provided guidance on the metes and bounds of this duty. *Condon Auto Sales,* 604 N.W.2d at 598. "The duty of loyalty is generally confined to instances of direct competition, misappropriation of profits, property, or business opportunities, trade secrets and other confidences, and deliberately performing acts for the benefit of one employer which are adverse to another employer." *Id.* This Court has not opined, however, whether an independent cause of action lies for breach of this duty. *Id.* at 600 ("it is unnecessary for us to determine in this case whether a separate cause of action exists for breach of loyalty, either in tort or contract").

---

[1] The Court of Appeals concluded Kurt's duty of loyalty rose to the level of a fiduciary. The Court of Appeals stated Kurt conceded this (Opinion 22), but that is not the case. Kurt only conceded he owed an employee's duty of loyalty. Regardless and as discussed herein, Kurt's status as a fiduciary will not change the outcome.

The District Court concluded the claims against Kurt did not give rise to a cause of action for breach of the duty of loyalty. (App. 358, Ruling 30 ("Although Plaintiffs make claims of self-dealing by Keith and Kurt, as noted above, the authorities related to self-dealing in derivative actions are addressed to corporate directors and officers . . . . As Kurt was not a director or officer of the corporation during the periods in question, the Court focuses the analysis on such allegations related to conduct by Keith.")).

The Court of Appeals necessarily—though not expressly—concluded that a cause of action exists for breach of duty of loyalty because it comprised the sole basis of Kurt's liability, holding "Kurt's repeat misappropriation of [Hora Farms'] corn for his personal use without reimbursement (which could likely be termed civil conversion or criminal theft) breached his duty." (Opinion 22). This holding significantly expands *Condon Auto* and should be reversed. The facts of this case do not establish a breach of loyalty claim against Kurt.

B. Corn-As-Compensation: The majority of Kurt's compensation for his work for Hora Farms was in corn, pursuant to his employment agreement.

The Court of Appeals' conclusion regarding Kurt's duty is contrary to the record and law for several reasons. Most notably, the Court of Appeals summarily rejected the corn-as-compensation explanation. Instead, the Court of Appeals concluded all corn Kurt received from Hora Farms was

"misappropriated." This means that Kurt "misappropriated" corn he received in accordance with his employment agreement with Hora Farms. The Court of Appeals improperly dismissed this obvious explanation. The undisputed record at trial showed Kurt's employment agreement expressly provided Kurt would be paid mostly in corn. (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).)

Payment in corn comprised most of the compensation to Kurt for his work for Hora Farms. An excerpt from Kurt's 2000 employment agreement, which Brian authored (Dist. Cr. Ruling p. 7), reflects:

Compensation will be $ 34,000 per year.
Employee will be paid his annual Salary in the following manner.
$4320 base salary - FICA taxes withheld = $332 46/mo.

Benefit package to be deducted from annual Salary includes:
house and building rent ($2400)
electricity
LP gas
medical and dental expenses,
blue cross ins. premium
food (Hy-Vee and meat processing or purchase)
Premium for $50,000 term life ins.

Balance of annual salary will be paid in grain used, stored, or sold in employees name.

employee Kurt Hora	date	employer Hora Farms Inc.	date
Kurt Hora	1/3/2000	Hora Farms Inc. 1/3/2000 Keith Hora President	

(Ex. 304). The Court of Appeals did not address Kurt's employment agreements. It also failed to address that both Brian and Gregg were paid in corn when they worked for Hora Farms and Kurt's employment arrangement was modeled after theirs. (*See, e.g.*, Ex. 506(a)). The conclusion Kurt misappropriated corn, even though the trial record established Hora Farms agreed to pay him the very corn he supposedly misappropriated, is not supported by *Condon Auto.*

The Court of Appeals rejected the corn-as-compensation explanation outright simply because "Kurt never claimed [the corn] as income on his tax filings and [Hora Farms] never reported the transactions in its filings." (Opinion 22). However, the tax consequences of Hora Farms' method of compensation were not at issue at trial. Even if they were, allegedly incorrect tax reporting cannot change otherwise agreed upon, bartered-for, compensation into "misappropriated" property.[2] Notably, the Court of Appeals cites no authority in support of this proposition, and it should be reversed.

C. The accuracy of the nine-bushel assumption does not implicate Kurt's Duty of loyalty.

Plaintiffs spent significant time at trial attempting to establish that the "9-bushel assumption", which Kurt and Hora Farms used to determine how

[2] Regardless, the evidence at trial that the bartering method of compensation was improperly reported to the IRS was conflicting.

much grain Kurt received, was inaccurate and resulted in Kurt receiving more corn than what the settlement statements showed. Even if this were true, it still would not amount to a breach of Kurt's employee duty of loyalty to Hora Farms.

Corn grown by Hora Farms and HK Farms was commingled in common storage and it was difficult to accurately track each entity's grain and by extension the amount of corn Kurt fed his hogs. Therefore, the parties agreed to use a fixed assumption of 9-bushels per hog to determine the amount of corn Kurt received every year. (App. 547, Ruling 9 ("In 2003, after Brian was no longer working for Hora Farms, Kurt suggested—and Keith agreed—to allow Kurt to stop weighing corn used for feed and instead to use a formula that assumed that Kurt fed his pigs 9 bushels per head to market weight"); *also see* (Tr. Vol. VIII 137:25-138:20; App. Vol. II p. 0679; Tr. Vol. VII 139:12-14.)). At year end, Kurt would multiply the number of hogs he sold by 9 bushels to determine how much Hora Farms grain he used. Using this number, Kurt and Hora Farms then determined if any additional consideration was owed—in either direction—after accounting for Kurt's labor, equipment use, inputs, and other expenses against. (*See* Ex. 189.) This "settle up" process[3] happened each year.

[3] The 85,000 bushels Kurt used after 2015 was comprised of corn Kurt had previously earned, but never used. Trial Exhibit 190 substantiates Kurt's receipt

Plaintiffs claim the evidence at trial suggested that when Kurt began weighing the corn he fed his hogs in 2015, the actual number was closer to 10 bushels per hog. Kurt testified at length that this higher number was due to multiple factors including death loss and county-wide disease. (App. Vol. II pp. 0770-0771; Tr. Vol. IX 72:24-73:7; App. Vol. II pp. 0767-0769; Tr. Vol. IX 69:25-70:18; 71:6-16.) Moreover, Plaintiffs mustered no credible evidence the number was higher than 9 bushels per hog during the period at issue (pre-2015). To the contrary, representatives from Big Gain, Inc., the company who provided Kurt's feed ration, said 9-bushel per hog was an accurate figure based on the rations they provided Kurt. (App. Vol. II p. 0660 App. Tr. Vol. VIII 90:16-24); *see also* Ex. 359.)

But inaccuracy in grain accounting and fixed assumptions—even if ultimately inaccurate—do not give rise to a claim for breach of duty of loyalty by an employee when that assumption was a bargained-for contractual term between employee and employer. Therefore, none of the grounds for breach

---

of the 85,000 bushels. (App. Vol. III p. 0368; App. Vol. II pp. 0708, 0723; Tr. Vol. IX 9:8-15, 2410:2.) At trial, Kurt explained Exhibit 190 at length. (App. Vol. II pp. 07090716, 0723; Tr. Vol. IX 10:3-17:20; 24:7-14.) Simply put, under the compensation arrangement, the 85,000 bushels represented corn Kurt was entitled to and could draw on after September 30, 2008. (App. Vol. II p. 0733; Tr. Vol. IX 34:8-14.) Like the 9-bushel assumption, Hora Farms agreed that Kurt was entitled to these bushels. The commodity value of corn at the time Kurt actually received the bushels is not relevant. It was corn Kurt produced and earned but hadn't received or used. He was entitled to the corn, not its dollar value.

articulated in *Condon Auto* are supported by the record here. The Court of Appeals finding of "misappropriation" is a bare conclusion in stark contrast to the District Court's ruling, and is not supported by the record.

D. The record lacks evidence Kurt received corn in excess of the 9-bushel assumption, and even if he did, it was not a breach of duty of loyalty.

The remaining "missing corn" is attributable to a myriad of other factors. These factors include shrink (the test weight of the corn at harvest measured by the yield monitor was much higher than the corn eventual sold at market due to drying) ((App. Vol. II p. 0734; Tr. Vol. IX 36:13-22.)), cleaning (See App. Vol. II pp. 0741-0753; Tr. Vol. IX 43:22-55:8.), damage due to grain handling equipment (See App. Vol. II pp. 0745-0752; Tr. Vol. IX 47:18-54:23.), and the margin of error the in the yield monitor itself. (App. Vol. II p. 0671; Tr. Vol. VIII 126:1-4.)

Importantly, the District Court made no finding that Kurt ever *intentionally* took corn in excess of his compensation. This conclusion is readily supported by the trial record. Even if there was a discrepancy after factoring in Kurt's compensation, the record failed to show that Kurt took that corn intentionally. Crucially, the Court of Appeals concluded "misappropriation" but failed to articulate why the District Court was wrong and, further, what specific acts of Kurt constituted misappropriation.

If Kurt was negligent in handling corn (a fact not established at trial), poor management does not create a breach of duty of loyalty. Finally, Keith—Hora Farms' president and majority shareholder at all times relevant—testified that whatever Kurt was paid, he was worth more. (App. Vol. II p. 0903; Keith Hora, Tr. Vol. X 78:5-6.)

E. The Court of Appeals did not determine who carried the burden to prove breach of fiduciary duty, a key issue on remand.

The Court of Appeals failed to determine who had the burden to prove Kurt's breach of duty. It did not consider the burden significant because even if it were Plaintiffs' burden, they met it. (Opinion 22)). However, because the alleged misappropriation involves hundreds of discreet actions, it is critical who has the burden to prove whether each act constituted a breach of the duty of loyalty if this case is remanded for a trial on damages. This Court should determine with whom the burden lies in a breach of an employee's duty of loyalty claim.

CONCLUSION

For the reasons set forth herein, the HK Defendants, respectfully request that this Court grant further review and for such other further relief as the Court deems appropriate.

/s/ Joseph W. Younker
JOSEPH W. YOUNKER (#AT0008668)
Direct Dial: (319) 358-5569
Email: jyounker@bradleyriley.com
MATTHEW G. BARND (AT#0013360)
Direct Dial: (319) 861-9824
Email: mbarnd@bradleyriley.com
of
BRADLEY & RILEY PC
Chauncey Building
404 East College St. Suite 400
Iowa City, IA 52240
Telephone: (319) 363-0101
Facsimile: (319) 363-9824
ATTORNEYS FOR DEFENDANTS
KURT HORA, HEATHER HORA AND
HK FARMS, INC.

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 proportionally spaced typeface using Garamond in 14 font size, and contains 5,232 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(*a*).

Dated: February 28, 2023 */s/ Joseph W. Younker*

CERTIFICATE OF SERVICE AND FILING

The undersigned certifies that on February 28, 2023, the foregoing document was filed and served upon the following persons and upon the Clerk of the Iowa Supreme Court by electronic means using the EDMS system:

John F. Lorentzen
Haley Y. Hermanson
Nyemaster Goode, P.C.
700 Walnut, Suite 1600
Des Moines, IA 50309
Email: jfl@nyemaster.com

Sarah J. Gayer
Nyemaster Goode, P.C.
625 1st St SE, Suite 400
Cedar Rapids, IA 52401
Email: sjgayer@nyemaster.com
Attorney for Plaintiffs
Brian Hora, Gregg Hora and
Precision Partners Corp

Stephen J. Holtman
Abram V. Carls
Simmons Perrine Moyer Bergman PLC
115 3rd Street SE, Ste. 1200
Cedar Rapids, IA 52401
Email: sholtman@spmblaw.com
Email: acarls@spmblaw.com
Attorney for Defendants
Keith Hora and LoRee Hora

/s/ Joseph W. Younker
Joseph W. Younker

IN THE COURT OF APPEALS OF IOWA

No. 22-0259
Filed February 8, 2023
Amended February 17, 2023

BRIAN HORA and GREGG HORA, Individually and on behalf of HORA FARMS, INC., and PRECISION PARTNERS CORP.,
Plaintiffs-Appellants/Cross-Appellees,

vs.

KEITH HORA and KURT HORA, Individually and in their capacity as Shareholders, Directors, Officers, Managers, and Employees of HORA FARMS, INC., HEATHER HORA, HK FARMS, INC., and HORA FARMS, INC.,
Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Washington County, Sean W. McPartland, Judge.

The plaintiffs appeal, and the defendants cross-appeal, from the ruling denying the plaintiffs' shareholder derivative claims and the plaintiffs' request to remove a trustee. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.**

John F. Lorentzen of Nyemaster Goode, PC, Des Moines, and Sarah J. Gayer of Nyemaster Goode, PC, Cedar Rapids, for appellants/cross-appellees.

Stephen J. Holtman and Abram V. Carls of Simmons, Perrine, Moyer, Bergman, PLC, Cedar Rapids, for appellee/cross-appellant Keith Hora.

Joseph W. Younker and Matthew G. Brand of Bradley & Riley, PC, Iowa City, for appellees/cross-appellants Kurt Hora, Heather Hora, and HK Farms, Inc.

Heard by Bower, C.J., and Badding and Buller, JJ.

BULLER, Judge.

This dispute centers on the management of Hora Farms, Inc. (HFI). Brothers Brian and Gregg Hora filed this shareholder derivative lawsuit on behalf of HFI, claiming breach of fiduciary duty and fraud, seeking appointment of a custodian for HFI, and requesting removal of the trustee of a shareholder trust. After an eleven-day trial, the district court dismissed Brian and Gregg's claims, and they appeal. The defendants cross-appeal, reasserting their defenses below and requesting appellate attorney fees. We affirm in part and reverse in part, finding the district court erred in its application of the law regarding self-dealing and breach of fiduciary duty. We find Defendants Keith Hora and Kurt Hora breached their duties, and we remand for further proceedings consistent with this opinion, including a determination of damages and ruling on indemnification. We also vacate the ruling on appointment of a custodian and removal of the trustees, and we remand for the district court to decide that question in light of this opinion. Finally, we deny all requests for appellate attorney fees.

I. Background Facts and Proceedings

A. The Hora Family and Relevant Entities

Keith Hora was born on an Iowa farm in 1938 to George and Marie Hora. He has two younger siblings: Kathy and Kevin. Keith married Celeste in 1959, and together they had six children between 1960 and 1968: Gregg, Brian, Dana, Kurt, Darren, and Heidi. Kurt is married to Heather.

The Celeste N. Hora Trust ("the Trust") is a testamentary trust, created upon Celeste's death in 1989. Keith has been the Trust's sole trustee since its creation.

Keith and Celeste's six children are the Trust's beneficiaries, with each child to receive an equal share of trust property, per stirpes, upon Keith's death.

HFI was incorporated in Iowa in 1974, with George and Keith serving as the initial directors. HFI owns 1075 acres of land in or near Washington County, and it grew corn and soybeans at all times relevant here. At the time of trial, HFI had 1200 Class A voting shares: Keith owns 501 shares, the Trust owns 303 shares, and Kathy and Kevin each own 198 shares. HFI also had 3600 Class B non-voting shares: Keith owns 868 shares, the Trust owns 867 shares, Kathy and Kevin each own 548 shares, and Keith and Celeste's six children each own 128 or 129 shares.

Kurt and Heather formed HK Farms, Inc., through which Kurt grows crops and feeds swine from wean to finish. Brian and his wife formed Precision Partners Corp., through which Brian conducts farm activities.

B. Pre-Litigation Facts

Gregg worked for HFI from 1982 to 1985; he then left HFI and the area and had no further involvement in HFI's daily operations. Brian began working for HFI in 1985. Kurt began working for HFI in 1988. Brian supervised Kurt and HFI's operations during this time, and Kurt testified Brian was "extremely difficult to work with."

George died in 1995. Marie soon replaced George as a director of HFI alongside Keith. Keith has served as HFI's president since George's death, while Marie has never held an officer position.

In fall 2000, an argument on the farm erupted between Keith, Brian, and Kurt. Kurt ended up quitting HFI, and Brian was fired. Brian has since done a little farm work for HFI but has had no involvement with managing the company. HFI

rehired Kurt in 2001 in a managerial role, and he continued to serve as operations manager through trial. When Kurt returned to HFI, he received hourly pay, bonuses based on production, and reimbursement for certain expenses. Kurt also claims he took part of his compensation in corn used for feed in his swine operation. In 2003 or 2004, Kurt and Keith agreed to estimate Kurt's use of corn at nine bushels per hog Kurt sold.

Marie continued as a director until her death in March 2015 at the age of ninety-nine. Soon after her death, Gregg and Brian began raising concerns to Keith and Kurt about HFI's financial situation, specifically HFI's negative cash flow and corn that could not be found and was not sold. In August, Gregg was elected to replace Marie as director alongside Keith. Gregg resigned less than one year later, stating Keith and Kurt were preventing HFI from adopting changes needed to reverse HFI's trend of accumulating more debt. Darren was elected as a director in 2017, and he and Keith continued to serve as directors at the time of trial.

On August 18, 2017, Brian, Gregg, and Precision Partners (plaintiffs) filed their petition against Keith, Kurt, Heather, and HK Farms[1] (defendants). The plaintiffs eventually amended their petition and advanced five counts: (1) Keith and Kurt breached their fiduciary duties to HFI through mismanagement, self-dealing, and other actions; (2) Keith and Kurt committed fraud, fraudulent concealment, and fraudulent misrepresentation; (3) a custodian should be appointed for HFI; (4) Keith should be removed as trustee of the Trust; and (5) Keith interfered with the business relations of Precision Partners. On the plaintiffs' motion, the court

[1] The petition also included claims against Keith's current wife. The court denied those claims, and the plaintiffs do not pursue those claims on appeal.

severed Count 5 for a separate trial on the interference-with-business-relations count. The court later granted the defendants' partial motion for summary judgment, finding the five-year statute of limitations barred the plaintiffs' claims arising before August 18, 2012.

The facts developed at trial established multiple family members, including Keith, expressed concern about the significant discrepancy between the amount of corn produced by HFI and the amount of corn actually sold. By some estimates, as much as nearly one third of the corn produced each year was missing. Related concerns were expressed about HFI's lack of profitability and increasing debt when the market for corn and soybeans was quite good. At the same time the business was losing money, Kurt and his farming operation had an increased net worth of nearly $1.5 million. Keith's net worth also increased during the same time period, though perhaps not to the same extent as Kurt's. When minutes were circulated after a meeting, Heather (Kurt's wife) e-mailed the family reminding everyone that they had discussed "Keith[']s personal net worth & debt" because "this may be important in finding the holes in the dam or however it was put."

Kurt obfuscated and offered shifting stories to explain what happened to the missing corn. At one point, Kurt claimed that all of the missing corn was explainable due to damage or shrink during processing. But evidence in the record undermines that claim. For example, Kurt claimed a monitoring-equipment failure to the tune of 3.3% for eight years, yet such a malfunction was never reported to the crop insurer. At another point, Kurt claimed to have loaned a nebulous "corn tab" in excess of 85,000 bushels to HFI through his company, HK Farms. Yet Kurt's own settlement sheets indicate he sold or used HK Farms's entire corn

production in the relevant years, and no documentation of the loan appears in tax forms or business records for either entity. Kurt also claimed that the missing corn could be explained by the cleaning process, but for that explanation to work, hundreds of semi-trailers worth of debris would have been removed from the farm, and there is no evidence that ever happened.

Faced with significant evidence that he used HFI corn as feed in his swine operation, Kurt eventually admitted to taking at least 85,000 bushels of corn, but he claimed he was entitled to the corn as compensation or backpay. No corroboration for the backpay was submitted at trial, and it is undisputed that Kurt did not report use of the corn taken from HFI on either his personal tax returns or HK Farms's tax returns. A conservative valuation of corn taken by Kurt is roughly $450,000 for 85,000 bushels, and a more-aggressive valuation is more than $1 million for at least 200,000 bushels. The more-aggressive valuation, from the plaintiffs' expert, is generally consistent with Keith's own estimates of missing corn. The more-aggressive valuation is also corroborated by Keith reporting to the family that HFI's long-time banker repeatedly asked Keith why HFI's records show it sells all the soybeans produced "but never come[s] close to selling and accounting for the bushels of corn that were produced." In any event, the amount of backpay Kurt claimed was $179,000, and he took at least $250,000 more in corn than he was he was allegedly owed, even if his version of events was true.

Given the abysmal record-keeping, all parties admit some difficulty in determining the exact amount of corn taken by Kurt. Kurt claimed to have originally estimated what he took based on an Iowa State University formula, but this could not be reconciled with other record evidence regarding the amount of corn missing

from HFI each year during the relevant periods. Kurt admitted at trial that his estimate system was not accurate, and he conceded that he should have switched to a computerized system at least ten years sooner. In 2015, Keith sent a message to the family members observing that, if all of the missing corn was used by Kurt to feed his swine, "then I AM a terrible manager and will seek outside help" to manage the farms and resolve the issue. Keith also remarked to family members that Kurt "had too good of a deal," at the expense of the company. Consistent with these remarks, HFI's paid consultant described Kurt's deal with Keith as "too sweet."

Trial evidence also established, with little dispute, that Keith used HFI resources to pay personal expenses for himself and his wife without any legitimate business purpose. The expert testimony valued these personal expenses at $193,223. The $193,233 includes football tickets that were falsely accounted for as crop expenses or building-repair costs, as well as department-store purchases, travel lodging or time-share purchases, and groceries from a variety of locations in and outside of Iowa. Keith did not deny the expenses, but he claimed they were part of his compensation. No documentation corroborated this claim or established that HFI paying thousands of dollars in personal expenses was compensation for any of Keith's roles. Keith also failed to report the income to taxing authorities as compensation or pay appropriate tax on it. In addition, HFI double-compensated Keith for his vehicle, paying both mileage and all of the operating expenses (fuel, service, maintenance, license, and insurance) for the same vehicle. In other words, Keith double-dipped his vehicle reimbursement.

Following an eleven-day trial in July and August 2020, the district court rejected the plaintiffs' claims and dismissed Counts 1 through 4. The plaintiffs voluntarily dismissed Count 5. The plaintiffs filed a motion to reconsider, which the court denied in full other than nonsubstantive corrections to the facts. The defendants also filed an application for costs and fees, which the court denied.

The plaintiffs appeal the dismissal of Counts 1 through 4 and seek appellate attorney fees. The defendants cross-appeal, also seeking appellate attorney fees.

II. Standard of Review

The parties agree the claims below were tried in equity, implicating our de novo review. Iowa R. App. P. 6.907. We give weight to the fact findings of the district court, especially with regard to witness credibility, but we are not bound by them. Iowa R. App. P. 6.904(3)(g).

III. Defendants' Preliminary Defenses

We first address the various preliminary defenses asserted by the defendants, including statutory claims based on standing and the statute of limitations, as well as equitable claims based on the doctrines of estoppel, laches, and unclean hands. The district court partially agreed with the defendants regarding the statute of limitations but otherwise rejected all preliminary defenses. We do the same on appeal, with a modification regarding the statute of limitations due to our subsequent holding regarding breach of fiduciary duties.

A. Standing

The defendants below asserted that the plaintiffs lacked standing under the Iowa Business Corporation Act. *See* Iowa Code ch. 490 (2017). The district court

found standing during the summary-judgment proceedings and re-affirmed that finding following the lengthy bench trial. We affirm these rulings.

Iowa law generally bars derivative actions unless the plaintiffs are (1) shareholders (2) who fairly and adequately represent the interests of the corporation. *Id.* § 490.741. The district court correctly noted that no Iowa case law speaks to how the burden is allocated under this section, but we agree with the district court that the text of the statute allocates the burden of proving standing to the plaintiffs. *Id.* (prohibiting suit "unless the shareholder satisfies" the statutory requirements).

It is undisputed that Brian and Gregg were shareholders of HFI at all relevant times. We also have little difficulty concluding that they fairly and adequately represent the interests of the corporation. The remedies they seek are not for their individual profit, but instead to benefit all shareholders and to further the corporation's interests. We also affirmatively find that the plaintiffs did not initiate this derivative action for any improper purpose. The plaintiffs have carried their burden to prove standing.

The only substantial case law marshaled by the defendants is a Wisconsin case, *Read v. Read*, 556 N.W.2d 768 (Wis. Ct. App. 1996). But we find *Read* easily distinguished, and we share the district court's observation that the defendants' reliance on *Read* is "misplaced if not misleading." The procedural posture of *Read* involved the plaintiffs seeking to amend a suit to allege a closely held corporation more than two years after the suit was filed and less than two weeks before trial. *See* 556 N.W.2d at 563–74. Here, the petition always alleged a closely held corporation. As a result, this case does not involve the issue at the

heart of *Read*, which concerns available remedies for bringing suit against a closely held corporation (which may operate more like a partnership) as compared to a traditional corporation. *See, e.g.*, *Redeker v. Litt*, No. 04-0637, 2005 WL 1224697, at *4 (Iowa Ct. App. May 25, 2005) (noting a distinction in available remedies). *Read* does not alter our analysis, and the district court did not err in finding standing.

Last, we reject the claim made in Keith's appellate brief that seeking to appoint a custodian or guardian for the corporation necessarily obviates standing due to the original purpose of HFI's incorporation. It is not improper for concerned shareholders to request this equitable remedy when the allegations concern corrupt management and self-dealing, as the plaintiffs allege here.

B. Statute of Limitations

The district court twice partially granted and partially denied the statute-of-limitations claim below, first at the summary-judgment stage and again following trial. In short, the court limited the evidence to claims based on conduct that arose on or after August 18, 2012, based on the five-year statute of limitations. *See* Iowa Code § 614.1(4).

Now on appeal, both parties seek to relitigate the statute of limitations. We affirm the district court. Given our ruling later in this opinion, however, we clarify application of the statute of limitations as it relates to the conduct we find breached an essential duty.

First, we reject Kurt's claim on appeal that the misappropriated-corn claim is barred by the statute of limitations. Kurt admitted at trial that he took at least 30,000 bushels in 2015, and he failed to prove that any portion of the

misappropriated corn was taken before August 2012. Under these circumstances, we find that all damages related to misappropriated corn are recoverable by the plaintiffs, and we direct the district court to abide by this ruling when evaluating damages consistent with the balance of this opinion. *See Earl v. Clark*, 219 N.W.2d 487, 491 (Iowa 1974) ("If the [statute of limitations] defense is partial only, barring only a part of the damage, defendant has the burden of proving what part of the damage occurred before the running of the limitation period." (citation omitted)). Second, to the extent our directions on remand implicate a similar question concerning Keith's personal expenses, the district court shall determine damages consistent with this opinion. Finally, to the extent any dicta in the district court's ruling is inconsistent with these directions, the dicta is vacated.

C. Estoppel and Laches

On appeal, the defendants reiterate their equitable defenses, arguing equity principles should have been a complete bar to litigation. While the defendants concede the district court "properly articulated" the law regarding laches and estoppel, they claim the district court improperly melded the statute of limitations and these equitable defenses. We affirm.

Estoppel by acquiescence occurs when "a person knows or ought to know that she is entitled to enforce her right or to impeach a transaction and neglects to do so for such a time as would imply that she intended to waive or abandon her right." *Davidson v. Van Lengen*, 266 N.W.2d 436, 438 (Iowa 1978). Similarly, but not identically, "[l]aches is an equitable doctrine premised on unreasonable delay in asserting a right, which causes disadvantage or prejudice to another." *State ex rel. Holleman v. Stafford*, 584 N.W.2d 242, 245 (Iowa 1998). A party alleging

laches has the burden to prove its application by clear, convincing, and satisfactory evidence—including "a showing of substantial prejudice." *Id.* at 245–46.

We start with the laches claim and the heavy burden it imposes on the defendants. *See id.* We affirm the district court's rejection of the claim, and we independently conclude that the defendants did not meet their burden by clear, convincing, and satisfactory evidence. We find the defendants have not proven prejudice, let alone substantial prejudice, that would impair their defense of any claims at issue in this appeal or otherwise harm their interests. We also note that laches is generally unavailable for any claim brought within the statute of limitations period, though we find it unnecessary to rest our decision on this ground. *See Life Invs. Ins. Co. of Am. v. Est. of Corrado*, 838 N.W.2d 640, 645 (Iowa 2013) ("Ordinarily the doctrine of laches does not apply within the statute of limitations unless there is a showing of a special detriment to another.").

While the estoppel-by-acquiescence claim does not require the same proof of prejudice, *see Davidson*, 266 N.W.2d at 439, we find the defendants have not properly invoked this equitable doctrine either. Even without the prejudice requirement, the burden to prove estoppel is borne by the party invoking the doctrine and requires proof "by clear and convincing evidence." *ABC Disposal Sys., Inc. v. Dep't of Nat. Res.*, 681 N.W.2d 596, 606 (Iowa 2004). The defendants did not carry their burden on this claim, as the record evidence is insufficient to prove that the plaintiffs intended to waive or abandon any rights related to the claims at issue in this appeal. To the contrary, the record shows affirmative investigation and other acts that tend to show objection to Keith's and Kurt's misconduct, rather than acquiescence—particularly as relates to the

misappropriated-corn and personal-expenses claims that we find meritorious elsewhere in this opinion.

Last, having affirmed the district court's rejection of the equitable defenses based on the defendants not carrying their initial burden, we find it unnecessary to reach the plaintiffs' claim that the defendants' "misleading tactics and concealments" would independently bar the equitable doctrines. *See Holden v. Constr. Mach. Co.*, 202 N.W.2d 348, 356 (Iowa 1972) (refusing to apply "estoppel and laches upon the basis of [the defendants'] own concealments, misleading tactics and misrepresentations").

D. Unclean Hands

The defendants also sought to invoke below, and reiterate on appeal, a claim that the plaintiffs' "unclean hands" barred the suit outright. We affirm the district court's rejection of this claim.

This doctrine, sometimes referred to as the "clean hands" doctrine, "is not a favored doctrine of the courts and should not be invoked when the only loser would be the public." *Cedar Mem'l Park Cemetery Ass'n v. Pers. Assocs., Inc.*, 178 N.W.2d 343, 353 (Iowa 1970). When properly invoked, the unclean-hands doctrine requires proof that the plaintiff "dirtied [his hands] in acquiring the rights he now asserts." *Anita Valley, Inc. v. Bingley*, 279 N.W.2d 37, 41 (Iowa 1979) (citation omitted). The doctrine exists "to protect the integrity of the court where granting affirmative equitable relief would run contrary to public policy or lend the court's aid to fraudulent, illegal or unconscionable conduct." *Myers v. Smith*, 208 N.W.2d 919, 921 (Iowa 1973).

As a threshold matter, we note the plaintiffs are likely correct in their claim that the unclean-hands doctrine applies only to equitable claims, rather than law claims grounded in statute for damages. *See Opperman v. M. & I. Dehy, Inc.*, 644 N.W.2d 1, 6 (Iowa 2002) (noting the doctrine's application to "granting affirmative equitable relief"); *In re Est. of Herm*, 284 N.W.2d 191, 196–97 (Iowa 1979) (similar). We elect to address the merits of the defendants' argument, rather than parse out its application to different aspects of the suit.

On the merits, we reject application of the unclean-hands doctrine to Brian and Gregg. While the record includes some evidence of less-than-ideal business practices by the two during their own involvement with HFI preceding this lawsuit, we agree with the district court that this conduct was generally not during the same time period as the claims giving rise to the lawsuit (some was more than thirty years prior) and that the claims (even if proven) fall short of the misconduct necessary to invoke the doctrine. We also independently conclude that, even if we were more troubled by the plaintiffs' conduct, and even if it were more contemporaneous, the rights the plaintiffs seek to vindicate in this suit were not obtained through the alleged misconduct. In other words, no hands were "dirtied . . . in acquiring the rights [the plaintiff] now asserts," which bars application of the doctrine. *See Anita Valley*, 279 N.W.2d at 41. Finally, we are not persuaded by the defendants' reliance on *Tope ex rel. Peripheral Solutions, Inc. v. Greiner*, No. 15-1571, 2017 WL 6033871, at *4 (Iowa Ct. App. Dec. 6, 2017). There, the nominal plaintiff stole from the corporation, unlawfully converted some $40,000 in assets to his personal use, and forwarded mail to a location inaccessible to the business and in hinderance of the corporate interests. *Tope*, 2017 WL 6033871,

at *4. The record does not contain evidence of comparable conduct by these plaintiffs, and *Tope* does not undermine the district court's ruling.

IV. Plaintiffs' Claims

Having affirmed rejection of all preliminary defenses put forward by the defendants, we move to the plaintiffs' claims. They assert (1) breach of fiduciary duty, (2) fraud, (3) appointment of a custodian for HFI, and (4) removal of Keith as trustee of the Trust. As discussed below, we affirm the district court in part on these issues, reverse in part, and remand for further proceedings consistent with our opinion, including a determination of damages and a ruling on indemnification.

A. Breach of Fiduciary Duties

By statute, corporate officers and directors have a duty of care, which imposes "the duty to act in conformity with . . . the care that a person in a like position would reasonably exercise under similar circumstances." Iowa Code § 490.842(1)(b). Officers and directors also have a duty of loyalty, which imposes the duty to act "[i]n good faith" and "[i]n a manner [the officer or director] reasonably believes to be in the best interests of the corporation." Iowa Code §§ 490.830(1); 490.842(1).

Most analysis of corporate decision making is guided by the business-judgment rule. "The 'heart of the business judgment rule' is 'judicial deference to business decisions by corporate directors.'" *Oberbillig v. W. Grand Towers Condo. Ass'n*, 807 N.W.2d 143, 154 (Iowa 2011) (citation omitted). However, "the business judgment rule governs only where a director is shown not to have a self interest in the transaction at issue." *Cookies Food Prods., Inc., by Rowedder v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 453 (Iowa 1988).

The law affords special regulation to self-dealing and transactions that involve a conflict of interest. Historically, the Iowa Supreme Court required "directors who engage in self-dealing to establish the additional element that they have acted in good faith, honesty, and fairness," in addition to the informed consent of shareholders or disinterested directors.[2] *Id.* The modern statute appears to make the requirement disjunctive. *See* Iowa Code § 490.861(2). Because the defendants did not plead any affirmative defense under section 490.861(2)(a) or (b), any defense of a self-dealing claim requires the director or officer to affirmatively prove that "[t]he transaction, judged according to the circumstances at the relevant time, is established to have been fair to the corporation." Iowa Code § 490.861(2)(c). "Fair to the corporation" means

> that the transaction as a whole was beneficial to the corporation, taking into appropriate account whether it was all of the following:
>
> a. Fair in terms of the director's dealings with the corporation.
>
> b. Comparable to what might have been obtainable in an arm's length transaction, given the consideration paid or received by the corporation.

Iowa Code § 490.860(3).

The law also prohibits application of the business judgment rule when a director lacks

> objectivity due to the director's familial, financial, or business relationship with, or a lack of independence due to the director's domination or control by, another person having a material interest

---

[2] We are mindful that the General Assembly has adopted statutory amendments since *Cookies*, but we agree with the commentary that *Cookies* is still largely good law and the modern statute should be interpreted similarly or identically. *See* Matthew Doré, *Iowa Practice Series: Business Organizations* § 28:11 (West Oct. 2022 update) [hereinafter *Iowa Practice Series*]. In any event, no party urges that the relevant principles have changed since *Cookies*.

> in the challenged conduct, which also meets both of the following criteria:
>
> (a) Which relationship or which domination or control could reasonably be expected to have affected the director's judgment respecting the challenged conduct in a manner adverse to the corporation.
>
> (b) After a reasonable expectation to such effect has been established, the director shall not have established that the challenged conduct was reasonably believed by the director to be in the best interests of the corporation.

Iowa Code § 490.831(1)(b)(3). As a commentator explains,

> Courts . . . refuse to apply the business judgment rule where the director's conduct advances the director's own self-interest or the interests of any party *other than* the corporation. Such situations involve a potential violation of the director's duty of loyalty, so that review of the director's conduct under deferential business judgment rule standards is inappropriate.

Iowa Practice Series § 28:6 (internal footnote omitted) (also collecting cases).

With this backdrop, we review the district court's analysis of the plaintiffs' numerous claims of misconduct by the defendants.

1. Keith Engaged in Self-Dealing Concerning Personal Expenses and Double-Dipping Mileage Reimbursements

The plaintiffs contend that Keith engaged in self-dealing by paying personal expenses with corporate assets. The undisputed record evidence is that Keith and his wife paid nearly $200,000 in personal expenses from the corporate checking account without reimbursing the company and without documented authorization. The record discloses no legitimate business purpose for these expenses. Despite these facts, the district court found that Keith did not engage in self-dealing.

We discern two errors in the district court's ruling. First, because Keith engaged in self-dealing, the district court erred in assigning the burden regarding fairness to the plaintiffs rather than Keith. *See Cookies*, 430 N.W.2d at 453.

Second, the district court erred in finding that Keith's conduct was excused because Keith's self-dealing reflected "consistent practices of all Hora family members who were employed by and/or involved in the operation of Hora Farms over the years." While it may be true that other family members also behaved poorly, a breach-of-fiduciary-duty claim focuses on the action of the fiduciary. *See* Iowa Code § 490.842; *Cookies*, 430 N.W.2d 453–54. If anything, evidence that others also engaged in misconduct tends to support the plaintiffs' claims that Keith breached fiduciary duties by mismanaging HFI.

Because our review is de novo, we resolve the merits of this claim. We find Keith engaged in self-dealing and that these transactions are not shielded by the business-judgment rule. *See* Iowa Code § 490.860(3). We also find that Keith did not carry his burden to prove that this transaction was fair to the corporation and comparable to an arms-length transaction. While there is some record evidence suggesting that the total compensation Keith received could have been appropriate, an arms-length transaction would not include athletic tickets and personal shopping paid for with crop and infrastructure accounts or the double-dipping vehicle reimbursements. We also find independent harm to the corporation through the false or incomplete business tax returns and other records filed under Keith's management, as the records failed to adequately document or authorize payment of the personal expenses as compensation, which impacted available deductions and tax owed by HFI and exposed the corporation to legal liability.

We reverse the district court on this personal-expenses self-dealing claim, and we remand for the district court to enter judgment in favor of the plaintiffs and determine damages.

2. Keith Allowed Kurt to Misappropriate HFI Corn

The plaintiffs also contend that Keith breached his duty because he knew Kurt was feeding HFI corn to Kurt's swine and relatedly knew that HFI was not selling a substantial portion of the produced corn. The district court found that this conduct, as it relates to Keith, did not involve self-dealing. We disagree. The beneficiary of Keith failing to monitor the corn taken by Kurt was Kurt, who is Keith's son. We have little trouble concluding that this qualifies as a self-dealing or conflicted transaction. *See* Iowa Code §§ 490.860(2)(c) (regulating transactions when "the director knew that a related person was a party or had a material financial interest"), (5)(b) (defining "related person" to include "[a] child"); 490.831(1)(b)(3) (noting the lack of protection for directors who lack objectivity due to familial relationships).

Again, because our review is de novo, we now determine whether Keith met his burden to affirmatively prove fairness to the corporation. *See* Iowa Code § 490.860(3). We find that Keith has not carried his burden. At core, what Keith enabled was civil conversion or criminal theft of HFI corn by his son Kurt. While perhaps there is some debate as to the extent Keith knew about the conversion or theft, there is no question he knew it was happening. Keith's own words from the 2015 message to his family are damning, given his admission that allowing Kurt to convert or steal a large quantity of corn reflected on "terrible" management and weighed in favor of seeking "outside help." So too for Keith's moment of honesty

in disclosing that Kurt had "too good of a deal" at the expense of the company, which was consistent with HFI's expert describing the deal as "too sweet." Yet Keith continued to engage in his own self-dealing, enabled Kurt to do the same, and did not ask any disinterested party to review the arrangements.

We find the conduct related to misappropriated corn was not fair to the corporation and was not the equivalent of an arms-length transaction. In addition, we find this breach harmed the corporation not only through monetary loss, but also due to its broader impact on HFI's financials and legal liabilities: because the payment-by-commodity arrangement (if that is truly what occurred) was not properly reported, HFI was unable to take advantage of all relevant tax deductions, failed to pay applicable employment taxes, and may now face significant tax difficulties (if not severe liability and penalties). *Cf. Seraph Garrison, LLC ex rel. Garrison Enters., Inc. v. Garrison*, 787 S.E.2d 398, 406 (N.C. Ct. App. 2016) (finding an officer breached his fiduciary duty through "indifference to the payroll tax," which "presented the corporation with a myriad of legal problems"). We also find harm to HFI because the abject lack of documentation (no W-2s, 1099s, or other papers) for the bushels misappropriated by Kurt may lead to criminal liability for aiding and abetting Kurt in the commission of state and federal tax fraud or evasion. Finally, we find harm to HFI in its lending process because, as the certified fraud examiner explained, Keith allowing or facilitating the misappropriation of corn resulted in HFI providing "materially incomplete" records to its lenders, which likely impacted financial decision making or loan availability.

We reverse the district court on this self-dealing claim, and we remand for the district court to enter judgment in favor of the plaintiffs and determine damages.

We do not opine as to whether damages on this count are joint and several with Kurt or any other defendant.

3. Other Claims Keith Breached Duties

The plaintiffs below and on appeal also make a variety of other allegations that Keith breached his duties. To summarize, the plaintiffs claim Keith essentially diminished the value of shares in the corporation through poor record-keeping and bad management. Keith disputes error preservation, but we bypass the error-preservation concern given our resolution of the issue on the merits. *See State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999) (bypassing error-preservation concern and proceeding to the merits).

The remaining allegations (other than the personal-expenses and misappropriated-corn claims) do not involve self-dealing or unjust enrichment of Keith or his immediate family members—at least not to the same extent as the personal-expenses and misappropriated-corn claims. We find the remainder of claims against Keith are either shielded by the business-judgment rule or are not supported by sufficient record evidence that would allow us to find bad faith, dishonesty, intention to harm, or unfairness to the corporate interest. We therefore affirm the district court's finding that the additional allegations do not warrant relief.

4. Kurt Misappropriated Corn

The district court did not address any alleged breaches of duty by Kurt, reasoning in a footnote that claims of breach and self-dealing were limited to corporate directors or officers. Kurt's appellate brief defends the suit on the merits, rather than by relying on the footnote. On de novo review, we find the district court erred in not analyzing whether Kurt breached the duties he owed to HFI.

At minimum, Kurt owed HFI the common law duty of loyalty all agents owe to a principal. *E.g.*, *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 598–99 (Iowa 1999). Kurt conceded this in his pleadings below and at oral argument, and his trusted position as operations manager of HFI justifies the imposition of fiduciary duties. *See id.* at 599 (recognizing fiduciary duties arise when an employee or agent has "greater authority to act for the principal"). It is well-established that an agent or employee breaches this duty through misappropriation of the employer's property. *See id.* at 600.

On this issue, we note the debate between the parties about who bears the burden. We ultimately find it unnecessary to resolve this question, as the evidence convinces us the plaintiffs proved breach. We find Kurt's repeat misappropriation of HFI corn for his personal use without reimbursement (which could likely be termed civil conversion or criminal theft) breached his duty. This misappropriation was not a mere accounting error but a deliberate and repeat series of choices that involved taking the corn, making false estimates of the amount taken, and inaccurately recording the taking to such a degree that precise accounting was made difficult or nearly impossible. We also reject Kurt's claim that the corn was permissible compensation, as Kurt never claimed it as income on his tax filings and HFI never reported the transactions in its filings. Last, we observe that Kurt's shifting stories (all of which conflict, to varying degrees, with more credible evidence) provide substantive proof of his culpability. *Cf. State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993) ("A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt and the false story is relevant to show that the defendant fabricated evidence to aid his defense.").

We reverse the portion of the district court's order finding Kurt did not breach a duty, direct the district court to enter judgment for the plaintiffs on this claim, and remand for the district court to determine damages. We again decline to opine on whether these damages are joint and several with Keith or any other defendant.

5. Other Alleged Breaches of Duty by Kurt

The plaintiffs also make a variety of other claims of misconduct against Kurt, alleging improper payments to HK Farms for crop inputs and overcharging HFI for labor. We find that the district court should have addressed these claims, based on our conclusion regarding the duty Kurt owed to HFI farms. However, although we are hindered by the lack of fact-finding on this claim, we are convinced on de novo review that the plaintiffs did not carry their burden. Our review has been informed, but not bound by, the district court's conclusion that the plaintiffs' expert testimony (the sole basis of these claims) was "less credible than other testimony in the case."

As to the crop inputs, we find the deeply conflicting evidence in the record is not sufficient for the plaintiffs to prove by a preponderance of evidence that any overpayment was sufficient to violate the agent–principal duty Kurt owed to HFI. Unlike the misappropriated-corn claim, Kurt has plausible explanations and did not engage in deceptive conduct regarding the crop inputs.

As to the labor billing, we find Kurt's record-keeping was sloppy and incomplete, but did not rise to the level of violating a duty to HFI. While we are hesitant to reward Kurt's bad record-keeping by finding his poor accounting prevented the plaintiffs from meeting their burden, we are persuaded that we must do so here because these records were essentially the sole basis for the expert's

conclusions regarding labor billing. *Cf. N. Skunk River Greenbelt Ass'n, Inc. v. Allen*, No. 18-0842, 2019 WL 6358298, at *7 (Iowa Ct. App. Nov. 27, 2019) (finding plaintiffs failed to carry burden in part due to "abysmal" recordkeeping and financial books that were a "nightmare"). Like the crop-inputs claim, Kurt has plausible explanations, and this claim also lacks the deceptive conduct that convinces us Kurt breached a duty with regard to the misappropriated corn.

We deny the plaintiffs' claims with regard to any additional misconduct committed by Kurt, though we reiterate our condemnation of both his conduct and poor record-keeping.

B. Fraud

Although there is some overlap in the claims of fraud and breach of fiduciary duty, the elements are different enough that outcomes may be different in litigation—as is the case here. To the extent the plaintiffs independently pursue a fraud theory, we agree with the district court that Keith's and Kurt's conduct, while dishonest and contrary to HFI's interests, does not rise to the level of fraud, fraudulent concealment, or fraudulent misrepresentation. *See Phoenix v. Stevens*, 127 N.W.2d 640, 642 (Iowa 1964) (summarizing the specific elements necessary to demonstrate actionable fraud). We are persuaded of this in part because the corporate records, while sloppy, contained sufficient information to allow this derivative suit to go forward and provided the basis for us to grant relief on at least some of the relevant claims. We recognize more or better claims may have been possible with better record-keeping, but the burden for fraud is high and must be borne by the plaintiffs. *See id.* We therefore affirm the district court on the fraud analysis.

C. Custodian and Removal of a Trustee

In Count III of their petition, the plaintiffs requested appointment of an independent custodian due to the claimed egregiousness of the defendants' violations. Because we have reversed and vacated three underlying breach-of-duty claims that impacted the district court's analysis of this issue, we vacate and remand for the district court to decide the question with the correct legal footing on the underlying claims.

We order the same remedy for the claim made in Count 4 of the petition, concerning the trust. This claim should also be decided anew on remand with the benefit of our opinion.

We note that, given the equitable nature of the remedies, the district court may consider whether any further deficiencies have been remedied or discovered in the course of litigation. As our supreme court has said, in crafting an equitable remedy, the district court "has considerable flexibility in resolving the dispute." *See Baur v. Baur Farms*, Inc., 832 N.W.2d 663, 677 (Iowa 2013).

D. Heather and HK Farms

The plaintiffs on appeal challenge the district court's findings that Heather and HK Farms also had liability for breach of fiduciary duty or fraud. Here, we agree with the district court that the plaintiffs did not carry their burden to prove that Heather or HK Farms facilitated the conduct at issue or acted as co-conspirators. The best evidence the plaintiffs point to is Heather's signature on tax forms, but there is little or no credible evidence she knew of the fiduciary breaches when signing the documents. We affirm the district court's conclusion that neither Heather or HK Farms have any liability in this action.

E. Fees, Costs, and Indemnification

The district court determined that the plaintiffs raised sufficient concerns that an award of fees and costs to the defendants was not appropriate. *See* Iowa Code § 490.746 (allowing the district court to award a party's expenses incurred in a derivative suit). We agree. *See Vaughan v. Must, Inc.*, 542 N.W.2d 533, 540 (Iowa 1996) (where an award of attorney fees is authorized by statute, we review such a decision for abuse of discretion). However, because we have reversed some (but not all) of the claims decided by the district court, we direct that the district court can revisit the question of the plaintiffs' trial fees and costs if our opinion would have affected its analysis in the first instance. In doing so, the district court must consider whether "the proceeding has resulted in a substantial benefit to the corporation." Iowa Code § 490.746(1).

The plaintiffs and defendants each seek appellate attorney fees and costs. *See Bankers Tr. Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982) (holding a statute allowing an award of attorney fees includes an award of appellate attorney fees). When available, appellate attorney fees are a matter of this court's discretion. *See Christy v. Lenz*, 878 N.W.2d 461, 469 (Iowa Ct. App. 2016). In exercising our discretion, we note both parties have prevailed on some issues and been defeated on others. We have considered the benefit to the corporation, and we affirmatively reject the defendants' claim that the plaintiffs "commenced or maintained [the suit] without reasonable cause or for an improper purpose." *See* Iowa Code § 490.746(1), (2). We deny the request for attorney fees on appeal and direct that the parties pay their own costs. We also note that, although we have affirmed that neither Heather or HK Farms have liability, the questions presented by the suit and

addressed in the brief jointly filed by Kurt, Heather, and HK Farms are sufficiently grounded in fact that we find an award of fees to any individual entity who shared in the briefing is not appropriate.

Finally, the plaintiffs contest whether Keith was properly indemnified for his legal fees. By statute, corporate officers are indemnified in suits brought when the director "was wholly successful, on the merits or otherwise." *Id.* § 490.852. This provision is intended to mandate indemnification when "the proceeding is disposed of on a basis which does not involve a finding of liability." *Allen*, 2019 6358298, at *6 (quoting *Iowa Practice Series* § 28:16). Regardless of the statute, articles of incorporation may restrict indemnification. *See* Iowa Code § 490.858.

Article III, section 14 of HFI's Articles of Incorporation provides that indemnification is not available if the director or officer has been found "liable for negligence or misconduct in the performance of duty." The district court did not address this issue, presumably because it found no breach of duty. Because we found breaches of duty and reversed on the personal-expenses and misappropriated-corn issues related to Keith, we direct the district court to decide indemnification on remand. We find no basis for permissive indemnification under section 490.851, given the evidence and arguments made below. If the district court finds that Keith engaged in "negligence or misconduct in the performance of duty" as those terms are used in Article III, section 14, the district court shall order Keith to repay HFI the sum of any erroneous indemnification and make all necessary fact-findings to effectuate such an order.

F. Disposition

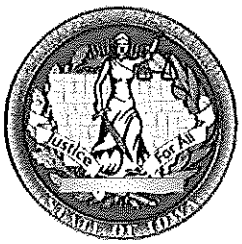
As to Keith, we reverse the district court on the personal-expenses and misappropriated-corn claims, and we remand for the district court to enter judgment against Keith and determine damages. The district court must also determine the applicability of the indemnification clause and order repayment to HFI if appropriate.

As to Kurt, we reverse the district court on the misappropriated-corn claim and direct the district court to determine damages.

As to the appointment of a custodian and removal of the trustee, we vacate and remand for the district court to determine these issues in light of our ruling on the breach-of-duty claims.

We affirm on all other grounds presented by the parties, whether addressed in this opinion explicitly or implicitly. The request for appellate attorney fees is denied and the parties shall pay their own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.



State of Iowa Courts

Case Number	Case Title
22-0259	Hora v. Hora

Electronically signed on 2023-02-17 09:58:14