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/Cross-Appellees,

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-Appellees/Cross-Appellants.

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

RESISTANCE OF DEFENDANTS-APPELLEES KURT HORA, HEATHER HORA AND HK FARMS, INC.TO THE PLAINTIFFS-APPELLANTS' APPLICATION FOR FURTHER REVIEW

(COURT OF APPEALS DECISION FILED FEBRUARY 8, 2023, AMENDED FEBRUARY 17, 2023)

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I. The Court need not address "adverse domination" because Brian and Gregg participated in and possessed the facts necessary to bring their claims at least 20 years ago.

Brian and Gregg argue that, since Keith was always a director of Hora Farms, "[t]he corporation could not have known of the wrongdoings he hid from the other shareholders, much less taken any recourse." (Plaintiffs' Application p. 13). As a general proposition, this makes sense enough. Applied to the facts of this case, however, it is absurd. As Plaintiffs note, "the adverse domination doctrine "is a logical extension of the discovery rule…."' (Plaintiffs' Application p. 8) (citation omitted). The adverse domination doctrine does not apply to this case because there was nothing for Brian and Gregg to discover; they knew, and complained, of the actions that are the subject of this lawsuit more than twenty years before they brought it. Decades ago, Brian and Gregg engaged in the same conduct they complain about here. In fact, according to Gregg, "And 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. 446 at 173:12-14).

Brian and Gregg had inside knowledge of the operation and management of Hora Farms—including its grain storage protocols—for decades before initiating this action as shown by Gregg's testimony set forth above. Moreover, in the 1990s, Brian 1) had the ability to request his

compensation in-kind (App. Vol. II pp. 0251-0252 at 163:18-164:3); 2) comingled his corn in Hora Farms' bins (App. Vol. II pp. 0261-0262 at 175:22-176:2); and 3) engaged in the annual process of "settling up" with Hora Farms (App. Vol. II p. 0263 at 182:12-15). 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 at 191:10-194:9; App. Vol. VI pp. 67-68 (Brian's 1994 meeting notes). Under the facts of this cases, Plaintiffs' argument for the application of the adverse domination doctrine fails.

The Court can reject Plaintiffs' Application for procedural reasons, too. Brian and Gregg's Application marks the first time in this case that they argue the "adverse domination" doctrine. In support thereof, Brian and Gregg argue "this Court has yet to expressly address the adverse domination doctrine." (Plaintiffs' Application p. 7). The problem with their argument, however, is that Brian and Gregg failed to raise this argument until their Application, and, therefore, deprived the District Court and Court of Appeals the opportunity to expressly address the adverse domination doctrine. Because an argument cannot be raised for the first time on appeal—let alone for the first time on application for further review—the Application must be rejected.

"It is a basic rule of appellate practice that questions not presented to and not passed on by the trial court cannot be raised or reviewed on appeal." *Gardin v. Long Beach Mortg. Co.*, 661 N.W.2d 193, 196 (Iowa 2003) (quoting *Shill v. Careage Corp.*, 353 N.W.2d 416, 420 (Iowa 1984)); *see Vincent v. Four M Paper Corp.*, 589 N.W.2d 55, 64 (Iowa 1999) (holding "[w]e will not address an argument which the district court did not have an opportunity to consider").

In this case, not only did the District Court not have an opportunity to consider the "adverse domination" doctrine, neither did the Court of Appeals. For the first time in the five and a half year life of this case, Brian and Gregg assert the "adverse domination" (and, indeed, for the first time use this phrase) in their Application for further review. An argument cannot be raised for this first time on appeal. *See, e.g., Gardin*, 661 N.W.2d 196. Therefore, the Application for the Court grant further review on the issue of adverse domination must be rejected.

II. The Court of Appeals considered the "benefit to the corporation" and appropriately declined to award attorney fees to Brian and Gregg.

In support of their argument that the Court of Appeals applied an incorrect legal standard in denying their appellate attorney fees, Brian and Gregg pull the following quote from the Opinion: "both parties have prevailed on some issues and been defeated on others." (Plaintiffs' Application p. 20)

(citing Opinion p. 26). Based on this quote, Plaintiffs argue that the Court of Appeals supplanted the standard provided in Iowa Code § 490.746(1) with a "prevailing party" standard." (Plaintiffs' Application p. 20). The Court of Appeals did not. In fact, in the next sentence the Court of Appeals makes clear that it "considered the benefit to the corporation...." (Opinion p. 26).

Moreover, when available, appellate attorney fees are subject to the Court of Appeals' discretion. *See Christy v. Lentz,* 878 N.W.2d 461, 469 (Iowa Ct. App. 2016). The statute itself provides that the award of fees is discretionary. § 490.746 ("On termination of the derivative proceeding, the court *may* do any of the following...") (emphasis supplied). The record in this matter provides numerous reasons why both the Court of Appeals and District Court would choose to not award appellate attorney fees. For example, this years-long litigation process has served as a detriment to the company. (App. Vol. II p. 0959 at 200:19-20.) 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 at 108:23-109-1). Sue Basten, an officer with Washington State Bank, questioned Gregg's intent to benefit Hora Farms. (App. Vol. II p. 0329 at 118:16-20.) As the District Court noted, "the 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.) The Court should reject this issue for further review.

CONCLUSION

For the foregoing reasons, the Court should decline to grant further review on this issues identified by Brian and Gregg.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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

[X] this application has been prepared in a proportionally spaced typeface using Garamond in 14 font size, and contains 1,021 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(*a*).

Dated: March 10, 2023 */s/ Joseph W. Younker*

CERTIFICATE OF SERVICE AND FILING

The undersigned certifies that on March 10, 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:

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