IN THE SUPREME COURT OF IOWA
No. 22-0259

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

Plaintiffs-Appellants/Cross-Appellees
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.,

Defendants-Appellees/Cross-Appellants.

Appeal from the District Court for Washington County
The Honorable Sean McPartland

Resistance of Plaintiffs-Appellants Brian Hora and Gregg Hora to Keith Hora's Application for Further Review

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I. KEITH RAISES NO ISSUE OF FIRST IMPRESSION CONCERNING BRIAN AND GREGG'S STATUTORY STANDING TO BRING DERIVATIVE CLAIMS

Keith's first issue for further review is whether Brian and Gregg "fairly and adequately represent the interests of the corporation." *See* Iowa Code § 490.741 (2) (establishing standing requirements for a shareholder derivative action). The district court found that they do, and the Court of Appeals "had little difficulty" reaching the same conclusion. *Amended Opinion*, p. 9, filed February 17, 2023. Keith raises no issue of "first impression" for the Iowa Supreme Court to address and no grounds justifying further review on this issue.

Keith challenges standing for three reasons: Brian and Gregg (1) request dissolution of Defendant Hora Farms, Inc. ("Hora Farms" or "HFI"); (2) request custodial control of Hora Farms; and (3) have taken "actions that pursue their individual interests." Keith Hora's Application for Further Review, p. 2, filed February 28, 2023. These reasons are spurious. Brian and Gregg do not request dissolution of Hora Farms; they request that the entity be placed into the control of an independent custodian. Keith cites no authority – because there is none – that their request for independent custodial control of Hora

Farms is inconsistent with making derivative claims. And finally, there is substantial evidence to support the lower courts' rejection of Keith's claim that Brian and Gregg had an "improper purpose" in bringing the derivative claims. Simply put, Keith's arguments about derivative standing have been consistently rejected throughout this case and do not require further review.

First, Brian and Gregg did not request dissolution in their post-trial filings, and they have made it absolutely clear that they are not requesting corporate dissolution in this appeal. See Plaintiffs-Appellants' Reply Br., p. 83. Therefore, the issue is moot.

While Brian and Gregg asked for dissolution of Hora Farms in their Petition and Amended Petition, this request did not disqualify them from pursuing derivative claims. Keith relies heavily on *Read v. Read*, 556 N.W.2d 768, 771 (Wis. Ct. App. 1996), in support of a purported "dissolution-disqualification" rule, but he fails to mention a later decision clarifying *Read*:

> The *Read* court concluded only that the trial court's determination was not a misuse of its discretion; it did not hold…that no minority shareholder who files a motion to dissolve the corporation can ever fairly and adequately represent the interests of the corporation in a derivative action."

Betty Andrews Revocable Tr. v. Vrakas/Blum, S.C., 779 N.W.2d 723 (Wisc. Ct. App. 2010). *See also Trondheim Cap. Partners LP v. Life Ins. Co. of Alabama*, 2022 WL 893542, at *7 (N.D. Ala. Mar. 25, 2022) (rejecting the argument the plaintiffs lacked standing because their individual claims sought dissolution); *Bragoni v. Francalangia*, 2017 WL 5642275 at *7 (Conn. Super. Ct. 2017) ("In sum, the court concludes that the plaintiff's direct claim for dissolution does not prevent him from fairly and adequately representing the interests of the corporations with respect to the derivative claims").

Unlike *Read*, appellate review in this case does not involve analyzing whether the district court abused its discretion in concluding the plaintiffs failed to prove standing. Quite the opposite, as here, the district court concluded that Brian and Gregg had standing. The Court of Appeals agreed and went on to "share the district court's observation that the defendants' reliance on *Read* [*v. Read*, 556 N. W.2d 768 (Wis. Ct. App. 1996)] is 'misplaced if not misleading.'" *Amended Opinion*, at 9.

Moreover, it is entirely foreseeable that, in many circumstances, derivative claims would properly precede dissolution as a remedy. Absent enforcement through derivative claims, the true value of the

corporation may not be correctly established. Grounds for dissolution may still exist after the corporation's claims have been liquidated and collected in derivative proceedings. But dissolution is a separate question that may be separately and independently resolved on its merits. These remedies do not conflict. They may, in fact, complement each other.

Courts that have concluded otherwise have either confronted different facts or failed to acknowledge that these remedies may be logically and practically consistent. There is no *per se* "dissolution-disqualification" rule that should operate as a matter of law in all derivative actions. And there is certainly no justification to use this case as a vehicle to create one.

Second, Keith cannot cite to any authority supporting the proposition that shareholders' request for a neutral custodian, subject to the oversight of the district court, defeats statutory standing to bring derivative claims. The idea is absurd and utterly inconsistent with the right to petition the government for aid and assistance. In this case, Brian and Gregg do not (and have not) requested that they personally be put in control of Hora Farms, but rather, the appointment of a

neutral custodian. Such judicial relief would be appropriate only if the district court determines that a custodian would be in the best interests of the corporation as a whole.

Further, the remedies Brian and Gregg sought "would benefit shareholders equally." (District Court Order pp. 21-22, filed September 30, 2021.) There is nothing untoward or inappropriate about a neutral custodian appointed by the district court. A contrary conclusion would yield absurd results; no shareholder could request a neutral custodian in derivative proceedings even though a custodian may, under the circumstances, be in the best interests of the shareholders. As the Court of Appeals succinctly observed:

> It is not improper for concerned shareholders to request this equitable remedy [of a neutral custodian] when the allegations concern corrupt management and self-dealing, as the plaintiffs allege here.

Amended Opinion, p. 10. Thus, Keith's second objection to Brian and Gregg's standing to bring derivative claims is groundless and suggests nothing for further review.

Third, Keith claims "[t]he other ninety-five percent shareholders were invited but declined to support or join this suit." Keith's Application p. 19. Of course, the suit would not have the support of the

majority shareholders—because Keith owns or controls the majority interests. Whether other shareholders have expressed their support for this action is irrelevant. *See* 13 Fletcher Cyc. Corp. § 5975 ("It is not necessary that a shareholder have the support of a majority of shareholders or even the support of all the minority shareholders"). "The mere fact that other shareholders were willing to go along with a violation of the rights of the corporation" does not foreclose a minority shareholder's derivative action, as the majority shareholders "have no right to destroy the property rights of the minority shareholders, even if there is only one in the minority." *Brandon v. Brandon Const. Co. Inc.*, 776 S.W.2d 349, 353 (Ark. 1989). Even if "other minority shareholders have disavowed the action of the [shareholder bringing the derivative suit] and indicated they do not wish to continue the action, she is not prohibited from doing so." *Id.*

But in this case, Brian and Gregg were not the only shareholders to request changes in Hora Farms' operations. In 2016, Dana and Heidi asked Keith to step down, a change that Darren and Kathy also requested. (Ex.133 p.5). In other words, Brian and Gregg are not the only minority shareholders to identify problems with Hora Farms'

operations, even though they are the only minority shareholders who have pursued judicial action.

Some degree of hostility is inevitable in corporate family farm disputes. *See Cattano v. Bragg*, 727 S.E.2d 625, 629 (Va. 2012) ("Charged emotions and economic antagonism are virtually endemic to disputes in closely held corporations."). As such, when considering standing for derivative suits involving closely-held corporations, courts "look beyond the mere presence of economic and emotional conflict, placing more emphasis on whether the totality of the circumstances suggest that the plaintiff will vigorously pursue the suit and that the remedy sought is in the interest of the corporation." *Id.*

The issue of whether Brian and Gregg have derivative standing should be reviewed for correction of errors at law. *See Iowa Citizens for Cmty. Improvement v. State*, 962 N.W.2d 780, 787 (Iowa 2021); *Homan v. Branstad*, 864 N.W.2d 321, 327 (Iowa 2015). The district court concluded that Brian and Gregg fairly and adequately represent Hora Farm's interests in advancing the derivative claims in this action, a conclusion the Court of Appeals affirmed:

> 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.

Amended Opinion, p. 9. Thus, Keith's third and final objection to Brian and Gregg's standing to bring derivative claims, and as a reason for further review of the issue, is groundless.

Throughout this case, Brian and Gregg have represented the interests of all shareholders—even those who have, through inaction, demonstrated some reservation to commit the financial and emotional effort needed to resolving the family's problems. The relief the corporation has received in this action benefits all shareholders equally.

Substantial evidence supports the prior decisions concluding that Brian and Gregg have standing. Further review is unnecessary and would not provide any benefit beyond the unique facts of this case. Keith is merely rearguing the evidentiary points he made and lost below. There is no legal issue that meets the requirements for further review. *See* Iowa R. App. P. 6.1103 (b)(1)-(4). The Court should reject the first and primary question posed by Keith for further review.

II. KEITH'S CLAIM OF "ERROR" IN THE COURT OF APPEALS' ANALYSIS AMOUNTS TO DISSATISFACTION THAT HE MUST REPAY HORA FARMS FOR HIS PERSONAL EXPENSES AND DOES NOT PRESENT GROUNDS FOR FURTHER REVIEW

Keith and his wife paid $193,223 in personal expenses from the Hora Farms checking account without any business purpose and without reimbursing the corporation. (APP.VOL.II pp.86,543-4); (APP.VOL.IV pp.24,47-64); (TR.VOL.VI 49:14-52:25); (Ex. 213 pp.2,25-42). Though Keith now claims these personal expenses are part of his "compensation," the amount of personal expenses Keith charged to Hora Farms annually "are significantly higher" than the compensation amount Hora Farms deducted on its income tax return. (APP.VOL.II p.86).

Keith's expert, Russ Thompson, opined that if one considered only Keith and LoRee's wages and "benefits," then Hora Farms was underpaying what a farm management firm would charge. (APP.VOL.II p.940-TR.VOL.X 127:2-0;141:8-143:7). His analysis was incomplete, however, because he did not consider Kurt's salary or the corn Kurt took when analyzing Hora Farms' management costs. *Id.* Thus,

Thompson failed to analyze Hora Farm's total management expenses, and Keith failed to meet his burden to prove "fairness as a whole."

Keith's misuse of Hora Farms' funds to pay his personal expenses—without accounting for them properly, and without proof of what fair management costs would be—constitutes a breach of his duties of care and of loyalty, not only as a director, but also as an officer and employee. The Court of Appeals was correct in so holding and requiring Keith to repay Hora Farms for his personal expenses. There is no reason to revisit the analysis and no ground for further review. The next appropriate step is to allow the district court to determine the amount of personal expenses that Keith must repay.

III. KEITH'S LIABILITY IS NOT LIMITED TO BREACH OF HIS DUTIES OF LOYALTY AS A DIRECTOR

In his Application for Further Review, Keith now seems to believe that Kurt's misappropriation of corn would not be a "transaction" within the meaning of Iowa Code § 490.860 (2) (defining a "Director's conflicting interest transaction"). Keith Hora's Application for Further Review, p. 25. Keith has never taken this position before. Instead, he has always asserted that: "Kurt received corn from Hora Farms as an

in-kind trade for his services." *See* App. vol. III, p. 991, ll. 9-12. Keith's failure to preserve this new argument is reason enough to deny further review. Regardless, further review is unnecessary because Kurt's misappropriation of corn undoubtedly describes a "transaction" with Hora Farms.

The transaction Keith approved was the deeply-flawed compensation arrangement with Kurt. The terms of this transaction did not require Kurt to weigh the corn he took. It assumed, without proper investigation by Keith, that 9 bushels a sold head was fair. The accounting Keith agreed to, in the form of "settling up" at the end of a season, relied on whatever Kurt reported—which later proved to be false. The very structure of the transaction approved by Keith allowed Kurt to take unreasonable and excessive "compensation." This was a breach.

In the end, it does not matter whether the excessive corn Kurt took purportedly as "compensation" was a "transaction" within the meaning of Iowa Code § 490.860 (2). A similar analysis applies:

> Although these nontransactional situations are not covered by the provisions of subchapter F, [regulating judicial review of director conflict-of-interest transactions and related director and shareholder approval procedures], a court may

> very well recognize that the subchapter F procedures provide a useful analogy for dealing with such situations.

Model Business Corporation Act Annotated (5th Ed. 2020), p. 8-432, Subchapter F, Introductory Comment, 3. Nontransactional Situations Involving Interest Conflicts, B. Other Situations.

Hora Farms' claims against Keith extend beyond his duties and actions as a director; the claims also included Keith's duties and actions as an officer, manager, and employee. There was never any suggestion (in either the claims or defenses) that Keith's liability was somehow based exclusively on his role as a director of Hora Farms. Indeed, the court of appeals' analysis relied both on a director's liability under Iowa Code §§ 490.831 and 490.860 and on a fiduciary's liability to a corporation. The court of appeals correctly rejected Keith's attempts to escape liability for his breaches of fiduciary duties in each one of the roles he had.

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Certificate of compliance

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because the application has been prepared in a proportionally-spaced typeface using Century Schoolbook font in size 14 and contains 2,275 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ *Amanda Mason*

Certificate of service

I hereby certify that on March 10, 2023, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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The undersigned further certifies that the foregoing document was served on Hora Farms, Inc., in an envelope with postage fully paid and deposited in a U.S. Post Office depository as follows:

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