IN THE SUPREME COURT OF IOWA

No. 19-2151

SUSAN A. GUGE AND PEGGY MCDONALD,

Plaintiff-Appellees,

vs.

KASSEL ENTERPRISES, INC.; CRAIG KASSEL; and DEBORAH KASSEL,

Defendant-Appellants

Appeal From the District Court for Palo Alto County

The Honorable Charles Borth

DEFENDANT-APPELLANTS' BRIEF

[AND REQUEST FOR ORAL ARGUMENT]

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ROUTING STATEMENT

Defendant-Appellants and Cross-Appellees believe these combined appeals should be retained by the Supreme Court as meeting the criteria for retention under Rule 6.1101(2)(d) of the Rules of Appellate Procedure. This case involves the application of an Iowa farming corporation to redeem the shares of stock of minority shareholders petitioning for dissolution under § 490.1434 of the Code of Iowa. The Supreme Court has previously ruled that in such an instance, the shareholders should be paid fair value as defined in §490.1301. Here the District Court in its simplistic and erroneous opinion simply computed the fair market value of the farm corporation assets and divided by the number of outstanding shares to determine the fair value ostensibly because the corporation was acting under Subchapter S of the Internal Revenue Code. Should this holding be allowed to stand, it will violate the teachings of this Court in Baur v. Baur Farms, Inc., 832 N.W.2d 663 (Iowa 2013) but vitiate the provisions of §490.1434 of the Code allowing minorities, using obviously false claims of oppression as the District Court here found, to oppress the majority owner completely innocent of any oppression.

I. STATEMENT OF THE CASE

A. Nature of the Case

On May 17, 2018, the Plaintiffs Susan Guge and Peggy McDonald (hereafter "Plaintiffs" or "Guge" and "McDonald") filed suit in the Iowa District Court for Palo Alto County alleging claims in six counts against their brother, Craig Kassel, his wife, Deborah Kassel, and three corporations.

Two of the defendant corporations, Kassel Farms, Inc. and Great Oak Farms, Inc. were owned by Craig Kassel and Deborah Kassel. The third corporation, Kassel Enterprises, Inc. was an Iowa corporation engaged in farming, owning 670 acres of row crop farmland in Palo Alto County and owned by the Plaintiffs (23.75% of the common stock respectively) and defendant Craig Kassel who owned 52.50% of the defendant Kassel Enterprises, Inc. (App. V.I, p.13-78.).

The Plaintiffs in their 120 paragraph Petition alleged in Count I a request for "Judicial Dissolution of Kassel Enterprises, Inc." pursuant to Iowa Code Section 490.1430. The petition is hardly a model of clarity but appears to only mention conduct by Defendants Craig Kassel and Kassel Farms, Inc. in the nature of underpayment of cash rent and an unfair exchange of real estate to support the dissolution claim. (App. V.I, p.23-24.)[1]. In Count II, Guge and McDonald accused Craig Kassel, his wife Deborah Kassel, and their wholly owned farm corporations of a variety of breaches of fiduciary duties. In Count III, Guge and McDonald accused the same Defendants of fraud largely re-characterizing the fiduciary breaches as

[1] References to the record, most of which will be included in the appendix, shall be made by abbreviations of the pleadings and court filings, exhibit numbers, and transcript references. The references will be replaced in the final brief by citations to the Joint Appendix pages.

fraudulent acts. In Count IV, Guge and McDonald alleged that Defendants (only identifying Craig Kassel) breached contracts by not complying written by-law provisions of Kassel Enterprises, Inc. In Count V, Plaintiffs claim to be third party beneficiaries to contracts violated at least by Craig Kassel. Finally, in Count VI, Guge and McDonald alleged a civil conspiracy against them by unidentified Defendants. In Counts II, III, IV, V, and VI, Guge and McDonald demanded trial by jury on their damage claims. (App. V.I, p.13-30.). No count of the Petition contained a derivative demand.

On June 22, 2018, all Defendants answered denying the material allegations of wrong doing and alleging two counterclaims. (App. V.I, p.79-91.). On July 5, 2018, Guge and McDonald replied to the counterclaims denying the same. (App. V.I, p.92-97.). On August 20, 2018, defendant Kassel Enterprises, Inc. filed its notice that pursuant to section 490.1434 of the Code of Iowa, it was electing to purchase the Plaintiffs' shares for fair value. (App. V.I, p.98-99.). The Plaintiffs never responded to the notice so after the 60 day negotiation period, Kassel Enterprises, Inc. moved pursuant to the statute for a hearing to determine fair value. (R. Mot. to Det. Fair Val. 12-18-18). Over Plaintiffs' resistance, the District Court entered an order setting deadlines for expert discovery and a date for the statutorily required hearing to determine fair value. (App. V.I, p.108-110.). In the meantime,

Plaintiffs had commenced discovery on their claims as contained in Count II through VI of their petition.

B. Course of Proceedings

Claiming falsely that Defendants had not responded to discovery necessary for the fair value hearing Guge and McDonald moved to compel discovery and continue the fair value hearing. (R. Mot. To Comp. Dis. 4-5-19; Mot. To Cont. Fair Value Hr. 4-26-19). In fact, Plaintiffs had failed to file any expert reports on the fair value issue. (Res. To Mot. to Cont. Fair Val. Hr.) Despite Defendants' objections, the District Court continued the date for the fair value hearing to October 10, 2019 and the trial until November 5, 2019. (App. V.I, p.115, p. 135). The only substantial discovery in the proceeding was conducted between June and September of 2019. On September 13, 2019, Plaintiffs and Defendants filed motions for summary judgment on the claims pending against them. (App. V.I, p.140-285.)

The District Court had set October 10, 2019 for the hearing to determine the value of Guge's and McDonald's stock in Kassel Enterprises, Inc. While summary judgment proceedings on the remaining five counts of the petition and three counts of the counterclaims were pending, Defendants filed a motion to strike Plaintiffs purported supplemental expert opinion.

(App. V.II, p.40 et seq). On the night before the fair value hearing Plaintiffs filed a document titled "Statement of Issues and Trial Brief" (App. V.II, p.102-159.) in which Guge and McDonald made two new claims. The first claim was that Plaintiffs should be allowed to increase the value of their stock based upon Craig Kassel's wrong doing as alleged in the petition. The second claim was that Guge and McDonald were entitled to attorney fees because of Defendants' wrongdoing as provided by Section 490.1434 of the Code of Iowa.

C. Disposition of the Parties' Claims Below

On October 10, 2019, the proceedings to determine the fair value of Plaintiffs' stock in Kassel Enterprises, Inc. came on for hearing. Prior to the hearing the District Court determined that Guge and McDonald would be entitled to present additional evidence relating to Defendants' purported misdeeds but that such evidence would only be admitted with respect to the issue of whether Plaintiffs were entitled to attorney fees as provided in § 490.1434 of the Code (App. V.V, p.12-15.). The evidentiary hearing proceeded with Guge and McDonald first offering evidence relating to misconduct justifying attorney fees. Then Defendant Kassel Enterprises presented its evidence through its expert on the fair value of its common stock as of the date before the suit was filed. (App. V.V, p.76 et seq.).

Plaintiffs called an accountant to testify as to his opinion of the fair value. (App. V.V, p.138 et seq.). Reports of the experts were offered into evidence.

On October 1, 2019, Plaintiffs had dismissed their claims in Counts III, IV, V, and VI of their Petition and against certain defendants in Counts II. (App. V.I, p.268-269.). After the evidentiary hearing on October 10, 2019, both Plaintiffs and Defendants submitted post hearing briefing on the issues of fair value and Plaintiffs' entitlement to attorney fees. On November 5, 2019 the District Court entered its Order dismissing Plaintiffs' claims not previously dismissed and also dismissing Defendants' counterclaims. (App. V.II, p.284-92). That same day the District Court entered its Order on the issues litigated in the October 10 fair value hearing. (App. V.II, p.270-282.) The District Court found that Guge and McDonald were entitled to attorney and expert fees (App. V.II, p.276-278.) and ordered further proceedings to determine the amounts. Further the District Court found that each of the Plaintiffs' shares should be valued at $6,826.87 and that each Plaintiff should be paid $1,373,327. (App. V.II, p.276.)

After submitting the briefing required by the District Court's November 5 order on attorney fees, Defendants Kassel Enterprises, Craig Kassel, and Deborah Kassel submitted their Rule 1.904 Motion to Alter or

Amend on November 20, 2019. On December 5, 2019, the Court denied Defendants' Rule 1.904 Motion in its entirety and on December 6, the Court entered its Order granting Plaintiffs' an award of attorneys' fees and expert fees (App. V.II, p.378-387.). On December 31, 2019, Defendants filed their Notice of Appeal of the attorney fee award and on January 3, 2019, appealed the fair value determination. Plaintiffs have cross appealed both orders. (App. V.II, p.388-397.)

II. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

A. Parties and Pleadings

On May 17, 2018, plaintiffs Susan Guge and Peggy McDonald (hereafter plaintiffs or "Guge" and "McDonald") filed a six count petition and jury demand against their younger brother Craig Kassel (hereafter "Craig"), his wife, Deborah Kassel (hereafter "Deborah") and three corporations, Kassel Enterprises, Inc. ("KE"), Kassel Farms, Inc. ("KF") and Great Oak Farms, Inc. ("Great Oak"), the latter two corporations wholly owned by Craig and Deborah. Guge and McDonald are the older sisters of Craig Kassel. The defendant KE is an Iowa farming corporation as are defendants KF and Great Oak. (App. V.I, p.13-14.). Guge and McDonald each owned 23.75% of the common stock of KE and Craig owned 52.50% of the stock at the time the petition was filed. KE owned 660 acres of row crop farmland in Palo Alto County and KF and Great Oak were farming that ground on a cash rent basis (App. V.I, p.19-21.)

In the six count, eighteen page, 120 paragraph petition with thirty pages of exhibits, plaintiffs Guge and McDonald alleged claims against defendants Craig Kassel, Deborah Kassel and Kassel Enterprises. (App. V.I, p.13-77.). In Count I, plaintiffs claimed that the defendant Kassel

Enterprises should be dissolved because Craig had underpaid cash rent and exchanged land to the detriment of Kassel Enterprises. (App. V.I, p.23-24.) In Count II plaintiffs charged all the remaining defendants with a variety of breaches of fiduciary duties. (App. V.I, p.23-24.). In Count III, Guge and McDonald alleged Craig, his wife and wholly-owned corporations committed fraud against the plaintiffs – referencing unidentified earlier paragraphs in the petition. In Count IV, plaintiffs alleged the defendants (identifying Craig) violated the articles and by-laws of Kassel Enterprises, thereby damaging them. (App. V.I, p.27-28.). In Count V, plaintiffs claimed they were "third party beneficiaries" as shareholders who were damaged by violations of the articles and by-laws of Kassel Enterprises. They alleged Craig had caused these violations and that therefore they were damaged. (App. V.I, p.28-29.). Finally, in County VI plaintiffs alleged a civil conspiracy "to accomplish the unlawful conversion of KE's assets . . . ." (App. V.II, p.29.). This conversion caused the plaintiffs damage.

All defendants answered and filed two counterclaims, one for abuse of process and a second for equitable setoff. (App. V.I, p.79-92.). Affirmative defenses were also alleged. No discussion of the facts learned in discovery relative to the plaintiffs' claims in their petition is necessary for two reasons. First of all, shortly after answer, Defendant Kassel Enterprises filed its

notice that it would purchase Guge's and McDonald's common stock for fair value. (App. V.I, p.98-101.). This election by KE was made pursuant to the provisions of Section 490.1434 of the Code of Iowa. That section of the Iowa Code provides that when minority shareholders claiming oppression sue to dissolve a corporation, the corporation (and other shareholders) can cause the suit to be dismissed by purchasing the complaining shareholders' stock for fair value. § 490.1434 Code of Iowa.

The second reason that no discussion of the evidence discovered in the arduous proceedings allowed by the District Court over Defendants' objection, is that, faced with summary judgment filings, Guge and McDonald dismissed Counts III, IV, V and VI of their petition and also the two corporate defendants in Count II. (App. V.I, p.268--269.). The District Court summarily dismissed the two remaining defendants in its November 5 Summary Judgment Ruling. Thus, the only remaining claim for disposition was the determination of the fair value of plaintiffs' stock causing dismissal of Count I for dissolution of Kassel Enterprises. (App. V.II, p.271-283.).

B. History of Kassel Enterprises and Its Operations, Shareholders and Financial Statements

Kassel Enterprises, Inc. was formed in late December 1977 by

Lawrence and Georgia Kassel as a farm corporation in Palo Alto County. Lawrence and Georgia were the sole shareholders and are the parents of Guge, McDonald and Craig Kassel. In the last decade of the 20th Century, Lawrence and Georgia commenced a gifting program giving stock in Kassel Enterprises to three of their children. (App. V.I, p.15, V. 1X p. 196-213, 332-337.). After Lawrence's death in 2005, Guge owned 23.75% of the corporation's stock. Her sister, McDonald, owned 23.75%. Craig Kassel owned 23.75% of the stock and their mother, Georgia, owned 28.75%. For the succeeding twelve years until Georgia's death in 2017, Craig cash rented the crop land owned by KE. At Lawrence's death the corporation owned 520 acres outright and an undivided one-third of a 270-acre parcel. (App. V.I, p.16.). After his death, the corporation purchased an additional 60 acres.

Prior to Georgia's death, she gifted about 13% of her stock to Craig and his wife, Deborah. Pursuant to a family settlement agreement, Georgia's gifts were reversed and Craig purchased all of his mother's stock at a formulated price with the land valued at $2000 per acre. The result of this transaction and other reallocations was that each plaintiff received an additional $320,000 from their mother's estate. (App. V.IX, p.57-59, 62-64.). Parenthetically, it should be noted that the corporation had purchased

an additional sixty acres of row crop farm land after Lawrence's death. (App. V.IX, p.73-87.). A couple of weeks after receiving their final checks from Georgia's estate, Guge and McDonald filed the instant suit.

At the time that suit was filed, Kassel Enterprises owned 660 acres of row crop farmland and had effectively no debt. (App. V.I, p.16.). The current balance sheet provided by Craig to the corporation's bank showed assets of cash - $1665, cash rent due - $181,071, land - $6,084,000 and debt of $22,000. The cash rent was calculated at $275 per acre (App. V.I, p.49-50, 65-67.). In May of 2018, Craig owned 52.50% of the 847 shares outstanding. Guge and McDonald each owned 23.75% of the stock. (App. V.I, p.16.).

C. Evidence of Fair Value and Findings by District Court

Shortly after notifying plaintiffs and the District Court that it was exercising its right to redeem plaintiffs' stock, KE provided Guge and McDonald with a preliminary estimate of its view of the fair value of the stock. This letter was an attempt to initiate negotiations as required by § 490.1434. Receiving no reply, KE moved for a hearing to determine the fair value. (App. V.I, p.102-104). The motion was opposed by plaintiffs but on February 26, 2019, the District Court entered an order which, inter alia, set

the valuation date for the fair value determination (the day before plaintiffs filed suit) and required the parties to file their expert reports and appraisals for the valuation determination. (App. V.I, p.105-109.). Plaintiffs proceeded to file their letter expert opinion dated March 29, 2019, authored by Anthony Wagner (App. V.IX, p.159-161.) and a February 7, 2019 appraisal report which valued ninety acres of a 270-acre tract owned by KE (App. V.II, p.47-50.). Defendants, on the other hand, filed a proper appraisal of the real estate of KE as of May 17, 2018, showing an appraised value of $5,616,667 on April 29, 2019. (App. V.IX, p.313-328.). On May 16, 2019, KE filed an expert opinion (App. V.IX, p.196-230.) which included an analysis of the financial statements and opined as to the fair value of Plaintiffs' stock in Kassel Enterprises.

After Plaintiffs' attorneys were informed of the obvious deficiencies in their expert filings, they took two steps to remedy their deficient filings. First, Plaintiffs filed a document entitled "Plaintiff's Stipulation as to Valuation of Farmland" (App. V.IX, p.311-312). In that document Plaintiffs stipulated to the value of KE's farmland as found by KE's appraiser, Vulganott. Secondly, Plaintiffs filed a May 29, 2019 letter to attorney William Smith authored by Wagner, which was styled as a "supplement" to his March 29, 2019 letter. (App. V.IX, p.329-331.). In that second opinion

letter, Wagner again attacked Defendant KE's expert opinion claiming "no justification for the application of a tax effect discount to fair value for an S corporation . . . ." (App. V.IX, p.330.). Wagner then proceeded to attach a chart which noted an "Indicated Fair Market Value" of the share of KE as $6,622.06. KE replied with its own Supplemental Report directly rebutting Wagner's claims about the application of a "tax effect discount" because in a redemption transaction such as was the case here, the impact on the remaining shareholders was the same as the Court of Appeals had held in its last Baur opinion.

Before the October 10, 2019 hearing to determine fair value, KE moved to strike the supplemental letter opinion of the Plaintiff (App. V.II, p.36-79.). Defendants' original opinion and second opinion carefully opined on the "fair value," not "fair market value of the assets" of Kassel Enterprises. (App. V.IX, p.196 et seq, p. 332 et seq.). The final conclusion was that fair value of each share was $4,949.

The only oral evidentiary hearing in this case was the hearing to determine fair value conducted on October 10, 2019. (App. V.II, p.270 et seq.) At the commencement of the hearing, the District Court heard evidence of Craig Kassel's misconduct as alleged in the dismissed counts of the Petition. The evidence was offered by Guge and McDonald for two

purposes. First, it was offered to show damage increasing the value of the corporation, and secondly to support a claim for attorney and expert fees for Kassel's misconduct pursuant to Section 490.1434(5) of the Code. The District Court only allowed that evidence for the fee issue. (App. V.II, p.270.) The District Court then briefly recited the pertinent history of the litigation and the parties' respective share of ownership before launching his analysis of the evidence of the fair value of Plaintiffs' stock.

Kassel Enterprises expert Crotty testified in detail as to his theoretical and factual basis for determining the fair value by Guge's and McDonald's common stock. (App. V.V, p.79-83.) He testified in accordance with his April 29, 2019 report that he had determined the fair value of the shares of KE as of May 16, 2018 in accordance with the controlling legal precedent of the books, records and appraisals of the Company. (App. V.IX, p.196 et seq., 332 et seq. V. V p. 79-103.) He recited the applicable Iowa Supreme Court case law and the required standard set forth in § 490.1301 of the Code to wit: "Fair value" means the value of the corporation's shares determined accordingly to the following: ... (b) using customary and current appraisal concepts and techniques generally employed to similar businesses in the context of the transaction requiring appraisal... ." Crotty described the appraisal method used - adjusted net tangible asset method - because KE's

primary source of value resided in its operating assets. (App. V.IX, p.196-210.) He followed the guidance of the Iowa Supreme Court in not applying valuation discounts for lack of marketability or minority status in Baur v. Baur Farms, Inc. 832 N.W.2d 663 (Iowa 2013). Further, he briefly recited the basis for his discount to the value of the Plaintiffs' stock in KE using the built-in gain tax liability. (App. V.V, p.79-103.) That rationale was detailed in his two reports but particularly at pages 14-15 of Exhibit 104. (App. V.IX, p.210-211.)

Counsel for Plaintiffs cross examined Crotty largely to establish that there was no precedent in Iowa or elsewhere applying a liquidation tax discount to a corporation's stock when the corporation is an S-corporation for federal income tax purposes since in an S-corporation all gains flow out to shareholders and are taxed at that level. (App. V.V, p.107-115, V. IX p. 159, 329.) Crotty's response was the Court of Appeals in Baur v. Baur Farms, Inc., 885 N.W.2d 829 (Iowa Ct. App. 2016) made no distinction between C corporations and S corporations and in other valuation contexts using the next asset value method, the tax discount for built-in gains was applied.

Plaintiffs presented their expert Wagner who testified consistently with his second report (App. V.I, p.329-331.) that no deduction for the built-

in gain on KE's assets should be made on the value of the stock. The reason was there should be no liquidation tax discount in the valuation of a business for liquidation purposes if it was an S-corporation. (App. V.V, p.138-148.) He admitted on cross-examination that his analysis contained in Exhibit 106 merely added the fair market value of the assets to the cash on May 16, 2019, balance sheet, subtracted the liabilities and divided the "net asset value" by the number of outstanding shares. (App. V.V, p.163-165.) [2]

The District Court began its analysis of the fair value of KE with the following comment:

> "While the Defendants' expert criticizes the Plaintiffs' expert for opining only as to the "fair market value" of the corporation rather than the "fair value" as required by Section 490.1434, the Court notes that both sides seem to use the terms interchangeably here ... . While the term "fair value" and "fair market value: may be distinguishable for purposes of this proceeding, the Court need not make that distinction in determining the value of the corporation before the application of any asserted discounts." (App. V.II, p.272.)

The Court went on to discuss the fact that Plaintiffs' expert had adopted KE's balance sheet with its appraised value of the farmland. He proceeded to state the "fair value" of the corporation was the same for both

[2] It should be noted that both experts included a discount for transaction costs of the theoretical liquidation of Kassel Enterprises. Crotty used 8% as the transaction cost and Wagner used 3%.

parties. He then ruled that a "discount based upon some future hypothetical sale is not appropriate and should not be allowed." He, therefore, ruled "no discount for transaction costs will be applied to the fair valuation of Kassel Enterprises." He made this ruling even though both parties' experts had applied a discount for such costs. (App. V.IX, p.196, 331.)

The District Court then ruled that no discount should be allowed for tax liability on built-in gain. He stated that Defendants' expert's reliance on Baur v. Baur Farms, Inc., 885 N.W.2d 829 (Iowa Ct. App. 2016) (unpublished) was misplaced because Baur Farms was a C-corporation as opposed to an S-corporation which Kassel Enterprises is. This distinction was thought to be significant because of the different income tax treatment between S and C corporations. He reasoned that a C-corporation would be taxed (on liquidation) on its built-in gain (appreciated value of assets) at both the corporate and shareholder level. Therefore "[w]ithout application of a tax discount, the remaining shareholders of the C-corporation would be responsible for that tax on built-in gain without any contribution from the departing/selling shareholders." (App. V.II, p.274.) He went on to say the "inequitable result may be remedied by application of the tax discount during valuation in order to evenly distribute that tax burden amongst the

outgoing and the remaining shareholders in proportion to their ownership interests." (App. V.II, p.274-275.)

After discussing the tax liability of shareholders of S-corporations, the District Court went on to reason as follows:

> "The Plaintiffs will be taxed for their fair share of any gain on the appreciated assets of Kassel Enterprises by virtue of the corporation's redemption of their appreciated shares for fair value. In turn, as a side note, Kassel Enterprises' basis in the Plaintiffs' former shares will be increased in an amount to fair value it pays the Plaintiffs, thereby reducing any future tax obligation it may have upon some future speculative liquidation, if any."

This latter holding by the District Court appears to be a response to KE's argument that the entire burden of the built-in gain on Plaintiffs stock will be transferred to KE's remaining shareholders in a redemption transaction - just like Baur. The District Court apparently did not understand that KE will have no basis increase resulting from purchasing Plaintiffs' shares after redemption. (See § 490.631 Code of Iowa). The corporation's basis is the purchase price of the land – not the stock.

In any event, the District Court proceeded to value Plaintiffs' shares at the net fair market value of KE's assets divided by the number of shares (847). He then multiplied that amount ($6,826.87) by the number of shares

owned by each (201.165) to require KE to pay each Plaintiff $1,373,327. (App. V.II, p.276.)

The District Court went on to rule that Plaintiffs were entitled to attorney and expert fees to be determined by further proceedings in a separate judgment citing Iowa Code § 490.1434(5) (2019) and §490.1430 (a)(b)(2) and (4) (2019). Finally he entered an Order determining how Kassel Enterprises should pay the redemption price. That Order required the corporation to pay each plaintiff $350,000 in cash within sixty (60) days and to provide each Plaintiff with five notes for one-fifth of the remaining balance payable annually December 1, at 6-1/2% interest (App. V.II, p.279-281.) Craig and Deborah Kassel were required to guarantee the notes and give other security.

Finally, after further proceedings the District Court entered a judgment providing that Kassel Enterprises was to pay attorney and expert fees in the amount of $93,620.74 and $6,540.00, respectively on December 6, 2019.

III. ARGUMENT

A. The District Court Erred in Determining the Fair Value of Plaintiffs Shares of Stock.

Preservation of Error

Defendants preserved error with regard to the issue of the fair value of Plaintiffs' share of Kassel Enterprises, Inc. by presenting expert valuation testimony and reports before the October 10, 2019 valuation hearing, by moving to strike Plaintiffs' purported supplemental report, by presenting evidence and argument relating to the properly measured fair value of Plaintiffs' stock at the October 10, 2019 hearing, by presenting law and argument supporting such evidence after the hearing, by making a Rule 1.904 Motion to Alter Or Amend contesting the District Court's November 5, 2019 Order and Ruling on Fair Value and the terms and conditions of redemption.

Scope of Review

Because the determination of the fair value of Plaintiffs' stock was conducted in the contact of a claim for dissolution of the corporation, an equitable claim, review is de novo. See Baur v. Baur Farms, Inc., 832 N.W.2d 663, 668 (Iowa 2013). The Court is not bound by the District

Court's factual findings but may give them appropriate weight. Soults Farms, Inc. v. Schaefer, 797 N.W.2d 92 (Iowa 2011).

B. The District Court Erred in Failing to Apply The Statutory Measure for Fair Value

The District Court commenced his simplistic analysis of the significant issue in this litigation with the following two statements. "While the Defendants' expert criticizes the Plaintiffs' expert for opining only as to the "fair market value" of the corporation rather than the "fair value" as required by Section 490.1434, the Court notes that both sides seem to use the terms interchangeably here. ... ." While the terms "fair value" and "fair market value" may be distinguishable for purposes of this proceeding, the Court need not make the distinction in determining the value of the corporation before the application of any discounts." The District Court identified no examples to demonstrate the first proposition because there were none. (App. V.II, p.272.) The District Court never did make the distinction between "fair market" value and "fair" value in his ruling. Citing no legal authority, let alone any "customary and current appraisal techniques" the District Court simply divided the appraised net fair market value of the assets of Kassel Enterprises ($5,782,357) by the number of outstanding shares of Kassel Enterprises (847) to get a per share value of one

share of $6,826.87. This is not the "fair value" of the Kassel Enterprises stock. It is the fair market value of the assets owned by the corporation. The District Court cited no authority for this finding because there was none. The only factual basis for this finding by the District Court was the schedule authored by Plaintiffs' expert Wagoner (App. V.IX, p.331.) titled Asset-Based Approach - Indicated Fair Market Value. Wagner testified that he computed this value by taking the net stipulated value of Kassel Enterprises assets and dividing that amount by the number of outstanding shares. (App. V.V, p.155-168.) The fair market value of the underlying assets could only be realized by dissolution of the corporation and the sale of all assets for fair market value. This, of course, generates two consequences. Number one - costs of sale and number two - capital gains taxes on the built in gain of appreciated farmland.

But the fundamental flaw in the District Court's analysis is his failure to understand that he was required to determine the fair value of the corporation's shares of common stock - not the corporation's underlying assets. In Baur v. Baur Farms, Inc., 832 N.W.2d 663 (Iowa 2013) the Iowa Supreme Court, citing N.W. Inv. Corp. v. Wallace, 741 N.W.2d 782 (Iowa 2007) mandated the use of "fair value' as defined by Section 490.1301 in proceedings involving § 490.1434 of the Code. That provision states:

> "'Fair Value' means the value of the corporation's shares determined according to the following:
>
> (a) Immediately before the effectuation of the corporate action to which the shareholder objects.
>
> (b) Using customary and current appraisal concepts and techniques generally employed by similar businesses in the context of the transaction requiring appraisal.
>
> (c) Without discounting for lack of marketability or minority status... ."

The District Court recognized that both Crotty, KE's expert and Wagner, Plaintiffs' expert, agreed that the appropriate appraisal methodology was the "Asset Based Approach." (App. V.IX, p.196-213, 331.). The District Court and both experts adjusted the value of the corporation's assets to market value based on the values in KE's appraisal and the 2018 balance sheet assets and liabilities (App. V.IX, p.230, 331.). But at this point in the analysis the experts and the Court diverged.

The proper application of the net asset value method of valuation of a minority interest in a corporation is to adjust the value of the corporation such as KE for theoretical transaction costs (broker and other fees) if the real estate is sold. Both Wagner and Crotty calculated these fees and deducted them from the value of the corporation. The District Court differed with both experts claiming that he didn't think a sale be required.

> "Rather, as noted above, it is speculative at best considering that Craig Kassel has no present intention of selling Kassel Enterprises or its land. No third-party

> auctioneer or salesperson will be needed to effectuate the same of Plaintiffs' shares to the corporation.... . A discount based upon some future hypothetical sale is not appropriate and should not be allowed. As such, no discount for transaction costs will be applied to the fair valuation of Kassel Enterprises." (App. V.II, p.276.).

The District Court then continued in his order to first follow the opinion of the Plaintiffs' expert and declined to apply a "discount" for the tax liability on "built in gain" distinguishing the Baur v. Baur case (885 N.W.2d 829) on the basis that Baur Farms was a C corporation. He then simply divided the net appraised fair market value of Kassel Enterprises' assets by the number of outstanding shares to arrive at a fair value of $6,826.87 per share. He multiplied that number by each plaintiff's number of shares (201.165) to find a redemption price of $1,373,327 per share. The Court then turned to the redemption purchase provision requiring a $700,000 down payment and five equal annual notes at 6½% interest guaranteed by Craig Kassel and his wife and secured by guarantees and mortgages. (App. V.II, p.270-281.)

The District Court ignored the fact that he imposed substantially more onerous terms on Kassel Enterprises in the redemption transaction than the Court in Baur found were prohibitive for Baur Farms to meet. The District Court in its Order on Fair Value required Kassel Farm to pay Guge and

McDonald each $1,373,327 or a total of $2,746,654.00 to redeem 47.5% of the stock. Kassel Enterprises was to pay $700,000 down and the balance in five equal annual installments at 6 ½ % interest. This meant that each annual installment had a principal payment of over $200,000 to each Plaintiff. (App. V., p.279-281.) The District Court also required Craig and Deborah Kassel to guaranty the notes, and put up the Kassel Enterprises farmland as collateral only if a borrowing was to pay the notes.[3] Further it was clear that Kassel Enterprises could not amortize the $2,746,000 payment with its own income. Its land was cash rented for $275 per acre or a total of $184,000 annually. Thus liquidation or partial liquidation might be required.

Terms in the Baur v. Baur Farms, which were not nearly as onerous, were deemed to require partial liquidation or borrowings which the corporation could not amortize from earnings, to say nothing of personal guarantees. See Baur v. Baur Farms, Inc., 832 N.W.2d 663 (Iowa 2013); Baur v. Baur Farms, Inc., 885 N.W.2d 829 (Iowa Ct. App. 2016). There payment of $1,825,000 for 26% interest in a $7,600,000 farm was considered prohibitive because it would require partial liquidation or a

[3] The Court claimed Kassel Enterprises was to receive $700,000 for the purchase of 90 acres of its farmland in Guge's parallel partition claim. The Court had no basis for that finding. It never occurred. Kassel Farms simply purchased its own share of the partitioned-farm.

mortgage loan guaranteed by others than the defendant corporation on individual majority shareholder.

Clearly the District Court did not understand the methodology used to determine fair value of Kassel Enterprises, nor did he properly apply it because if he had, he should have applied the so-called "liquidation discount" as Crotty did in Exhibit 104 at page 15 and Exhibit 107.

Instead of understanding the valuation process as always being a hypothetical attempt to determine fair value using a variety of models, the District Court simply made up his own valuation technique with no legal, accounting or professional basis. His analysis completely missed the mark when he launched into his analysis of the differing capital gains tax treatment between an S corporation and a C corporation. He completely missed the point that both experts in Baur v. Baur Farms, Inc. at the District Court level testified that "full discounts for liquidation tax are fair and customary in the purchase of shareholder interests in Iowa farm corporations." (App. V.VI, p.42-43.). This position was adopted by the Iowa Court of Appeals in the second appeal. (Baur v. Baur Farms, Inc., 885 N.W.2d 829 (Iowa Ct. App. 2016) 2016 WL 4036105).

C. The District Court Erred In Not Reducing The Fair Value of Plaintiffs' Stock By the Potential Capital Gain Tax Liability.

Plaintiffs' expert used neither that statutory formula nor that adopted by the Court of Appeals. Rather, Wagner sought to determine the fair market value of Plaintiffs' stock by simply equating it to the fair market value of the underlying assets. (App. V.IX, p.331.). What Accountant Wagner did was simply divide the net stipulated value of the assets of $5,608,886 by the number of outstanding shares. He thus simply determined the fair market value of the shares based upon the fair market value of the assets. The obvious flaw in this analysis is that Plaintiffs were not selling, and Kassel Enterprises was not buying row crop farmland. Plaintiffs were selling stock which had an earnings stream of about $40,000 per year and Kassel Farms was redeeming the same. This would give a price/earnings ratio with no adjustment for tax or inflation of 34 to 1[4]. Plaintiffs' expert

[4] The most common method for determining fair value is to calculate investment value, usually based on the company's earnings. Courts agree that net asset value and market value are of little use in determining the fair value of an interest in an ongoing close corporation; net asset value is generally used when an enterprise is liquidating and market value is difficult to determine for many corporations whose shares are not widely tracked. Some courts try to determine investment value by using a variety of factors, but the most commonly utilized formula treats company earnings as determinant of investment value. A California decision held that price-earnings ratios of similar companies whose shares have a market may be

also admitted that the so called "built-in gain" was the result of appreciation in the value of Kassel Enterprises' owned farmland and agreed with his partner Lodden that a "willing buyer on the other end always asks for a substantial discount on the stock, the value of the stock, compared to the fair market value of the land because of the built-in gains tax." (App. V. p.177-178.) He, Lodden, went on to explain in Baur, that the failure to take into account the built-in gains punished those that want to get out after the first transaction. The remaining shareholders shoulder the responsibility for paying taxes on the built-in gains due to appreciated assets whether the corporation.

Both Plaintiffs' expert Wagner and Defendants' expert Crotty adopted the asset based approach using the net asset value. The District Court agreed but refused to consider a reduction or discount in the stock value arising from the income tax liability for the built in gain attributable to the plaintiffs' stock. That built in gain was attributable to the appreciation in the value of the land since its purchase by the corporation. This was the District Court's fundamental error.

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used to compare investment values, but that this method is not the sole method of determining investment value. 2 Oppression of Min. Shareholders and LLC Members §7:20, O'Neal and Thompson's Oppression of Minority Shareholders and LLC Members §7:20 Fair Value.

In both the District Court opinion on remand and the Court of Appeals affirmation of the District Court, these courts found that the fair value of Jack's shares was the market value of BFI's assets, discounted for their liquidation value. (885 N.W.2d at 829 (Table) 2016 WL403615 *4). Further the Court of Appeals quoted the District Court with approval the following language:

> The court cannot say that BFI's insistence on a liquidation tax discount, reduced to "present value," was unreasonable. Both Van Werden and CPA Lodden testified credibly that the use of a liquidation tax discount is customary in such transactions. Jack presented no contrary evidence. With BFI's low tax basis on its assets, a purchase of Jack's interest would give BFI a substantial built-in gain that would constitute a burden on the remaining shareholders. No reliable basis existed for determining when the remaining shareholders would be hit with the impact of that burden. The illustration provided by Lodden regarding the impact of the built-in gain is reasonable and persuasive.
>
> Lodden's testimony is particularly persuasive in light of the relief requested by Jack in this lawsuit, consistent with his repeated motions at the BFI board meetings for dissolution of the corporation. If BFI was dissolved as Jack requested, the amount available to BFI shareholders would be its net liquidation value. Moreover, Jack has asked for an order of dissolution as one of the remedies he seeks in this action. That is the ultimate statutory remedy available on proof of oppression. The income taxes are only one of the costs that would result from dissolution. Fair value for Jack's shares does not exceed a value that takes the full liquidation tax consequences into consideration.

> We agree with the district court's conclusion the fair value of Jack's shares should take into consideration the taxes and other costs that would result from liquidation of the corporation. *See In re Marriage of Muelhaupt*, 439 N.W.2d 656, 650 (Iowa 1989)(finding the value of a party's shares of stock should be "subject to a substantial discount because such an amount could be realized only upon liquidation of the company"). The testimony of Van Werden, an attorney, and Lodden, a CPA, supports the application of a liquidation tax discount. (2016 WL 403615 *4)

Moreover, nowhere in either the Court of Appeals decision – or the District Court decision – is there any mention or inference that the application of the so-called liquidation tax discount is limited to "C-corporations." There is no case law cited for such a limitation because "built in gains" exist in both S-corporations and C-corporations. In both S corporations and C corporations in Iowa, the effect of the corporation buying its own shares is the same. See §490.631 Code of Iowa. When a corporation buys its own shares, those shares disappear and the built in gain attributed to the shares is assessed against the stock of the remaining shareholders. This is precisely the unfairness which was a basis for the allowance of the discount in Baur.

The District Court erred and refused to take into consideration the tax impact of a redemption as contemplated by § 490.1434 on both the redeeming corporation and on the remaining shareholder. One first must

remember that the so called liquidation tax discount is only theoretical. There will be no liquidation – as the Court found. The calculation is only a part of the valuation methodology. A United States Court of Appeals decision from the Fifth Circuit summarizes the argument as follows:

> The Tax Court made a significant mistake in the way it factored the 'likelihood of liquidation' into its methodology, a quintessential mixing of apples and oranges; considering the likelihood of a liquidation sale of assets when calculating the asset-based value of the Corporation. Under the factual totality of this case, the hypothetical assumption that the assets will be sold is a foregone conclusion – a given – for purposes of the asset-based test. The process of determining the value of the assets for this facet of the asset-based valuation methodology must start with the basic assumption that all the assets will be sold, either by Dunn Equipment to the willing buyer or by the willing buyer of the Decedent's block of stock after he acquires her stock. By definition, the asset-based value of a corporation is grounded in the fair market value of its assets, which in turn is determined by applying the venerable willing buyer-willing seller test. By its very definition, this contemplates the consummation of the purchase and sale of the property, i.e., the asset being valued.
>
> * * *
>
> We are satisfied that the hypothetical willing buyer of the Decedent's block of Dunn Equipment stock would demand a reduction in price for the built-in gains tax liability of the Corporation's assets at essentially 100 cents on the dollar, regardless of his subjective desires or intentions regarding use or disposition of the assets. Here, that reduction would be 34%. This is true "in spades" when, for purposes of computing the asset-based value of the Corporation, we assume (as we must) that the willing buyer is purchasing the stock to get the assets, whether in or out of corporation solution. We hold as a matter of law that the built-in gains tax liability of this particular

> business's assets must be considered as a dollar-for-dollar reduction when calculating the asset-based value of the Corporation, just as, conversely, built-in gains tax liability would have no place in the calculation of the Corporation's earnings-based value.
>
> Dunn v. Comm'r, 301 F.3d 339, 352-53 (5th Cir. 2002).

Plaintiffs will not be taxed twice. Plaintiffs will only be taxed one time based on the "fair value" the Court finds for the stock. Contrary to the statements of the District Court, the sole remaining shareholder – Craig Kassel – will be responsible for the capital gains taxes on the appreciated assets when the corporation or its assets are sold because neither his basis in his stock nor Kassel Enterprises basis changes. In a redemption scenario, Kassel Enterprises repurchase of the Plaintiffs' stock will "disappear" into the corporations' treasury stock, and there is not a step up in basis (See §490.631). To ignore personal taxes would overestimate the value of an S-corporation and would lead to a value that no rational investor would be willing to pay to acquire the stock. This is a simple premise – no investor would be willing to pay for more than the value of what would actually end up in his pocket. That is why it is fair to reduce the price of the stock by all of the built-in gain tax on it.

Plaintiffs' most significant attack on Defendants' valuation was the fact that the expert Crotty had applied a so called "liquidation tax discount"

to the value of Plaintiffs' shares reaching a final opinion of $4,949 per share or $995,666 for each Plaintiff. Crotty justified the application of this discount on the basis of the Court of Appeals decision in the third Baur case:

> We agree with the district court's conclusion the fair value of Jack's shares should take into consideration the taxes and other costs that would result from liquidation of the corporation. *See* In re Marriage of Muelhaupt, 439 N.W.2d 656, 660 (Iowa 1989) (finding the value of shares of stock should be "subject to a substantial discount because such an amount could be realized only upon liquidation of the company.

885 N.W.2d 829 (Iowa Ct. App. 2016) 2016 WL 4036105 *4.

Further, in that very same opinion, the Court of Appeals justified this "liquidation tax discount" because of: "BFI's low tax basis on its assets, a purchase of Jack's interest would give BFI a substantial built-in gain that would constitute a burden on the remaining shareholders. No reliable basis existed for determining when shareholders would be hit with the impact of that burden. Id. at *4. This is precisely the same effect the Plaintiffs' expert's and the District Court's finding will have on Craig Kassel. His basis in his stock will effectively double. § 490.631, Code of Iowa.

Finally in this regard, it should be carefully noted that Defendants' expert Crotty in his testimony at the hearing and in Exhibit 107 carefully calculated the impact of the liquidation or built in gain capital gain tax on

the fair value price of plaintiffs' stock. He computed the net gain on the hypothetical sale of the land, the plaintiff's basis, the federal and state tax that would be applicable. Each plaintiff would be applicable. Each plaintiff would receive almost $1,000,000. Clearly the estimated liquidation tax of roughly 31% is substantially less than the estimated tax in a C-corporation in Baur of around 70%. (App. V.IX, p.335-336.)

D. The Ruling of the District Court Allows the Minority To Misuse § 490.1434 to Oppress the Majority.

Plaintiffs made little effort to claim Crotty's analysis was incorrect about the impact of the redemption structure on the share valuation. Plaintiffs spent the bulk of their time attempting to prove that there was no case law in Iowa or elsewhere applying a "liquidation tax discount" to an S corporation in the "fair value" context. Rather, plaintiffs attacked Craig Kassel's decision to have the corporation redeem the stock as opposed to his personal purchase of the Plaintiffs' shares. The latter would have a different impact they claimed. The Iowa Supreme Court discussed the application of § 490.1434 and its procedure in Baur v. Baur Farms, Inc. stating:

> We read these statutory provisions as extensions of the principle that every shareholder may reasonably expect to share proportionally in a corporation's gains." (citing cases) … When this

> reasonable expectation is frustrated, a shareholder oppression claim may arise. (citing cases)

832 N.W.2d at 673. The Court went on to adopt a reasonableness standard for the adjudication of oppression claims by minority shareholders stating:

> The determination of whether the conduct of controlling directors and majority shareholders is oppressive under section 490.1430(2)(b) and supports a minority shareholder's action for dissolution of a corporation must focus on whether the reasonable expectations of the minority shareholder have been frustrated under the circumstances… .

Unlike Baur or Van Horn, the facts and circumstances of this case are materially different. In those cases, the corporations had never paid dividends. Here, Plaintiffs Guge and McDonald were gifted their stock. They never worked for the corporation – Kassel Enterprises. The value of the real estate owned by KE has increased over fivefold to $8,500 per acre. (Ex. 107) They have been paid dividends of $35,000 per year for the last several years. Their brother, attempting to be fair, increased their share of their mother's estate by $350,000 each – largely from his share of the estate – a few weeks before suit was filed. (App. V.VI, p.57-58, 62-64.)So, the question becomes in this case, what reasonable expectation of the Plaintiffs' was frustrated? How were they oppressed? The plaintiffs dismissed all their oppression claims and the court found the claims failed to evidence

oppression. (App. V.II, p.276-277.). As shown by their dismissals of virtually all their claims, (to say nothing of their inability to articulate, let alone prove damages), this action would have been dismissed but for Kassel Enterprises, Inc.'s irrevocable election to purchase the stock for fair value. (Section 409.1434)

As the Supreme Court state in Baur, *supra:*

> In fashioning appropriate remedies, we have explained that trial courts should regard requests for general equitable relief with considerable liberality. (citing cases.) We caution, however, courts must be careful when determining relief to avoid giving the minority a foothold that is oppressive to the majority. *See* Maschmeier, 435 N.W.2d at 383. We also note that if, instead, the district court finds from the fully developed record evidencing the fair value of Jack's equity interest that no oppression has been demonstrated by a preponderance of the evidence, this action shall be dismissed. Baur v. Baur Farms, Inc., 832 N.W.2d at 678. (Emphasis supplied)

Indeed, if the election to redeem was not irrevocable, Kassel Enterprises might have taken a more aggressive stance in the case particularly in light of the Plaintiffs' dismissal of claims and the requirements for proof of oppression set forth in Baur and Van Horn v. Van Horn Farms, Inc., 919 N.W.2d 768 (Table) 2018 WL 3060240.

By adopting the Plaintiffs' method and calculation of fair value, the District Court has vitiated the force and effect of § 490.1434 for resolving disputes in farm corporations which have elected to be S-Corporations for income tax purposes. No defendant farm corporation or majority shareholder will elect to purchase minority stock. Rather, the case will be tried and the minority will be left where it was.

E. The District Court Erred In Assessing Attorney and Expert Fees Against The Corporate Defendant Under Section 490.1434 of the Code.

Preservation of Issue for Review

Defendant Kassel Enterprises, Inc. (the only Defendant against whom an award of attorney fees and expert fees has been entered) along with Defendants Craig Kassel and Deborah Kassel objected to Plaintiffs' claims for attorney fees at the October 10, 2019 Hearing on Fair Value (App. V.II, p.263-270.). These Defendants further objected to the Plaintiffs' claims in their "Response to Plaintiffs' Claim for Attorneys Fees for Filing Petition to Dissolve (Resp. to Plts' Claims 10-25-19). These Defendants further objected in their Rule 1.904 Motion to Alter and Amend dated November 20, 2019. Finally, Defendants filed a separate appeal of the District Court's

ruling on Attorney and Expert fees on December 6, 2019. The Notice of Appeal was filed December 31, 2019.

Scope and Standard of Appellate Review

The Scope and Standard of Review for an award of attorney fees and expert fees is for abuse of discretion. (Smith v. Iowa State University, 885 N.W.2d 620 (Iowa 2016); Lee v. State, 874 N.W.2d 631 (Iowa 2016); Boyle v. Alum-Line, Inc., 773 N.W.2d 829 (Iowa 2009) reversal proper when ground for ruling are clearly unreasonable and untenable.

F. The District Court Had No Statutory Basis to Assess Attorney And Expert Fees Against The Completely Passive and Therefore Innocent Corporate Defendant.

On the morning of the Hearing to determine the fair value of Guge's and McDonald's stock in Kassel Enterprises Inc., their attorneys first moved for an award of attorneys and expert fees. (App. V.V, p.11-15.) The District Court allowed the attorneys to present evidence on that claim. Guge and McDonald argued they were entitled to the award under Section 490.1434(5) of the Code which provides in pertinent part:

> "If the court finds that the petitioning shareholder has probable grounds for relief under Section 490.1430, subsection 1, paragraph "b," subparagraph (2) or (4), it may award to the petitioning shareholder reasonable fees and expenses of counsel and of any experts employed by the shareholder." (Iowa Code § 490.1434 (5) (2019).

Section 490.1430 (1)(b) of the Code provides in relevant part that the court may dissolve a corporation in a proceeding brought by a shareholder if the shareholder establishes either:

> "(2) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent...
>
> x x x
>
> (4) the corporate assets are being misapplied or wasted."

Iowa Code § 490.1430 (a)(b)(2) and (4) (2019).

In his Order on Fair Value dated November 5, 2019, the District Court found for Guge and McDonald on the fee issue in part stating:

> "While the court agrees with the Defendants that the record does not support a finding of probably grounds of illegal, oppressive, or fraudulent conduct by the Defendants, this conclusion does not end the inquiry. The grounds under Section 490.1430(1)(b)(4) set forth grounds distinguishable from oppressive conduct. The term "misapplied," found in Section 490.1430(1)(b)(4), is not defined in the statute, but the court finds it could include use or spending of assets or money without proper authority or use of such assets improperly. (Citing dictionary definitions)" (App. V.II, p.276-277.)

The District Court went on in this Order to describe certain actions of Craig Kassel as "waste" or "misappropriation." ("Craig, over a period of several years benefitted... [by] renting Kassel Enterprises' farmland at ... less than

fair market value;" "Craig further misapplied corporate assets by having Kassel Enterprises take out numerous loans... [even though] these loans have all been paid... ." "Craig misapplied Kassel Enterprises' assets by trading farmland...leaving some Kassel Enterprises' land landlocked.") This latter claim the Court decided wasn't waste but misapplication. (App. V.II, p.277-279.). No defendant other than Craig, or indeed no other person or entity was identified as committing any wrongful act.

After making the findings above noted, the District Court ordered the Plaintiffs to file an affidavit setting forth their claimed attorney fees and expenses. The Defendants were to file a responsive affidavit after which the Court would enter a separate order on attorney and expert fees. The Court went on in this Order to dismiss Count I of Plaintiffs' petition. That Count was the Count which requested dissolution of Kassel Enterprises, Inc. and in which it was the only Defendant. Simultaneously, the District Court entered his Order on Summary Judgment dismissing all remaining claims in Court II against Craig and Deborah Kassel. (App. V.II, p.283-292.)[5] Guge and McDonald filed their affidavit claiming fees in excess of $237,950.00. (App. V.II, p.293-337.)Defendants responded and also filed a Rule 1.904

[5] Parenthetically all other claims of the Plaintiffs had been dismissed on October1, 2019.

Motion to Alter or Amend (App. V.II, p.361-365.) which in part contested the award of fees.

On December 6, 2019, the District Court entered his Order for Attorney Fees and Expenses. He commenced this Order with a recitation of the history of the fee proceedings and then stated as follows:

> "The court recognizes that the Plaintiffs are entitled to fees under Iowa Code Section 490.1434(5) only under Count I of their six-count Petition. Counts II through VI were either dismissed by the Plaintiffs voluntarily or by the Court via Summary Judgment. Either way, they were unsuccessful on Counts II throught VI of their Petition, and they are not entitled to an award of attorney fees on those claims." (Emphasis supplied.) (Order 12-6-2019, p. 1.)

After a tedious analysis of Plaintiffs' attorneys' $237,000 bill (discussed later in Section B. 2) the District Court entered the following astounding Order:

> "IT IS THEREFORE ORDERED that Kassel Enterprises, Inc. shall pay to Plaintiffs attorney fees and expenses in the amount of $93,620.74 and expert fees in the amount of $6,540. These amounts shall be paid within sixty (60) days of the date of this Order.

This absurd Order is a clear abuse of discretion and must be reversed and held for naught for the following reasons.

In the first instance, Guge and McDonald are entitled to no fees under Count I of their Petition. In Count I of the petition the Plaintiffs only

requested that Kassel Enterprises, Inc. be dissolved, a receiver be appointed and a transaction be unwound. (App. V.I, p.24.)The District Court had already ruled in its November 5th Order that the Plaintiffs had proved nothing in the nature of oppression justifying dissolution. (App. V.II, p.277.) Thus there is no statutory basis under § 490.1434 of the Code to render an Order requiring payment of attorney fees. Secondly, and equally obviously, Guge and McDonald did not prevail under Count I of their Petition. They requested dissolution of the Defendant Kassel Enterprises, but Kassel Enterprises, Inc. prevailed by exercising its statutory right to redeem the shares for fair value. Not only can attorney fees not be awarded where there is no statutory right, attorney fees cannot be awarded on unsuccessful claims and claims for which fees are not recoverable. Smith v. Iowa State University of Science and Technology, 885 N.W.2d 620, 625 (Iowa 2016; Lee v. State of Iowa 874 N.W.2d 631 (Iowa 2016).

Further, common sense and the record shows there was no basis for imposing an attorney fee award on the defendant corporation. Not only had Kassel Enterprises, Inc. been dismissed in the November 5, 2019 Order on Fair Value, there was no claim of wrongdoing by the Corporation in the underlying October 10 evidentiary hearing or in Plaintiffs' Petition. Kassel

Enterprises, Inc. is a completely passive Defendant. All wrongdoing claims (which will be discussed below) are directed at defendant Craig Kassel.

There is simply no statutory or evidentiary basis for the entry of an attorney fee award against Kassel Enterprises, Inc. and this portion of the judgment must be reversed and dismissed without more.

G. Despite The Fact That All Claims of Misapplication or Waste Had Been Dismissed, The District Court Awarded Attorney and Expert Fees based on Claims of Misconduct by Craig Kassel Which Had No Support In The Evidence

In his Order on Fair Value, the District Court, after determining that "Kassel Enterprises has failed to following corporate formalities" [6], found

[6] First, the Court finds that Kassel Enterprises has failed to hold meetings of shareholders and directors since 2005. The record shows that the corporation never held such meetings until 2019. (App. V.IV, p.224.). The Court finds that Plaintiffs were removed as officers of the Corporation. This is false. Plaintiffs were officers and directors of Kassel Enterprises until 2019 after suit was filed (App. V.IX, p.91, 125 et seq.). Craig Kassel did not become President until his mother died in 2017 except for a brief period after his father's death (App. V.IX, p.91.) There were four directors until 2019 (App. V.IX, p.91, 125 et seq.) (Iowa Code § 504.1613.) Moreover there is no evidence or even a claim that Georgia Kassel, mother of all the parties, was ever not in full control of her faculties, was ever before her death not the largest shareholder, a director of Kassel Enterprises. Plaintiffs' claim of failure to follow corporate formalities is particularly hollow when viewed in light of actions which directly benefited the Plaintiffs. For Instance, Plaintiffs make no objection to the change in tax status from C Corporation to S Corporation in 2006 without a directors meeting. Plaintiffs make no objections to the purchase of 60 acres of farm land after their father's death without a board meeting, since the land value trebled before

that Craig Kassel had engaged in three types of misconduct constituting "misapplication" meaning "use or spending of assets or money without proper authority or the use of such assets improperly." (Order on Fair Value, 11-5-2019, pp. 8-9.) The first of the types of "misapplication" was the claim by Guge and McDonald that Craig Kassel - for a period of eleven years had underpaid Kassel Farms for cash renting its land. The District Court reasoned that the bonuses paid to Guge and McDonald of $20,000 per year did not make up "the difference" between the cash rent payment and the market rate. (App. V.II, p.277-279.)

However, the District Court ignored the fact that Craig, through his corporations Great Oak Farms and Kassel Enterprises, has cash rented farmland owned by the corporation since 2005 at or above market rates. From 2006 until 2017, when Georgia Kassel was President of the corporation, Craig's corporations paid $88,000 in rent each year. This amount was set by Georgia Kassel. (R. McDonald Dep., 93:24-95:3). Georgia Kassel set cash rent at that price because she "didn't want the land

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suit. Plaintiff's make no claim that they as shareholders did not have the right to examine the books of the Corporation and call meetings at any time. Plaintiffs make no objection to the failure to follow corporate formalities in the gifting by their parents of 23.75% of the shares of the corporation to them.

to be any higher than what it was." (R. McDonald Dep., 139:23-140:1-2.) When Georgia was in charge of the corporation from 2012 to 2017, Plaintiffs never complained that the amount of cash rent was too low.

At the same time Craig was renting the corporation's farmland for $88,000, Craig also made annual payments to each Plaintiff in the form of grain equivalent to $19,975.[7] (R. Guge Dep., 107:3-110:3.) These payments were to bring Craig's total rent up to market rate. (App. V.VI, p.59.)Craig made these annual payments to Plaintiffs because Georgia did not want to increase the rent on the corporation's property (App. V.IX, p.102-103.) Plaintiffs acknowledge that Craig's payments of grain were not gifts to them. (R. Guge Dep., 20:15-23.) Plaintiffs even understood that the payments of grain were directly related to the amount of cash rent. (R. McDonald Dep., 39:13-16.) ("Q". It went straight to you as a Shareholder to make up for the lack of payment of cash rent to you and your sister; isn't that true? A. Yes, that's true").

The Iowa State survey shows that average cash rent in Palo Alto County was between $222 per acre in 2017 and $290 per acre in 2013 for the six years prior to suit. (App. V.VI, p.59.) Craig paid the corporation

[7] 4,700 bushes at an average price of $4.25/bushel = $19,975.

$88,000, and Plaintiffs $19,975 each. (App. V.VI, p.59.)The Plaintiffs each own 23.75% of the corporation. If Craig paid all rent to the corporation and none to Plaintiffs directly at the same proportional rate, the total rent payment would have amounted to $260.77 per acre.[8] Indeed, Plaintiffs never explain how they were harmed - because they were not - nor do they ever dispute that Craig paid more in cash to rent to purchase extra land for Kassel Enterprises. Kassel Enterprises bought 60 acres of land after 2006 with Craig paying additional rent to cover the purchase price. Finally, in this regard this is nothing more than a disguised breach of fiduciary duty claim which the Court dismissed. Baur v. Baur Farms, Inc., 832 N.W.2d 663, 673-74 (Iowa 2013); Knobloch v. Home Warranty, Inc., 2016 WL 666 2709 (N.D. Iowa, 2016).

The second claim of "waste" or misapplication is that Craig Kassel took a million dollars of funds borrowed by Kassel Enterprises and used the funds for his own benefit. The purported "facts" recounted in the affidavit supporting fees was knowingly false and misleading. The Court heard the testimony of the Iowa State Bank & Trust officer showing, amongst other

[8] 23.75% x 88,000 = $20,900
$20,900 + (4.25/bu x 4,700 bu.) = $40,875 for 23.75%
660 acres x 23.75% = 156.75 acres
$40,875/156.75 acres =$260.77/acre

things, that every loan taken out by Kassel Enterprises between 2006 and 2011 was repaid both principal and interest. She testified she had provided the loan files and notes showing Georgia Kassel's signature. (App. V.II, p.24.) (App. V.II, p.361-365.) Craig Kassel testified without dispute that the bank officer knew the loans were for his benefit. The bank maintained financial statements showing the loans were repaid. The tax returns of the corporation did not reflect the loans or sufficient income to repay them. There was simply no waste, no misapplication, and no loss. Heidecker Farms v. Heidecker, 791 N.W.2d 429 at *12 (Iowa Ct. App. 2010) (held that even though a director and officer of the corporation deposited government program payments and crop proceeds from the corporation's farmland into his personal checking account, which he then used to pay farming expenses throughout the year, his conduct did not constitute fraud or misappropriation of corporate funds because he maintained accurate records). Moreover, there is no evidence or claim that Georgia Kassel was not in complete control of her mental faculties or unduly influenced by Craig.

The third event which the District Court found to be a "misappropriation" was the exchange of land between Kassel Enterprises and Kassel Farms, Inc., Craig's wholly owned farm corporation. The Court states that the land swap between Kassel Enterprises and Kassel Farms

constituted misapplication because it benefited Craig Kassel and left a portion of Kassel Enterprises real estate land locked. The Court states no shareholder or director meetings were held to approve the swap and observes the "assets were not necessarily wasted." In 2017, Craig and the corporation swapped real estate. Eighty-nine acres of the corporation's land was transferred to Craig, and in exchange, Craig transferred 95 acres to the corporation. (App. V.I, p.13-30.) Prior to consummating the transaction, Craig and corporation were provided with an appraisal of the land subject to the transfer. (R. App. V.II, Def. Mot. SJ, pp. 137-227.) The appraisal was performed by Richard Vulgamott, a well-respected appraiser of farm real estate. Id. Mr. Vulgamott found that the value of the land that would be transferred from Craig to the corporation had the same value as the land transferred by the corporation to Craig. Id. Plaintiffs produced no competent evidence that the value of the corporation's assets decreased after the land-swap. The only fact that Plaintiffs can point to is that some parcels of land transferred by Craig to the corporation were landlocked. (R. McDonald Dep., 27:1-3; 52:18; R. Guge Dep., 42:1-44:24.) Yet, that fact alone is not enough to present an issue of material fact when the report issued a qualified appraiser prior to the transaction determined that the value of the overall

exchange was equal. Parenthetically, Defendant Kassel Enterprises would note that Iowa law prohibits denial of access. Iowa Code § 6A.4 (2).

None of the claims the Court identifies as misapplication - even if true caused any harm to the Plaintiffs. Indeed none of the claimed "misapplications" caused any harm to Kassel Enterprises, Inc. All of the misconduct is claimed to be that of Craig Kassel. Yet, Kassel Enterprises is held liable for attorney fees. This is incomprehensible and an abuse of discretion.

H. Under No Circumstances Should The Plaintiffs Be Entitled To An Award of Attorney and Expert Fees Except For Services Related To The Fair Value Determination.

On November 12, 2019, the Plaintiffs filed their Affidavit in Support of Attorney Fees claiming entitlement to attorney fees of $231,401.11, expert fees of $6,540.00 and costs of $3,298.11. (App. V.II, p.293-337.) The District Court reduced those claims to $93,620.74 after its inscrutable analysis. (App. V.II, p.377-384.) It did not reduce the expert fees. This Order was a further abuse of the District Court's discretion. Ignoring for the moment the inapplicability of Iowa Code § 490.1434 which is the only basis for an award of fees, plaintiffs in the normal fee shifting situation "bear the burden to prove both that the services were reasonably necessary and that

the charges were reasonable in amount." Boyle v. Alum-Line, Inc., 773 N.W.2d 829, 832 (Iowa 2009) (quoting Landals v. George A. Rolfes Co., 454 N.W.2d 891, 897 (Iowa 1990). "The reasonableness of the hours expended and the hourly rate depends, of course, upon the facts of each case." Id. Factors considered by the district courts "in determining reasonable attorney fees include: '[t]he time necessarily spent, the nature and extent of the service, the amount involved, the difficulty of handling and importance of the issues, the responsibility assessed and results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar services.'" Id. at 832-833 (quoting Schaffer v. Frank Moyer Constr., Inc., 628 N.W.2d 11, 24 (Iowa 2001). Importantly "[r]eductions may be made, however for such things as partial success, duplicative hours or hours not reasonably expended." Id. at 833 (quoting Sherman v. Kasotakis, 314 F. Supp. 2d 843, 882 (N.D. Iowa 2004). As the District Court noted here - but did not apply - "the district court should make an appropriate reduction for unrelated time spent on unsuccessful claims and claims for which fees are not recoverable" (citing Smith v. Iowa State University, 885 N.W.2d 620, 625 (Iowa 2016)..." (App. V.II, p.378.)

In the case at bar it is clear that the Plaintiffs prevailed on none of their six theories of liability. The District Court found in its Order on

Attorneys Fees "Counts II through VI were either dismissed by the Plaintiffs voluntarily or by the Court via summary judgment." (App. V.II, p.377.) The District Court also found that the "record does not support a finding of probable grounds of illegal, oppressive or fraudulent conduct by Defendants... ." (App. V.II, p.277.)In that same order he dismissed Count I for dissolution. The obvious but unrecognized conclusion by the District Court is that Guge and McDonald prevailed on none of the six counts of their Petition. The only issue on which Plaintiffs arguably prevailed was the value of their minority interest in Kassel Enterprises, Inc. The attorney fees and expert fees for the fair market value determination are the only fees - by any stretch of the imagination or law - that Plaintiffs could be entitled to and they are listed on the last three pages of the Affidavit in Support of Attorney Fees under the heading for disbursements. (App. V.II, p.335-337.)

The bloated attorney fee claim was generated by the pursuit of obviously unmeritorious and bizarre claims of liability by the Plaintiffs and their attorney. A chronology of the pertinent (and perhaps compensable) actions of Plaintiffs began with the filing of the Petition on May 17, 2018. After answer, Defendant Kassel Enterprises elected to purchase Plaintiffs' shares under § 490.1434 of the Code of Iowa and sent Plaintiffs an estimate of the price. The Plaintiffs did nothing during the statutory negotiation

period so Kassel Enterprises moved for a hearing to determine Fair Value. (App. V.I, p.102.) The Defendants designated their experts and Plaintiffs moved for additional time which the Court granted and set a hearing date. (App. V.I, p.110.) Defendants filed the expert opinion and appraisal. Guge and McDonald filed a letter (App. V.I, p.159-161.) containing no value opinion and an appraisal valuing only a portion of the real estate at the wrong date. Plaintiffs moved to continue the May 2019 Fair Value Hearing on April 26, 2019, and the Court continued the hearing until October 10, 2019. (App. V.I, p.135.) During the summer, Plaintiffs stipulated to Defendants' expert appraisal (App. V.IX, p.311-312.), filed a "supplemental" expert report (App. V.IX, p.329-331.)and deposed Defendants' expert Crotty. Plaintiffs and their attorneys then appeared on October 10, 2019 at the Palo Alto Courthouse for the fair value hearing. Finally in these regards, it must be noted that virtually all the work by a lawyer on the fair value issue was done by William Sidney Smith, Esq. and is separately billed. (App. V.II, p.335-336.)

Clearly, for the reasons set forth in this Part B of the Argument, Plaintiffs are entitled to no award of attorney fees and such award as the District Court made was an abuse of discretion.

CONCLUSION AND REQUEST FOR RELIEF

A. Conclusion

For the above and foregoing reasons and argument it is clear that the District Court committed reversible error in its determination of the fair value of Plaintiffs' common stock in Kassel Enterprises, Inc. and in its Oder on the terms and conditions of the redemption of the common stock. Further the District Court abused its discretion entering an Order requiring Kassel Enterprises to attorney and expert witness fees to Plaintiffs' counsel.

B. Request for Relief

This Court should reverse the District Court on both its judgment on the fair value of the common stock of Kassel Enterprises and the terms for the redemption of Plaintiffs' stock and return the cause to the District Court to enter an Order determining the fair value of the stock after considering a discount to the value resulting from the built-in gain caused by the appreciation of the real estate of Kassel Enterprises.

Finally the Court should reverse the District Court's December 6 Order requiring Kassel Enterprises, Inc. to pay Plaintiffs' attorney and expert fees. The latter judgment should be returned to the District Court with directions to dismiss the claim.

Respectfully submitted

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ATTORNEYS FOR DEFENDANTS

REQUEST FOR ORAL ARGUMENT

Defendant-Appellants and Cross-Appellees respectfully request to be heard orally before submission of the case.

/s/*Thomas D. Hanson*
Thomas D. Hanson

CERTIFICATE OF FILING & CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July, 2020, I electronically filed the foregoing document with the Clerk of the Court by using the Iowa Judicial Branch electronic filing system which will send a notice of electronic filing to the following:

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I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-EDMS participants:

None

/s/*Cindy S. Dillinger*
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 12,243 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman font and utilizing the 2016 edition of Microsoft Word in 14 point font plain style.

/s/*Cindy S. Dillinger*
Cindy S. Dillinger

July 10, 2020
Date