

IN THE IOWA DISTRICT COURT FOR MADISON COUNTY

JOHN R. BAUR,)	
)	
Plaintiff,)	EQCV 032201
)	
v.)	
)	
BAUR FARMS, INC. and)	
ROBERT F. BAUR,)	
)	
Defendants.)	

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER

On March 18th and 19th, 2014, the trial after remand came before the Court. The Plaintiff, John R. Baur (Jack), was represented by attorneys Douglas A. Fulton and Allison Steuterman. The Defendants were represented by attorneys David Charles and Mark McCormick.

The parties agreed that the transcript of the first trial would be part of the record in this trial. The Court granted the parties time to prepare proposed rulings. The attorneys ordered the trial transcript of this case to use in preparing their proposed rulings and for this Court’s review. The proposals were submitted on or about May 21, 2014.

The case involved complicated issues. The Court reviewed the file and exhibits and read the trial transcripts from both trials. After due consideration and being fully advised, this Court finds that the proposed ruling of the Defendants to be correct on the facts and the law.

FINDINGS OF FACT

Plaintiff John R. Baur (“Jack”) and Defendant Robert F. Baur (“Bob”) are first cousins. Jack is a minority stockholder, and Bob is the majority stockholder in BFI, which is a small, closely held family farm corporation.

The Baur family has owned farmland in Madison County ever since Bob and Jack's great grandfather Stanislaus Baur bought 40 acres in July 1853. (Tr. 278, Ex. A-1, II Tr. 7). Descendants of Stanislaus have farmed that land and additional land that has been acquired over the years to the present time. Brothers Edward and Merritt Baur were grandchildren of Stanislaus who continued the pattern of growing the family farming operation. Their intention was that the land would be available to future generations of the Baur family so long as any family member was interested in farming it. (Tr. 116, 252-53, Ex. F).¹

Merritt had two sons, Jack and Dennis. Edward had three children, Bob and his sisters Karla and Ann. Dennis died in 2010. His two children are James Baur and Theresa ("Terri") Anthony. (II Tr. 8, Ex. EE1).

In 1966, Edward and Merritt formed BFI, a subchapter C corporation, as a means to keep land in the family so it would be available for future generations to farm and to facilitate the transfer of land to succeeding generations through stock transfers. Jack believes he may have suggested that the corporation be created for those purposes. He had gone to law school and graduated in 1966. (Tr. 31, 35-36, 116, II Tr. 11, Exs. E-4, F).² Edward and Merritt contributed 1,736 acres of land to BFI. They had previously farmed that land in partnership. (*Id.*).

The land put into BFI was mostly pasture, with about 250 acres of cropland. The crop ground was bottom land that is subject to flooding and erosion. (II Tr. 13). The brothers kept

¹ Citations to II Tr. are to the transcript of the March 18 and 19, 2014 trial after remand. Other transcript references are to the transcript of the March 1, 2011 trial. Exhibit references are to the identification of final exhibits.

² Attorney Drew Tillotson did the legal work in the formation and organization of the corporation. The parties stipulated that if he testified in person, he would testify in accordance with his affidavit, Exhibit F. Attorney Fulton waived any hearsay objection. (Tr. 171).

about 1,700 acres of their land outside of BFI. This included approximately 900 acres of cropland. The remainder was pasture and timber. (II Tr. 12, 14).

BFI rented the land outside the corporation. The directors discussed their plan to do this in BFI's organizational meeting. (II Tr. 48). Edward and Merritt intended that that land be part of BFI's operating entity but not be owned by BFI. Keeping the land outside of BFI in this way provided family members, including Jack, with a source of income over the years and enabled Edward and Merritt to pass the land to their descendents, who would have a right to sell it if they wished. BFI did not pay dividends during Edward and Merritt lifetimes or thereafter. The land in BFI was poorer ground than the land outside that was rented. (II Tr. 16-18).

The corporation issued 2,450 shares of stock, 1,262 to Edward and 1,188 to Merritt, based at least in part on Edward's larger contribution of land. (Tr. 201, Ex. E-4). Edward was given a majority interest because the brothers expected that Edward's son Bob would stay on the farm, and they wanted Bob to hold a majority interest so he would be free to make necessary day-to-day operating decisions. Jack knew of the founders' intention at the time. (Tr. 36). Bob was then working actively on the farm and was the only heir viewed as likely to carry on the farming operation. (Ex. F).

The BFI land and rented land together constituted a large corn and cow operation during Edward and Merritt's lifetime and in subsequent years. (II Tr. 6). It became the largest cow operation in Madison County and one of the largest in Iowa. (II. Tr. 60). BFI purchased some additional land and rented more as its operation grew. The total operation now includes about 4,770 acres. All of that land is essential to the farming operation. (II Tr. 28, 60). BFI owns the machinery used in the operation as well as the cattle feedlots and farm buildings. BFI thus has over the years been the service center for the whole operation.

Bob and Jack were elected as directors of the corporation at its organizational meeting and have served in that capacity since then. (Ex. E-4). For a number of years, directors were paid \$5,000 each year, but the compensation was later reduced to \$250. (Tr. 231).

Bob farmed the land with Edward and Merritt until Edward's death in 1977. (Tr. 39). After his death, Merritt and Bob carried on the farming operations much as they previously had been conducted. (Tr. 39, 204-205). Merritt died in 1989. (Tr. 206). Through gift and inheritance, Bob acquired all of his father's stock in the corporation. Merritt gave stock both to his son Jack and his son Dennis, whose interest was put in trust. (Tr. 207). Jack acquired a twenty-six percent interest in the corporation, which he currently holds. (Tr. 41). Dennis acquired a twenty-three percent interest, now, by reason of Dennis's death in 2010, held in equal shares by James and Terri. Edward and Merritt gifted their land outside BFI to their descendents, who then received the income from that land and were free to dispose of their interests if and how they wished (as Jack did in 2010).

After receiving his law degree in 1966, the same year BFI was incorporated, Jack pursued a career in the law and insurance fields and as a pension consultant. (Tr. 37-38, 51-52). He has not participated in the farming operation. (Tr. 43). He did not make any issue of his minority position during his father's lifetime. (Tr. 40, 45). Jack waited until after his father's death in 1989 to express his wish to redeem his stock. He expressed that wish in writing to Bob in a 1992 letter. (II Tr. 62, Ex. T-1).

The original BFI bylaws contained restrictions on stock transfers. The restrictions provided a stock redemption price of \$100 per share. (Ex. E-3, Sec. 6.1). In order to redeem, the owner had to offer the stock to BFI at that price. Jack acknowledges that he was aware of redemption restrictions before he received his first gift of stock. (II Tr. 274). He acquired 620

shares of BFI stock by gift during the period that the \$100 per share redemption limitation was in effect. He acquired his remaining 24 shares through inheritance after Merritt's death. He acknowledges that he could not expect redemption for more than \$100 per share prior to the 1984 amendment to the bylaws.

Jack requested during his father's lifetime that the bylaws be amended to modify the restrictions on transfer which he asserted were "unreasonable." As a result, the corporation adopted the amendment to the bylaws requested by Jack on April 20, 1984. (Tr. 291-294, Ex. Z-4). In material part, the amendment provided:

Section 6.3. Restriction on Transfer. No shareholder shall dispose of any part of the shares in the corporation except under the following conditions:

(a) A shareholder desiring to sell, transfer, convey, assign or dispose of such shareholder's shares in any way whatsoever (hereinafter referred to as the "transferring shareholder") shall first offer to sell such shares to the corporation. Said offer shall be in writing directed to the Secretary, and the corporation shall have sixty (60) days to exercise its option to purchase all the shares so tendered. Notice of the exercise by the corporation of said option to purchase shall be given to the transferring shareholder in writing addressed to him at his address as shown upon the books of the corporation, or, if a different address is specified in the offer to sell, at that address.

(b) The price at which such shares are to be purchased by the corporation or the remaining shareholders thereof, pursuant to this By-Law, shall be a price mutually agreed upon between the transferring shareholder and the Board of Directors of the corporation. If no purchase price is agreed upon within thirty (30) days after giving notice of the exercise of an option by the corporation, the purchase price for each share shall be the book value per share of the shareholders' equity interest in the corporation as determined by the Board of Directors, for internal use only, as of the close of the most recent fiscal year. Such value, for example, for the fiscal year ended December 31, 1983, was \$686.00 per share.

...

Section 6.4. Notice on Shares. All shares of the corporation hereafter issued to any shareholder shall bear the following endorsement:

"THE SHARES OF STOCK REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO RESTRICTIONS AND ARE TRANSFERABLE

ONLY UPON COMPLIANCE WITH ARTICLE VI OF THE BY-LAWS OF THE CORPORATION.”

(Ex. Z-4).

As a result of this amendment, Jack would be assured of receiving at least book value for his stock as calculated pursuant to the amendment. (Tr. 291-294, Ex. Z-4). Jack did not at any time tender his shares for redemption pursuant to the amendment to the bylaws. Jack had forgotten about the amendment until it was pointed out to him by attorney Charles during Jack’s deposition in this litigation. (Tr. 193). When confronted with the restrictions in the 1984 bylaw in his testimony, Jack simply responded that he wants more for his stock than book value. (Tr. 128-129). Bob would not have supported the 1984 bylaw amendment if Jack had told him he expected redemption of his stock on a different basis than provided in the new bylaw, and, in that event, the amended bylaw would not have passed. (II Tr. 44-45).

One of the issues in the March 18-19 record related to the standard established by the shareholder buyout amendment adopted at Jack’s request. Bob kept the books for BFI throughout the period that he managed the farm operations. He prepared what he referred to as an “enterprise analysis” each year in order to evaluate the operation. (Tr. 342). Each year, he would divide all of the expenses between the different operations and try to determine which of the operations was doing well and which wasn’t. (Tr. 343). His analysis included an annual calculation of net worth, which he referred to as BFI’s book value. Bob gave Jack a copy of the net worth statement each year.

CPA witness Ted Lodden reviewed BFI valuations made by Bob to determine whether the calculations corresponded to the methodology that was used in 1984 and to see if it was consistently applied year-by-year. He found that the books were kept on a consistent basis and were typical of a farming operation. (II Tr. 238-239, Ex. PP). Using the methodology employed

in arriving at the \$686 per share valuation as of December 31, 1983, Lodden calculated the book value of BFI's assets as of December 31, 2010 to be \$1,638,915. Lodden separately calculated BFI's book value since 1984 using GAAP methodology. BFI's book value on an annual basis would have been substantially less if GAAP was used in the calculation. (*Id.*) From this evidence, it is clear that the book value of BFI could be calculated under the methodology used in 1984 in a consistent manner for any subsequent year. The record contains all of BFI's net worth statements and relevant financial records. (Exs. CG, HH and II).

When Jack requested in 1992 that BFI buy out his interest, Bob did not know what price Jack wanted because Jack did not identify a price. (II Tr. 62). Bob did not want to handle the negotiations personally because of the family relationship. (Tr. 223). Because of that, Bob asked Adel attorney James Van Werden to handle redemption negotiations. Van Werden knew both Bob and Jack, owned land in the Winterset area and was familiar with farm values in that area. (II Tr. 102). Attorney Van Werden attempted to negotiate with Jack and attorneys engaged by Jack for several years. (Ex. T-1). Van Werden worked with CPA Jim Smith and Bob's wife Caroline, also a CPA, to establish a price for the stock. Together they calculated the cash value of the stock by determining the fair market value of the land and livestock. On that basis, they calculated a stock value of \$514.33 per share, without any discounts. For purposes of an opening offer, they discounted the value for lack of marketability and for the tax BFI would pay upon liquidation of its assets. BFI would have to borrow any money to purchase the stock, and no lender would loan BFI the money without a personal guaranty from Bob. If limited to its own financial resources, BFI would have had to liquidate in order to pay Jack the calculated gross per share value. (II Tr. 64-70).

Van Werden initially communicated to Jack an offer of \$406 per share. Van Werden included all of the data that supported calculation of the offer with his initial proposal. (Ex. T-1 at 25-31). Van Werden became concerned about Jack's willingness to negotiate when about 30 months passed without Jack giving him a price he was willing to accept in response to BFI's December 1992 offer. He sent a letter to Jack on June 7, 1995 telling him that if he was serious about wanting to sell his shares, he needed to give a price that he was willing to accept. Van Werden testified about his concern as follows: "I wondered if there was another underlying agenda that I did not perceive and I thought that I was failing as a facilitator bringing the parties to the table." He believed that Bob was being fair by not bidding against himself by increasing his offer when he still had no number from Jack. (II Tr. 110). Van Werden later in 1995 received a letter from attorney Joe Brick that did not contain a counter-offer but showed Jack's calculation of BFI's net worth, which would show Jack's interest in BFI on that basis as \$600,000. (Tr. 227, Ex. Z-1 at 53-54). A \$600,000 payment would require liquidation of land and livestock and would impose the liquidation tax burden entirely on BFI and its remaining shareholders. A payment of that magnitude would emasculate BFI's operations. (II Tr. 71-76).

Van Werden responded to Brick's letter by communicating a \$368,000 offer for Jack's shares to attorney Brick on July 11, 1996. A few days later, Brick countered with a request on Jack's behalf for \$500,000. Despite Van Werden's persistence, this was the first time that Jack ever identified an amount that he wanted for his stock. (Tr. 138). After receiving Jack's number, BFI raised its offer to \$400,000. Jack's response was to ask for \$400,000 plus a \$100,000 note payable over five years. (II Tr. 78-79). BFI subsequently made a verbal offer to pay \$430,000 for Jack's interest but never received a response to that offer. Van Werden believed that the parties could resolve their difference if they met with their CPAs and attorneys.

He proposed such a meeting to Jack, but Jack responded by saying that it would be too expensive and refused to meet. He did not ever respond to BFI's last 1996 offer. (II Tr. 78-80).

Bob interpreted a December 1996 letter from Jack's attorney as ending the negotiations. (Tr. 315-316).

Bob throughout the period of negotiations had been meeting periodically with Jack to keep him informed regarding farm operations and business issues. He and Jack were the only directors of BFI during that period. Bob kept notes of meetings from December 1991 through March 11, 1997. (Tr. 214-215, Ex. H). He would give Jack the corporate net worth statements and discuss them with him. (Tr. 296). He explained to Jack in a July 1993 meeting why he was using Van Werden to negotiate the buyout. He also reported to Jack that BFI had bought 80 acres of pasture in November 1992 at a time when Jack was in the Cayman Islands and Bob had to make a prompt decision. Jack said that was okay. (Tr. 299-300, Ex. H at 3-4).

In a December 1993 meeting with Jack, Bob talked about BFI buying the Kiernan farm, which he believed could be acquired for \$500 per acre. Jack responded that he opposed that purchase because he believed it would impede BFI's ability to buy him out. Bob was disappointed at BFI's inability to purchase the land. (Tr. 300-301, Ex. H at 5). Matters came to a head in a meeting between the parties on March 11, 1997. Bob sought Jack's approval to bid at auction for some or all of Burger farmland, since it adjoined land that was part of the Baur Farms operation. He believed it would involve little increase in fixed costs. Bob recorded Jack's response in his notes as follows:

He said he understood why I would want to buy more land & that he knew it was probably a good idea for the corp to buy more land, but it did not help or do anything for himself personally so he was against the corp doing it.

(Tr. 311-313, Ex. H at 8).

This led to a discussion in which Jack blamed attorney Van Werden for the failure of the buyout negotiations. Bob and Jack then discussed the liquidation tax discount that would be applied to the redemption price for Jack's stock. Jack agreed that the discount was a valid consideration but disputed the need for it and criticized the calculation of the discount done by BFI's CPA. Bob believed that Jack's opposition to the Burger land purchase was against the corporation's best interest. He asked Jack to sign corporate minutes giving Bob authority to borrow to buy land. Jack refused to do so. Bob told Jack his decision was harming BFI and that he could expect a formal meeting of the board to change the board of directors and make other changes. He also told Jack he would consider a price to redeem Jack's stock that was lower than \$500,000 but more than BFI had previously offered. Jack said he would talk to his CPA about the liquidation tax discount and get back to Bob. Jack did not ever get back to Bob as he promised. (Tr. 315-318, Ex. H at 9-10).

Bob went to Jack's office three days later, the day before the scheduled auction of the Burger farm. He was prepared on behalf of the corporation to offer \$465,000 for redemption of Jack's stock. He was told Jack was not there, although he believed Jack's car was in the parking lot. (Tr. 318-319, Ex. H at 10). Bob attended the Burger farm auction the next day. He believed the auction prices for the cropland were too high but bid successfully for the corporation's purchase of two parcels of pasture ground. (Tr. 319-320).

Meetings of the shareholders and directors were held on May 30, 1997. Jack appeared at the shareholders' meeting with counsel. The shareholders adopted a proposal to amend the bylaws to increase the number of directors from two to three. The shareholders then elected Bob, Jack and Bob's wife Caroline as the three directors. The shareholders did not re-elect Jack as an officer of the corporation. Jack provided a statement to the shareholders stating that he

would be a dissenting shareholder thereafter. He also stated that he would be watching “for every act of mismanagement or self-dealing and, when found, Robert and Caroline will be held personally responsible for resulting damages.” (Tr. 61, Ex. I-1). At the board of directors meeting, the directors voted to authorize Bob to purchase the Burger parcels on which he had bid successfully. (Tr. 231-236, Ex. I-2). Jack continued to attend board meetings, and made motions on several occasions that BFI be dissolved or that BFI or Bob be directed to purchase his stock. He did not at any of those board meetings or any board meeting since then identify or accuse Bob or Caroline of any act of mismanagement or self-dealing. (Tr. 63, 238-239, Ex. J-1).

Jack did not after 1996 identify a price he would take for his stock until he said at a BFI board meeting on June 22, 2002 that his stock was for sale for \$600,000. (II Tr. 83). Bob was interested in that offer but, when Van Werden wrote a letter to Jack’s new attorney, Ron Sutphin, about it, Sutphin responded that Jack denied he had made an offer to sell his stock for \$600,000, (even though the board minutes showed otherwise). (II Tr. 87, Ex. T-2). Bob concluded that Jack’s negotiation tactic was to get BFI to put a number on the table and then negotiate against itself. He thus was reluctant to initiate another negotiation. (II Tr. 90). He would negotiate if Jack would put a number on the table, but Jack did not do so until 2007. (II Tr. 142).

Dennis Baur’s son James moved back to Madison County in 2002 and was engaged by the corporation in 2004 to manage the farming operation in place of Bob. (Tr. 251-252). Bob thus no longer managed BFI or its operations and derived no income for services to BFI after 2003. His only 2003 BFI income was \$1,500 for farm work. (Tr. 154, 251-252). James receives a salary from BFI for managing its farm operations. His current salary set by the board of directors, including Jack, is \$66,000 per year, plus a bonus if BFI does well. (II Tr. 324). Family members who own land rented by BFI continue to receive cash rent income from BFI.

After his return to Iowa, James became a member of the BFI board. At the September 9, 2005 annual BFI board meeting, Jack repeated his motion to dissolve BFI, sell the corporate assets and windup the corporation's affairs. He also repeated his alternative motion, assuming the first motion was not approved, asking that BFI or Bob purchase his interest "at the fair market value of those shares." (Tr. 79, Ex. J-1 at 20). At the end of the next year's annual meeting James asked Jack to "provide us a number." (Tr. 79). Subsequently, James met a couple of times with Jack to discuss Jack's valuation of his shares and potential redemption. (Tr. 79-80). Jack and James continued their discussions through an exchange of e-mails from January 4, 2006 until September 6, 2007. (Ex. 11-H).

The exchange of e-mails demonstrates that James experienced many of the same frustrations as attorney Van Werden had in his effort to negotiate with Jack. At one of their meetings, Jack revealed he had obtained an appraisal of the land. When James requested a copy, Jack refused to give it to him. James gave Jack updated numbers on the value of equipment and cattle, but still did not receive a copy of the appraisal. BFI obtained a copy of the appraisal only during this lawsuit. Jack had had it since January 2006. (Tr. 302-304, Ex. 10-A).

When James could not get a number from Jack he attempted to prompt a response by e-mailing Jack on May 16, 2006 telling him Caroline Baur had calculated a BFI value assuming a market value for the land \$1,500 an acre and offering a copy of the calculation to Jack. At Jack's request, James sent him a copy of Caroline's spreadsheet. James testified he simply guessed at a \$1,500 per acre value on the land in an effort to move the process forward in hoping he would get an offer from Jack identifying the amount he would accept for his shares. Subsequent exchanges did not prompt Jack to identify a price for his shares until August 2007. (Tr. 305).

The August 7, 2007 offer from Jack was the first time that Jack provided a redemption price that he would accept for his stock since the failed negotiations with attorney Van Werden, 11 years earlier. In an e-mail to James on that date, he offered to sell his shares to BFI for \$1,825,000. (II Tr. at 142). His entire e-mail was as follows:

At the last Director's meeting, you asked me to put a price on my shares of the company. I used the value reported by Bob on the 12-31-06 "Net Worth Summary" for all assets except real estate, and for liabilities. Land was valued at \$3,000 per acre. This gives the corporation a net value of over \$7,400,000. My 644 shares (out of total of 2450) would be worth just over \$1,950,000. Assuming about a 6.5% discount for the future income tax upon liquidation, I would be willing to sell my shares today for 1,825,000.

(*Id.*). Thus his only adjustment for the built-in capital gain attributable to redemption of his shares was a small fractional discount for the burden of the tax liability imposed on the remaining shareholders of BFI in the proposal. He essentially asked for redemption of his shares for what he asserted was his proportionate share of market value of BFI's assets without any meaningful adjustment for its tax impact on the other shareholders, including his brother Dennis, who at the time held his minority interest.

On September 6, 2007, James told Jack that he and Bob were working with their business advisers and would provide a response to him no later than December 1, 2007. (*Id.* at 144). Jack did not wait for a response but, instead, initiated the present lawsuit by filing his petition on October 10, 2007. (Petition). He did not give a reason for doing so.

Even though Jack had in the past acknowledged that a liquidation tax discount was a proper factor in setting a price for purchase of his stock, he insisted that any such discount be limited to a small percentage of the liquidation tax based on a determination of "present value." That view is reflected in his August 2007 offer.

Attorney Van Werden testified that full discounts for liquidation tax are fair and are customary in the purchase of shareholder interests in Iowa farm corporations. Expert testimony

on the subject was received from Telford (“Ted”) Lodden, a longtime Iowa CPA with many years’ experience with such transactions. Lodden testified that a calculation of liquidation value is a regular and usual step in getting to fair value for an interest in a subchapter C corporation in BFI’s situation. He testified that what he described as the “built-in-gain” (“BIG”) was an essential consideration for BFI in determining a fair value to offer for Jack’s stock.

Lodden gave the following illustration of the impact of the BIG:

Assume \$1,000,000 in fair market value of assets with zero basis and BIG upon sale of the assets of \$400,000	\$1,000,000 (market value) Less \$260,000 paid for purchase of a 26% interest and
	Less \$230,000 paid subsequently for a 23% interest
	\$110,000 left after the remaining 51% owner pays the \$400,000 BIG tax

(II Tr. 250-251). Thus, the remaining shareholder, the majority shareholder in the illustration, is left with the entire tax burden if the discount is not made. Lodden also testified that the BIG tax should not be reduced to present value for valuation purposes because any delay over time in paying the tax is offset by likely increases in land value over the same period. (II Tr. 247-248).

It was reasonable for BFI to establish its offer for Jack’s stock by calculating his proportionate share of net assets upon liquidation of BFI. The record shows that, in BFI’s circumstances, a discount for liquidation taxes is a proper factor for use in determining the fair value of Jack’s stock. BFI’s 1996 purchase offer for \$430,000 was well within fair value of Jack’s stock within the meaning of that standard. Jack’s \$1,825,000 proposal in August 2007 was a request for substantially more than fair value because it included only a small fractional discount for liquidation taxes.

BFI could not purchase Jack's stock without selling land or borrowing money or using some combination of those methods. This has always been the case. BFI's average net income between 1987 and 2007 was \$40,000 per year. (II Tr. 58). Bob was required to personally guarantee BFI's loan to purchase the Burger pasture. (II Tr. 188). BFI could not have purchased Jack's interest in 1996 without the personal involvement of family members and a substantial liquidation of assets. Its alternative was liquidation. BFI would not be able to pay the interest on a loan for the purchase from operating income. (II Tr. 176-178). Moreover, BFI could not borrow money to purchase Jack's stock unless someone signed an acceptable guaranty for the lender.

The same situation existed in 2007 and exists today. The BFI members have no obligation to guarantee a borrowing for purchase of Jack's stock, just as none of them have any obligation to purchase his interest individually. BFI would be unable to service the debt on any necessary borrowing. The only alternative for BFI to raise the necessary money for a purchase is the sale of assets. Because of BFI's minimal tax basis in its land, sale of land would impose a burden on BFI to pay massive taxes that would be owed upon sale of land. The necessary sale of assets would cripple BFI. BFI had no workable solution for paying the price Jack asked for in 2007. Under the record it is clear that BFI, if it had to rely on its own resources and assets, could not redeem Jack's shares at the price he wanted in 2007 without ceasing its operations, liquidating its assets and dissolving. (II Tr. 311).

Jack made certain allegations in the March 1, 2011 trial regarding benefits received by Bob in the past from BFI with the implication they were unwarranted or unauthorized. Jack identified payment by BFI for expenses of courses taken by Bob at Iowa State University while working on his PhD in economics and additional work at the University of Minnesota. Jack

recognized that BFI would benefit from Bob's additional education, and he approved those expenditures when they occurred. (Tr. 58-60, Ex. L-3). Jack made no objection to Bob's additional activities such as his part-time teaching at Grand View College and his investment job in Des Moines. (Tr. 302-303, Ex. H at 6). Throughout this period, Bob was carrying out his farm management responsibilities. (Tr. 303-304). Jack approved Bob's salary and bonuses. (Ex. L-3). When Bob sought an increase in compensation including an agreement relating to bonuses starting in the fourth quarter of 1993, Jack consented. (Tr. 302). From 1992 to 2002, the most money Bob was paid in any year was \$35,000. (Tr. 304). After the year in which he received \$35,000, Bob was paid \$22,000 during the next three years, \$18,500 for one year, \$18,000 for three years, \$15,000 for one year, and \$1,500 in 2003, which was the last year in which he received any payment for his services on the farm. (Tr. 305).

Bob kept detailed records of the time he worked on the farm and required farm employees to maintain and provide records of their time as well. All of these records were available to Jack for review. (Tr. 305). When Bob was provided a vehicle, he kept track of his personal usage and reimbursed the corporation at the end of the year for personal miles. (Tr. 306-307). BFI furnished cell phones to all BFI employees including Bob, and Bob paid the portion of his cell phone bill that represented personal use. (Tr. 309). Jack never sought authority to participate in day-to-day farming decisions nor did he ever ask for authority to write checks, borrow money or get involved in the farming operation in any other way. (Tr. 223-224, 213-214, 268).

BFI provided Jack with all of the information about the operations of the farm that he ever asked for. (Tr. 114). He also annually provided Jack with copies of the corporation's general ledger, profit and loss statement, balance sheet, income tax returns, and a net worth

spreadsheet that Bob prepared annually. (Tr. 95-98). In 2002, in response to a request for financial information from an attorney for Jack, Bob gathered several boxes of information which he made available for Jack to review at the corporate attorney's office. Jack never looked at the documents. (Tr. 111-112, Ex. L-2). He said the information "was more stuff than [he] wanted to sort through." (Tr. 113).

Jack made no criticism of Bob's handling of the farming operations despite the assertions in his petition. Under Bob's management and later James Baur's management, Baur Farms grew from a net worth at the end of 1986 of \$1,344,298 to a net worth at the end of 2007 of \$7,416,367. (Tr. 345-347, Ex. P at 1-2).

Jack made motions at stockholder and board meetings in 2005 and 2007 that due to "the lack of return on [his] minority interest in Baur Farms, Inc." the corporation be dissolved and alternatively that the corporation or majority shareholder purchase his interest "at the fair market value" of his stock. (Tr. 78, Exs. J-1 at 20 and 26 and J-2 at 38). He consistently expressed only his interest in having the corporation redeem his stock at a price on terms he would accept. (Tr. 238-239). When confronted with the problems that redemption of his stock would create for BFI, he said, despite his status as director of BFI, that it was not his problem. (Tr. 142-143).

Viewed as a whole, the record shows that Jack acquired his interest in BFI by gift and through inheritance. Most of his stock was received when it was restricted by a bylaw provision limiting its redemption value to \$100 per share. All of his shares were subsequently restricted by the 1984 amended restriction, made at his request, which limited redemption value to the book value of the stock as reflected in the net worth statements that Bob prepared annually from BFI's books and records. Those books have been kept in a consistent manner for the entire relevant period. The calculation methodology that produced a book value of \$686 per share at the end of

1983 would produce a book value for the stock in any subsequent year. The record does not contain any evidence that Jack ever complained to Bob about the restriction or that he ever communicated to Bob or his brother Dennis that he was not bound by the restriction. The record merely shows that he did not want the restriction applied to him in this lawsuit because it would not allow him to receive his idea of fair value for his stock.

Jack did not work on the farm after his 1966 graduation from law school, never sought employment by BFI, never contributed capital to BFI, never sought nor expected dividends from BFI and, after his father's death, simply expressed his wish that BFI or his cousin Bob buy his shares from him. During the period from 1992 through 1996, when attorney Van Werden attempted to negotiate a purchase of Jack's shares by BFI, Jack was unresponsive and did not engage, even through counsel, in the traditional back-and-forth of negotiation. Jack demonstrated in his 2010 negotiations to sell his interest in the Baur Brothers partnership that he knew how to negotiate in that manner. (II Tr. 170). BFI did not insist in the Van Werden negotiations on a minority discount and ultimately offered more than liquidation value for Jack's shares. Jack did not reject BFI's last offer; he merely did not respond to it.

Jack denied having stated in the 2002 annual board meeting that he would accept \$600,000 for his stock and did not at any time after 2006 identify a price he would accept until he e-mailed James on August 7, 2007 and told him that he was "willing" to sell his shares for \$1,825,000. Then, despite all of Jack's delays and unresponsiveness during prior discussions, he did not wait for an answer to his proposal but, instead, filed the present lawsuit.

The record demonstrates that BFI did not have resources, without enlisting the help of family members or others, to pay the amount Jack asked for his stock in 1995 and 1996, and BFI likewise lacked financial resources that would enable it to purchase Jack's stock for the amount

he requested in 2007. BFI lacked financial resources, without outside help, that would enable it to purchase Jack's shares at the prices he expressed willingness to accept on any occasion.

CONCLUSIONS OF LAW

Jack brought this action against BFI and Bob on October 10, 2007. He accused them of oppressive conduct under Iowa Code §490.1430(2)(b). He accused Bob of illegal, oppressive and fraudulent conduct and of "wasting and misapplying" the assets of BFI. He asserted that Bob's actions warranted dissolution of BFI. He dismissed his waste claim at the commencement of trial on March 1, 2011, Jack's attorney stated that Jack's action sought dissolution of the corporation or "some other equitable remedy in the form of requiring the corporation to purchase [Jack's] shares." (Tr. 8). He confirmed that Jack was not seeking a personal judgment against Bob. Jack withdrew his waste claim on that occasion. (*Id.* at 8-9). The case went to trial solely on Jack's claim of oppression. At the conclusion of Jack's evidence during his case-in-chief, the court sustained a defense motion that the action be dismissed for insufficiency of evidence. Upon an appeal by Jack, the supreme court on June 14, 2013 entered its decision reversing the district court ruling and remanding the case for further proceedings consistent with its opinion. The court's opinion appears at *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663 (Iowa 2013).

Certain of this Court's findings of fact are different from facts recited by the supreme court in its decision. Generally an appellate decision becomes the law of the case and is controlling both on the trial court and on further appeals in the same case. Several exceptions exist to this principle. One of those exceptions occurs when different facts are presented on retrial or other proceedings on an issue after remand. See *United Fire and Casualty Co. v. Iowa Dist. Ct. for Sioux County*, 612 N.W.2d 101, 103 (Iowa 2000). *State v. Grosvenor*, 402 N.W.2d 402, 405 (Iowa 1987).

The supreme court recognized that the record that it reviewed was truncated and not adequately developed for the court to apply the “reasonable expectation standard” adopted by the court. (*Id.* at 666). For that reason, the court provided that the record should be fully developed upon remand. To the extent this Court has made findings of fact contrary to those reflected in the supreme court’s decision, those findings are based on the evidence received by this Court in the remand proceeding. The supreme court noted that if, after taking additional evidence, “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.” (*Id.* at 678). The court also cautioned “that courts must be careful when determining relief to avoid giving the minority a foothold that is oppressive to the majority.” (*Id.*).

The supreme court held that “majority shareholders act oppressively when, having the corporate financial resources to do so, they fail to satisfy the reasonable expectations of a minority shareholder by paying no return on shareholder equity while declining the minority shareholders repeated offers to sell shares for fair value.” 832 N.W.2d at 674.

The supreme court held that a determination of oppression “must focus on whether the reasonable expectations of the minority shareholder have been frustrated under the circumstances.” 832 N.W.2d at 674. The court in its decision did not determine whether Jack’s articulated expectations in the present case were reasonable. BFI contends that the reasonableness of Jack’s expectations must take into account the fact that he received all of his shares through gift and inheritance; that redemption of his stock has been restricted by BFI bylaws; and that the record contains no evidence to support his expectation that he should be able to redeem his stock for his proportionate share of the market value of BFI’s assets, without

regard for the impact of redemption on BFI and the other stockholders. Courts have noted that the donor's wishes have some bearing on whether the donee's expectations are reasonable and that the donee's expectations "as they evolve over the life of the enterprise" also shape expectations that courts will credit. *See O'Neal & Thompson's Oppression of Minority Shareholders and LLC Members* §7: 12 at 7-124-7-125 (1913).

The New York Court of Appeals has stated that oppression should be deemed to arise "only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture. . . ." *Matter of Kemp v. Beatley, Inc.*, 473 N.E.2d 1173, 1179 (1984). Objectively viewed, Jack could not have had his present expectations when he received the gifted stock. Any such expectations would be unreasonable and not founded in objective reality.

The North Carolina Supreme Court has held that "in order for plaintiff's expectations to be reasonable, they must be known to or assumed by the other shareholders and concurred in by them." *Meiselman v. Meiselman*, 307 N.E.2d 551, 563 (N.C. 1983). The court said that privately held expectations which are not made known to the other participants are not reasonable. (*Id.*). In *Meiselman*, the court stated:

These "reasonable expectations" are to be ascertained by examining the entire history of the participants' relationship. That history will include the "reasonable expectations" created at the inception of the participants' relationship; those "reasonable expectations" as altered over time; and the "reasonable expectations" which develop as the participants engage in a course of dealing in conducting the affairs of the corporation. The interests and views of the other participants must be considered in determining "reasonable expectations." The key is "reasonable." In order for plaintiff's expectations to be reasonable, they must be known to or assumed by the other shareholders and concurred in by them. Privately held expectations which are not made known to the other participants are not "reasonable." Only expectations embodied in understandings, express or implied, among the participants should be recognized by the court.

307 S.E.2d at 563.

Reviewed under that standard, Jack could not reasonably expect to redeem his shares for a price that did not take into account the bylaw restrictions, the expectations of the other stockholders, and the impact of redemption on BFI and those stockholders. Jack did not until his 1992-1996 negotiations with attorney Van Werden communicate to the other shareholders an expectation that he could redeem his stock for more than an amount calculated under the bylaws. He had no reasonable expectation at that time that a different methodology would be used. Bob had no such expectation either, or he would not have supported the 1984 amendment. The two other shareholders, James and Terri, who each hold minority interests, testified that their only expectation is that their interests would be redeemed pursuant to the bylaws. (II Tr. 267 and 323). In addition, BFI was not obligated to redeem Jack's stock without regard to the impact of redemption on BFI's operations or on the rights of other shareholders. They would have every reason to be treated the same as Jack upon redemption of their shares. Jack's contrary expectations were not concurred in by them and are not reasonable.

Jack complains about having been denied a return on his shares. He admits, however, that he did not at any time request that BFI pay dividends and acknowledges that he does not believe it is a good idea for farm corporations like BFI to pay dividends. He wanted BFI to redeem his stock so that it would not merely pass to the next generation. He has known that Merritt and Edward intended that BFI hold the land and continue to operate the farm so long as a family member was interested in farming it. He made no capital investment in BFI at any time. 620 of his shares were gifted to him by his father at time when the bylaws restricted redemption rights to \$100 per share. His additional 24 shares were inherited, and his redemption rights are subject to the provisions of the 1984 amendment.

The record made in the proceedings after remand shows that Jack's only negotiation with BFI for a buyout of his stock occurred during the period between 1992 and 1997. The record does not show that the parties reached an impasse because of any insistence by BFI on obtaining a minority discount for purchase of Jack's stock. BFI used that factor only as an initial bargaining chip. Buying Jack out at the price he identified in the 1992-1996 negotiations or in his 2007 offer, however, plainly would have been oppressive to Bob and Jack's brother Dennis.

The record shows the parties disagreed over the calculation of a tax liquidation discount. BFI used fair market value numbers in putting a value on the land and other BFI assets for purposes of its 1992 calculation. The only fighting issue that remained in their negotiation was over the applicability of a liquidation discount. Negotiations were protracted because of Jack's delays in responding to BFI offers communicated by Van Werden. BFI's last communicated offer of \$430,000 did not include a minority discount and was substantially more than the liquidated value of Jack's stock, using market value figures.

The court cannot say that BFI's insistence on a liquidation tax discount, not 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 the relief requested by Jack in this lawsuit, consistent with his repeated motions at BFI board meetings for dissolution of the

corporation. If BFI was dissolved as Jack requested, the amount available to BFI stockholders 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.

The record also shows that BFI would be unable to raise the money that Jack seeks for his interest in the corporation without selling assets to the point that no practical way would exist for BFI to continue its operations. The court finds under the standard adopted by the supreme court that BFI in the circumstances shown in the record here did not have the corporate financial resources to satisfy the price demanded by Jack in the 1992-1996 negotiations, nor did BFI have the financial resources in 2007 nor does it even now have the resources to meet Jack's demand for \$1,825,000 for his shares.

The Court holds that the fair value of Jack's shares under the standard adopted by the supreme court does not exceed the amount of his proportionate share of the market value of BFI's assets, discounted to their liquidation value. The \$430,000 final offer made in its last 1996 offer to Jack was based on fair market value of BFI assets and exceeded Jack's proportionate share in the liquidated value of BFI at that time. That offer exceeded the fair value of Jack's shares at that time. Jack's earlier request for \$400,000 plus a promissory note for \$100,000 payable over 5 years was substantially in excess of the fair value of his shares. He had no reasonable expectation that his shares should be redeemed for that amount.

Other than for his repeated requests for dissolution of BFI, Jack did not subsequently put a number on the table in requesting a buyout of his shares until his August 2007 offer to sell his

shares for \$1,825,000. That proposal was admittedly based on his view of the appraised fair market value of BFI assets, with only a small fractional discount for redemption tax consequences. BFI did not have the resources to meet that demand without dissolution, and Jack would receive only the liquidation value of his interest upon dissolution of BFI. The fair value of Jack's equity interest in BFI under the record in this case cannot and does not exceed his proportionate share of BFI's liquidation value.

Because his demands have exceeded the fair value of his equity interest, Jack has failed to meet his burden to prove oppression by a preponderance of the evidence.

ORDER

It is the Order and Judgment of the Court that this action be and is hereby dismissed at Jack's costs.

Dated this 29th day of July, 2014.

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State of Iowa Courts

Type: OTHER ORDER

Case Number **Case Title**
EQCV032201 JOHN R BAUR VS BAUR FARMS INC; ROBERT F BAUR

So Ordered

A handwritten signature in dark ink that reads "Gary M. Kimes". The signature is written in a cursive style. Below the signature is a horizontal line.

Gary G. Kimes, District Court Judge,
Fifth Judicial District of Iowa