IN THE COURT OF APPEALS OF IOWA

No. 7-657 / 96-1725

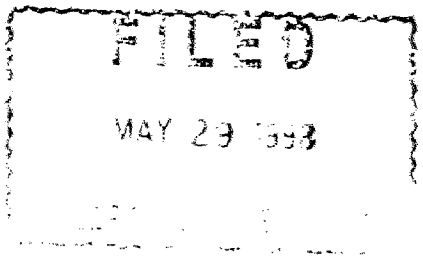
ELY, INC., f/k/a
MICROFUEL CORPORATION,

Plaintiff-Appellant,

vs.

ALLEN C. WILEY,

Defendant-Appellee.



Appeal from the Iowa District Court for Linn County, Lynne Brady, Judge.

Plaintiff corporation appeals from the district court's valuation of the stock of defendant as a dissenting shareholder. **REVERSED AND REMANDED.**

Stephen J. Holtman, Richard G. Hileman, Jr. and Leonard T. Strand of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, and Donald G. Thompson of Bradley & Riley, P.C., Cedar Rapids, for appellant.

Tom Riley, Peter Riley and Mark E. Liabo of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellee.

Considered by Cady, C.J., and Huitink and Mahan, JJ. Sackett, J., takes no part.

MAHAN, J.

Plaintiff corporation appeals from the district court's ruling on remand from *Ely, Inc. v. Wiley*, 546 N.W.2d 218, 221 (Iowa App. 1996). The district court confirmed the prior valuation of defendant's interest as a dissenting stockholder. We reverse and remand.

Allen Wiley invented a process called MicroMill to grind coal and other substances into a micro-fine powder. The micronized coal burned more efficiently and caused less pollution. In 1987, Wiley created a company, MicroFuel Corporation, now known as Ely, Inc., to produce and market the process. Wiley maintained a twelve percent interest in the company.

By 1991, the company was in financial difficulty. Only one MicroMill unit had been sold. The majority shareholder, IES Energy, Inc., loaned Ely $350,000. Ely began to search for additional investors. In April 1992, the note from IES was due and Ely did not have sufficient reserves to repay the debt.

In September 1992, Fuller Corporation presented an offer to purchase the assets of the company for $750,000 plus a percentage of future royalties not to exceed $6.5 million. Wiley presented his own similar offer. The Tennessee Valley Authority (TVA) also presented a licensing agreement in which TVA would have invested $500,000 in Ely in exchange for a percentage of royalties. The shareholders voted to accept Fuller's offer. Fuller is a large corporation and, due to its greater resources, was believed to be able to generate greater sales.

Under Iowa Code section 490.1302(1), as a dissenting shareholder, Wiley was entitled to payment for the fair value of his shares. Fair value is defined as follows:

> "*Fair value*," with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

Iowa Code § 490.1301(4). The objective of a fair-value determination is to ascertain the actual worth of what the dissenter loses because of his or her unwillingness to go along with the controlling stockholders. *Sieg Co. v. Kelly*, 568 N.W.2d 794, 798 (Iowa 1997) (*Sieg II*).

Ely determined the fair value of Wiley's twelve percent share of the stock was $24,200. This is twelve percent of the cash remaining after the Fuller sale and the repayment of the debt to IES. Ely also agreed to pay Wiley a certain amount of future royalties. In effect, Wiley was paid $0.025 per share. Wiley disagreed with the payment and Ely filed an action to determine the fair value of Wiley's shares. *See* Iowa Code § 490.1330.

At the trial, Ely presented the expert testimony of Paul Much, who relied on the Fuller sale to determine the fair market value of the shares. Much came to the conclusion $24,200 was the fair value of the shares. He testified the shares were worth at most $0.095 per share, which was based on the sale of the company for $750,000, not taking into consideration the IES debt.

Wiley presented the expert testimony of Yale Kramer, who determined the fair value of the stock was $0.40 per share. Kramer did not consider the Fuller sale because he felt the stock should be valued immediately before the sale. Kramer found the average price per share paid by all shareholders was $0.43. Kramer also considered some proposed sales of shares, TVA's interest in the company, and a statement by Ely's chairman of the board that the company was worth between $7 and $9 million.

The district court determined it could not consider Much's valuation because it was improper to consider the Fuller sale in determining the shares' value. The court also found the sale to Fuller was really a compulsion sale because Ely had very few options available at the time of the sale. The court concluded Wiley should be paid in full and not be required to wait for future royalties. The court found his shares were worth $0.40 per share and awarded him $353,400.

Ely appealed. We concluded the Fuller sale was relevant and the testimony of Much should not have been excluded because he considered the sale. *Ely, Inc. v. Wiley*, 546 N.W.2d 218, 221 (Iowa App. 1996). We remanded the case to the district court. *Id.*

On remand, the district court did not hear additional evidence, but reconsidered the record previously made. The court found Much's testimony should not be considered because he assumed the Fuller sale was an arm's-length transaction. The court concluded the sale was closer to a compulsion sale than a market-based

transaction. The court found Ely was out of cash and was feeling pressure because IES had called its note. The court accepted Kramer's valuation and determined the value of Wiley's shares were $0.40 per share. Ely has appealed the decision on remand.

I. Actions to determine the value of a dissenter's shares pursuant to chapter 490 are at law. *Sieg II*, 568 N.W.2d at 797. The district court's findings of fact are binding on us if supported by substantial evidence. *Id.*

II. Ely contends the district court erred by refusing to consider the valuation opinion of its expert, Much. Ely also contends the district court erred by finding the Fuller sale was a compulsion sale.

Fair market value is defined as that value which a willing buyer and willing seller, both well informed as to the facts, but neither under any compulsion to act, would establish in an arm's length sale. *Sieg Co. v. Kelly*, 512 N.W.2d 275, 279 (Iowa 1994) (*Sieg I*). Thus, where one of the parties is under a compulsion to act, a sale does not establish the fair market value of the item.

We find the district court erred in finding the Fuller sale constituted a forced transaction, and in rejecting the opinion testimony of Much.

The definition of fair market value is based upon a hypothetical buyer and seller under no compulsion to act in the marketplace. Concepts related to a hypothetical analysis, however, should not be applied to an actual transaction between

an actual buyer and an actual seller. The factors and circumstances underlying the transaction involving the disputed property are properly considered.

It was for the district court to assign weight to the opinions expressed by the experts, but it was error to completely reject the opinion of Much because he considered the Fuller sale. Ely was facing severe financial problems. It lacked sufficient reserves to pay its debts. It looked for additional investors and ultimately entertained purchase offers from three sources. The Fuller sale was a relevant transaction and Ely was not a hypothetically compelled seller.

For this reason, we remand the case to the district court for a reconsideration of the testimony of the expert witnesses. The court is directed to consider the opinions of both experts. We leave it to the court to determine the relative weight to be given to each expert opinion. **III.** Wiley seeks appellate attorney fees pursuant to Iowa Code section 490.1331. Under this section, an award of attorney fees and expenses is a two-step process. *Security State Bank v. Ziegeldorf,* 554 N.W.2d 884, 893 (Iowa 1996). The court must first find the corporation (1) did not substantially comply with the requirements of chapter 490, or (2) acted arbitrarily, vexatiously, or not in good faith. *Sieg II,* 568 N.W.2d at 804. Then, if either of these facts are present, the court has discretion to award attorney fees and expenses in some amount. *Security State Bank,* 554 N.W.2d at 893.

Wiley believes Ely acted arbitrarily, vexatiously, or not in good faith by pursuing this appeal. Wiley has the burden to prove the corporation had no factual or legal basis for its fair-value determination or acted for a purpose other than to honestly pay him the fair value of his shares, including acting with an intent to defraud or harass. *Sieg II*, 568 N.W.2d at 805. We determine Wiley has not met this burden and we make no award of attorney fees.

We reverse the decision of the district court and remand for further proceedings. We do not retain jurisdiction. Costs of this appeal are assessed one-half to each party.

REVERSED AND REMANDED.