STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0396

JoAnn Helfman,
on behalf of the Estate of James R. Helfman,
Appellant,

vs.

Ruth Ann Johnson, et al.,
Respondents.

Filed February 24, 2009
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CV-06-2578

Victor E. Lund, Mahoney, Dougherty & Mahoney, P.A., 801 Park Avenue, Minneapolis, MN 55404; and

Kathleen K. Goddard, 2249 East 38th Street, Minneapolis, MN 55407-3083 (for appellant)

Eric F. Hansen, David G. Hellmuth, Hellmuth & Johnson, PLLC, 10400 Viking Drive, Suite 500, Eden Prairie, MN 55344 (for respondents)

Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Crippen, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

On appeal from a determination of damages in a minority shareholder dispute, appellant argues that the district court erred in (1) applying a discount to the valuation of the corporation; (2) awarding damages based on 18.75% ownership rather than 23.75%; and (3) not allowing additional distributions for 2003. We affirm.

FACTS

This is a shareholder dispute between appellant[1] JoAnn Helfman, on behalf of the Estate of James R. Helfman and respondents Ruth Ann Johnson, et al., shareholders of Alpha Title, Inc. and Monument, Inc. In 1998, the parties consolidated appellant's title-examination expertise with respondents' real-estate closing company to form Alpha. Appellant owned a 23.75% interest in Alpha. The business profited and distributions to shareholders increased through 2002. In January 2002, Monument was organized to serve as a passive investor. By the end of 2002, the real estate market was declining and Alpha received little to no new business.

In 2003, the parties' working relationship unraveled. In December 2003, respondents held a board meeting without notice to appellant and voted to issue themselves new shares of Alpha retroactive to May 2003. This action reduced appellant's ownership interest to 5%. As a result, appellant sought a buy-out and the

[1] James R. Helfman passed away shortly after initiating litigation; his wife and personal representative, JoAnn Helfman, saw the case through to this appeal. "Appellant" refers to both JoAnn Helfman and James R. Helfman.

district court valued the corporation. Appellant challenges the district court's decision to discount the valuation of Alpha.

D E C I S I O N

Valuation

Appellant argues that the district court abused its discretion in valuing Alpha. "[F]indings of valuation will not be disturbed if within the limits described by the evidence, even though they do not exactly adopt the testimony of any one witness." *Standard Constr. Co. v. Nat'l Tea Co.*, 240 Minn. 422, 428, 62 N.W.2d 201, 205 (1953); *see Hertz v. Hertz*, 304 Minn. 144, 145, 229 N.W.2d 42, 44 (1975) (stating "[a]ssigning a specific value to an asset is a finding of fact"). This court will reverse the district court's valuation of property only if it is clearly erroneous. *Spinnaker Software Corp. v. Nicholson*, 495 N.W.2d 441, 445 (Minn. App. 1993), *review denied* (Minn. Mar. 30, 1993).

Under Minn. Stat. § 302A.751, subd. 2 (2008), the district court may order the sale of all shares of the corporation held by the plaintiff or defendant to either the corporation or the moving shareholders if the court determines in its discretion that an order would be fair and equitable to all parties. The purchase price shall be the fair value of the shares. Minn. Stat. § 302A.751, subd. 2.

> [F]air value . . . means the pro rata share of the value of the corporation as a going concern. To determine fair value, the [district] court may rely on proof of value by any technique that is generally accepted in the relevant financial community and should consider all relevant factors, but the value must be fair and equitable to all parties.

Advanced Commc'n Design, Inc. v. Follett, 615 N.W.2d 285, 290 (Minn. 2000). "When conflicting opinions of expert witnesses have a reasonable basis in fact, the [fact-finder] must decide who is right." *Thomas v. Thomas*, 407 N.W.2d 124, 126 (Minn. App. 1987). "The [district] court is not bound by the opinion of any witnesses concerning values." *Id.* (citing *Lehman v. Hansord Pontiac Co.*, 246 Minn. 1, 7, 74 N.W.2d 305, 310 (1955)). The weight and credibility of expert testimony is for the fact-finder to determine. *Shymanski v. Nash*, 312 Minn. 304, 308, 251 N.W.2d 854, 857 (1977). The "opinions of expert witnesses are only advisory and the [fact-finder] may weigh such evidence in the light of all the facts and opinions presented to it and draw its own conclusions." *Hous. & Redev. Auth. v. First Ave. Realty Co.*, 270 Minn. 297, 306, 133 N.W.2d 645, 652 (1965).

The parties hired experts to value the corporation. The experts presented their reports and testified during a court trial. Appellant's expert, John Edson, used the income approach to value Alpha on December 31, 2003, the agreed-upon valuation date. Edson determined that the fair value of Alpha was $1,850,000. Respondents' expert, Steve Erchul, declined to use the income approach; although Erchul testified that if he had used this approach, he would have valued Alpha at $1,003,000. Instead, Erchul used the adjusted assets method of valuation, explaining that this approach is often used to value companies that do not have a consistent or predictable client base; when the company has little to no value from labor or intangible assets; when it is easy to enter the industry; and when there is significant chance of losing key personnel, which could negatively impact the company. Using this method, Erchul valued Alpha at $11,000.

The district court found that Edson's valuation was overly optimistic and was based largely on past performance, while Erchul's valuation was unrealistically low and did not value Alpha as a going concern. The district court concluded that Erchul's $1,003,000 value was reasonable and applied a 24.60% discount rate based on the evidence presented and as a balance between the extremes of each expert. The district court stated that the rate is "also the same discount referenced by [appellant's] expert in several of his valuations." Edson's report shows a "discount factor" of 24.60% using the discounted future cash flow method of valuation. The district court explained, however, that the applied discount rate was based on three factors, which were necessary to consider in order to prevent appellant from receiving a disproportionate amount of damages. The three factors the district court considered in discounting the valuation were: (1) there were no non-compete agreements in place; (2) there were no employment contracts binding employees; and (3) the market trend on the valuation date was strongly downward.

Appellant contends that the district court impermissibly applied a minority shareholder discount and a marketability discount. *See Pooley v. Mankato Iron & Metal, Inc.*, 513 N.W.2d 834, 838 (Minn. App. 1994) (stating that application of a minority shareholder discount in the context of a court-ordered buyout is improper because the legislature enacted Minn. Stat. § 302A.751 to protect minority shareholders who have been unfairly prejudiced), *review denied* (Minn. May 17, 1994); *Advanced Commc'n Design, Inc.*, 615 N.W.2d at 292 (declining to adopt a bright-line rule regarding the applicability of a marketability discount in the context of a court-ordered fair-value

buyout under Minn. Stat. § 302A.751, and holding that "absent extraordinary circumstances, fair value in a court-ordered buy-out pursuant to section 302A.751 means a pro rata share of the value of the corporation as a going concern without discount for lack of marketability"). But the district court stated that the discount was not related to minority shareholder or marketability discounts. Instead, the discount involved consideration of other conditions. Considering the overall evidence and the equities, the district court determined that the industry was in a serious downward trend and that Alpha's employees were able to leave and freely compete with Alpha.

The record supports the district court's findings. In 2002, the real-estate market was declining, especially in the area of refinancing. During that time, there was evidence that Alpha's business was down 75%. Further, respondents requested that a 40% discount be applied. The district court determined that 40% was too "aggressive" and that "24.60% [was] reasonable and appropriate." The district court did not impermissibly discount the valuation, and, therefore, did not abuse its discretion in its valuation of Alpha.

Percent Ownership

Appellant also argues that the district court erred in awarding appellant 18.75% of Alpha when appellant actually owned 23.75%. The district court subtracted 5%, finding that respondents had unfairly diluted appellant's ownership interest by issuing themselves new shares. In October 2005, appellant accepted a $13,537.50 payment for the 5% share of Alpha. Thus, appellant was already compensated for the 5% interest. To award

appellant 23.75% would result in double compensation for 5% of the shares. The district court was within its discretion in compensating appellant for an 18.75% share in Alpha.

Additional Distributions

Appellant argues that the district court erred by failing to award additional distributions from Monument based on 2003 tax returns. Monument was incorporated in 2002 as a passive investor. The district court determined that "[t]his court does not find that $10,980 of distributions from Monument [] was due to [appellant] for 2003." Appellant concedes that the only evidence supporting this claim is the 2003 tax return, which was admitted as Exhibit 7. Exhibit 7 is approximately 73 pages, not all of which is limited to Monument's 2003 tax return. Appellant claims that the tax return is sufficient evidence to support the claim because respondents submitted no evidence in opposition.

Appellant was required to demonstrate damages with reasonable certainty. *Lowe v. Armour Packing Co.*, 148 Minn. 464, 467, 182 N.W. 610, 611 (1921). And a fact-finder may not base an award of damages on speculation or conjecture. *Ahrenholz v. Hennepin County*, 295 N.W.2d 645, 649 (Minn. 1980). Determining whether damages are speculative is a function of the district court. *Austin v. Rosecke*, 240 Minn. 321, 322, 61 N.W.2d 240, 242 (1953). Here, the district court found that appellant did not prove its damages, i.e., entitlement to 2003 distributions from Monument. The district court did not err in making that determination because appellant failed to meet the burden of demonstrating damages. Merely introducing a 73-page exhibit that includes a tax return into evidence does not meet this burden without further evidence of how the exhibit supports the claim. Appellant concedes that there was no oral testimony supporting the

claim. The district court would have made a damages award based on speculation or conjecture if it had made an award based solely on the exhibit, and such an award would not have been supported by the record.

Affirmed.