

A09-1247
STATE OF MINNESOTA
IN COURT OF APPEALS

PeopleNet Communications Corp.,

Respondent,

vs.

Baillon Ventures, LLC,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUE

Are the expenses and compensation of a party-retained expert appraiser allowable costs and expenses under Minn. Stat. § 302A.473, subd. 8(a)?

The district court ruled Minn. Stat. § 302A.473, subd. 8(a) only applies to an appraiser appointed by the court and not to an expert appraiser hired by a party.

Most apposite cases:

MT Properties, Inc. v. CMC Real Estate Corp., 481 N.W.2d 383, 388
(Minn. App. 1992)

Most apposite statutes:

Minn. Stat. § 302A.473, subd. 7
Minn. Stat. § 302A.473, subd. 8(a)
Minn. Stat. § 302A.473, subd. 8(b)

STATEMENT OF FACTS

This is a dissenters' rights proceeding under Minn. Stat. § 302A.473. The action was initiated by respondent PeopleNet Communications Corp. under Minn. Stat. § 302A.473, subd. 7 after appellant Baillon Ventures, LLC exercised its statutory right to dissent to a proposed merger. The district court, the Honorable Robert A. Blaeser, held a court trial and made a determination of value of the corporation following the process set forth in Minn. Stat. § 302A.473. (A-1, A-9) The district court also concluded that both parties complied with all the procedural requirements of the statute and that neither party acted in bad faith. (A-8, A-9).

Pursuant to the district court's valuation order dated March 31, 2009 (A-10), appellant Baillon Ventures then submitted an application for its costs and expenses pursuant to Minn. Stat. § 302A.473, subd. 8. (A-11).

Minn. Stat. § 302A.473, subd. 8(a) provides:

The court shall determine the costs and expenses of a proceeding under subdivision 7, including the reasonable expenses and compensation of any appraisers appointed by the court, and shall assess those costs and expenses against the corporation, except that the court may assess part or all of those costs and expenses against a dissenter whose action in demanding payment under subdivision 6 is found to be arbitrary, vexatious, or not in good faith.

Baillon Ventures' application for costs and expenses included a request for an award of the fees and expenses of their expert appraiser, John

Wagner, who testified at trial. (A-11). Wagner was the only expert appraiser who testified as to the value of PeopleNet at trial. (See A-80 (Wagener expert report)). PeopleNet did not retain an appraiser to testify at trial, relying solely on the testimony of their business advisors and company employees. Nor did the district court appoint its own expert as is permitted under the statute.

In response to Baillon Venture's request for the award of the costs of their expert appraiser, PeopleNet objected arguing such an award was not permitted under Minn. Stat. § 302A.473, subd. 8(a) and objecting to an award of Wagner's fees on the merits. (A-68, also A-75 (Baillon Ventures' reply)). The district court awarded a portion of appellant's costs and expenses by order dated May 18, 2009, but denied in its entirety Baillon Ventures' application for reimbursement of the expenses and compensation of its expert appraiser. (A-78).

In its accompanying memorandum, the district court's rationale was stated as follows: "John Wagner was not an 'appraiser appointed by the court' under Minn. Stat. § 302A.473, subd. 8(a). Instead, Mr. Wagner was a private expert hired by Baillon." (A-79). Judgment was entered the same day (A-79), and appellant Baillon Ventures then filed this appeal raising solely this issue of statutory construction. (A-136).

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY CONSTRUED MINN. STAT. § 302A.473, SUBD. 8(a) WHEN IT CONCLUDED THE STATUTE DOES NOT PROVIDE FOR RECOVERY OF THE FEES AND COSTS OF PARTY-RETAINED APPRAISERS.

This is an issue of first impression requiring statutory construction of Minn. Stat. § 302A.473, subd. 8(a) and the relationship between this provision and the provisions of Minn. Stat. § 302A.473, subs. 7 and 8(b).

Minn. Stat. § 302A.473, subd. 8(a) is mandatory requiring that “[t]he court shall determine the costs and expenses of a proceeding under subdivision 7, including the reasonable expenses and compensation of any appraisers appointed by the court, and shall assess those costs and expenses against the corporation” (Emphasis added).

It is undisputable that this proceeding was brought and tried as a proceeding pursuant to Minn. Stat. § 302A.473, subd. 7. Accordingly, the expense of Baillon’s appraiser should be assessed against PeopleNet pursuant to subdivision 8(a).

The district court was persuaded that the provisions of Minn. Stat. § 302A.473, subd. 8(b), which allows the court to also award “all fees and expenses of any experts” under certain circumstances, limits an award under

subdivision 8(a) to only an “appraiser appointed by the court.” (A-79).

Subdivision 8(b) provides as follows:

(b) If the court finds that the corporation has failed to comply substantially with this section, the court may assess all fees and expenses of any experts or attorneys as the court deems equitable. These fees and expenses may also be assessed against a person who has acted arbitrarily, vexatious, or not in good faith in bringing the proceeding, and may be awarded to a party injured by those actions.

Minn. Stat. § 302A.473, subd. 8(b).

A. Minnesota Secondary Authorities Have Concluded the Statute Provides a Bias In Favor of Dissenting Shareholders by Requiring an Award for Appraisers.

While there is not Minnesota appellate case law specifically addressing the issue, secondary authorities who have analyzed the statute and the intent of the legislature to provide a meaningful means of dissent have concluded the costs of a party-retained expert are recoverable under the statute:

An apparent bias in favor of dissenting shareholders in the MBCA relates to the costs and expenses of the court proceeding. The MBCA provides that such costs and expenses, including those of appraisers, must be assessed against the corporation unless a dissenting shareholder’s supplemental payment demand is found to be ‘arbitrary, vexatious, or not in good faith.’

18 John H. Matheson et al., *Minnesota Practice Corporation Law & Practice* § 7.31 (Supp. 2008) (emphasis added). The same conclusion is repeated by

another author in a second volume of the Minnesota Practice series. 20A Brent A. Olson, Minnesota Practice *Business Law Deskbook* § 29:30 (2008) (same).

B. An Award of Party-Appointed Appraiser's Compensation Is Consistent with the Legislature's Use of the Word "Including" in Subdivision 8(a).

This conclusion is consistent with the express statutory language and the courts' interpretation of the word "including." "The word 'includes' is usually a term of enlargement, and not of limitation." Burgess v. U.S., 128 S.Ct. 1572, 1578 n.3 (2008) (quoting 2A N. Singer & J. Singer, *Statutes and Statutory Construction* § 47:7, p. 305 (7th ed. 2007)). The word "including" is identically construed by the Minnesota Supreme Court and Minnesota Court of Appeals:

The phrase "including vested pension benefits" is not a proviso, but rather an example of what may be included in marital property. In conjunction with reading only enumerated exceptions into the statute, the term "including" should not be read as a term of limitation. As stated in 2A Sutherland, *Statutory Construction*, § 47.07:

A term whose statutory definition declares what it "includes" is more susceptible to extension of meaning by construction than where the definition declares what a term "means." Thus, it has been said that the word 'includes' is usually a term of enlargement, and not of limitation It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated"

Janssen v. Janssen, 331 N.W.2d 752, 755-56 (Minn. 1983); Vanderleest v. Vanderleest, 352 N.W.2d 54, 57 (Minn. App. 1984) (quoting Janssen).

It is both reasonable and customary (and perhaps essential to avoid an allegation of bad faith or vexatious conduct) for a dissenter such as Baillon Ventures to use an expert appraiser in a valuation proceeding under Minn. Stat. § 302A.473, subd. 7. Indeed, such an allegation of bad faith was made by PeopleNet in this matter and rejected by the district court. (A-9). The legislative purpose of providing a meaningful vehicle for dissenting shareholders to assert their rights would be curtailed if only court-appointed appraisers were reimbursable. Likewise, such a ruling would of necessity result in increased requests in these proceedings for the court to appoint an appraiser since only court-appointed appraisers would be reimbursed, thus burdening the court with the additional administrative tasks of appointing and overseeing that appraiser.

Subdivision 8 must be read so as to give meaning to “all its provisions.” Minn. Stat. § 645.16. Thus, subdivision 8(a)’s requirement that the court “shall determine the costs and expenses of a proceeding under subdivision 7” is not limited by inclusion of the phrase “including the reasonable expenses and compensation of any appraisers appointed by the court.” The latter language is but an example of the types of costs and

expenses to be included. See Janssen, 331 N.W.2d at 755-56; Vanderleest, 352 N.W.2d at 57.

C. The Legislative Purpose of Assuring a Meaningful Dissent Opportunity Will Be Severely Chilled If Dissenting Minority Shareholders Cannot Recover the Expenses and Compensation of Their Expert Appraiser.

A minority shareholder cannot reasonably be expected to dissent from a proposed corporate action and then “go it alone.” The statute allows for sanctions against the shareholder if their dissent is made in bad faith. Minn. Stat. § 302A.473, Subds. 8(a) and 8(b). In order to dissent in good faith, the shareholder must either have expertise in valuation themselves or they must obtain advice from a valuation expert. Minority investors in start up companies such as PeopleNet are often friends of the company founders or are simply passive investors known as “angel” investors. As investors they are not necessarily valuation experts and therefore they must hire business appraisers to assist them in determining the value of their stock.

In this case, the Merger Notice and Proxy materials provided to Baillon Ventures were 138 pages long. PeopleNet also had 5 different classes of stock, each with its own liquidation preference and conversion rights. Compounding this, PeopleNet simultaneously used two different accounting methods to report their results. In discovery, PeopleNet provided

over 45,000 pages of documents including reams of financial data. PeopleNet itself hired experts (both an investment banker and a fairness opinion provider) to advise them as to the value of the company. The district court acknowledged “this is not a simple calculation.” (A-7 (¶41)).

Minn. Stat. § 302A.473 clearly reflects a legislative intent orientated toward protecting the minority shareholder: The corporation must pay the minority dissenter the company’s estimated value of the dissenter’s shares up front despite the dissent, Minn. Stat. § 302A.473, subd. 5(a); the minority shareholder is entitled to interest on the value of its shares commencing on the date of the corporate action, *id.*; regardless of the value determined by the court, a minority shareholder who dissents cannot receive less than what the company paid to them, thus providing a safety net, *id.* subd. 7; and the statute contains strict deadlines so the company cannot use delay tactics to wear down or discourage dissenters, *id.* subds. 4-7.

Minority shareholders will be deterred from taking the risk of hiring a valuation expert and dissenting if they cannot recover their expert fees. A dissenting shareholder with very few shares, for example, would be deterred from dissenting because the costs of the proceeding would exceed the amount of a meritorious recovery.

The conclusion that Minn. Stat. § 302A.473, subd. 8(a) requires the company to pay for the minority dissenter's appraiser's compensation and expenses is thus also consistent with the statute's overall theme of enabling a minority shareholder to stand up to a corporation and seek their day in court.

D. Minn. Stat. § 302A.473, subd. 8(b) Does Not Exclude the Possibility of an Award of Compensation for Party-Appointed Appraisers.

Citing subdivision 8(b), this Court has held “the costs that are presumed to be paid by the corporation [under § 302A.473, subd. 8(a)] do not include attorney fees.” MT Properties, Inc. v. CMC Real Estate Corp., 481 N.W.2d 383, 388 (Minn. App. 1992). Presumably this holding would be equally applicable if party-retained appraisers fall within the term “any experts” also referenced in subdivision 8(b).

In the same discussion in MT Properties, however, this Court expressly ruled:

Because CMC did not act in bad faith, MT cannot avoid paying the reasonable fees associated with the valuation proceeding under Minn. Stat. § 302A.473, subd. 7. However, because the record does not indicate the amount of CMC's costs, this case must be remanded for a determination of those fees which MT must reimburse CMC under Minn. Stat. § 302A.473, subd. 8(a).

Id. (emphasis added). The term “fees” has a specific meaning and has been construed as “payments for services performed or to be performed.”

Hutchinson Technology v. Commissioner of Revenue, 698 N.W.2d 1, 9 (Minn. App. 2005). The Hutchinson court also noted the Black's law definition of the word "fee" as "a charge for labor or services, esp. professional services." Id. (citing Black's Law Dictionary 647 (8th ed. 2004)). This Court's remand instruction in MT Properties requiring reimbursement by the corporation of the dissenting shareholder's "fees" (other than attorney's fees) must necessarily have included the party-appointed appraiser. The remand instruction in MT Properties is in accord with the rule of statutory construction requiring that subdivision 8(a) and 8(b) must be read so as to give meaning to all their provisions. See Minn. Stat. § 645.16.

Restricting subdivision 8(a) to only court-appointed appraisers would ignore the legislature's use of the word "including" and thwart the overall legislative purpose of Minn. Stat. § 302A.473. The term "any experts" as used in subdivision 8(b) can be given an appropriate construction consistent with the language of subdivision 8(a) and the legislative purpose of section 302A.473 by construing "any experts" to mean any experts other than appraisers. This would include the many other possible types of experts sometimes used in these proceedings who may be called to address specific business issues, forensic accounting issues, technical issues, etc.

Baillon Ventures respectfully submits that the legislature's wording of subdivisions 8(a) and 8(b) and this Court's ruling in MT Properties warrants an interpretation that all expert appraisers, party-appointed and court-appointed, fall within the ambit of subdivision 8(a). This comports with the legislature's use of the word "including" in referencing appraisers appointed by the court. This interpretation effectuates the legislative purpose of providing a meaningful mechanism for asserting dissenter's rights. And this interpretation follows the uniform interpretation of this statute by secondary authorities specifically addressing the meaning of subdivision 8(a) and by this Court in MT Properties.

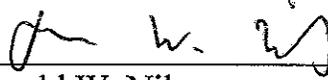
CONCLUSION

Based on the foregoing, Baillon Ventures LLC respectfully requests that the district court's order be reversed and that this matter be remanded for a determination of the fees and expenses to be awarded appellant pursuant to Minn. Stat. § 302A.473, subd. 8(a).

Dated: September 17, 2009

Respectfully submitted,

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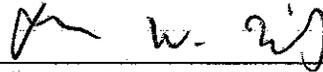
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2427 words. This brief was prepared using Microsoft Word 2003 version word processing software.

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