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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1495**

John Holdahl, et al.,
Appellants,

vs.

BioErgonomics, Inc.
f/k/a BioE, Inc., et al.,
Respondents,

BioE, LLC, et al.,
Respondents.

**Filed February 4, 2013
Affirmed
Stoneburner, Judge**

Hennepin County District Court
File No. 27-CV-10-24236

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Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellants, representatives of a certified class of former corporate shareholders of respondent BioErgonomics, Inc., challenge the summary-judgment dismissal of their numerous claims arising out of the transfer of all corporate assets to creditors who continued the business under a new corporate structure. All of appellants' claims depended on their assertion that the value of the assets transferred exceeded the debt secured by the assets. Appellants argue that the district court erred by determining that no admissible evidence supported this assertion and that respondent corporations, creditors, and former directors are therefore entitled to summary judgment on all of the claims asserted. Because the record supports the district court's conclusion that appellants have failed to raise a material fact issue about the value of the assets transferred relative to the debt, and because appellants concede that this issue is dispositive of all of their claims, we affirm.

FACTS

Appellants are a certified class of "angel investors"¹ who invested more than \$30 million in respondent BioErgonomics, Inc. (BioE), a biomedical company that provided human cord-blood stem cells for research. Respondent Dr. Daniel Collins

¹ An "angel investor" is "[a]n investor who provides financial backing for small startups or entrepreneurs. . . . Angel investors give more favorable terms than other lenders, as they are usually investing in the person rather than the viability of the business. They are focused on helping the business succeed, rather than reaping a huge profit from their investment. Angel investors are essentially the exact opposite of a venture capitalist." <http://www.investopedia.com/terms/a/angelinvestor.asp> (last visited January 11, 2013).

co-founded BioE in 1993 and was a member of the board of directors (board) at all relevant times. Respondent Michael Haider joined BioE in 1998, and, at times relevant to this action, was the president, CEO, and a board member. Respondents Steven Sauer, Ronald Erikson, and John Miller were also board members at all times relevant to this action.

Investors in BioE understood that BioE was a startup corporation that presented significant risk to investors, who would have no liquidity in their shares unless and until, sometime in the future, BioE went public or was acquired. Beginning in 2007, BioE, which never made a profit, began experiencing financial difficulties and was unable to meet operating expenses. Despite seeking professional assistance in an attempt to raise \$10 million in growth capital, BioE was unable to attract new investors. An attempt to raise up to \$3.5 million through a new private placement also failed. By February 2008, BioE was expecting to be without any cash by April or May 2008, and the board discussed ways to fund the corporation until it reached certain expected milestones such as FDA approval of a product BioE had developed. The board believed that, once FDA approval was granted, BioE would be in a better position to find more investors or be acquired.

Erickson, who co-owns respondent Queenwood Capital Partners LLC, proposed a \$1 million bridge loan in hopes that other investors would then come forward to raise an additional \$1 or 2 million. In March 2008, the board, with Erickson abstaining, approved the Queenwood bridge loan at a below-market rate of nine percent, secured by all of BioE's intellectual property.

By mid-2008, the FDA had still not approved BioE's product and BioE was again running short on working capital. Queenwood indicated that it was willing to extend an additional \$1 million bridge loan if someone else would also loan money to BioE. The board formed a special committee consisting of Collins, Haider, Miller, and Sauer to decide whether to pursue additional loans. The special committee concluded that, without additional financing, the current shareholders would lose their investments, but with additional financing, there was a small chance BioE would be able to continue operations. The special committee agreed to authorize a \$3 million debt offering, with interest at 20 percent, secured by all of BioE's assets. Queenwood loaned BioE \$1 million and respondents James and Theo Baustert loaned \$2 million. Queenwood and the Bausterts took a security interest in all of BioE's assets.

In January 2009, Haider informed the shareholders that the FDA had approved the product and that BioE could now sell the product, but Haider also reported that BioE would need additional working capital in the first quarter of 2009. Because of a manufacturing flaw in the product, however, BioE was unable to market the product as planned. BioE sued the manufacturer, but was left without the capital it expected from product sales.

Queenwood and the Bausterts again offered bridge loans secured by all of BioE's assets. In August 2009, the board, with Erickson abstaining, voted to accept \$300,000 from each creditor, payable in \$100,000 installments from each creditor in August, September, and October 2009. The loans matured on October 31, 2009, and default on these loans would trigger default on the prior loans.

In October 2009, BioE defaulted on the final bridge loans. Erickson proposed a voluntary transfer of all secured assets to a new entity owned by Queenwood and the Bausterts, who would provide the new entity with financing necessary to continue the business and expand research and development. The new entity agreed to employ all of BioE's employees, pay or assume all of BioE's outstanding liabilities, reimburse BioE for the cost of filing 2009 taxes, and obtain a five-year "tail" directors' and officers' liability and fiduciary insurance policy. The board discussed the value of BioE's assets and found precise valuation impossible due to the pending litigation over the defective manufacture of its product. The board, however, passed a resolution determining that the current value of BioE did not exceed the debt owed to Queenwood and the Bausterts.

Queenwood and the Bausterts formed BI Acquiring LLC (BIA), which notified BioE of its default on loans totaling \$4.6 million plus interest in the amount of \$479,123, and demanded immediate payment in full or foreclosure.

After seeking an opinion from outside counsel on how to proceed, the board formed a special committee to decide whether to accept the proposal for a voluntary transfer of all assets in order to continue the business as a new entity. Collins, Haider, Miller, and Sauer were appointed to the special committee. Shortly after the special committee convened, Haider and Collins resigned due to their interest in the proposed continuation of the business. Counsel then advised Miller and Sauer that, due to BioE's insolvency, their primary duties were owed to BioE's unsecured creditors and employees. The special committee unanimously resolved to accept the terms of the proposed voluntary transfer. Haider notified the shareholders that BioE had ceased doing business

and had surrendered all of its assets to BIA. Most of BioE's employees became employees of BIA, which continued, with Haider as CEO, to develop the same products and conduct the same business as BioE.²

Appellants sued BioE, the former board members of BioE, BIA, Queenwood, and the Bausterts in a 13-count complaint, asserting violation of the Minnesota Fraudulent Transfer Act (MFTA), conversion, civil theft, tortious interference with business expectancy, unjust enrichment, conspiracy, and breach of the fiduciary duties of loyalty, care, and candor. The district court certified appellants as representatives of a class of disinterested shareholders. All of appellants' claims depend on their ability to establish that the value of BioE's voluntarily transferred secured assets exceeded the amount of BioE's debt at the time of the transfer.

Respondents moved for summary judgment, arguing that appellants failed to provide sufficient evidence to raise a material fact question about whether the value of BioE's assets at the time of the transfer exceeded the amount of BioE's debt. The district court agreed and granted summary judgment to respondents, dismissing all of appellants' claims. The district court concluded that appellants' expert valuation, which the court found to be the only evidence submitted by appellants to support their claim, is based on speculation and that no reasonable jury could find, based on the expert's report, that the value of BioE's assets exceeded BioE's debts at the time of the transfer. This appeal followed.

² By the time of the summary judgment motions in this case, BIA, which also failed to make a profit, had ceased doing business.

DECISION

I. Standard of Review

Summary judgment must be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. This court reviews a district court’s summary judgment decision de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). In doing so, this court determines “whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Id.* The evidence is viewed in the light most favorable to the party against whom summary judgment was granted. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009). A party opposing summary judgment “may not rest upon the mere averments or denials of the adverse party’s pleading but must present specific facts showing that there is a genuine issue for trial.” Minn. R. Civ. P. 56.05. There is no genuine issue of material fact “when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

II. Evidence of Valuation

Appellants concede in their reply brief on appeal that their challenge to summary judgment on all of their claims depends on whether they produced evidence that would

allow a jury to conclude that the value of BioE's assets at the time of the asset transfer exceeded BioE's approximately \$5 million debt. Appellants argue that the district court (1) erred by rejecting their expert's report as speculative, and (2) erroneously determined that appellants failed to present any evidence other than their expert's report to support their claim, because 13 other documents submitted as evidence allow a jury to conclude that the value of BioE's assets on the date of the asset transfer exceeded the amount of the debt.

A. The expert's report

Appellants argue that the district court erroneously excluded evidence contained in their expert's report that BioE was worth \$11.9 million on the date of the asset transfer. The district court excluded the expert's report as speculative because the expert's report ignored BioE's debt and relied on management projections that assumed BioE would receive \$10 million in new capital in the fall of 2009, an assumption the district court concluded was speculative and not supported by the evidence. Expert testimony is inadmissible unless it satisfies all of the requirements of Minn. R. Evid. 702, including foundational reliability.

A district court's evidentiary ruling on the admissibility of an expert opinion rests within the sound discretion of the trial court and will not be reversed unless it is based on an erroneous view of the law or it is an abuse of discretion. The district court has considerable discretion in determining the sufficiency of foundation laid for expert opinion. Even if evidence has probative value, it is still within the district court's discretion to exclude the testimony.

Gross v. Victoria Station Farms, Inc., 578 N.W.2d 757, 760-61 (Minn. 1998) (quotation and citations omitted). This standard is “very deferential.” *Id.* at 761. From our painstaking review of the record, we conclude that the district court did not abuse its discretion in excluding appellants’ expert’s report as without foundation in the record.

To arrive at a value of BioE’s assets at \$11.9 million on the date of the asset transfer, the expert’s report relied on “management’s representations for the financial condition of the company as contained in the documents they prepared.” The expert’s report relied on management projections because BioE had “no historical revenue base from which to apply overall market growth.” Specifically, the expert’s report relied on management’s October 2009 re-capitalization plan (using a September 2009 forecast)³ to produce the following anticipated figures through 2014:

<u>Year</u>	<u>Revenue</u>	<u>Operating Profit</u>	<u>New Working Capital</u>
Nov.-Dec. 2009	\$92,500	(\$304,788)	\$455,458
2010	\$6.4 million	\$414,276	\$2.1 million
2011	\$14.5 million	\$3.05 million	\$2.3 million
2012	\$23.5 million	\$6.8 million	\$1.9 million
2013	\$29.5 million	\$9.6 million	\$997,291
2014	\$34.6 million	\$12.3 million	\$1.35 million

The expert’s report extrapolated these figures out to 2019:

³ The re-capitalization plan has the Bates stamp “OLD_BioE012965.”

2015	\$36.4 million	\$11.6 million	\$82,150
2016	\$38.2 million	\$10.7 million	\$454,596
2017	\$40.1 million	\$9.6 million	\$477,326
2018	\$42.1 million	\$8.0 million	\$501,192
2019	\$44.2 million	\$6.6 million	\$526,252

The expert’s report used these projections under a discounted cash-flow valuation method to value BioE at \$11.9 million as of the date of the asset transfer. But the expert’s report acknowledges that “the company will require working capital in order to fund its growth.”

The re-capitalization plan relied on by the expert’s report assumed that BioE would receive \$10 million in new capital during the period from September to December 2009. Of that \$10 million in new capital, \$5 million would immediately be used to pay off Queenwood and the Bausterts. The re-capitalization plan indicated that BioE would also need to pay approximately \$1 million to cover other expenses in 2009. From that point on, the re-capitalization plan did not project any additional need for new capital.

The October 2, 2009 “updated” re-capitalization plan, also relied on by the expert’s report,⁴ stated that, “[c]ritical to our plan is a \$10,000,000 re-capitalization of our business that retires approximately \$5 million of debt and provides BioE approximately \$5 million of working capital. The working capital will be focused to finance the Company’s inventory build and market penetration of the [product] in the

⁴ The “updated” re-capitalization plan has the Bates stamp “NEW_BioE0004900.”

U.S. and other global geographies.” “The plan assumes repayment of approximately \$5,200,000 for the principal and accrued interest for the Queenwood and Baustert loans in November 2009.”

Because the projections in the re-capitalization plan were premised on the “critical” need of receiving \$10 million in new capital in 2009, the district court correctly concluded that BioE’s inability to obtain \$10 million in new capital would make the projections speculative. As the district court noted, there is no evidence in the record that anyone was willing to invest \$10 million in new capital in BioE in 2009. The evidence shows only that no one was willing to invest *anything* in BioE.⁵ Without any evidence that BioE met or was able to meet its need for \$10 million in new capital in 2009, the projections in the re-capitalization plan are unreliable and irrelevant to the value of BioE as it existed at the time of the asset transfer. And, because the expert’s report’s valuation of BioE is based on the unreliable projections in management’s re-capitalization plan, it too is unreliable, and as such has no evidentiary value. *See MCC Invs. v. Crystal Props.*, 451 N.W.2d 243, 247 (Minn. App. 1990) (“An expert’s opinion based on speculation and conjecture has no evidentiary value. If the facts upon which such an opinion is based are

⁵ Appellant John Holdahl, for example, testified that no one was willing to invest in BioE because of the \$5 million debt. He further testified that, to be viable, any investment would need to be \$8 million to \$10 million so that the debt would be retired and the company would have working capital. Holdahl’s testimony is consistent with the re-capitalization plan that required investments of \$10 million to pay off the debt and to provide working capital going forward. The board minutes also make clear that BioE could not find any other investors.

unreliable, the opinion is unsound and a verdict based on that opinion cannot stand.”
(citation omitted)), *review denied* (Minn. Mar. 27, 1990).⁶

The expert’s report is also unreliable because it ignored BioE’s existing debt and, therefore, its need for \$5 million in 2009 to pay off that debt. The projections explicitly stated that paying off the debt in 2009 was a “critical” part of the re-capitalization plan. The expert’s report appears to assume, without any evidence to support the assumption, that BioE would pay the debt.

Appellants assert that the expert’s report is reliable because, as contemplated by the re-capitalization plan, BioE in fact received \$10 million in new capital when the \$5 million debt was extinguished by the asset transfer and Queenwood and the Bausterts provided \$5 million in financing for BIA from 2009 to 2011 to use as working capital. This argument is without merit.

First, the record shows that BioE never obtained \$5 million to pay off its debt, and the debt was not “extinguished” as appellants suggest. Rather, BioE had to transfer all of its assets to the secured creditors. Appellants’ expert’s report valued BioE as if it had retained its assets and had no debt, a hypothetical condition that never existed. The

⁶ Appellants attempt to distinguish *MCC Investments* by pointing out that the facts relied on by the expert in that case were “false” projections. But there is essentially no difference between false projections and projections without a reasonable basis in fact—both are “unreliable.” Here, the expert’s report valued BioE based on management’s re-capitalization plan, but that plan was unreliable because the “critical” assumption of receiving \$10 million in new capital was simply unattainable. The assumption that BioE would receive \$10 million was essentially “false” based on management’s known understanding that BioE was unable to attract any investors who would be willing to give BioE \$10 million in new capital.

expert's report acknowledged that this was a hypothetical condition it employed to value BioE.

Second, the re-capitalization plan did not call for new working capital spread out over time from 2009 to 2011.⁷ Rather, the re-capitalization plan specifically required \$10 million in new working capital in 2009. The plan did not call for any additional capital after that point. Receiving \$10 million in new capital in 2009 was “critical” to the re-capitalization plan, but there was no evidence of this occurring. Appellants contend that the re-capitalization plan *did* intend to spread out that new working capital because it references working capital for inventory builds. But the re-capitalization plan accounts for those inventory builds separately from the \$10 million of new capital required in 2009. And the new working capital was not just needed for inventory builds; in 2010 alone, the re-capitalization plan required nearly \$3.3 million for overhead expenses. As acknowledged by management, therefore, obtaining \$10 million in 2009 was “critical” to the overall re-capitalization plan, and without that critical factor, the revenue projections contained in that plan have no meaning.

Additionally, the actions of Queenwood and the Bausterts regarding BIA are not relevant to the valuation of BioE's assets at the date of the asset transfer. The record is conclusive that Queenwood and the Bausterts were no longer willing to fund BioE, and the fact that they were willing to fund the new business that they established with the

⁷ This is apparently how the expert's report viewed the re-capitalization plan, because as noted in the table above, the expert's report assumes approximately \$5 million in new capital to be used over time from 2009 to 2011.

transferred assets is irrelevant to valuation of those assets at the time of the transfer.⁸ The district court did not err in concluding that the expert's report is too speculative to create a material fact question about whether the value of BioE's assets at the time of the asset transfer exceeded BioE's debt.

B. Other valuation evidence

Appellants argue that, even without the expert's report, other evidence in the record supports their assertion that the value of BioE's assets exceeded the amount of BioE's debt on the date of the asset transfer.⁹ But all of the documents identified by appellants are based on the same speculative projections and/or unsupported hypotheses that made the expert's report unreliable, and are therefore too speculative to be admissible evidence of the value of BioE's assets at the time of the asset transfer.

Exhibits 282 and 284 are the October 2, 2009 "updated" re-capitalization plan. In these exhibits, Haider acknowledges that the re-capitalization plan is being used as a

⁸ Furthermore, the record does not support appellants' assertion that Queenwood and the Bausterts provided BIA with the type of working capital contemplated by the BioE re-capitalization plan. That plan required a large influx of cash in order to accomplish, among other things, inventory builds in 2010 and 2011. But the record reflects that Queenwood and the Bausterts provided only enough working capital to BIA to cover the operating expenses until it stopped doing business.

⁹ Respondents BioE and board members assert that, in response to the summary judgment motion, appellants relied solely on their expert's report to argue that a material fact question exists concerning whether the value of BioE's assets exceeded the amount of the debt on the asset-transfer date and have therefore waived reliance on the 13 documents identified on appeal as supporting their assertion of the value of BioE's assets. Generally, an appellate court will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Because the record reflects that the documents identified by appellants were referenced by the parties in the summary-judgment proceeding, we will consider this argument.

basis to obtain \$10 million in new capital. He was unsuccessful, and BioE went into default. As explained above, the expert's report relied on this document, which contains unreliable projections that are not based on fact, and these unreliable projections may not be used to establish the value of BioE at the time of the asset transfer. *MCC Invs.*, 451 N.W.2d at 247.

Exhibits 139, 236, 237, 256, and 287 all contain identical revenue projections, which are similar to those contained in the re-capitalization plan. But, as explained in the re-capitalization plan, the revenue projections depend on an influx of new capital in order to retire the \$5 million debt and to provide working capital to BioE. Without this new influx of capital, BioE could not continue as a going concern. The projections contained in these exhibits are therefore unreliable to establish the value of BioE as of the date of the asset transfer when BioE was out of cash, in default on its loans, and when no one was willing to pay off the debts or provide BioE with new working capital.

Exhibits 237, 288, 289, 290, and 291 contain "talking points" in which Haider states that the value of BioE's intellectual property is "[u]nknown without valuation, but believed to be at least \$7,000,000." But this valuation is again a projection based on a 100% capital-invested BioE, which did not exist at the time of the asset transfer. Haider testified in his deposition that when BioE ceased being a going concern, its intellectual property became virtually worthless. And Haider makes clear in the talking points that "[a]ll parties agree that a recapitalization is necessary" including \$5 million to pay off the debt to Queenwood and the Bausterts. Without re-capitalization, the projected value of the intellectual property as contained in these talking points is not an accurate projection

of value at the time of the asset transfer, and the talking points do not constitute evidence of the value of BioE's assets on the asset-transfer date.

Exhibits 153 and 286 state that, as of April 2009 (when BioE was a going concern with enough capital to continue operations), the value of certain BioE stock was \$1 or \$2 per share. On the date of the asset transfer, BioE was insolvent and had no working capital and was about to cease operations. Because circumstances changed between April 2009 and the date of the asset transfer in November 2009, the asserted value of stock in April 2009 is not relevant to the value of the stock at the time of the asset transfer. Appellants' other arguments regarding stock values fail for the same reason.

Because none of the exhibits relied on by appellants are probative of the value of BioE's assets at the time of the asset transfer, the district court did not err in concluding that appellants failed to establish a genuine issue of material fact on that issue. And because all of appellants' claims against respondents depend on a finding that the value of BioE's assets exceeded the amount of the debt secured by the assets, we need not address the district court's additional reasons for granting summary judgment on the specific claims.

Affirmed.