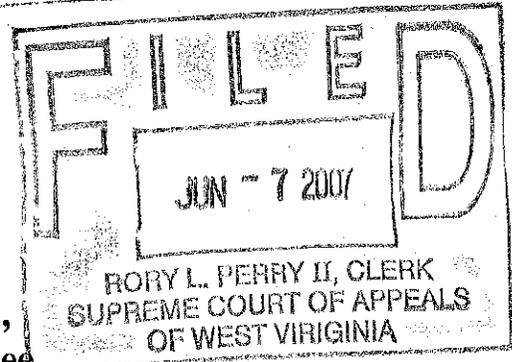


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33348



ROBERT J. HELFER,
Petitioner Below, Appellee,

v.

CAROL A. HELFER,
Respondent Below, Appellant,

BRIEF OF THE APPELLEE

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I. INTRODUCTION

In this case, the Family Court determined that the evidence Dr. Helfer's experts presented on the valuation of Dr. Helfer's solo chiropractic practice was more credible and convincing than the evidence Ms. Helfer's evidence. As the Family Court's findings of fact are not clearly erroneous, as it did not abuse its discretion in applying the law to the facts, and as it complied with this Court's standard for the valuation of enterprise goodwill,¹ its decision should be affirmed.

II. STATEMENT OF FACTS

Dr. and Ms. Helfer were parties to a divorce proceeding culminating in a final hearing dealing with the valuation of Dr. Helfer's chiropractic practice.² Dr. and Ms. Helfer each produced expert witnesses to value the property: Dr. Helfer employed Louis J. Costanzo, III, a Certified Public Accountant and owner of his own accounting firm in Wheeling,³ and Ms. Helfer employed John Ross Felton, Jr., a CPA and President of an accounting firm.⁴

While the witnesses agreed there were a number of ways to value the proprietorship, the reports prepare by Messrs. Costanzo and Felton mutually excluded all approaches other

¹*May v. May*, 214 W. Va. 394, 589 S.E.2d 536 (2003).

²4/1/05 Tr. at 1.

³*Id.* at 3-4.

⁴*Id.* at 25.

than the two that are the bone of contention here.⁵ Mr. Costanzo employing a capitalized earnings approach,⁶ while Mr. Felton employed a excess earnings method.⁷

During his testimony, Mr. Costanzo explained why he did not use an excess approach, an approach that tries to provide a valuable for intangibles by way of capitalizing excess earnings.⁸ Mr. Costanzo explained that “this approach is not appropriate for an evaluation of Dr. Helfer’s practice because there are not any excess earnings to be valued.”⁹ Using the capitalization approach, Mr. Costanzo valued the practice at \$41,000.¹⁰

Mr. Felton employed the capitalized earnings approach and valued the practice at \$388,000.¹¹ Mr. Felton admitted to using actual numbers gathered from Dr. Helfer’s tax returns to do all of his calculations except to calculate excess earnings.¹² To calculate Dr. Helfer’s excess earnings, Mr. Felton employed what he admitted was “an entirely hypothetical number.”¹³ Mr. Felton testified that his hypothetical amount was generated from the

⁵*Id.* at 79.

⁶*Id.* at 57.

⁷*Id.*

⁸*Id.* at 8.

⁹*Id.*

¹⁰*Id.* at 4.

¹¹*Id.* at 39.

¹²*Id.* at 43.

¹³*Id.* [emphasis added).

perspective of hiring another chiropractor to come in and take over Dr. Helfer's practice.¹⁴ Mr. Felton conceded that the \$65,000 he used was not actually reflective of what Dr. Helfer was actually making.¹⁵

In other words, when Dr. Helfer's actual earnings did not support a finding that there was any excess earnings, which would be necessary to conclude that enterprise goodwill existed, Mr. Felton simply replaced Dr. Helfer's actual earnings in his formula with hypothetical earnings. In addition to the obvious "garbage in/garbage out" nature of Mr. Felton's testimony, the flaws in his assumptions and calculations were addressed for the Family Court in the testimony of another of Dr. Helfer's witnesses, John S. Bodkin, Jr.

Mr. Bodkin is a partner in the CPA firm of Bodkin, Wilson, and Kozicki.¹⁶ Mr. Bodkin testified that Mr. Felton's use of the excess earning method was not appropriate because the proprietorship's assets, cash, and accounts receivable had already been divided as marital assets and not as business assets, and, thus, there were no assets that substantially impacted the value of the practice.¹⁷ He further explained that the conceptual basis for an earnings method of valuation is that it computes the company's equity based on the appraised

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.* at 56. Mr. Bodkin is also President of the West Virginia Board of Accountancy.

¹⁷*Id.* at 58.

value of tangible assets.¹⁸ The excess earnings approach was first recognized by the Internal Revenue Service in a Revenue Ruling that stated the excess earnings approach should only be used when no better method is available.¹⁹ Mr. Bodkin then testified that the literature on the use of the excess earnings method clearly states that there must be an appraised value and that a book value or an assumed value, such as Mr. Felton used, is inappropriate.²⁰ Without an appraised value the excess earnings method should not be used.²¹

Mr. Bodkin testified that Mr. Felton's values of the tangible assets of the business were provided only by Ms. Helfer.²² Mr. Felton simply calculated from percentages that represented a depreciated value using a different method for depreciation.²³ Mr. Bodkin testified that, on the other hand, Mr. Costanzo used book values of 7 and 5 years, which follows IRS guidelines.²⁴

Indeed, Mr. Bodkin testified that in reaching his goodwill calculation, Mr. Felton calculated the value of the building, which Mr. Felton had already calculated in addressing

¹⁸*Id.*

¹⁹*Id.* at 60.

²⁰*Id.*

²¹*Id.* See also *id.* at 71, 73, 75, 84.

²²*Id.* at 60.

²³*Id.* at 60-61.

²⁴*Id.* at 61.

the appraisal of the building, in essence, allowing him to “double dip.”²⁵ Mr. Bodkin also pointed out the incongruity of Mr. Felton’s assessment of goodwill in the location of the business and yet determining the value of the property was only \$10 a square foot.²⁶ In essence, Mr. Felton’s method of determining values was “just totally arbitrary.”²⁷ In sum, Mr. Bodkin testified that the more appropriate method of calculation was the capitalization earning approach and not the excess earnings approach.²⁸

Like any fact-finder, the Family Law Judge was free to accept or reject the expert testimony from either party. Based upon the totality of the evidence, the Family Law Judge made the following findings of fact, which are well-supported by the evidence of record:

9. This Court was not impressed with Jack Felton, Respondent’s expert accountant. Mr. Felton used hypothetical Chiropractor incomes from the internet in determining his valuation when he had Petitioner’s actual income with which to work. Mr. Felton also used cash values within the business checking account in his valuation, some of these cash values included marital assets that had previously been divided between the parties and thus did not exist at the time of the valuation. He admitted that . . . using these cash values was error and would affect the business valuation. Mr. Felton made further errors in using “new” value costs for office equipment instead of using the actual appraised value of old office equipment. Felton made adjustments for depreciation but didn’t and couldn’t justify the depreciations.

²⁵*Id.* at 69.

²⁶*Id.*

²⁷*Id.* at 61

²⁸*Id.* at 77.

10. Mr. Felton used an excess earnings method to calculate the business value at \$388,000. This Court finds there is no basis in fact for this valuation.

11. Lou Costanzo, an accounting expert for Petitioner, testified that the value of the practice at the time of separation was \$41,000 using the capitalization approach. As of the date of separation, Mr. Costanzo had been employed for years by Dr. Helfer; he had the opportunity to go through [the] facility, interview Dr. Helfer regarding the practice, and was very familiar with actual values to use within his appraisal.

12. Petitioner's accounting expert, Jack Bodkin, opined that the capitalization method was most appropriate for valuation of the chiropractic business. Mr. Bodkin is a CPA who reviewed both appraisals and indicated that the difference between them was the method used as well as the varying values discussed above.

13. *Methods of Valuation:* Mr. Bodkin stated that the excess earnings method used by Mr. Felton was inappropriate and that the capitalization method used by Mr. Costanzo was more appropriate. He supported his opinion by citing that the IRS recommended the use of the excess earnings ONLY if another method was not available. In this case, another method was available and thus Mr. Felton's chosen valuation method was inappropriate.

14. *Varying Values :* Mr. Bodkin opined that Mr. Felton should not have used "new" values for office assets as opposed to the appraised value of the office assets; use of those numbers was arbitrary without an appraisal. Mr. Costanzo testified that \$108,000 per year was reasonable income to attribute to Petitioner. Mr. Felton testified that \$65,000 per year was reasonable compensation.²⁹ Mr. Bodkin testified that \$110,000

²⁹Mr. Felton's source was a website called salary.com, but he admitted that he did not even use the annual salary of \$72,000, which allegedly represented annual salary for the 50 percentile of chiropractors working in Bethlehem, Pennsylvania, but further discounted that figure to \$65,000 by artificially reducing this figure to account for a less than forty hour workweek. Tr. at 30. Mr. Costanzo and Mr. Bodkin also used the same source, but used median figures not

was reasonable compensation. Another bid difference in values used by the accountants was rental value per square foot of the property. Mr. Felton testified that \$10/square foot was reasonable. Mr. Constanzo testified that \$18/square foot was reasonable. Mr. Bodkin opined that \$16/square foot was appropriate.

15. Based upon the above findings, this Court finds that the value of the Chiropractic Business for purposes of equitable distribution shall be \$41,000 in accord with the opinion of Lou Constanzo.³⁰

Because these findings of fact are not clearly erroneous and there was no abuse of discretion in applying the applicable law to these findings, the judgment of the Circuit Court of Ohio County, which adopted these findings and conclusions, should be affirmed on appeal.

III. STANDARD OF REVIEW

“In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.”³¹ This

from Bethlehem, Pennsylvania, but from the Wheeling area. Tr. at 11, 61-62. Moreover, as noted by Mr. Bodkin, there was nothing on the salary.com website to justify any less than 40-hour, 36-hour, or any other hour-based workweek; rather, the median figures presented were for a chiropractor’s salary and benefits irrespective of hours worked. Tr. at 62. The Court will search the record in vain to find any justification for Mr. Felton’s 30-hour workweek discount. This is yet another example of how Mr. Felton manipulated his numbers to get his formula to produce the desired result.

³⁰Ex. A, Final Order Regarding Equitable Distribution at 4-6 (emphasis supplied).

³¹Syl., *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004); *see also* W. Va. Code § 51-2A-14(c) (“The circuit court shall review the findings of fact made by the family court judge under the clearly erroneous standard and shall review the application of law to the facts under an

standard is highly deferential.³² “A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court’s account of the evidence is plausible in light of the record viewed in its entirety.”³³ This somewhat dry explanation of clearly erroneous is flushed out somewhat by *Brown v. Gobble*,³⁴ where this Court said that “it will disturb only those factual findings that strike [it] wrong with the ‘force of a five-week-old, unrefrigerated dead fish.’”

Additionally, an abuse of discretion is highly deferential.³⁵ “[D]eference . . . is the hallmark of abuse-of-discretion review,”³⁶ because this Court does not “substitute its judgment for the circuit court’s.”³⁷ “In general, an abuse of discretion occurs when a

abuse of discretion standard.”).

³²*Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 106, 459 S.E.2d 374, 383 (1995).

³³Syl. Pt. 1, in part, *In Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

³⁴196 W. Va. 559, 563, 447 S.E.2d 489, 493 (1996) (quoting *United States v. Markling*, 7 F.3d 1309, 1319 (7th Cir.1993)),

³⁵*Tennant supra* at 106, 459 S.E.2d at 383.

³⁶*General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997).

³⁷*Shafer v. King’s Tire Serv., Inc.*, 215 W. Va. 169, 177, 597 S.E.2d 302, 310 (2004) (citations omitted).

material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them.”³⁸ “[A]n appellate court should strive to uphold discretionary rulings made by trial judges and avoid in almost every case tampering with that discretion.”³⁹

IV. ARGUMENT

A. BECAUSE THERE WAS MORE THAN AMPLE EVIDENCE IN THE RECORD TO SUPPORT THE FAMILY LAW JUDGE’S RESOLUTION OF A DISPUTE AMONG EXPERTS AS TO THE EXISTENCE OF ENTERPRISE GOODWILL, THE JUDGMENT OF THE CIRCUIT COURT OF OHIO COUNTY SHOULD BE AFFIRMED.

The crux of this case is Ms. Helfer’s erroneous statement that “[t] Plaintiff/Appellee’s expert never discussed goodwill at all in his evidence. Nor does it appear that any calculation of *any type* of goodwill was ever calculated.”⁴⁰ This is incorrect; Mr. Costanzo did account

³⁸*Gentry v. Mangum*, 195 W. Va. 512, 520 n. 6, 466 S.E.2d 171, 179 n. 6 (1995).

³⁹*State v. David D. W.*, 214 W. Va. 167, 178, 588 S.E.2d 156, 167 (2003) (per curiam) (Maynard, J., concurring).

⁴⁰Appellant’s Br. at 9 (emphasis in original). Indeed, the word “goodwill” appears no less than twenty-one times in the transcript of the experts’ testimony before the Family Law Judge. Tr., Index at 5. Her petition for appeal was even more inaccurate. Indeed, her first assignment of error was: “The Court erred in adopting the Petitioner’s/Appellee valuation for the Chiropractic Business as it did not include any consideration for the intangible of enterprise goodwill.” Petition for Appeal at 5 (emphasis added). The petition for appeal also erroneously stated, “The Husband’s expert valued the business using the income approach, capitalized earnings method. . . No testimony was presented . . . [concerning] enterprise goodwill” Petition for Appeal at 9 (emphasis added). The petition for appeal further misrepresented, “The Plaintiff/Appellee’s expert never discussed goodwill at all in his evaluation.” Petition for Appeal at 11 (emphasis supplied). The petition for appeal further misstated, “Mr. Bodkin, the Plaintiff/Appellee’s second

for “goodwill,” or, more precisely, the absence of goodwill, and there was extensive testimony from both of Dr. Helfer’s witnesses regarding the issue of goodwill.

In *May*,⁴¹ this Court held, in pertinent part, that (1) “‘Enterprise goodwill’ is an asset of the business and may be attributed to a business by virtue of its existing arrangements with suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business;”⁴² (2) “‘Personal goodwill’ is a personal asset that depends on the continued presence of a particular individual and may be attributed to the individual owner’s personal skill, training or reputation;”⁴³ and (3) “In determining whether goodwill should be valued for purposes of equitable distribution, courts must look to the precise nature of that goodwill. Personal goodwill, which is intrinsically tied to the attributes and/or skills of an individual, is not subject to equitable distribution. On the other hand, enterprise goodwill, which is wholly attributable to the business itself, is subject to equitable distribution.”⁴⁴

expert did not consider goodwill in determining which accounting method was most acceptable.” Petition for Appeal at 11 (emphasis supplied). The petition for appeal further misrepresents, No discussion was undertaken as to why they [Dr. Helfer’s experts] determined that goodwill should not be used.” Petition for Appeal at 11 (emphasis added). Indeed, as discussed herein, both of the Appellee’s highly-qualified experts conducted an analysis of the existence of enterprise goodwill, but simply determined that it did not exist in this matter. In *Wachter v. Wachter*, 216 W. Va. 489, 491, 607 S.E.2d 818, 820 (2004), this Court awarded an appellee in a divorce case her reasonable attorney fees expended to defend an appeal. Similarly, in this case, in light of the foregoing, Dr. Helfer respectfully requests that he be awarded his reasonable attorney fees expended to defend this appeal.

⁴¹*Supra* note 1.

⁴²Syl. pt. 2, *May*, *supra* note 1.

⁴³Syl. Pt. 3, *May*, *supra* note 1.

⁴⁴Syl. Pt. 4, *May*, *supra* note 1.

“Goodwill is excess earning power: once the normal rate of return for identifiable tangible and intangible assets is determined, any rate of return in excess of a normal return is attributable to unidentifiable intangible assets-goodwill.”⁴⁵ In other words, “Goodwill,’ in context of valuing marital property in dissolution proceeding, is the value of a business or practice that exceeds the combined value of the physical assets,”⁴⁶ or “the value of a business over and above its book value.”⁴⁷ “[W]hat is being measured in the final analysis are those ‘excess earnings’ of an enterprise which are properly attributable to its good will[.]”⁴⁸ Here, Mr. Costanzo did value the goodwill of the practice and the Family Law Judge, after weighing the evidence, properly accepted his valuation.

“[T]here are a variety of acceptable methods of valuing the goodwill of a professional practice, and no single method is to be preferred as a matter of law.”⁴⁹ “[I]n valuing goodwill five major formulas have been articulated[.]”⁵⁰ Among these methods are a straight

⁴⁵May, *supra* at 406 n.18, 589 S.E.2d at 548 n.18 (quoting Alicia Brokars Kelly, *Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill*, 51 Rutgers L.Rev. 569, 610 (1999)).

⁴⁶Barth H. Golberg, VALUATION OF DIVORCE ASSETS § 8:4 (1984). *Accord In re Talty*, 652 N.E.2d 330, 333 (Ill. 1995); *Bostwick v. Bostwick*, 1991 WL 42628, *2 (Del. Fam. Ct.); *Kahn v. Kahn*, 536 N.E.2d 678, 681 (Ohio Ct. App. 1987).

⁴⁷Elizabeth S. Baker & Shari J. Fein, *Establishing the Existence and Value of Professional Goodwill as a Marital Asset*, 68-FEB Fla. B.J. 20, 20 (1994).

⁴⁸*Levy v. Levy*, 397 A.2d 374, 380 (N.J. Super. Ch. Div. 1978).

⁴⁹May, *supra* at 405-06, 589 S.E.2d at 547-48 (quoting *McDiarmid v. McDiarmid*, 649 A.2d 810, 815 (D.C. App.1994))(emphasis added).

⁵⁰*Id.* at 406, 589 S.E.2d at 547 (quoting *In re Hall* 692 P.2d 175, 179 (Wash. 1984)).

capitalization method and the excess earnings method.⁵¹ Mr. Costanzo valued Dr. Helfer's practice using a straight capitalization of earnings method. Thus, his valuation, adopted by the Family Law Judge, comported with this Court's decision in *May*. And, because "no single method is to be preferred as a matter of law," there is no legitimate

"Under the straight capitalization accounting method the average net profits of the practitioner are determined and this figure is capitalized at a definite rate, as, for example, 20 percent. This result is considered to be the total value of the business including both tangible and intangible assets. To determine the value of goodwill the book value of the business' assets are subtracted from the total value figure."⁵² Inherent is the use of a straight capitalization method is the calculation of goodwill.⁵³

Ms. Helfer attempts to diminish the import of Mr. Bodkin's testimony that he afforded no value to goodwill. This was because Bodkin agreed with Mr. Costanzo that no goodwill existed. The only expert who testified that there was goodwill was Mr. Felton—but he used

⁵¹*Id.*, 589 S.E.2d at 548.

⁵²*Id.*, 589 S.E.2d at 547.

⁵³*See McAfee v. McAfee*, 971 P.2d 734, 740 (Idaho Ct. App. 1999) ("Under this method, the earnings from prior years are capitalized to arrive at a total value of the business. This value includes both tangible and intangible assets. Goodwill is included within this valuation.") (cited in *May*, supra at 407, 589 S.E.2d at 549); *Wallander v. Pariseau*, 1990 WL 152701, *2 (Minn. Ct. App.) ("In most instances, the valuation of 'goodwill' involves a capitalization of earnings."); *Swann v. Mitchell*, 435 So.2d 797, 801 (Fla. 1983) ("Under the capitalization of earnings method, the goodwill is evaluated by determining the average annual net earnings of the business, determining the value of the business and tangible assets, deducting from the total net earnings those earnings attributable to the tangible property and then capitalizing the balance.").

a fundamentally-flawed excess earnings method that both Mr. Costanzo and Mr. Bodkin dismissed, *inter alia*, because there were no excess earnings.

This Court expressly recognized that enterprise goodwill does not always exist in a professional practice; rather, only “once a professional practice has been determined to possess distributable goodwill” is a “value” to be “placed thereon.”⁵⁴ “[B]ased on the case law, one comes to understand that what is being measured in the final analysis are those ‘excess earnings’ of an enterprise which are properly attributable to the good will[,]”⁵⁵ and without excess earnings the most goodwill is worth is nothing.⁵⁶

“It has been correctly noted that ‘[o]n appeal, if it appears that the trial court reasonably approximated the net value of the practice and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be

⁵⁴*May, supra* at 405, 589 S.E.2d at 547.

⁵⁵Barth H. Goldberg, VALUATION OF DIVORCE ASSETS § 8:4 (1984), 14 MINNESOTA PRAC., FAMILY LAW § 9.8 (2d ed.) (footnote omitted) (“The question of good will is a question of fact and not of law. Basically, the issue is an analysis of excess earnings properly attributable to the favor the management of a business wins from the public.”).

⁵⁶*In re Wicheta*, 2002 WL 31839378, *5 (Wash. Ct. App.) (“After considering all the testimony the court ultimately determined that although there was goodwill in Dr. Wicheta’s practice, it had no value because there were no excess earnings We find no abuse of discretion because the court’s determination regarding the value of the goodwill was well within the range of the evidence.”); *Bostwick v. Bostwick*, *supra* at *9 (finding that absent excess earnings there can be no goodwill); *Philip Morris Inc. and Consol. Subsidiaries v. C.I.R.* 96 T.C. 606, 638 (1991) (“Coopers & Lybrand determined that Seven-Up’s colors business had no excess earnings and thus did not have any valuable goodwill. Such conclusion, which was based on the absence of any excess earnings in the colors business, is consistent with the conclusions we have reached [in other cases].”).

disturbed.”⁵⁷ Here, the Family Law Judge properly resolved a dispute among experts over the existence of goodwill applying varying methods both of which this Court has approved; thus, his decision should be affirmed.

The implicit premise of Ms. Helfer’s argument is that *every* business has “good will” and that this good will *must* be worth something. This is simply not the case.⁵⁸ Ms. Helfer’s approach creates a sort of “rule of liberality” in goodwill issues—any expert who finds goodwill must be preferred to an expert who does not. This approach clearly conflicts with *May*’s holding that good will does not exist in every case⁵⁹—as proven by this Court’s use of the terms, “goodwill, *if any*” and the highly deferential standard of review *May* crafted in such cases.⁶⁰ The inherent danger of such a position is well demonstrated in this case.

⁵⁷*May, supra* at 4, 589 S.E.2d at 549 (quoting *Conway v. Conway*, 508 S.E.2d 812, 818 (N.C. App. 1988)).

⁵⁸*See, e.g., In re Rosen*, 130 Cal. Rptr.2d 1, 3 (Ct. App. 2002) (“The trial court’s finding that Bruce’s law practice has a goodwill value of \$42,500 is erroneous. On remand, Bruce’s law practice shall be assigned a goodwill value of zero.”); *Moser v. Moser*, 633 N.W.2d 277 (Wis. Ct. App. (2001) (Table) (text available at 2001 WL 800469, *5) (“There is no dispute that absent a noncompete agreement, the value of goodwill would be zero.”).

⁵⁹It also conflicts with the rule that there is no “best expert,” *see Kiser v. Caudill*, 210 W. Va. 191, 557 S.E.2d 245 (2001); *Watson v. Inco Alloys International, Inc.*, 209 W. Va. 234, 545 S.E.2d 294 (2001); *Jones v. Patterson Contracting, Inc.*, 206 W. Va. 399, 524 S.E.2d 915 (1999); *Dolen v. St. Mary’s Hosp. of Huntington, Inc.*, 203 W. Va. 181, 506 S.E.2d 624 (1998); *Gentry v. Mangum, supra*, and that a trier of fact is to give only as much weight and credit to expert testimony as it deems it entitled when viewed in connection with all the circumstances, *see Moore v. St. Joseph’s Hosp. of Buckhannon, Inc.*, 208 W. Va. 123, 538 S.E.2d 714 (2000); *Bressler v. Mull’s Grocery Mart*, 194 W. Va. 618, 461 S.E.2d 124 (1995); *Tabor v. Lobo*, 186 W. Va. 366, 412 S.E.2d 767 (1991); *Martin v. Charleston Areas Medical Center, Inc.*, 181 W. Va. 308, 382 S.E.2d 502 (1989).

⁶⁰*May, supra* at 407, 589 S.E.2d at 549.

Mr. Felton applied the excess earnings approach to value goodwill. While this is a recognized method of valuing goodwill,⁶¹ the validity of a result is not judged only by the method, but also by its implementation. “[I]t is not enough for the trial court to determine that an expert’s methodology is valid in the abstract. The trial court must also determine if the witness has applied the methodology in a reliable manner.”⁶² “Even using a reliable methodology, it is axiomatic that if the facts applied to that methodology are suspect, then the conclusion is unreliable.”⁶³

Mr. Bodkin testified that Mr. Felton’s testimony was contradictory because in testifying to good will, Mr. Felton testified about the location of the business, but then only valued the property at \$10 a square foot.⁶⁴ Additionally, and more seriously, Mr. Bodkins testified that the use of an excess earnings method was contraindicated because the assets, cash and, ultimately, the accounts receivable of the practice were divided as marital property and not as assets of the practice.⁶⁵ Thus, “[t]here would basically be no assets at th[at] point to substantially impact the value of the practice.”⁶⁶

⁶¹*Id.*, 589 S.E.2d at 548.

⁶²*Carlson v. Okerstrom*, 675 N.W.2d 89, 105 (Neb. 2004).

⁶³*Eitenne v. United Corp.*, 2001 WL 156998 at * 6 (Terr. V.I.).

⁶⁴Tr. at 69.

⁶⁵*Id.* at 58.

⁶⁶*Id.*

Additionally, the \$53,000 value Mr. Felton used was taken from the word of Ms. Helfer and not from an appraisal of the business's assets.⁶⁷ Mr. Bodkin testified that "the literature on how to use the excess earnings method clearly states that you need to have an appraised value. You can't just choose to use a book value, you can't just choose to use an assumed value as Mr. Felton did."⁶⁸ "[W]ithout an appraised value this method [excess earnings] should not be used."⁶⁹ Indeed, what was appraised was the building and Mr. Bodkin testified that including the location in both the appraisal and for purposes of good will was "double dipping."⁷⁰

And, Mr. Felton used different numbers for different purposes, a procedure that struck Mr. Bodkin as "unusual."⁷¹ As Mr. Bodkin explained, "I thought that Mr. Costanzo's use of the capitalization of earnings method to value this practice which is a sole proprietorship to be more appropriate than the excess earnings method. I just didn't feel that there was an appraised value for the equipment and the fixed assets, and that really hurts your ability to use the excess earnings method."⁷²

⁶⁷*Id.* at 60.

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Id.* at 69.

⁷¹*Id.* at 67.

⁷²*Id.* at 71.

As previously discussed, the Family Law Judge carefully reviewed Mr. Felton's opinions in light of these and other criticisms, and determined that those opinions lacked sufficient factual and conceptual foundation, as was his right.

V. CONCLUSION

In her petition for appeal and continuing in her brief, Ms. Helfer has misrepresented the evidence before the Family Law Judge regarding the issue of goodwill, and has further misrepresented the Family Law Judge's disregard of the same.

Using well-supported, real-world financial data, Dr. Helfer's expert conducted an analysis of valuation of Dr. Helfer's professional practice using a method approved by this Court in *May* and determined that no enterprise goodwill existed. Ms. Helfer's expert, on the other hand, used hypothetical and heavily manipulated data to determine that enterprise goodwill did exist. Dr. Helfer's rebuttal expert, however, carefully dissected the analysis of Ms. Helfer's expert and, ultimately, the Family Law Judge rejected the same, articulating in his order a multitude of reasons the determination of the existence of enterprise goodwill was unreliable, unsupportable, and not credible. The Family Law Judge's findings of fact cannot be said to have been clearly erroneous nor can his application of the law to those facts be said to constitute an abuse of discretion.

WHEREFORE, the Appellee, Robert J. Helfer, requests that this Court affirm the judgment of the Circuit Court of Ohio County, and award to him the reasonable attorney fees incurred about his defense of this appeal.

ROBERT J. HELFER

By Counsel

A handwritten signature in black ink, appearing to read "Andil G. Ranney", is written over a horizontal line.

Andil G. Ranney, Esq.

W. Va. Bar No. 3013

Scott E. Johnson, Esq.

W. Va. Bar No. 6335

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EXHIBIT A

FINDINGS OF FACT

EQUITABLE DISTRIBUTION

1. Prior to the hearing, the parties stipulated to the following values:

MARITAL ASSETS

Marital Home	\$650,000
1996 Chrysler	\$ 6,975
2000 Jeep	\$ 19,950
1997 Income Tax Refund	\$ 15,719.78

Fidelity T073847631	changed to 2BX-531057	\$53,007.18
Harris 3VZ-024837	changed to Etrade 5739-9018	\$90,772.58
Harris 014-151393	changed to Etrade 5725-3505	\$ 2,039.10
Harris 014-149702	changed to Etrade 5725-3472	\$ 500.00
Invesco 9527200	changed to AIM 0009527200	\$12,550.89
Fidelity 2AJ-158224		\$10,105.27

MARITAL DEBTS

Marital Home Debt	\$573,810.00
BNB (Debt on Building)	\$224,812.00
Jeep Debt	\$ 18,391.00
Wachovia	\$ 2,229.41
Citi Platinum	\$ 7,247.91
Fidelity Investment	\$ 7,297.78
MBNA	\$ 10,328.47
Worker's Compensation Debt	\$ 86,635.71
2002 Penalties and Interest	\$ 1,300.00
Personal and Real Estate Taxes	\$ 6,313.52
2002 Fire Service Fee	\$ 152.11

2. Other than the above listed assets, the parties disagreed upon the valuation of the chiropractic business and the National Road building.

3. Petitioner submitted his valuation for the National Road building on April 2, 2003 and August 29, 2003, as well as his valuation of the business on May 7, 2004. Petitioner valued the business at \$41,000.00 and the building at \$325,000.

4. Respondent first disclosed her valuation of the business on March 17, 2005, and of the building on January 22, 2004. Respondent valued the business at \$388,000 and the building at \$495,000.

5. Based upon the testimony offered on September 1, 2005 regarding the valuation of the building, the court makes the following findings.

Building -- The value of the National Road Building is \$330,000.

6. The Court finds the valuation presented by Petitioner's experts, Phil Jackson and Larry McDaniel, to be far more credible than A.J. Ciprianni, the Respondent's expert. As such, this Court finds that Mr. Jackson's valuation of the National Road Building at \$330,000 shall be the value assigned to the marital asset located on National Road, Wheeling West Virginia.

7. Mr. Ciprianni made numerous mistakes in his appraisal method that compromised the validity of his report. For example, he included an unimproved shed area as finished square footage. That was only one of the mistakes. The valuation was not as of the date of separation; no adjustments were made to the subject property in comparison to the comps listed within the report; he went all over the spectrum with values beginning at \$495,000, then \$466,264, then \$389,917.90, and finally \$445,000. He sat at the hearing with a calculator feverishly trying to reconcile his varying values and never successfully explained the four different values that he assigned to the property.

8. Mr. Larry McDaniel was called as an expert by Petitioner. He testified that he had reviewed both appraisals and that he concurred with Phillip Jackson's appraisal of \$330,000. He further testified that he absolutely couldn't accept Mr. Ciprianni's valuation because the mistakes he made violated the Uniform Standards for Professional Appraisal Practice. He labeled the errors made by Ciprianni as sufficient to affect the value as stated within the appraisal. He opined that Phillip Jackson made a few minor mistakes; however, his mistakes did not violate the Uniform Standards for Professional Appraisal Practice and thus did not compromise the value within his appraisal. Mr. McDaniel's critique of both appraisals was well documented in the form of a 21 page critique with graphs and charts explaining his analysis. The Court has reviewed the same and concurs with Mr. McDaniel's opinion.

Business – The value of the Chiropractic Business is \$41,000

9. This Court was not impressed with Jack Felton, Respondent's expert accountant. Mr. Felton used hypothetical Chiropractor incomes from the internet in determining his valuation when he had Petitioner's actual income with which to work. Mr. Felton also used cash values within the business checking account in his valuation, some of these cash values included marital assets that had previously been divided between the parties and thus did not exist at the time of the valuation. He admitted that the using these cash values was error and would affect the business valuation. Mr. Felton made further errors in using "new" value costs for office equipment instead of using the actual appraised value of old office equipment. Felton made adjustments for depreciation but didn't and couldn't justify the depreciations.

10. Mr. Felton used an excess earnings method to calculate the business value at \$388,000. This Court finds there is no basis in fact for this valuation.

11. Lou Costanzo, an accounting expert for Petitioner, testified that the value of the practice at the time of separation was \$41,000 using the capitalization approach. As of date of separation, Mr. Costanzo had been employed for years by Dr. Helfer; he had the opportunity to ^{W.S.} go through facility, interview Dr. Helfer regarding the practice, and was very familiar with actual values to use within his appraisal.

12. Petitioner's accounting expert, Jack Bodkin, opined that the capitalization method was most appropriate for the valuation of the chiropractic business. Mr. Bodkin is a CPA who reviewed both appraisals and indicated that the difference between them was the method used as well as the varying values discussed above.

13. Methods of Valuation: Mr. Bodkin stated that the excess earnings method used by Mr. Felton was inappropriate and that the capitalization method used by Mr. Costanzo was more appropriate. He supported his opinion by citing that the IRS recommended the use of the excess earnings ONLY if another method was not available. In this case, another method was available and thus Mr. Felton's chosen valuation method was inappropriate.

14. Varying Values: Mr. Bodkin opined that Mr. Felton should not have used "new" values for office assets as opposed to the appraised value of the office assets; use of those numbers was arbitrary without an appraisal. Perhaps one of the biggest differences between values used by the experts was the amount of reasonable compensation attributable to the Chiropractor. Mr. Costanzo testified that \$108,000 per year was reasonable income to attribute to Petitioner. Mr. Felton testified that \$65,000 per year was reasonable compensation. Mr. Bodkin testified that \$110,000 was reasonable compensation. Another big difference in values used by the accountants was the rental value per square foot of the property. Mr. Felton testified

that \$10 / square foot was reasonable. Mr. Costanzo testified that \$18/square foot was reasonable. Mr. Bodkin opined that \$16/square foot was appropriate.

15. Based upon the above findings, this Court finds that the value of the Chiropractic Business for purposes of equitable distribution shall be \$41,000 in accord with the opinion of Lou Costanzo.

16. While the parties agreed upon the values listed in paragraph 1 above, the parties disagreed as to the inclusion of the assets and debts into the distribution as well as the allocation of the same. Specifically, the parties disagreed on the following:

- a. Inclusion of 1997 Income Tax Refund
- b. Inclusion of the Worker's Compensation Debt
- c. Inclusion of the 2002 Penalties and Interest
- d. Inclusion of the pensions and stocks in the distribution

17. This Court finds the following with regard to the inclusion of items 16a through 16d in the equitable distribution.

- a. The 1997 Income Tax Refund which was previously awarded to Respondent in its entirety on her motion for an advance on attorney's fees and costs shall be included within the distribution and allocated to her. The 1997 Income Tax Refund was generated as a result of income tax filed while the parties were married. Thus, any resulting refund is a marital asset subject to equitable distribution.
- b. The Worker's Compensation Debt shall be left in the distribution. However, in as much as that debt is the subject of an appeal, any resulting discount or increase in

the penalty shall be equally shared between the parties. That is, the parties shall be financially responsible, one to another, for 50% of any resulting increase or decrease in the liability as determined at some future date.

- c. The 2002 Income tax penalties and interest paid by Petitioner on a ^{WTS} 2002 tax liability is marital property in as much as the parties filed a joint income tax return for 2002. In as much as Petitioner paid that debt, he shall receive credit for that debt on his side of the column in equitable distribution.
- d. Pursuant to the *Boyle* decision, all pension and stocks ~~shares~~ shall be divided equally between the parties within sixty (60) days of the date of this hearing.

18. The resulting allocation of property and payment to equalize distribution are delineated in the attached Marital Property Exhibit 1. Based upon the distribution, Petitioner owes Respondent \$39,868.66.

19. Petitioner shall make application to refinance the marital home within thirty (30) days of the date of this hearing, and complete the refinance within ninety (90) days of the date of this hearing so as to pay Respondent her share of the marital property distribution.

MEDICAL SUPPORT FOR THE MINOR CHILD

20. Petitioner shall be responsible for the first \$250.00 of medical expenses not covered by insurance; thereafter, the parties shall share the medical expenses in accordance with their statutory share of income; that is 87% for Petitioner and 13% for Respondent

CONCLUSIONS OF LAW

1. The Court concludes that the value of the Chiropractic Business is \$41,000.
2. The Court concludes that the value of the National Road Building is \$330,000.
3. The resulting allocation of property and payment to equalize distribution are delineated in the attached Marital Property Exhibit 1. Based upon the distribution, Petitioner owes Respondent \$39,868.66.
4. Petitioner shall make application to refinance the marital home within thirty (30) days of the date of this hearing, and complete the refinance within ninety (90) days of the date of this hearing so as to pay Respondent her share of the marital property distribution.

Based upon the above findings of fact and conclusions of law, **IT IS HEREBY ORDERED, ADJUDGED, and DECREED** that:

1. The resulting allocation of property and payment to equalize distribution are delineated in the attached Marital Property Exhibit 1. Based upon the distribution, Petitioner owes Respondent \$39,868.66.
2. Petitioner shall make application to refinance the marital home within thirty (30) days of the date of this hearing, and complete the refinance within ninety (90) days of the date of this hearing so as to pay Respondent her share of the marital property distribution.
3. Petitioner shall be responsible for the first \$250.00 of medical expenses not covered by insurance; thereafter, the parties shall share the medical expenses in accordance with their statutory share of income; that is 87% for Petitioner and 13% for Respondent

4. The issues of spousal support, attorney's fees and expert fees shall be addressed by separate order of this court.

5. Respondent's objections and exceptions to all of the court's rulings are hereby noted.

6. The Clerk is directed to send attested copies of this order to Petitioner, through his attorney, Elgine Heceta McArdle, Esq., McArdle Law Offices, 80 Twelfth Street, Suite 206, Wheeling, West Virginia, 26003, and to the Respondent, through her attorney, Holli Massey Smith, at 39 Fifteenth Street, Wheeling, West Virginia, 26003.

ENTERED this 3rd day of May, 2006.

/s/ William F. Sinclair

JUDGE

Have Seen and Approved ~~copy~~ copy, Teste:

Brenda L. Miller

Holli Massey Smith, Esq. Circuit Clerk
Counsel for Respondent

Prepared by

Elgine Heceta McArdle, Esq.
Counsel for Petitioner

This Order is a Final Order of the Family Court. Any party believed to be aggrieved by the Final Order may take an appeal either to the Circuit Court or the West Virginia Supreme Court of Appeals. A Petition for Appeal to the Circuit Court may be filed by either party within thirty (30) days after entry of the Final Order. In order to appeal directly to the Supreme Court of Appeals, all parties must file a joint notice of intention to appeal and waiver of right to appeal to the Circuit Court within fourteen (14) days after entry of the Final Order.

ENTERED IN FAMILY COURT 51
ORDER BOOK
PAGE 319
as dated on Order.

Brenda L. Miller
CLERK OF THE CIRCUIT
COURT OF OHIO COUNTY, WV

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on June 7, 2007, I served the foregoing "Brief of the Appellee" upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Heather Wood, Esq.
Frankovitch, Anetakis, Colantonio & Simon
337 Penco Road
Weirton, WV 26062

A handwritten signature in black ink, appearing to read "Ancil G. Ramey". The signature is stylized and written over a horizontal line.