

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

DAVID R. DODD, DAVID E. DODD, and
DIANN D. MARTIN,

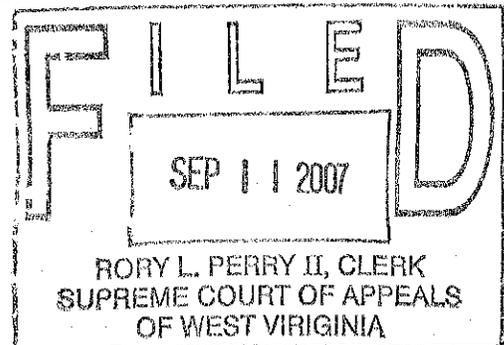
Plaintiffs/Appellants herein,

Circuit Court of Berkeley County
Civil Case No. 02-C-320
Docket number 071070

vs.

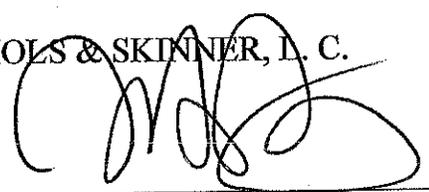
POTOMAC RIVERSIDE FARM, INC.;
LOGAN D. WANNAMAKER, individually and as a
Director of Potomac Riverside Farm, Inc.;
MARJORIE LEE WANNAMAKER, individually and as
a Director of Potomac Riverside Farm, Inc.;
NATIONAL CITY BANK, a foreign
corporation doing business in West Virginia,
as Trustee of Voting Trust Agreement of Potomac Riverside Farm, Inc.
and as Trustee of Edwin D. Dodd Trust; and
SARAH D. KAUFFMAN, as President of Potomac Riverside Farm, Inc.,

Defendants/Appellees herein.



APPELLANTS' REPLY BRIEF

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By: 

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I. DISCUSSION OF LAW

This appeal concerns a minority shareholder dissent proceeding pursuant to W.Va. Code §31-1-123 (1974). Appellants are dissenting minority shareholders of Appellee Potomac Riverside Farm, Inc. (PRF). The trial court ordered that an unfair and inequitable rate of interest be paid on the value of Appellant's shares. The annualized rate of return from the trial court was just over two percent, despite Appellants being without use of their money for over five years. The trial court also erroneously placed a value of \$1,400,000.00 on the corporate land, 360 acres of farm land including 1.4 miles of deep water Potomac River frontage. The value was based upon the problematic report of an out-of-state appraiser, and was contrary to a local appraiser's value of \$2,082,000.00. This erroneously resulted in a per share value of \$952.37, and a total principal amount to Appellants of \$339,996.09.

Appellants respond herein to the Appellees' arguments, summarize the reasons why the trial court's rulings were incorrect, and respond to the corporate Appellee's cross-assignment of error.

A. The trial court erred in its interest determination.

The trial court erroneously ruled that the fair value of Appellants' 357 shares as of August 31, 2001, was \$339,996.09, and that the interest on Appellants' loss of use of that money for over five years, through the date of the trial court's Order, is only \$38,001.71, an annualized rate of return of just over two percent. The trial court's ruling disregarded

the recommendation of the Special Commissioner, who recommended that simple interest at the rate of 8% per year be granted to Appellants for the loss of use of their money. The trial court's ruling was unfair and inequitable. The appropriate rate of interest should be 10%, compounded annually.

This Court has recognized that in exchange for the statutory abolition of unanimity for a corporate action to sell substantially all of its assets, rights have been granted to dissenting minority shareholders. *In the Matter of Fair Value of Shares of Bank of Ripley*, 184 W.Va. 96, 99, 399 S.E.2d 678, 681 (1990). Toward that end, this Court held that, "dissenter's rights statutes are construed favorably toward the shareholder, particularly where there is no prejudice to the corporation. . . . Doubts arising from a lack of precision or accuracy in the statute should, where possible, be resolved in favor of the dissenting shareholder. [Footnote omitted]." *Id.* at 99-100, 681-682. In ruling on the interest issue, the trial court did not resolve the statutory imprecision concerning interest in favor of the dissenting shareholders.

1. The trial court erred by making an inequitable and unfair allowance for interest, where the court's order partially allowed for no interest, and partially allowed for interest at the rate of 1.674%.

The portion of the trial court's ruling returning no interest was apparently based upon the fact that the closing on the sale of the corporate real estate did not occur until June 12, 2003. Such a ruling is unfair to the minority shareholders, because Appellants objected to the corporation's decision to sell the land, yet are penalized for that same

decision in the interest calculation. Preventing Appellants from earning interest on the fair value of their shares for that time period doubly penalizes them. Such a result is unfair and inequitable.

PRF attempts to justify the low interest award by asserting that the corporation was unprofitable.¹ However, interest in a case like this one is not based upon the return that the dissenting shareholders would have received on their shares had they not objected. Rather, the interest is based upon the lost use of the dissenters' money. *In re Valuation of Common Stock of McLoon Oil Co.*, 565 A.2d 997, 1007 (Me. 1989). Consequently, the fact that PRF did not pay dividends to its shareholders should not guide the interest rate. PRF also attempts to justify the return of no interest on a portion of the per share value, despite mandatory statutory language to the contrary, by citing several Delaware cases² as alleged authority for the proposition that a trial court is authorized to eliminate interest awards entirely. However, the cases cited by PRF are not minority shareholder dissent cases and thus provide no guidance.

In addition, the trial court's ruling that Appellants shall receive 1.674% simple

¹In one instance, the corporate Appellee misstates the holding of a case in support of its argument. At page 15 of Appellees' brief, Appellees cite *Rapid American Corp. v. Harris*, 603 A.2d 796 (Del. 1992), for the proposition that the appraisal statutes "are intended to compensate dissenting shareholders for the return they would otherwise have had on their shares if the proposed corporate action had not transpired, and nothing more." In fact, the *Rapid American Corp.* case says no such thing.

²*Rose Hall Ltd. v. Chase Manhattan Banking*, 566 F.Supp. 1558 (D.Del. 1983), aff'd 740 F.2d 956 (3rd Cir. 1984); *E.I. Fleishmann Lumber Corp. v. Resources Corp.*, 114 F.Supp. 843 (D.Del. 1953).

interest on \$835.51 per share for the time period of June 13, 2003 through October 5, 2006, is neither fair nor equitable. This portion of the trial court's interest ruling is based upon the interest actually earned by PRF after it placed the net proceeds from the sale of the corporate real estate in a money market account at Appellee National City Bank. PRF's decision to place the funds in such an account should have no bearing on the interest determination in this case, nor should the trial court's order requiring the funds to be held in constructive trust lead to an artificially low interest ruling. Appellants dissented from PRF's decision to sell the corporate property. They were then entitled to both the fair value of their shares, and a fair and equitable rate of interest thereon. Affirmation of the trial court's ruling would encourage corporations to act punitively toward dissenting shareholders.

Indeed, Appellees' attacks on Appellants, which continue in the Appellees' briefs, demonstrate the necessity of the earlier-cited *Bank of Ripley* holding; minority shareholders are at a substantial disadvantage and need protection from the courts. In the instant case, Appellees chose to sell the corporate property. Appellees' chosen course of action led to this proceeding. This Court should not be misled by PRF's attempt to portray itself as a victim. The minority shareholders are entitled to the fair value of their shares, along with fair and equitable interest thereon. W.Va. Code § 31-1-123 (1974).

Appellees attempt to justify the trial court's low interest rate by referring to delays allegedly caused by Appellants, and to alleged bad acts committed by Appellants.

However, the trial court specifically found that Appellants “did not act arbitrary or vexatious. Furthermore, even though the Court removed the *lis pendens*, the Court finds that Plaintiffs made colorable arguments in good faith.”³ This portion of the trial court’s Order shows the untruth of Appellees’ allegations that Appellants’ actions somehow affected the trial court’s interest ruling.⁴

Appellees’ arguments make it clear that they desire that the interest determination be used to punish Appellants for their dissent. Punishment is not the purpose of the minority shareholder dissent statute. Appellants have simply sought all along to enforce their legal rights. The trial court’s Order concerning interest should be reversed.

2. The fair and equitable rate of interest should be 10% per annum, compounded annually.

Ten percent is a fair and equitable interest rate. There are two reasons for this. First, the current minority shareholder dissent statute requires interest to be paid at the prejudgment interest rate of 10%. W.Va. Code §31D-13-1302(5) (2002). The new statute should provide guidance to the Court. Second, a 10% interest rate for the fair value of shares of a corporation whose main asset is real estate is fair and equitable. This

³October 5, 2006, Order Determining Rate of Interest, Costs, Expert Witness’ Fees, and Attorney’s Fees, at page 11.

⁴PRF’s brief, at page 18, falsely states that “[t]he trial court also took into account that the dissenters’ actions post litigation which were again designed to delay the closing on the sale of the farm and thus delayed the investment opportunity for all concerned, not just the dissenters.” The trial court’s order makes no such finding.

is especially so in light of the testimony of PRF's own expert, who testified that an investor in a business like PRF would expect, conservatively, an eight percent return on the investment. PRF should not be allowed to escape the consequences of its own expert's testimony.

Appellants are compelled to note that PRF incorrectly alleges that there was no evidence of the escalation of real estate values during the operative time period. In fact, the Commissioner took judicial notice of such fact:

Mr. Bean: . . . I think the Commissioner can take notice of the fact that this has been a very buoyant market in this area and there have been a number of articles that I've seen in the paper that suggest that the market has been in an upswing.⁵

Later, the Commissioner stated, "we all know and nobody's going to dispute that real estate prices have gone up in general[.]"⁶ Appellants' appraiser also testified that real estate values rose.⁷ PRF's assertion that there was no evidence of the increase in real estate value is false.

Lastly, the interest should be compounded in order to achieve true fairness and equity. As other courts have concluded, compound interest is the vehicle by which a court achieves true fairness. *In re: Valuation of Common Stock of McLoon Oil Co.*, 565 A.2d 997, 1007 (Me. 1989); *Computer Task Group, Inc. v. Peierls*, 810 So.2d 977 (Fl.

⁵ Tr. I, at page 42, line 18 to page 43, line 2.

⁶Tr. I, at page 142, lines 19 - 21.

⁷Tr. I, at page 112, line 16 - page 113, line 4.

2002), *reh. denied*; *Sarrouf v. New England Patriots Football Club, Inc.*, 492 N.E.2d 1122 (Mass. 1986); *Onti, Inc. v. Integra Bank*, 751 A.2d 904 (Del. Ch. 1999). Bearing in mind the necessity for protection of minority shareholders as noted in *Bank of Ripley*, and of this Court's previous acceptance of other holdings from *Sarrouf*,⁸ fairness and equity dictate that compound interest be awarded to the minority shareholders in this case. This Court should enter an additur for compound interest at the rate of ten percent, from August 30, 2001, through June 29, 2006.

B. The trial court erred in determining the fair value of Appellants' shares.

The major factual dispute in the commissioner's hearing was the value of the corporate land. The trial court erroneously ruled that the land's value was \$1,400,000, mostly based upon the testimony of an out-of-state appraiser. Appellants' appeal of this issue was timely, and this Court should remand the issue to the trial court for further consideration.

1. The trial court erred in basing the fair value of Appellants' shares of the corporation upon a valuation of \$1,400,000 for 360 acres of farmland containing one and one-half miles of deep water Potomac River frontage.

The commissioner and the trial court disregarded the testimony of an experienced local appraiser who had personal knowledge of all of his comparables, in favor of an out-of-state appraiser who testified that he had not personally viewed all of the comparables

⁸*In the Matter of Fair Value of Shares of Bank of Ripley*, 184 W.Va. 96, 102, 399 S.E.2d 678, 684 (1990).

and who made a 70% adjustment to several of his comparables. This constituted an abuse of discretion. This issue should be remanded to the trial court.

The erroneous evaluation of the corporate land resulted in a value of \$952.37 being placed on the corporate shares. This amount was even less than the per share value testified to by PRF's expert appraiser, who performed a business valuation that resulted in a value of \$1,111.00 per share for PRF's shares.⁹ PRF did not adduce this evidence during its appraiser's testimony and the information was revealed to the Commissioner only upon cross-examination. This issue should be remanded to the trial court.

Appellants note that PRF's brief incorrectly asserts that the minority shareholders presented no evidence of deep water river frontage adjacent to the corporate land. In fact, Appellant Diann Dodd Martin testified to water skiing and boating on the river.¹⁰

2. The appeal of the trial court's share valuation was timely because the trial court's April 6, 2006, Order did not resolve the litigation as to a claim or a party.

Appellees argue that the trial court's ruling upon the fair value of the shares was final; however, Appellees' assertion is not supported by the facts or the law. Appellants' appeal of the value of the shares is timely.

As noted in *Durm v. Heck's, Inc.*, 184 W.Va. 562, 566, 401 S.E.2d 908, 912 (1991), "an order may be final prior to the ending of the entire litigation on its merits if

⁹Tr. II, at page 205, lines 10 - 16.

¹⁰Tr. I, at page 58, line 11 - page 59, line 16.

the order resolves the litigation as to a claim or a party. *See* W.Va.R.Civ.P. 54(b); Fed.R.Civ.P. 54(b).” In the instant case, the trial court ruled upon the fair value of the shares in its April 6, 2006, Order Adopting Special Commissioner’s Recommended Findings, In Part. However, the trial court also instructed the parties to file memoranda addressing interest, costs, attorney’s fees, and witness fees.

It is illogical to conclude that the order was final in light of the trial court’s request for further briefing. It is likewise illogical to conclude that the order resolved the litigation as to a claim, where the question of interest and the question of the fair value of the shares stem from the same statute, W.Va. Code §31-1-132 (1974). Because the issues of interest and costs were not addressed in the trial court’s April 2006, Order, it is clear that the minority shareholders’ claim for the fair value of their shares was not fully resolved until the trial court’s October 5, 2006, Order Determining Rate of Interest, Costs, Expert Witness’ Fees, and Attorney’s Fees. Consequently, Appellants’ appeal was timely.

C. Appellee’s cross-assignment of error concerning costs is not sustainable, where the trial court applied the relevant statute as written.

The trial court correctly applied W.Va. Code §31-1-123 concerning the apportionment of the costs of the minority shareholder proceeding. Nonetheless, PRF seeks to change the trial court’s ruling in that respect. PRF’s cross-assignment of error on this issue should be rejected.

1. The relevant statute requires the costs to be assessed against the corporation.

Unless the dissenters acted arbitrarily, vexatiously, or in bad faith, the corporation must pay the costs and expenses. The relevant portion of the statute states:

The costs and expenses of any such proceeding shall be determined by the court and shall be assessed against the corporation, but all or any part of such costs and expenses may be apportioned and assessed as the court may deem equitable against any or all of the dissenting shareholders who are parties to the proceeding to whom the corporation shall have made an offer to pay for the shares if the court shall find that the action of such shareholders in failing to accept such offer was arbitrary or vexatious or not in good faith.

W.Va. Code §31-1-123 (1974).

In assessing the costs against the corporation in accordance with the statute, the trial court specifically found that Appellants “did not act arbitrary or vexatious. Furthermore, even though the Court removed the *lis pendens*, the Court finds that Plaintiffs made colorable arguments in good faith.”¹¹ The trial court was in the best position to assess the parties’ bona fides. Moreover, the trial court’s ruling as to fair value exceeded PRF’s formal fair value offer by over \$116.00 per share. Thus, there was no error in assessing the costs against PRF in accordance with the statute.

2. PRF’s offers of judgment are irrelevant.

PRF also seeks to apply W.Va.R.Civ.P. 68 concerning its offers of judgment in this matter, despite the fact that, until this honorable Court rules upon the interest issue,

¹¹October 5, 2006, Order Determining Rate of Interest, Costs, Expert Witness’ Fees, and Attorney’s Fees, at page 11.

and until the trial court rules upon the remaining issues in this case (breach of fiduciary duty against the Appellees, slander of title against the Appellants), the final judgment amount is unknown.

In an attempt to bolster its otherwise-unsupported assertion, PRF argues that its offers of judgment had some relation to a per-share figure. Nothing in the offers of judgment reflect that to be the case. In fact, the offers of judgment state that the amount is “inclusive of any and all attorney’s fees, interest and costs to which Plaintiffs may be entitled.” That phrase specifically contradicts Appellees’ current argument that dividing the total amount of the offer of judgment by the number of shares yields the corporation’s actual per share offer. The trial court noted this contradiction as well, and further observed that the Appellees’ decreased their per share valuation for the Commissioner’s hearing.¹² Appellees should not be entitled to retroactively revise the meaning of their offers of judgment. The cross-appeal should be denied.

II. CONCLUSION.

In conclusion, this Honorable Court should correct the trial court’s errors in this minority shareholder proceeding. First, because the interest rate determined by the trial court was not fair and equitable, and in part violated the mandatory requirements of the minority shareholder dissent statute, the Court should reverse the trial court’s ruling on interest. Second, because 10% compound interest is fair and equitable in this case, the

¹²October 5, 2006, Order Determining Rate of Interest, Costs, Expert Witness’ Fees, and Attorney’s Fees, at page 12.

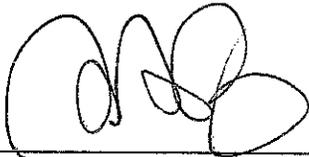
Court should grant interest at the fair and equitable rate of 10%. Third, because the trial court erred in valuing the corporate real estate, the Court should remand the issue of the fair value of the corporate shares to the trial court. All of the same should be done to promote fairness and equity and to encourage small business investment in this state. Moreover, the Court should determine that Appellee's cross-assignment of error concerning costs is not sustainable, where the trial court applied the relevant statute as written. The relevant statute requires the costs to be assessed against the corporation.

III. RELIEF REQUESTED

WHEREFORE, based upon the foregoing, Appellants respectfully request this honorable Court to reverse the trial court's rulings concerning interest and the fair value of Appellants' shares of the corporation, to enter an additur allowing for interest at the rate of 10%, compounded annually, from August 30, 2001, through June 29, 2006, and to remand the issue of fair value to the trial court for further consideration.

DAVID R. DODD, DAVID E. DODD,
DIANN D. MARTIN, and all other
similarly situated minority shareholders
of Potomac Riverside Farm, Inc.,

Appellants, by counsel



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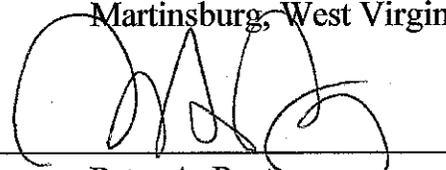
Defendants/Appellees herein.

CERTIFICATE OF SERVICE

I, Peter A. Pentony, counsel for the Appellants, do hereby certify that I have mailed a true copy of the foregoing **Appellant's Reply Brief** upon the following persons, by mailing the same by U.S. Mail, postage prepaid, this 10th day of September, 2007:

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