

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34703

CAROL A. HELFER

Appellant

vs.

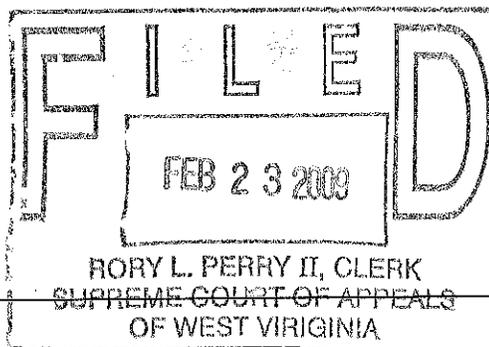
ROBERT J. HELFER,

Appellee

Underlying Proceeding

No. 02-D-209

Ohio County Family Court



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**BRIEF OF THE APPELLANT, CAROL A. HELFER**

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NOW COMES the Appellant, Carol A. Helfer, by and through the undersigned counsel, and pursuant to this Honorable Court's Order of January 22, 2009, submits this brief in support of her appeal of the June 26, 2008, Order of the Circuit Court of Ohio County affirming the March 28, 2008, Order of the Family Court of Ohio County.

**I. NATURE OF THE PROCEEDING AND THE RULING BELOW:**

This matter arises out of a Family Court action wherein Robert J. Helfer filed an action of divorce on or about July 2, 2002, in Ohio County, West Virginia, seeking a divorce from his wife, Appellant, Carol A. Helfer (hereinafter "Ms. Helfer"). This case is now before this Honorable Court for the second time on the issue of the value of the enterprise goodwill attributable to the chiropractic business of the Appellee, Robert J. Helfer (hereinafter "Dr. Helfer").

This Court previously remanded the case to the Court below with instructions to perform a valuation of the enterprise goodwill attributable to Dr. Helfer's practice. Specifically, this Court held that the Family Court's valuation of Dr. Helfer's practice needed to include a reasonable approximation of enterprise goodwill subject to equitable distribution, or alternatively, the court needed to articulate a finding of no goodwill and explain its reasons. The Circuit Court remanded the case back to the Family Court to conduct proceedings consistent with this Court's opinion.

On March 28, 2008, the Family Court issued a Final Order without conducting an evidentiary hearing, finding once again that there was no enterprise goodwill attributable to the Dr. Helfer's chiropractic practice. The Family Court used as the basis for its ruling the same testimony adduced at the April 1, 2005, hearing that led to the first appeal to this Court.

On or about April 25, 2008, Ms. Helfer timely filed an appeal of the Family Court's ruling with the Circuit Court. The Circuit Court denied the appeal in an Order dated June 26, 2008.

It is from the June 26, 2008, Order of the Circuit Court that Ms. Helfer appeals.

## II. STATEMENT OF FACTS OF THE CASE:

On May 3, 2006, the Family Court issued a Final Order dealing with the issues of equitable distribution in this case. In its May 3, 2006, Order the Family Court made no finding as to the value of the enterprise goodwill associated with Dr. Helfer's practice.

The Family Court's May 3, 2006, Order was appealed to the Circuit Court. By Order dated July 24, 2006, the petition was not accepted. Ms. Helfer subsequently appealed the matter to this Court, and the petition was accepted. In its November 8, 2007, decision, this Court held that the Family Court's valuation of Dr. Helfer's practice needed to include a reasonable approximation of the enterprise goodwill of the chiropractic practice subject to equitable distribution, or the court needed to articulate a finding of no goodwill and explain its reasons. *See Helfer v. Helfer*, 221 W.Va. 625, 628-629, 656 S.E.2d 70, 73-74 (W.Va. 2007). As such, the matter was remanded.

On March 28, 2008, the Family Court disposed of the matter on remand without conducting an evidentiary hearing. The Family Court based its ruling upon the evidence presented in the hearing conducted on April 1, 2005, that led to its original May 3, 2006, Order, which led to the first appeal to this Court. In its March 28, 2008, Order, the Family Court again erroneously held that the value of the enterprise goodwill attributable to Dr. Helfer's chiropractic business was zero.

The Family Court stated that its ruling turned upon what it referred to as a "vital error" in the transcript of the April 1, 2005, hearing presented to this Court in the prior appeal. (March 28, 2008, Order at Findings of Fact ¶¶ 4-5.) The written transcript presented in the prior appeal recorded the testimony of Dr. Helfer's rebuttal expert, John Bodkin, as follows:

Q: You don't give any value to enterprise goodwill, is that correct?

A: I broke it down.

The Family Court found that Mr. Bodkin's testimony was actually as follows<sup>1</sup>:

Q: You don't give any value to enterprise goodwill, is that correct?

A: I really don't.

The Family Court utilized this testimony of Mr. Bodkin, and only this testimony, as the basis for its finding that the value of the enterprise goodwill attributable to Dr. Helfer's practice was zero. (March 28, 2008, Order at Findings of Fact ¶ 9.) Rather than conduct an evidentiary hearing on the issue of enterprise goodwill, so as to engage in a sound valuation method as this Court directed, the Family Court instead again ignored the testimony of Ms. Helfer's expert, stating, "In the case at bar the only evidence presented indicated that the petitioner's chiropractic business had a zero value related to enterprise goodwill." (Id.)

The Family Court's findings of fact in this case are clearly erroneous. Additionally, the Family Court made errors of law in regard to the evidence it considered. More specifically, the Family Court not only failed to utilize a sound valuation method in determining the value of the enterprise goodwill attributable to Dr. Helfer's practice, it failed to utilize any valuation method at all. The Family Court once again chose to ignore Ms. Helfer's expert who clearly indicated that there was enterprise goodwill attributable to the business in favor of Mr. Bodkin's bald assertion that there was no enterprise goodwill.<sup>2</sup> (Trans. 4-1-05 p. 35 ln. 10.)

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<sup>1</sup> Based upon numerous reviews of the actual video recording of the hearing, it appears that Mr. Bodkin's testimony was in fact, "I really don't," and that the court reporter who transcribed the video recording made an error.

<sup>2</sup> The Family Court likewise refused to consider the report of Daniel Selby, MBA, CPA, CVA that was disclosed and placed of record in *Respondent's Supplemental Disclosure of Expert Witness's Valuation Report*, as well as Ms. Helfer's brief in support of her petition for appeal to the Circuit Court, and which would have been submitted in an evidentiary hearing on the issue.

Further, even assuming there was insufficient evidence presented in the original April 1, 2005, hearing, as the Family Court contends, the Family Court violated the rule of the case doctrine by failing to proceed in accordance with the mandate and the law of the case as established by this Court by failing to conduct an evidentiary hearing on the issue. This Court clearly held, "the valuation of Appellee's business should include a reasonable approximation of the business' enterprise goodwill, if any, based upon competent evidence and on a sound valuation method." 221 W.Va. 625, 628, 656 S.E.2d 70, 73-74 (W.Va. 2007).

Finally, the Family Court committed an error of law in considering Mr. Bodkin's testimony at all. The testimony upon which the Family Court relies does not even rise to the standard of admissible expert testimony under the West Virginia Rules of Evidence. Moreover, it is unreliable and clearly wrong on its face. As such, it could not form the basis for a decision in this case, and should have been accorded no weight whatsoever.

The Family Court's March 28, 2008, ruling is erroneous. As such, this case should be remanded with instructions to conduct an evidentiary hearing on the enterprise goodwill issue. Additionally, this Court has previously recognized that enterprise goodwill should be evaluated and equitably distributed, but has not yet adopted a method for valuating enterprise goodwill. Appellant submits that this Court should direct that enterprise goodwill be evaluated utilizing a qualitative analysis of the portion of the business that arises from items such as advertising and location (goodwill assets attributable to the business itself) versus other sources such as personal referrals (goodwill assets attributable to the individual), followed by a valuation of the business based upon the capitalization of excess earnings approach.

**III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL:**

1. The Family Court erred in adopting Dr. Helfer's valuation of zero dollars (\$0.00) for the enterprise goodwill aspect of the chiropractic business because it utilized an incorrect and unsound valuation method in reaching said value.
2. The Family Court erred and violated the law of the case doctrine by failing to conduct an evidentiary hearing on the value of the enterprise goodwill asset attributable to Dr. Helfer's business.
3. The Family Court erred in adopting Mr. Bodkin's opinion inasmuch as the same was insufficient to meet the evidentiary standard for admission of expert testimony, and was unreliable and clearly wrong on its face.

**IV. POINTS AND AUTHORITIES RELIED UPON:**

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**V. DISCUSSION OF THE LAW:**

**1. STANDARD OF REVIEW:**

In reviewing a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, this Court utilizes a clearly erroneous standard in evaluating the family court’s findings of fact. *Syl. Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (W.Va. 2004). The family court’s application of the law to the facts is reviewed under an abuse of discretion standard. *Id.* Finally, questions of law are subject to *de novo* review. *Id.*

This Court has held that the determination of the value of goodwill is a question of fact. *May v. May*, 214 W.Va. 394, 589 S.E.2d 536, 544 (W.Va. 2003). However, the trial court is

required to reasonably approximate the net value of goodwill based upon competent evidence and on a sound valuation method or methods. *See May*, 214 W.Va. at 407, 589 S.E.2d at 549.

In this case, all three standards of review will have application. First, the Family Court's findings of fact are subject to a clearly erroneous standard. The Family Court's application of the law to those facts is subject to an abuse of discretion standard. Finally, the Family Court's rulings of law are subject to *de novo* review.

**2. THE FAMILY COURT ERRED IN ADOPTING DR. HELFER'S VALUATION OF ZERO DOLLARS (\$0.00) FOR THE ENTERPRISE GOODWILL ASPECT OF THE CHIROPRACTIC BUSINESS BECAUSE IT UTILIZED AN INCORRECT AND UNSOUND VALUATION METHOD IN REACHING SAID VALUE.**

The Family Court's ruling is erroneous and should be reversed. An analysis of enterprise goodwill requires the court to utilize a sound valuation method based upon competent evidence. *See May*, 214 W.Va. at 408, 589 S.E.2d at 550; *Helper*, 221 W.Va. at 628, 656 S.E.2d at 73. This Court has stated that "'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.*" Syl. Pt. 2 *May*, 214 W.Va. 394, 589 S.E.2d 536 (emphasis added).

This Court has not yet adopted a valuation method for determining the value of enterprise goodwill, but has identified a number of methods that may be acceptable: 1) straight capitalization; 2) capitalization of excess earnings; 3) IRS variation of capitalized excess earnings; 4) the market value approach; and 5) the buy/sell agreement method. *See May*, 214 W.Va. at 406, 589 S.E.2d at 548.

At the April 1, 2005, hearing, which is the hearing upon which the Family Court again based the ruling at issue in this appeal, Dr. Helfer's expert, Louis Costanzo, valued the business

using the income approach, capitalized earnings method. (Trans. 4-1-05 p. 57, ln. 2; p. 28 ln. 7.)

No evidence was presented through Mr. Costanzo that enterprise goodwill was part of the total value opined by said expert, and Mr. Costanzo stated the value of the chiropractic business to be \$41,000.00. (Trans. 4-1-05 p. 12 ln. 18); *see also Helfer*, 221 W.Va. at 627, 656 S.E.2d at 72.

Ms. Helfer's expert, Jack R. Felton, testified in the April 1, 2005, hearing that he valued the business at \$388,000.00 using the cost based approach, capitalization of excess earnings method to determine the value. (Trans. 4-1-05 p. 39 ln. 6; p. 28 ln. 13) Mr. Felton testified that a portion of the value of the business was attributable to the intangible of enterprise goodwill, but failed to quantify the portion of the value representing enterprise goodwill. (Trans. 4-1-05 p. 35 ln. 10).

The Family Court did not base its March 28, 2008, ruling on the testimony of Mr. Costanzo or Mr. Felton. Rather, the Family Court chose to base its ruling on the testimony of Dr. Helfer's proffered rebuttal expert, John Bodkin. (Trans. 4-1-05 pp. 56-85.)

Mr. Bodkin provided almost thirty pages of testimony, which served almost solely to agree with, and thereby bolster, Mr. Costanzo's testimony. Meanwhile, Mr. Bodkin's testimony on the issue of enterprise goodwill was solely the following:

A: I personally, I think I would go to a doctor whether he was on that side of Chicken Neck Hill or he was downtown. I go to a doctor because of the doctor, not because of the location.

(Trans. 4-1-05 p. 69 ln. 9-12.)

Q: You don't give any value to enterprise goodwill; is that correct?

A: I really don't.<sup>3</sup>

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<sup>3</sup> The original typed transcript of the April 1, 2005, proceeding gives the answer as "I broke it down." Mr. Bodkin submitted an affidavit on remand of this case indicating that his actual

(Trans. 4-1-05 p. 78 ln. 22-24.)

The Family Court's ruling purports to adopt Mr. Bodkin's testimony as the basis for its finding of no enterprise goodwill attributable to Dr. Helfer's chiropractic practice. (March 28, 2008, Order at Findings of Fact ¶¶ 4; 7-8, at Conclusions of Law ¶¶ 2-3.) However, Mr. Bodkin provided no valuation method for his arrival at a value of zero dollars, nor did he even testify that zero dollars was the value arrived at by Mr. Costanzo. Further, Mr. Bodkin pointed to no facts upon which he could arrive at a value of zero dollars aside from his personal preference in choosing doctors, which is clearly irrelevant. Not only did Mr. Bodkin fail to describe his "sound valuation method," he employed no valuation method at all. *See May*, 214 W.Va. 408, 589 S.E.2d at 550.

Mr. Bodkin provided no evidence upon which the Family Court could base a finding as to the value of the enterprise goodwill of Dr. Helfer's practice. The Family Court's adoption of Mr. Bodkin's "valuation method" is clearly erroneous. As such, the ruling should be reversed, and this case remanded.

In light of this Court's rulings in *May* and also in the previous appeal in this case, it is clear that enterprise goodwill is subject to equitable distribution. Inasmuch as equitable distribution of enterprise goodwill is now firmly a part of West Virginia jurisprudence, it is time that an accepted approach to valuing enterprise goodwill be adopted. An appropriate method for valuing enterprise goodwill should take into account qualitatively what portion of the business arises from items such as advertising and location (goodwill assets attributable to the business itself) versus other sources such as personal referrals (goodwill assets attributable to the individual). (See Report of Daniel L. Selby, MBA, CPA, CVA, at pp. 9-10, Appendix A to

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answer was "I really don't." The Family Court held in its March 28, 2008, Order that this was a "vital error."

Memorandum of Law in Support of Petition for Appeal to the Circuit Court.) Mr. Selby performed such a qualitative evaluation in his report submitted for this case. (*Id.*)

To make a proper determination as to the enterprise goodwill attributable to a professional practice of the type at issue here it is necessary to engage in a factual analysis of patient load and the source of those patients. *See May*, 214 W.Va. 402, 589 S.E.2d at 544 (determination of goodwill is a question of fact). For example, doctor to doctor or patient to patient referrals would represent a portion of the practice attributable to personal goodwill, while patients generated from advertising would represent a portion of the practice attributable to enterprise goodwill.

The next step in valuing enterprise goodwill should utilize the capitalization of excess earnings approach. This is the most commonly relied upon approach for valuing professional practices. *See 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); *In re Marriage of Hall*, 692 P.2d 175, 179 (Wash. 1984). This approach views enterprise goodwill as excess earning power attributable to the business as opposed to the professional, and is the approach Mr. Selby utilized in arriving at his value of the enterprise goodwill associated with Dr. Helfer's practice. (See Report of Daniel L. Selby, MBA, CPA, CVA, at p. 11, Appendix A to Memorandum of Law in Support of Petition for Appeal to the Circuit Court); *see also* 51 Rutgers L. Rev. at 610.

The Family Court not only failed to utilize the sound valuation method proposed above, it failed to utilize any valuation method. In this case, during the relevant time period, 44% of Dr. Helfer's patients were obtained through yellow page advertising.<sup>4</sup> (See Report of Daniel L.

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<sup>4</sup> To assure compliance with the Health Insurance Portability and Accountability Act, Mr. Selby was provided with Mr. Selby was provided only with a statistical breakdown of referral data that

Selby, MBA, CPA, CVA, at p. 9, Appendix A to Memorandum of Law in Support of Petition for Appeal to the Circuit Court.) No such analysis was performed by Mr. Costanzo, let alone Mr. Bodkin. Given this fact, the Family Court's finding that there is no enterprise goodwill is clearly erroneous on its face.

The Family Court also failed to conduct any factual analysis that would allow it to make the finding that it did. Rather, the Family Court relied on one line of testimony to make its ruling, notwithstanding the fact that the one line of testimony was not otherwise supported by the evidence. As such, this case should be reversed and remanded with instructions to engage in a qualitative evaluation of Dr. Helfer's practice with a view toward attributing a value to enterprise goodwill.

**3. THE FAMILY COURT ERRED AND VIOLATED THE LAW OF THE CASE DOCTRINE BY FAILING TO CONDUCT AN EVIDENTIARY HEARING ON THE VALUE OF THE ENTERPRISE GOODWILL ASSET ATTRIBUTABLE TO DR. HELFER'S BUSINESS.**

The Family Court violated the law of the case doctrine by failing to conduct an evidentiary hearing in this case on the issue of the enterprise goodwill attributable to Dr. Helfer's practice. "The general rule is that when a question has been definitely determined by this Court its decision is conclusive on parties, privies and courts, including this Court, upon a second appeal or writ of error and it is regarded as the law of the case." Syl. Pt. 1 *Mullins v. Green*, 145 W.Va. 469, 115 S.E.2d 320 (W.Va. 1960).

When a case is remanded for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal. See Syl. Pt. 3 *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W.Va. 802, 805, 591

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contained no patient identifiers, and no patient information aside from a "yes/no" in regard to whether the referral source was from advertising. The information was derived from a laptop computer in the possession of Ms. Helfer that had been utilized in the chiropractic practice

S.E.2d 728, 731 (W.Va. 2003). Compliance with the mandate and law of the case requires implementing *both* the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces. *See id.* Moreover, the mandate rule is not limited to matters decided either explicitly or implicitly on appeal; rather, when the Supreme Court of Appeals' decision results in the case being remanded to the circuit court for additional proceedings, the mandate controls the framework that the circuit court must use in effecting the remand. *See id.* 214 W.Va. at 808, 591 S.E.2d at 734. A ruling that is inconsistent with this Court's mandate is erroneous as a matter of law. *See id.*

In this case, at the very least, the Family Court failed to implement the spirit of this Court's mandate in *Helper*. 221 W.Va. at 628-629, 656 S.E.2d at 73-74. In reversing and remanding the Family Court's May 3, 2006, decision, this Court stated, "the valuation of Appellee's business should include a reasonable approximation of the business' enterprise goodwill, if any, based upon competent evidence and on a sound valuation method. If the lower court finds there to be no enterprise goodwill, it is essential that the court not only articulate that finding, but also explain its reasons for making such finding." *Id.*

As set forth above, the Family Court failed to utilize a sound valuation method in reaching its determination that the enterprise goodwill of the practice was zero.<sup>5</sup> Rather, the Family Court based its ruling on a single line of testimony not otherwise supported by the evidence in the record. As such, this Court's mandate was not followed.

Further, the Family Court seems to suggest in its March 28, 2008, Order that the reason for its holding is that there is a lack of evidence in the record of the April 1, 2005, hearing from which it may make a ruling on the enterprise goodwill issue. (March 28, 2008, Order at Findings

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<sup>5</sup> As discussed below, the evidence considered by the Family Court did not even rise to the level of admissible expert testimony.

of Fact ¶¶ 3-4.) If that is, in fact, the case, then in order to comply with this Court's mandate to make a finding based upon competent evidence and on a sound valuation method, the Family Court was required to conduct an evidentiary hearing on the issue.

In similar circumstances, this Court has directed that further evidentiary hearings be held in order to elucidate issues relating to division of marital assets. *See Roig v. Roig*, 178 W.Va. 781, 783, 364 S.E.2d 794, 796-797 (W.Va. 1987). In the *Roig* case, the lower court was faced with expert testimony that failed to provide sufficient information for a valuation of a husband's pensions. *See id.* In remanding the case for further evidentiary hearings this Court held "it was error for the trial court not to demand accurate, methodologically sound, expert testimony on the present value of the right to receive pensions." *See id.*

By confining itself to the evidence in the April 1, 2005, hearing, the Family Court also applied an incorrect standard of proof in the case in that it failed to recognize the shifting burdens applicable in a dispute as to property distribution in a divorce case. As this Court stated in *Roig*:

Modern divorce cases are different from traditional civil lawsuits. When a court is asked to divide property equitably to allow the parties to go their separate ways there is no plaintiff or defendant for the purposes of allocating the burden of proof. When a divorce proceeding focuses on the distribution of property, as opposed to the assessment of fault, the burden of proof is upon both parties to present evidence that will assist the court in reaching a sound result.

*See id.*; see also *Mayhew v. Mayhew*, 205 W.Va. 490, 519 S.E.2d 188 (W.Va. 1999).

Contrary to the Family Court's findings, it was not confined to the evidence presented at the April 1, 2005, hearing. The Family Court was empowered, and indeed, required by this Court's ruling as the law of the case to conduct an evidentiary hearing to obtain any and all evidence necessary for it to make a reasoned determination of the enterprise goodwill attributable to Dr. Helfer's practice.

The failure to conduct an evidentiary hearing clearly represents an abuse of discretion. The Family Court was mandated to make a well-reasoned finding, and failed to do so. As such, the Family Court's March 28, 2008, ruling should be reversed and remanded with instructions to conduct an evidentiary hearing on the enterprise goodwill issue.

**4. THE FAMILY COURT ERRED IN ADOPTING MR. BODKIN'S OPINION INASMUCH AS THE SAME WAS INSUFFICIENT TO MEET THE EVIDENTIARY STANDARD FOR ADMISSION OF EXPERT TESTIMONY, AND WAS UNRELIABLE AND CLEARLY WRONG ON ITS FACE.**

The "expert" testimony of John Bodkin adopted by the Family Court in its March 28, 2008, ruling was insufficient to meet the standard for admissibility of expert testimony. As such, not only should it have not formed the basis for the Family Court's ruling, it should not have been considered at all. Rule 702 of the West Virginia Rules of Evidence provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

The first and universal requirement for the admissibility of expert testimony is that the evidence must be both reliable and relevant. *See* Syl. Pt. 3 *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (W.Va. 1995); *Craddock v. Watson*, 197 W.Va. 62, 66, 475 S.E.2d 62, 66 (W.Va. 1996). The reliability requirement is met only by a finding that the technical theory that is the basis for the opinion is scientific, technical, or specialized knowledge. *See Craddock*, 197 W.Va. at 66, 475 S.E.2d at 66; *see also* Syl. Pt. 3 *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171. The essence of the rule is that the expert testimony must assist the factfinder's comprehension. *See Sheely v. Pinion*, 200 W.Va. 472, 478, 479, 490 S.E.2d 291, 297-298 (W.Va. 1997). Where expert testimony is based on underlying studies that are not presented in evidence and whose methodology is not explained, the testimony does not meet the reliability

standard. *See Wilt v. Buracker*, 191 W.Va. 39, 47, 443 S.E.2d 196, 204 (W.Va. 1993); *see also Jones v. Patterson Contracting, Inc.*, 206 W.Va. 399, 409-410, 524 S.E.2d 915, 925-926 (W.Va. 1999) (Justice Davis concurring in part and dissenting in part), *citing Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

There was absolutely nothing scientific or technical about Mr. Bodkin's opinion on the enterprise goodwill issue, and it was insufficient to meet the standard for admissibility. As described above, Mr. Bodkin testified merely that he found no enterprise goodwill. This finding was apparently based solely upon how he personally chooses his doctors. Mr. Bodkin did not testify as to the valuation method that led him to his conclusion, nor did he provide any testimony regarding how he made his calculations. As a matter of law, his testimony was unreliable.

In fact, a review of Mr. Bodkin's testimony as a whole reveals that he added nothing new to the testimony already provided by Dr. Helfer's other expert, Louis Costanzo, and merely attempted to bolster Mr. Costanzo's testimony by agreeing with it. This Court has already found that Mr. Costanzo provided no evidence on the issue of enterprise goodwill, and therefore, there was nothing within Mr. Costanzo's testimony upon which Mr. Bodkin could base his testimony.<sup>6</sup>

Most importantly, however, Mr. Bodkin's testimony is illogical and unreliable on its face. "Nothing in the Rules appears to have been intended to permit experts to speculate in fashions unsupported by, and in this case indeed in contradiction of, the uncontroverted evidence."

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<sup>6</sup> Moreover, even if the Family Court confined itself to the evidence in the April 1, 2005, it was not permitted to simply ignore the testimony of Carol Helfer's expert. *See Bettinger v. Bettinger*, 183 W.Va. 528, 533, 396 S.E.2d 709, 714 (W.Va. 1990). "[T]he family law master is not free to reject competent expert testimony which has not been rebutted." *See id.* Carol Helfer's expert, Jack Felton, testified that there was enterprise goodwill attributable to Dr. Helfer's practice. That opinion was never rebutted, and the Family Court could not simply ignore it.

*Newman v. Hy-Way Heat Systems, Inc.*, 789 F.2d 269, 270 (4<sup>th</sup> Cir. 1986) *see also Gentry*, 195 W.Va. at 527, 466 S.E.2d at 186.

The evidence in this case showed that Dr. Helfer operated a sole proprietorship chiropractic practice located on National Road, a main thoroughfare, in Wheeling, West Virginia. During the marriage, significant expense was incurred to relocate that practice to another location on National Road. If there were no enterprise goodwill associated with Dr. Helfer's practice, there would have been no reason to relocate the practice to a business location on a main artery in Wheeling or to incur *any* expense in obtaining the location. Rather, if all of the goodwill was personal it would have been sufficient to locate the practice in the basement of the marital home, or indeed anywhere at all. If all of the goodwill of the business is personal, then Dr. Helfer's presence in any location within a reasonable distance of Wheeling would have been just as good a location as any other.

The evidence also showed that Dr. Helfer advertised his business in the Yellow Pages. While advertising alone might not suffice to demonstrate the existence of enterprise goodwill, the fact that Dr. Helfer obtained 44% of his patients as a result of the advertisement shows that there simply must be at least *some* enterprise goodwill associated with the practice.

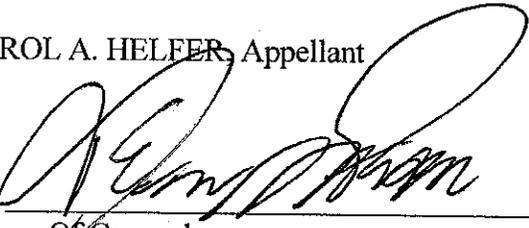
In short, it is simply impossible that there is no enterprise goodwill associated with Dr. Helfer's practice. That conclusion is illogical and unsupported by the evidence. Nonetheless, that is what the Family Court found in its March 28, 2008, ruling. Mr. Bodkin's testimony is clearly wrong, and as a result, the Family Court's ruling is likewise clearly wrong. Reversal is, therefore, warranted.

**VI. CONCLUSION AND RELIEF PRAYED FOR:**

The March 28, 2008, ruling by the Family Court is clearly erroneous. The Family Court utilized an incorrect and unsound valuation method in reaching its finding that there was no enterprise goodwill associated with Dr. Helfer's chiropractic practice. The Family Court also violated the rule of the case doctrine by failing to conduct an evidentiary hearing on the enterprise goodwill issue. Finally, the testimony the Family Court relied upon was not reliable or admissible expert testimony and was clearly wrong on its face. As such, this matter should be reversed and remanded to the Family Court with instructions to conduct an evidentiary hearing on the enterprise goodwill issue.

WHEREFORE, based upon the foregoing, the Appellant, Carol Helfer, prays that this Honorable Court reverse the March 28, 2008, Order of the Family Court, remand this case back to the Circuit Court with instructions, and grant such other and further relief as the Court deems meet and proper.

CAROL A. HELFER, Appellant

By: 

Of Counsel

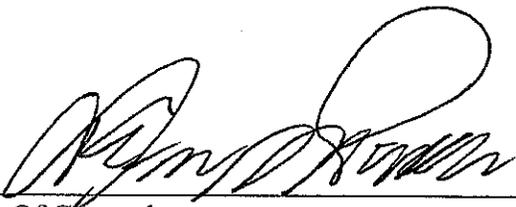
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**CERTIFICATE OF SERVICE**

Service of the foregoing *Brief of the Appellant, Carol A. Helfer* was had upon the following by mailing a true and correct copy thereof by United States mail, postage prepaid, this **18<sup>th</sup> day of February, 2009**, in accordance with Rule 15 of the West Virginia Rules of Appellate Procedure. At this time, it is unclear whether the Appellee is represented in this appeal, and as such, both the Appellee and his last known counsel have been served at the addresses set forth below.

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