

**IN THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**

**CAROL A. HELFER,
RESPONDENT BELOW, APPELLANT,**

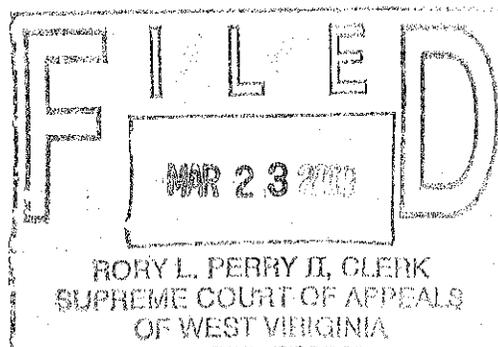
APPEAL NO.: 34703

CASE NO.: 02-D-209

vs.

**ROBERT J. HELFER,
PETITIONER BELOW, APPELLEE**

**FAMILY COURT OF
OHIO COUNTY,
WEST VIRGINIA**



BRIEF OF THE APPELLEE, ROBERT J. HELFER

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TO: THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF
APPEALS OF THE STATE OF WEST VIRGINIA

HON. BRENT D. BENJAMIN, CHIEF JUSTICE
HON. ROBIN JEAN DAVIS, JUSTICE
HON. JOSEPH P. ALBRIGHT, JUSTICE
HON. MARGARET L. WORKMAN, JUSTICE
HON. MENIS E. KETCHUM II, JUSTICE

RORY L. PERRY, II, CLERK

TABLE OF CONTENTS

Title Page **ii**

Table of Contents **iii**

Nature of the Proceeding and the Ruling in the Lower Court **1**

Statement of Facts of the Case **1**

Assignments of Error for Appeal/How Decided in Lower Court **5**

Points and Cases Supporting Appellee **5**

Discussion of Law/Assignments of Error **6**

1. Standard of Review **6**

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 **6**

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 **8**

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 ... **10**

Conclusion and Relief Prayed for **10**

Certificate by Attorney **11**

Certificate of Service **11**

The Appellee, Robert J. Helfer, by and through his counsel, Mark D. Panepinto, pursuant to the Order of this Court dated January 22, 2009, submits this brief in opposition to the Appeal from an Order of the Circuit Court of Ohio County, West Virginia, dated June 26, 2008, which affirmed a March 28, 2008, Order from the Family Court of Ohio County, West Virginia.

I. Nature of the Proceeding and the Ruling in the Lower Court

At issue in this Appeal is the single isolated issue of “enterprise goodwill” of a sole practice chiropractic business of the Appellee, Dr. Robert J. Helfer, incident to a divorce between the parties.

This issue of enterprise goodwill was previously before this Court and was remanded, with instructions, to the Family Court of Ohio County, West Virginia. The Family Court of Ohio County, West Virginia complied with the directions of this Court upon remand and issued an Order. The Family Court found, based upon the evidence during the original trial upon the issue of the practice’s value, that the Family Court did consider enterprise goodwill and that said chiropractic business had a zero (0) value allocable to enterprise goodwill. The Family Court articulated its reasoning in so finding a zero (0) value.

The Ohio County Circuit Court, Judge James P. Mazzone, found, upon appeal by the Appellant, that the Family Court followed the directions for remand and “addressed the concerns of the Supreme Court of Appeals”, contained within the Supreme Court of Appeal’s Order of remand. The Ohio County Circuit Court further found no clear error or abuse of discretion. It is from that Order of the Circuit Court affirming the decision of the Family Court finding zero (0) enterprise goodwill that the Appellant now brings this appeal.

II. Statement of Facts of the Case

The Appellee/Petitioner below, filed the underlying divorce action in 2002 and has been attempting to finalize this divorce case which is now in its seventh year. The time and expense in

which this case has required has caused significant hardship to the Appellee/Petitioner below both financially and mentally.

Nearly three years after the divorce case was initially filed, the Family Court of Ohio County, West Virginia, on April 1, 2005, provided the parties with an entire day in which to present testimony relative to litigating the value of the Petitioner's sole practice chiropractic business.

The Family Court, at the conclusion of that proceeding, valued the chiropractic business at Forty-One Thousand Dollars (\$41,000.00) and did not articulate in its Order any value attributable to enterprise goodwill of the said chiropractic business even though the Court concluded there was none. That Order of the Family Court was entered May 3, 2006. On November 7, 2007, this Court, upon appeal from the Order of the Family Court failing to articulate any enterprise goodwill value of the chiropractic business, ruled that the matter should be remanded to the Family Court with directions on how to address the issue of enterprise goodwill. This Court also gave directions to the Family Court to articulate its reasoning.

On March 28, 2008, the Family Court issued an Order which, in essence, found that the value of the enterprise goodwill of the chiropractic business was zero (0) and it articulated its reasoning that relied essentially upon expert witness, John Bodkin, a certified public account, who opined that there was no enterprise goodwill value associated with the chiropractic business primarily and because the income of the Appellee chiropractor was below the average income of chiropractors and that there were no excess earnings in which to apply any "multiplier" or capitalization theory to establish any enterprise goodwill. Said expert, who is an officer of the West Virginia State Board of Accounting and who's qualifications were not challenged, further supported his conclusion of zero (0) value for enterprise goodwill in that, essentially, the personal reputation of the chiropractor is of significance in evaluating enterprise goodwill and that the location of the chiropractic business is a secondary factor as opposed to the personal reputation of the doctor. Accordingly, the Family Court

concluded that there is no distributable enterprise goodwill associated with the Appellee's chiropractic business for equitable distribution purposes as any goodwill which may exist is obviously personal goodwill which is not subject to equitable distribution.

The Family Court further indicated in its Order upon Remand that **it had properly recognized the concept of enterprise goodwill, considered the same, and gave no value to it.** (emphasis added) Even further, and most significantly, the Family Court recognized that the transcript previously forwarded to this Court in the original appeal contained a **"vital error"** (emphasis added) in the transcript upon the issue of enterprise goodwill when said expert of the Appellee was asked the question "You don't give any value to enterprise goodwill, is that correct?". The Family Court recognized that the transcript submitted to this Court praying for the original appeal indicated the expert's response was "I broke it down.", when the actual testimony of the expert, according to the audio/video recording made of the hearing, the hand written notes made contemporaneously with the testimony by the Family Court judge, as well as the affidavit by the expert, all indicated that the Appellee's expert's answer was "I really don't."

The Family Court, followed the remand instructions of this Court in entering its Order upon Remand wherein it found that the enterprise goodwill value of the chiropractic business was zero (0) and it had articulated its reasoning for so finding. While it certainly is not disputed that the Appellant's expert gave testimony that there was enterprise goodwill associated with the chiropractic business, and that the Family Court judge therefore considered the Appellant's testimony of enterprise goodwill, the Family Court judge, nonetheless rejected that testimony and chose to agree with the opinion of the Appellee's expert relative to zero (0) value for enterprise goodwill. It is well-settled legally, that when there is competing testimony upon an issue, that it is within the sound discretion of the Family Court judge to rule and that such rulings should not be disturbed on appeal under the clearly erroneous standard of review. The Family Court judge in opining that zero (0)

enterprise goodwill was associated with the chiropractic business, applied the burden of proof standards properly, as recited by this Court in May vs. May, 214 W. Va. 394, 400; 589 S.E.2d 536, 542 (West Virginia 2003) (footnote 10) by requiring the Appellant to carry that burden. Id. at 400, 542.

The location of the business is not a consideration of enterprise goodwill of the chiropractic business as Appellant received her share of the equity in the real estate and the location of that real estate was certainly a major component of its value. To award additional money again for location would be double dipping of awards. The Appellee's expert in concluding that the chiropractic business of the Appellee had zero (0) enterprise goodwill applied the standards generally relied upon by experts in his field by rejecting a multiplier because no excess earnings existed and that the location of the business is excluded from consideration of enterprise goodwill. Much of this same rationale was recognized by this Court in May as criteria commonly used by accountants when addressing this issue. Id. at 544, 402; and Id. at 547, 405.

After the issue of enterprise goodwill was decided against the Appellant in the Family Court, the Appellant, six years into this litigation, has sought to name a new expert with a new report and to somehow integrate this new expert and his new report into this litigation/appeal. Said new expert, Daniel Selby, and his new report, which surfaced six years into this litigation and five years after the discovery/expert and 26(b)(4) deadlines, has never been admitted in any proceeding and should not be considered by this Court in any manner.

It should be noted that the real estate in which the chiropractic business was located, has been valued and allocated/divided by the Family Court and that issue has become final. It is also worthy of note that the Family Court has required the Appellee chiropractor to provide significant monthly alimony/spousal support unto the Appellant for many years and any enterprise goodwill which may be injected into this case allocable to the chiropractic business, should certainly have an offset- effect

on alimony as this Court has recognized that a “double dip” occurs when you have an alimony awarded based upon a future income stream and enterprise goodwill which is capitalized upon the theory of the very same future income stream. It is further worthy of note that the Family Court judge did indicate in prior Orders that he considered the equitable distribution allocation between the parties and the liquidity picture, in awarding significant alimony to the Appellant as well as required the Appellee to pay all of the attorney fees of the Appellant incurred before the Family Court.

Based upon all of the foregoing, the Order upon Remand issued by the Family Court of Ohio County, West Virginia, Judge William F. Sinclair, entered on March 28, 2008, is not clearly erroneous, is supported by expert testimony with well accepted rationale utilized by experts in the accounting/appraisal fields and recognized by this Court, and in full compliance with the remand Order of this Court.

III. Assignments of Error for Appeal/How Decided in Lower Court

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 Cases Supporting Appellee

Cases

May v. May,
214 W.Va. 394, 589 S.E.2d 536 (W.Va. 2003) 4, 6, 7, 8, 9, 10

Carr v. Hancock,
216 W.Va. 474, 607 S.E.2d 803 (W.Va. 2004) 6

Rules

West Virginia Rule of Evidence 702 10

V. **Discussion of Law**

1. **Standard of Review**

Upon appeal, this Court, in reviewing decisions of the lower courts, applies a clearly erroneous standard. Carr vs. Hancock, 216 W.Va. 474, 607 S.E.2d 803 (West Virginia 2004). The judge of the Family Court's application of the law to the facts is reviewed by this Court under the abuse of discretion standard. Id. All questions of law are reviewed by this Court under the *de novo* standard of review. Id. The Appellee agrees with the Appellant that pursuant to the holdings of May vs. May, 214 W.Va. 394, 589 S.E.2d 536 (West Virginia 2003), that the issue of enterprise goodwill is a fact question.

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.**

It is beyond fathom how the Appellant asserts that the Family Court judge's ruling is clearly erroneous as a matter of law when the precise criteria recognized by this Court in May vs. May, Id. relative to the types of experts utilized, the valuation methods utilized, the criteria of the valuation methods to be considered, as well as the burden of proof rules, all were followed, considered, and properly ruled upon after extensive litigation. While the Appellee agrees with the Appellant's assertion that this Court has not yet adopted a precise valuation method when addressing the issue of enterprise goodwill and that the Court has recognized as recited in the May case, that a number of methods may be acceptable, this Court has recognized that capitalization of excess earnings is a proper method to be utilized when calculating enterprise goodwill and this is specifically the method employed by the Appellee's expert in rejecting such capitalization calculations when he opined that the use of any multiplier (capitalization) is inapplicable to this case when there are no excess earnings in which to capitalize or multiply.

The Family Court articulated that, while it considered the testimony of Appellant's expert, Jack R. Felton, that it had rejected the valuation method utilized. The Family Court in its Order entered on May 3, 2006, which addressed the issue of the consideration given by the Family Court to the Appellant's expert, the Family Court indicated:

"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 the old office equipment. Felton made adjustments for depreciation but didn't and couldn't justify the depreciations." (See Order entered May 3, 2006, page 4, paragraph 9)

Further, the Family Court when rejecting the expert testimony of the Appellant's expert further indicated that:

"Mr. Felton used an excess earnings method to calculate the business value at \$388,000.00. This Court finds there is no basis in fact for this valuation."

The Appellee agrees with the Appellant's assertion that the testimony in which the Family Court based its conclusion that there was zero (0) enterprise goodwill was based upon testimony which essentially was that the reputation of the doctor is paramount, that there is no enterprise goodwill to this practice, and that there are no excess earnings in which the capitalize to determine enterprise goodwill. It is the Appellee's position that there simply are very few ways in which to say zero (0) or no value. Without being redundant, the clear substance of the testimony of the Appellee's expert indicating zero (0) enterprise goodwill and the Family Court's concurrence, was based upon the criteria recognized by this Court as recited in May and as indicated above in this brief, as well as based upon hundreds if not thousands of years of evolution of substantive/procedural rules relative to burden of proof.

The Appellant implies that Appellee's expert, Mr. Bodkin's, answer of "I don't" when asked to confirm his belief that no enterprise goodwill existed, is completely from the hip and without merit. In fact his conclusion of no enterprise goodwill was a conclusion he arrived at based upon a review of both parties' submitted appraisals, testimony, and the calculated opinion that he arrived at based upon those reviews. While the Appellant argues for this Court to adopt a specific or accepted approach for establishing enterprise goodwill, the Appellee submits that this Court has already done so and very clearly done so pursuant to May vs. May. In a practical sense, this Court should not seek to require expert accountants or appraisers to value sole practice businesses utilizing a specific method for which there are differing schools of thought. Similarly, this Court should not require full blown appraisals often costing tens of thousands of dollars in cases involving sole practice or similar "mom and pop" type businesses. To do so would only tend to extend the significant time period which is already required to obtain a divorce in the state of West Virginia and would substantially increase the cost of litigation to all parties.

It is worthy of note that at the time of the final divorce hearing in this case, that the parties had nearly one million dollars of debt and a net worth of only approximately one-third of that amount. It would be wasteful and senseless to require parties with limited net resources to be forced to utilize specific experts utilizing specific criteria as defined by this Court whenever there already exists widespread and widely accepted methods for valuation used throughout the accounting/appraisal industry which this Court has previously recognized.

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 Appellee disagrees with the Appellant's contention that the Family Court has not implemented both the letter and spirit of the remand instructions of this Court. Valuation methods utilized by the Family Court were based upon competent evidence utilizing the valuation methods

as articulated by this Court in the May opinion and, the Family Court simply found that there was no enterprise goodwill. Pursuant to the specific remand instructions, the Family Court did articulate its reasons for so finding its value of zero (0) and explained those findings in its March 28, 2008, Order. That Order was affirmed by the Ohio County Circuit Court.

In essence, what the Appellant is requesting, is “another bite at the apple”. The Appellant seeks to introduce new evidence utilizing a new expert over a half decade subsequent to the deadline for disclosing such experts and opinions. This Court should not fashion a rule to enable a “second or multiple bite(s) at the apple” in enterprise goodwill cases as it would be contrary to long held burden/evidentiary procedures and would only tend to further congest the family courts of West Virginia with having to relitigate not only this enterprise goodwill case but perhaps other enterprise goodwill cases in which litigants are aggrieved by the various family courts’ rulings.

The full value of this practice has already been divided and awarded. The value of this practice arises from the income of the practice, which was ruled upon by utilizing true tax returns that showed the true actual income from the existing 20-year-old business. The value of the real estate was decided upon by written appraisals with expert testimony which fully considered the location of the business, and has been previously awarded. This Court has already allowed that issue to become final. The assets of the practice were valued, divided, and awarded. The only element of the practice not final is the goodwill. The personal goodwill cannot be divided by equitable distribution in divorce. May Id. Enterprise goodwill consists of excess earnings. If there were any excess earnings, the income statements would have shown the excess income in the years past separation of the parties. It is a fact that the income of the parties has declined, in essence reinforcing the conclusion that no enterprise goodwill exists, as there has been no excess earnings as Appellee’s expert’s expectations were correct, as verified by reality. Therefore, it appears that the Appellant has in fact received a very favorable award.

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.

As indicated above in this brief, the qualifications of Appellee's expert, John Bodkin, were not challenged at trial. The substance of his testimony complied with Rule 702 of the West Virginia Rules of Evidence and specifically complied with the highly technical and enumerated criteria pursuant to May, Id. The Appellee further disagrees with the Appellant's contention that it is "simply impossible" to have no enterprise goodwill associated with the chiropractic business at issue in this litigation. The Appellee points out that the May case and the other two chiropractic cases from other jurisdictions recited in May [Roth v. Roth, 406 N.W.2d 77 (Minn.App. 1987) and Antolik v. Harvey, 7 Haw.App. 313, 761 P.2d 305 (Haw. 1988)] are chiropractic cases in which zero (0) value was attributed to enterprise goodwill.

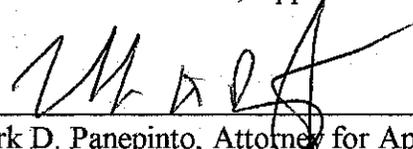
The Family Court's findings relative to no enterprise goodwill are supported by a reliable evidentiary basis which support the factual conclusions.

VI. Conclusion and Relief Prayed for

The Appellee asserts that the ruling of the Family Court of Ohio County, West Virginia is not clearly erroneous on its face, is in full compliance with the Remand Order of this Court, based upon competent evidence utilizing accepted criteria, and should be left undisturbed by this Court.

Wherefore based upon all of the foregoing the Appellee, Robert J. Helfer, prays that this Honorable Court affirm the March 28, 2008, Order of the Family Court.

Respectfully submitted,
ROBERT J. HELFER, Appellee

By: 
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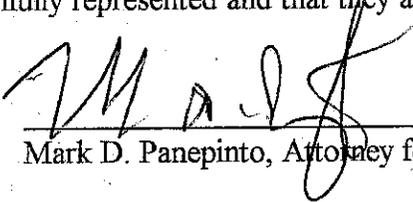
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FAMILY COURT OF
OHIO COUNTY,
WEST VIRGINIA

CERTIFICATE BY ATTORNEY

I hereby certify, pursuant to Rule 4(A)(c) of the West Virginia Rules of Appellate Procedure, that the facts alleged herein are faithfully represented and that they are accurately presented to the best of my ability.


Mark D. Panepinto, Attorney for Appellee

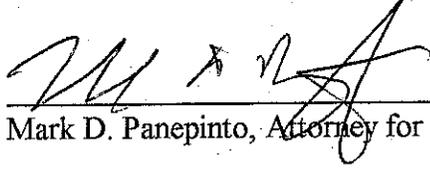
CERTIFICATE OF SERVICE

Type of Service: By Regular U. S. Mail

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