

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DONNA F. WILSON,

Appellant,

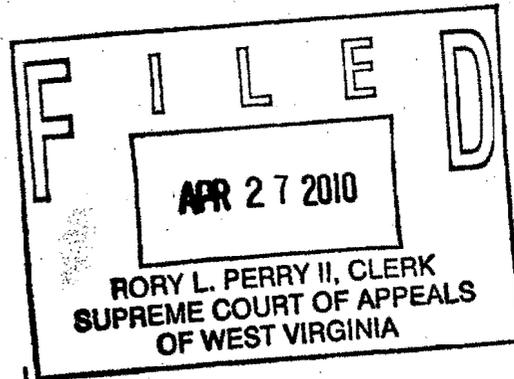
Appeal No. 35475

v.

LEON HUNTER WILSON,

Appellee.

REPLY BRIEF OF APPELLANT



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REPLY BRIEF OF APPELLANT

COMES NOW, Appellant, Donna F. Wilson, now known following divorce as Donna F. Miller (hereinafter for clarity "Donna Wilson" or "Wife"), by counsel, and files this Reply Brief in Support of her Appeal, stating as follows:

I. REPLY TO HUNTER WILSON'S STATEMENT OF FACTS AND FACTUAL ASSERTIONS

Hunter Wilson asserts that the Hunter Company of West Virginia (the "Hunter Company") is not an enterprise because of his self-perception, and the perception of Alan Murray regarding Hunter Wilson's importance to the company. While Hunter Wilson continues asserting the false statement that he was the sole employee of the Hunter Company, he also asserts that the twenty to twenty-five highly-skilled Hunter Company employees were not competent to finish the roads at the Westvaco and The Point projects and sell the remaining lots, notwithstanding their training and skill.

Hunter Wilson hopes that this Court will ignore the terms and conditions of Wife's Exhibit 1, the Management Agreement between the Hunter Company and National Land Partners (the "Management Agreement"). Section 3.2.2 of the Management Agreement is absolutely clear that the business of the Hunter Company would continue, and the Hunter

Company would continue to enjoy profits from “existing projects” even if Hunter Wilson died or became disabled:

In the event of the death or incapacitation of L. Hunter Wilson, Company will hire a substitute person or entity to manage the Project. In the event a substitute is hired, Manager shall be entitled to its compensation as determined in Section 6 using generally accepted accounting principles consistently applied, however, the cost of such substitute manager shall be an expense of the Project. (Emphasis added.)

Hunter Wilson asserts that no other person in West Virginia was capable of managing the Hunter Company in exchange for a salary of \$300,000 per year — a sum twice as much as West Virginia’s governor is paid to manage a far more complex enterprise.

Hunter Wilson asserts that he was the only employee when substantial evidence was submitted to the contrary, including his own testimony.

Hunter Wilson asserts that the advertising relevant to enterprise goodwill decisions in other jurisdictions is somehow diminished by the fact that each project paid the cost of such advertising through National Land Partners.

Hunter Wilson asserts that only one of the seven business locations — the office in Martinsburg — was owned by the Hunter Company.¹ Hunter Wilson argues that the remaining six locations were owned by a subsidiary of National Land Partners, not the Hunter Company. In this regard, Hunter Wilson missed the point. Six separate business locations with six separate marketing names are evidence of an enterprise. This would be compelling evidence whether the “enterprise” managed six different hotels at six different locations; six different automobile dealerships; or six different fast food restaurants. The salient point is that having multiple

¹ The assertion of ownership of the office in Martinsburg is also incorrect. As is noted from the record, the parties stipulated as to Cast Hill, LLC, which was the limited liability company that owned the location where the Hunter Company’s offices were located. However, the ownership and value of Cast Hill was resolved by stipulation achieved between the first day of trial in January 2008 and was announced to the Family Court on the second day of trial on May 8, 2008.

locations and having management responsibilities at different locations is evidence of an enterprise.

Hunter Wilson has failed to fully address the essential facts found by the Berkeley County Family Court (the "Family Court") in concluding that enterprise goodwill existed:

- The Management Agreement provided revenue and profits to the Hunter Company even following the death of Hunter Wilson (*see* Wife's Exhibit 1 at Section 3.2.2);
- The Hunter Company managed six (6) separate real estate projects in six (6) different locations in West Virginia (*see* Wife's Exhibits 8-10 and 15 and Husband's Exhibits 7-13);
- The Hunter Company employed more than twenty (20) highly skilled and trained employees (*see* May 8, 2008 Trial Transcript at page 122, lines 23-25; page 123, lines 6-25; and page 124, lines 1-18);
- Several of the Hunter Company's employees, other than Hunter Wilson, earned more than \$300,000 per year (*see* May 8, 2008 Trial Transcript at page 126, lines 3-19); and
- The expert testimony of Kenneth Apple ("Mr. Apple"), a certified public accountant who opined that enterprise goodwill clearly existed and was valued at \$9,381,420 (*see* May 9, 2008 Trial Transcript at page 46, lines 4-15).

Hunter Wilson's assertions that the construction spending theory was consistent with generally accepted accounting principles ("GAAP") cannot be reconciled with the facts presented at trial.

Finally, Hunter Wilson's assertion that profits due to the Hunter Company had both a marital and non-marital aspect is simply untrue; inconsistent with the law; and a misdirection in relation to the facts of this case. Prior to the second day of trial, Hunter Wilson and Donna Wilson resolved all issues, other than the value of the Hunter Company stock. The Hunter Company stock was unequivocally a marital asset. The only question for the Family Court was

whether the Hunter Company possessed enterprise goodwill and the value of said enterprise goodwill.

II. SUMMARY OF THE ARGUMENT

The Family Court complied with the mandate of both *Helper v. Helper*, 221 W.Va. 625, 656 S.E.2d 70 (2007) (“*Helper I*”) and *Helper v. Helper*, 224 W.Va. 413, 686 S.E.2d 64 (2009) (“*Helper II*”) by articulating the precise basis for finding both the existence and value of enterprise goodwill of the Hunter Company. The Berkeley County Circuit Court (the “Circuit Court”) violated the mandate of both *Helper* cases by applying the “*construction spending theory*,” which theory was (1) unsupported by required expert testimony; (2) inconsistent with generally accepted accounting principles (GAAP); and (3) not a goodwill valuation theory.

Whether or not a business entity possesses enterprise goodwill is a subject for expert testimony, as is the valuation of any such goodwill. The Circuit Court’s errors in reversing the Family Court included improperly supplanting the Family Court’s judgment and accepting the “*construction spending theory*.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) stand for the proposition that opinion evidence must be supported by reliable expert testimony in order for those theories to be admitted into evidence. The error of the Circuit Court in this case calls for guidance similar to that provided by the United States Supreme Court in *Daubert* and *Kumho* but in an accounting context (related to GAAP) and in the goodwill valuation context.

The Family Court rejected the construction spending theory in part because the “*theory*” is inconsistent with GAAP. GAAP is important in this case because profits to be paid to the Hunter Company were to be calculated applying GAAP.

6.2 As stated in Section D of the attached Schedule to this Agreement, all or a portion of the compensation due to Manager shall be based on "Net Profit", and the parties agree that Net Profit shall mean "Profit" for the Project and/or Scheduled Property, as determined in accordance with generally accepted accounting principles consistently applied . . .

See Wife's Exhibit 1 at Section 6.2.

This fact is undisputed. Shockingly, the Circuit Court concluded that the construction spending theory was consistent with GAAP notwithstanding the following:

- Alan Murray from National Land Partners conceded at trial that the construction spending theory was not consistent with GAAP. See September 11, 2008 Trial Transcript at page 6, lines 1-18.
- Alan Murray conceded that his summary exhibits supporting his construction spending theory and were not consistent with GAAP. See September 11, 2008 Trial Transcript at page 6, lines 23-25; page 7, lines 1-25; and page 8, lines 1-21.
- Donna Wilson's expert, Kenneth Apple, offered the opinion that the construction spending theory was inconsistent with GAAP. See September 11, 2008 Trial Transcript at page 116, lines 3-25.
- Hunter Wilson did not call or qualify any expert witness for any purpose, including the issue as to whether or not the construction spending theory was consistent with GAAP; whether the construction spending theory was an appropriate or valid method of valuation; and whether enterprise goodwill existed.
- At trial, because of discovery misconduct², Donna Wilson objected to evidence of a construction spending theory because of the absence of a foundation, the absence of expert opinion and the irrelevance of the construction spending theory given its inconsistency with GAAP. See May 8, 2008 Trial Transcript at pages 160-194 and May 9, 2008 Trial Transcript at pages 42-48.

While the Family Court explained why it rejected the construction spending theory, as *Helper I* and *Helper II* mandate, the Circuit Court did not tell us how it determined that the construction spending theory was consistent with GAAP. Footnote 2 of the Circuit Court Opinion asserts that the construction spending theory is "*consistent with generally accepted*

² In its initial ruling, the Family Court excluded the evidence based on discovery misconduct. See May 9, 2008 Trial Transcript at page 166, lines 15-17. The Family Court later reconsidered and allowed the evidence, subject to additional discovery before the last day of trial. See May 9, 2008 Trial Transcript at pages 189-193.

accounting principles (GAAP)” without citing any expert or evidentiary basis for that conclusion.³

The Circuit Court exceeded its authority in relation to the record before it when it asserted that the Family Court was clearly erroneous. Not only was the Family Court’s Opinion correct and consistent in all respects with *May v. May*, 214 W.Va. 394, 589 S.E.2d 536 (2003) and the *Helper* cases, but it is clear from the record that the Circuit Court was clearly erroneous. By way of example, the Circuit Court concluded from the record that it was “*undisputed*” that Hunter Wilson was the only employee of the Hunter Company:

In addition, the Family Court was clearly wrong with it found that HCWV “has a qualified and highly compensated work force. . . .” The evidence was not in dispute that this “work force” is composed entirely of employees of Inland Management Co., an NLP subsidiary. HCWV has only one employee, Mr. Wilson, and if he left HCWV, it would collapse entirely.

See Circuit Court Opinion at p. 15.

This false assertion continues to be argued in Hunter Wilson’s Brief to this Honorable Court. This argument by Hunter Wilson and the conclusion by the Circuit Court are simply false and misleading, given the substantial evidence presented to the Family Court that the Hunter Company had twenty to twenty-five highly skilled employees. The Circuit Court simply got it wrong when it asserted that this was an “*undisputed issue*.”

³ As discussed herein, references by Hunter Wilson to citations in the record are misleading, if not misconduct.

III. ARGUMENT

A. The “Construction Spending Theory” Violates the Mandate of Helfer and was Inconsistent with GAAP

1. Helfer I and II Require Expert Testimony on the Existence and Valuation of Enterprise Goodwill

As recently as November of 2009, this Honorable Court revisited the issue of enterprise goodwill in *Helfer II*. It is clear from both *Helfer I* and *Helfer II* that expert testimony is necessary to determine whether or not enterprise goodwill exists and for the valuation of such goodwill. In *Helfer I*, this Court remanded to the Family Court for an articulation of “a reasonable approximation of the business’ enterprise goodwill, if any, based upon competent evidence and on a sound valuation method.” *Id.* at 628 (Emphasis added). This Court also instructed the Family Court to articulate its reasoning for finding either the existence or non-existence of enterprise goodwill and the value therefor.

Footnote 1 to *Helfer II* explicitly confirms expert testimony is required to satisfy the “competent evidence” requirement articulated in *Helfer I* on the issue of goodwill:

Because the issue in Helfer I involved only whether the family court was required to take into account the value, if any, of enterprise goodwill, it was not necessary in that case that we set forth the substance of either the valuation reports prepared by the parties’ respective accounting experts or the experts’ testimony elicited at the April 1, 2005, hearing. In the instant appeal, however, the experts’ reports and testimony are crucial to our determination that the family court committed no error in concluding that Appellee’s chiropractic business has an enterprise goodwill of zero. Accordingly, this opinion sets forth, in some detail, those portions of the experts’ testimony and reports which are relevant to our holding in this appeal.

Id. at 416, 67.

The Circuit Court’s reliance upon *Webb v. Chesapeake*, 105 W.Va. 555, 144 S.E. 100 (1928) is an additional indication of the Circuit Court’s failure to follow the guidance of *Helfer*. While *Webb* certainly stands for the proposition that facts may outweigh expert testimony, it also

stands for the proposition that the **trier of fact** — not a Circuit Court sitting as an appellate court — may credit such facts and give them greater weight than the opinion of an expert. However, on the issue of goodwill, both *Helper* cases mandate that a trier of fact formulate a “*reasonable approximation of the business enterprise goodwill.*” This approximation is necessarily a conclusion based upon expert testimony. The holding in *Webb* cannot be reconciled with *May*, *Helper I* and *Helper II* in the context of enterprise goodwill in an equitable distribution proceeding.

A reasonable approximation is not counting money, counting bales of hay or weighing ounces of gold or tons of coal. The reasonable approximation of goodwill value is:

[T]he advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein, in consequence of general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices. [T]he value of a business or practice that exceeds the combined value of the net assets used in the business. Essentially, goodwill is “the favor which the management of a business has won from the public, and probability that old customers will continue their patronage.” *Gaydos v. Gaydos*, 693 A.2d 1368, 1372 (Pa.Super.1997) (quoting *Ullom v. Ullom*, 384 Pa.Super. 514, 559 A.2d 555, 558-59 (1989)). Further, marketable “[g]oodwill associated with a business is an asset distributable upon dissolution of a marriage.” *Seiler v. Seiler*, 308 N.J.Super. 474, 706 A.2d 249, 251 (1998) (citation omitted). However, “[w]here no market exists for goodwill, it should be considered to have no value.” *Manelick v. Manelick*, 59 P.3d 259, 265 (Alaska 2002).

May at 541, 399.

2. **The Construction Spending Theory is “Junk Accounting”
Similar to Junk Science as Prohibited by *Daubert***

Rule 402 of the West Virginia Rules of Evidence requires a relevance gate keeping function. In this case, relevance was framed by the Management Agreement’s provision that profits due and payable to the Hunter Company be calculated applying GAAP. Pursuant to

Helper I and *II*, such evidence must be supported by expert testimony. Donna Wilson's expert, Kenneth Apple, was qualified as an expert witness and offered opinions with regard to the existence of enterprise goodwill and the value thereof. Rather than offer an opposing expert opinion criticizing or contradicting Mr. Apple's opinions and valuation methodology (which opinions were admitted into evidence without objection), Hunter Wilson offered the construction spending theory to the Family Court through lay, rather than expert, witnesses.

As noted in the section of this Reply related to the Rule 59 issues, Donna Wilson objected to the admission of evidence inconsistent with GAAP and not produced pursuant to a Court Order compelling such information. Notwithstanding these objections, the Family Court admitted the information into evidence and appropriately gave it very little weight as set forth in the Family Court's Findings of Fact and Conclusions of Law.

Donna Wilson respectfully contends that guidance must be directed towards the Berkeley County Circuit Court, in relation to the role of an appellate court, and regarding the necessity of expert testimony in an equitable distribution proceeding where goodwill is an issue. Although the mandate from *Helper I* is clear, the Circuit Court clearly ignored that mandate.

At trial, it was undisputed that the "*construction spending theory*" was the methodology that National Land Partners and the Hunter Company used to keep track of projects and distributions for internal purposes.⁴ The essence of the evidence offered and one of the many reasons that the Circuit Court committed error is that the construction spending theory did not provide a true picture as to "*net profits*" due to the Hunter Company under GAAP.

The construction spending theory is not a valuation theory, or at least no evidence was presented at trial that it was. The question, therefore, was what was the relevance of the

⁴ Schedule D of the Management Agreement (see Husband's Exhibits 1-4) specifically provided that the Hunter Company and National Land Partners would "*determine jointly*" when profits might be distributed not "*less frequently than quarterly*." See Subsection D of Husband's Exhibits 1-4.

construction spending theory in the case at hand? Hunter Wilson would have this Court believe that the construction spending theory is an accurate valuation methodology for calculating net profits. This assertion is simply not true. The first reason it is a false and misleading proposition because the theory is not consistent with GAAP. The second reason is that the theory is not the kind of “*competent evidence*” contemplated by *Helper I* and *Helper II*.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the United States Supreme Court provided all trial courts with guidance regarding the admission of scientific evidence. The rationale behind *Daubert* was applied to experts of all kinds by virtue of the United States Supreme Court’s decision in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Courts around the country have concluded that the *Daubert* and *Kumho* analysis therefore must be applied to technical information, including accounting issues. See also *Turner v. Home Depot U.S.A., Inc.*, 2009 WL 2604533, Mass.Super., June 26, 2009 (No. 20070781); *Investor Resource Services, Inc. v. Cato*, 15 So.3d 412 (2009); *Haupt v. Heaps*, 131 P.3d 252 (2005); *Ashy v. Trotter*, 888 So.2d 344 (2004); *Message Center Management, Inc. v. Shell Oil Productions Co.*, 85 Conn.App. 401, 857 A.2d 936 (2004); *Family Health of Delaware, Inc. v. Brar*, 2004 WL 1588257, Del.Super., May 28 2004 (No. Civ.A. 02-C-04-011 WLW); *Stanley Tulchin Associates, Inc. v. Grossman*, 2002 WL 31466800, 2002 N.Y.Slip.Op. 50425(U), N.Y.Sup., October 10, 2002 (Index No. 1236/99); *Pepe & Hazard v. Jones*, 2002 WL 31255542, Conn.Super., September 11, 2002 (No. XO2CV960151601S); and *Magid v. Acceptance Ins. Companies, Inc.*, 2001 WL 1497177, Del.Ch., November 15, 2001 (No. CIV.A. 17989-NC).

Certainly, it cannot be argued that a layperson would be familiar with what is, and what is not, consistent with GAAP. Accordingly, *Daubert* and *Kumho* mandate that the analysis of “*net*

profits” calculated consistently pursuant to “*generally accepted accounting principles*” such as required in the Management Agreement, be subject to the review mandated by *Daubert* in order for the same to be reliable.

Through lay witnesses, Hunter Wilson asserted to the Circuit Court, and to the Family Court before it, that the Hunter Company was overpaid in relation to the Ashton Woods project by \$2,680,672 as of the time of separation, but only \$276,176.32 over the life of the project. This admission is contained on pages 13 and 14 of Hunter Wilson’s Brief, where he asserts that profits were paid to the Hunter Company in the sum of \$11,892,096.32 and that only \$11,615,290 were earned.

Based on the evidence presented to the Family Court, what was the significance of this \$276,176.72 difference?⁵ More important, what is the relationship between \$276,176.32 overpayment and the alleged overpayment of manager fees as of the time of separation in an amount of \$2,680,672 — based on the construction spending theory? The answer is that these numbers bear **no significance** because they do not relate to the value of the Hunter Company’s enterprise goodwill.

In *Daubert* and *Kumho*, the Supreme Court articulated why certain scientific studies such as astrology have no place in evidence as they constitute junk science and are not reliable. Long ago, Mark Twain spoke the axiom “*lies, damned lies and statistics*,” and attributed the axiom to Benjamin Disraeli. Offering the construction spending theory into evidence, when the same is

⁵ Kenneth Apple considered all results provided to him in formulating his opinion, including the aforementioned calculation of manager fees for Ashton Woods. Specifically, Mr. Apple testified that he did not include fees from Ashton Woods in his valuation because they had already been paid. See May 9, 2008 Trial Transcript at page 92, lines 23-25 and page 93, lines 1-8. This alleged overpayment of \$276,176.32 amounts to approximately 2.9% of his \$9,381,420 valuation of the Hunter Company stock. It is also important to recall, as is explained later, that Mr. Apple reduced the value of projected net profits by approximately \$1.8 million, reflecting replacement manager fees as if Hunter Wilson had died or become disabled — which clearly has not occurred. That reduction of value in Mr. Apple’s “*reasonable approximation*” of goodwill value is approximately 19%.

inconsistent with GAAP, and was not a valuation theory for the stock of the Hunter Company, constituted “*lies, damned lies and statistics.*” This theory would have and should have been excluded from evidence by the Family Court — although the Family Court clearly gave the theory little, if any, weight. *See* Finding of Fact No. 24. On the other hand, the Circuit Court improperly weighed this evidence a second time and decided to credit the construction spending theory to the exclusion of evidence that was, in fact, consistent with GAAP.

In relation to the enterprise value of the Hunter Company, the question for the Family Court is what was the goodwill value on the date of separation; not what was the percentage of construction spending. Kenneth Apple explained fully what he considered; what he did not consider; and why. His opinion was entered into evidence and accepted as is addressed hereinafter. The Circuit Court’s reliance upon “*lies, damned lies and statistics*” and the rejection of competent expert testimony is error.

3. **Hunter Wilson’s Lay Witnesses Admitted that the Construction Spending Theory was Inconsistent with GAAP**

The Family Court concluded that Hunter Wilson’s witnesses had conceded that the so-called constructing spending theory was inconsistent with GAAP. *See* Finding of Fact No. 24. “*Hunter Wilson did offer testimony of Joan Holz and Alan [sic] Murray to counter this by a different methodology, which they acknowledged did not apply GAAP.*” This conclusion was clearly confirmed by the testimony of Alan Murray from National Land Partners who explained the construction spending theory during his testimony on May 9, 2008. Mr. Murray acknowledged that he had read an opinion from Kenneth Apple that indicated that the financial statements that included information regarding the construction spending theory were not consistent with GAAP and Mr. Murray testified that he would “*stipulate*” that it was correct to

conclude that the theory was inconsistent with GAAP. See May 9, 2008 Trial Transcript at page 150, lines 7-25 and page 151, lines 1-10.

Accordingly, the Family Court was absolutely correct when it concluded that the construction spending theory was inconsistent with GAAP and the Circuit Court, on appeal, was absolutely wrong when it concluded that the construction spending theory was consistent with GAAP.

Mr. Murray was also called as a witness on the final day of trial, September 11, 2008.

Mr. Murray was asked to admit that:

Q. Mr. Murray, when we visited together back in May, during your direct examination I believe on several occasions you indicated that some accountants would indicate that the way that National Land Partners accounts for projects through the Hunter Company of West Virginia, would not be consistent with GAAP, is that correct?

A. That's partially correct.

See September 11, 2008 Trial Transcript at page 6, lines 1-8.

Later in his testimony, Mr. Murray explained in detail how National Land Partners' accounting documents were inconsistent with GAAP. It is important to remember that Hunter Wilson did not offer Mr. Murray as an expert witness. Hunter Wilson did not call any expert witness to testify about the presence or absence of enterprise goodwill or the valuation thereof. However, Mr. Murray, a certified public accountant and the CFO of National Land Partners, clearly and repeatedly admitted that the accounting documents supporting the construction spending theory were not prepared in accordance with GAAP.⁶ See also September 11, 2008 Trial Transcript at page 6, lines 23-25; page 7, lines 1-25 and page 8, lines 1-21.

⁶ Mr. Murray became a CPA in 1979, but had not consistently practiced the discipline and last did so in 1986. He clearly would not have qualified as an expert witness on these issues at trial.

4. **Donna Wilson's Accounting and Valuation Expert Presented an Unrebutted Opinion that the Constructing Spending Theory was Inconsistent with GAAP**

Kenneth Apple is a certified public accountant who was offered as an expert witness on behalf of Donna Wilson. As noted in the Opening Brief, Hunter Wilson stipulated as to his credentials and the appropriateness of his expert testimony pursuant to Rule 702 of the West Virginia Rules of Evidence. Both on direct and cross examination, Mr. Apple was questioned about GAAP in relation to the construction spending theory advocated by Hunter Wilson's witnesses:

Q. Mr. Apple, you were present in the Courtroom when Mr. Murray testified about various elements that resulted in the alleged calculation of manager fees, were you not?

A. Yes.

Q. And you heard him explain the elements of the various documents that he had previously identified including the income to date statements?

A. Yes.

Q. And you also saw him show the other accounts payable schedules and those sorts of things and my question is do you have an opinion to a reasonable degree of accounting certainty, as to whether or not the elements contained within Exhibits 22, 23, 24 and 25 are consistent with generally accepted accounting principles or GAAP?

A. I have an opinion, yes.

Q. Would you share with the Court your opinion regarding the elements of those four exhibits that do or do not comply with GAAP?

A. None of the elements of these would be GAAP because the financial statements that they were based upon were not in accordance with GAAP.

See September 11, 2008 Trial Transcript at page 116, lines 3-25.

Mr. Apple also specifically identified certain documents entered into evidence over Donna Wilson's objection, and offered an expert opinion that the documents were not consistent with GAAP:

Q. Okay, and so then would it also be true that Exhibit 26, the summary likewise would not be consistent with GAAP?

A. That is correct.

See September 11, 2008 Trial Transcript at page 117, lines 1-4.

Mr. Apple also provided an opinion to the Family Court as to why the application of GAAP was important given the requirements of paragraph 6.2 of the Management Agreement:

Q. Can you explain to the Court why you utilized GAAP when offering the opinions that you offered to this Court on May 8th?

A. Yes, because according to paragraph 6.2 GAAP is required.

See September 11, 2008 Trial Transcript at page 117, lines 19-23.

In Hunter Wilson's Brief, it is asserted that the construction spending theory is consistent with GAAP. This false assertion may be predicated on the testimony of Alan Murray who testified that at the end of the project, the construction spending theory and GAAP achieved the same result. On cross-examination, this fallacious contention was raised with Mr. Apple, who provided a contrary opinion:

Q. When the projects get to the end we have a completed project and we've taken all the revenues, deducted all the expenses and arrived at the net profit, your previous concerns about GAAP go out the window?

A. That would be true were it not for testimony I heard today, yes.

Q. And so what testimony did you hear today that caused you some concern?

A. The way the overhead expenses were allocated.

Q. But that... once you get to the end of the project, do those problems go away?

A. Not if I understood the testimony correctly.

Q. You just have concern about how expenses are allocated among these projects?

A. Basically, yes, because if the project before me is complete but there have been overhead expenses that were incurred by another project that were allocated to that project based upon the sales of the various projects, then generally accepted accounting principles would not allow me to expense against the current project expenses that were actually incurred on another project.

See September 11, 2008 Trial Transcript at page 123, lines 15-25 and page 124, lines 1-11.

Mr. Apple also testified that one of the difficulties in the approach that Hunter Wilson's witnesses took pursuant to the construction spending theory, and their internal methods of accounting, was that the expenses for the projects initiated after separation, which were not considered property of the Hunter Company were co-mingled from an expense perspective with the Hunter Company. The significance here is that in a Virginia project known as Black Diamond, Hunter Company employees would be paid to work on acquisition and development of the Virginia project, but their expenses would be paid from the Westvaco project, which was a marital asset. This was true because the Hunter Company and National Land Partners simply paid expenses based on which project had sales in a particular month. Mr. Apple explained how this internal accounting process created an inconsistency with GAAP:

Q. So do I understand that your quarrel is that allocating expenses from Black Diamond, having Westvaco pay Black Diamond expenses and reporting them as paid would be inconsistent with GAAP?

A. Yes.

Q. So even if we got to the end of the project, that problem, that deviance from GAAP would not be corrected?

A. That's correct.

See September 11, 2008 Trial Transcript at page 127, lines 17-25.

After Mr. Apple's testimony on September 11, 2008, Alan Murray was recalled to the stand by Hunter Wilson. On cross-examination, Alan Murray admitted that expenses associated with the Black Diamond project in Virginia were paid by the Westvaco project in a manner that was inconsistent with GAAP:

Q. Okay. But, but you would agree with me that allocating any overhead expense associated with Virginia Hunter, L.L.C., cannot be properly paid by West Virginia Hunter, L.L.C. pursuant to GAAP?

A. I would agree.

Q. And in all your statements, West Virginia Hunter and Virginia Hunter are intermingled in terms of overhead expense?

A. I would...that is a correct statement.

See September 11, 2008 Trial Transcript at page 135, lines 3-10.

5. **Donna Wilson's Accounting and Valuation Expert Presented an Unrebutted Expert Opinion on the Valuation of the Hunter Company**

Given the mandate of *May* and both *Helper* cases, it is of substantial significance that the only "competent evidence" of the "reasonable approximation of business enterprise goodwill" was presented by Donna Wilson through Kenneth Apple. As noted by Mr. Apple in his testimony, Paragraph 6.2 of the Management Agreement (Donna Wilson's Exhibit 1) framed the method of calculation of net profits:

6. **Compensation to Manager.**

6.1 For its services rendered under this Agreement, Manager shall receive and be paid by the Company compensation as provided in Section D of the attached Schedule to this Agreement.

6.2 As stated in Section D of the attached Schedule to this Agreement, all or a portion of the compensation due to Manager shall be based on "Net Profit", and the parties agree that Net Profit shall mean "Profit" for the Project and/or Scheduled Property, as determined in accordance with generally accepted accounting principles consistently applied for a period ending on the fifth anniversary of the date upon which 95% of the lots for that Project or Scheduled Property have been sold. Expenses shall include all ordinary and necessary project expenses, as well as an administrative fee to be paid to Company, or its nominee, equal to the percentage of gross sales set forth in the attached Schedule, Section B, and the "cost of capital" charge for monies advanced (whether as a capital contribution or loan) to the Project, also as part of the attached Schedule, Section B. Company shall receive a preferential profit participation before calculation of compensation payable to Manager equal to 12.5% of gross lot sales, 12.5% of the first \$700,000 of gross timber proceeds and 42.5% of the gross timber proceeds in excess of \$700,000. In the event that the amount of Company profit participation calculated in accordance with the preceding

formula exceeds the total Net Profit, then Manager shall receive no compensation based on profit participation.

Mr. Apple specifically testified that in his accounting and valuation business, he was called upon frequently to apply GAAP. *See* May 9, 2008 Trial Transcript at page 29, lines 14-22. Mr. Apple also testified that because of Section 6.2 of the Management Agreement, he opined that the value of the Hunter Company stock was based on three (3) factors: (1) the value of physical assets; (2) cash on hand; and (3) the present value of expected future profits on the Westvaco and The Point projects. *See* May 9, 2008 Trial Transcript at page 45, lines 4-25 and page 46, lines 1-15.

Reducing future income streams, or projected profits, to present value is a calculation conducted in the ordinary course of business by valuation experts such as Mr. Apple. In some circumstances, the future profits are rent from an apartment building, a shopping center or an office building. In other circumstances, future profits may be the result of operations from a chain of automobile dealerships or franchise restaurants. In any circumstance, reducing expected profits to present value is a process implemented frequently by certified public accountants and valuation experts. From the record, how do we know this? As in most cases, and in this one in particular, we know this from the evidence presented at trial, offered in the form of an opinion, and admitted into evidence pursuant to West Virginia Rule of Evidence 702. This evidence was the testimony of Kenneth Apple.

In addition to his opinions regarding the value of enterprise goodwill, Mr. Apple was likewise called to testify about the existence of enterprise goodwill and the non-existence of personal goodwill. Specifically on May 9, 2008, Mr. Apple testified that the Management

Agreement, Section 3.2.2⁷, provided for the continuation of net profits to the Hunter Company, even upon the death or disability of Hunter Wilson. Once again, pursuant to West Virginia Rule of Evidence 702, Mr. Apple offered the following opinion, which was unrebutted:

- Q. *I've forgotten the question, but I think it was asked to you to tell us how you determined that there was enterprise goodwill in relation to the present value of Hunter Company of West Virginia?*
- A. *Okay. The entire present value would be considered goodwill because the hard assets were the cash and the furniture and fixtures.*
- Q. *Can you tell me what about, what information disclosed to you about the Hunter Company caused you to determine there was enterprise rather than personal goodwill?*
- A. *Right. Primarily the management agreement that provides for that income stream to go to Hunter Company even if Mr. Wilson is passed away or becoming incapacitated or fired.*
- Q. *You're speaking of 3.2.2?*
- A. *I believe that's correct. Yes, 3.2.2.*
- Q. *Which also refers to Article 6.1.*
- A. *That's correct.*
- Q. *And are there any other factors or facts known to you about the Hunter Company of West Virginia that would be indicative that it had enterprise goodwill?*
- A. *Yes. Again, primarily the management agreement because the Hunter Company of West Virginia is not burdened with payroll benefits, that kind of thing, hiring and firing is all done by the people that he has the management agreement with.*
- Q. *Okay. So the management agreement itself, that contract itself creates enterprise value in your view?*
- A. *Yes. That's correct.*
- Q. *Because it creates a future income stream even upon the incapacity or death of Hunter Wilson?*
- A. *That's correct.*

⁷ Section 3.2.2 of the Management Agreement states: "In the event of the death or incapacitation of L. Hunter Wilson, Company will hire a substitute person or entity to manage the Project. In the event a substitute is hired, Manager shall be entitled to its compensation as determined in Section 6 using generally accepted accounting principles consistently applied, however, the cost of such substitute manager shall be an expense of the Project."

Q. *And the future income stream is the same stream it would have before?*
A. *Yes.*

Q. *Less that management cost that you talk about.*
A. *Yes.*

Q. *And so what value, if any, what value have you attributed, if any, to Hunter Company of West Virginia that would be considered personal goodwill?*
A. *Nothing.*

See May 9, 2008 Trial Transcript at page 68, lines 18-25; page 69, lines 1-25; and page 70, lines 1-2.

On cross-examination, Mr. Apple also testified that the evidence he heard at trial regarding twenty to twenty-five highly skilled employees supported his opinion regarding enterprise goodwill.

Not one of Mr. Apple's well formulated and supported opinions was challenged by any other expert witness, as none were called in this case by Hunter Wilson. As noted above, the construction spending theory cannot constitute a challenge to this opinion without required expert testimony and support.

Assuming without conceding that there was a \$276,176.72 overpayment at Ashton Woods, it is significant to note that this alleged overpayment would constitute a mere 2.9% of the valuation opinion of Kenneth Apple in the sum of \$9,381,420. This 2.9% difference does not violate the "*reasonable approximation of value*" for several reasons. The first reason is that Kenneth Apple reduced the value of the Hunter Company's stock by the cost of replacement management as if Hunter Wilson had died or become incapacitated. Obviously, this Reply is being written in April 2010 — approximately five years since the parties' separated. Hunter Wilson is alive and well and was at the time of trial. Notwithstanding this circumstance, Kenneth Apple reduced the value of the Hunter Company by the reasonable cost of management

or \$360,000 per year for the remaining five years of the projected sell off of the Westvaco project. This downward adjustment of \$1.8 million is equivalent to approximately 19% of Mr. Apple's almost \$9.3 million valuation.

B. The Circuit Court, Sitting as an Appellate Court, Ignored the Clearly Erroneous Standard to Upset Findings of Facts and Conclusions of Law of the Family Court Acting as the Trier for Fact

1. The Circuit Court, Sitting as an Appellate Court, Erroneously Concluded that it was "*Undisputed*" that Hunter Wilson was the Only Employee of the Hunter Company

Advocates in litigation must be zealous. This does not, however, permit an advocate to mislead the Court in the face of evidence before it. The Circuit Court concluded, in its Opinion, that it was undisputed that Hunter Wilson was the only employee of the Hunter Company. In Donna Wilson's Opening Brief, pages 15 through 24 in particular, actual testimony and evidence is identified that makes it clear that significant evidence was presented that the Hunter Company had twenty (20) to twenty-five (25) highly skilled employees, including specifically the following evidence:

- Hunter Wilson's testimony about the twenty to twenty-five employees and their specific roles. See May 8, 2008 Trial Transcript at page 122, lines 23-25; page 123, lines 6-25; and page 124, lines 1-18.
- Donna Wilson's testimony about twenty to twenty-five employees who each said that they worked for the Hunter Company. See May 8, 2008 Trial Transcript at page 273, line 22 through page 276, line 21.
- Donna Wilson's Exhibit 1 — the Management Agreement — which, in Paragraph 5.1.6 specifically required the Hunter Company to have employees.
- The Management Agreement's requirement in Section 5.1.6 that National Land Partners serve as "*administrative paymaster*," while the Hunter Company remained as the actual employer.

Hunter Wilson convinced the Circuit Court that the issue of him being the sole employee was an uncontested issue of fact, as if the foregoing evidence had not been admitted by the Family Court. The Circuit Court's conclusion that this was an undisputed issue makes it clear that the Circuit Court could not have reviewed the record of this case. Simply stated, the Circuit Court exceeded its authority when reviewing the evidence as an appellate court by supplanting the Family Court's findings based on unrebutted evidence.

2. The Circuit Court, Sitting as an Appellate Court, Erroneously Concluded that the Construction Spending Theory was Consistent with GAAP When No Expert or Lay Evidence Supported that Conclusion

The Family Court, in its Finding of Fact No. 24, concluded that Hunter Wilson conceded that his construction spending theory was inconsistent with GAAP. This evidence was presented through Alan Murray as is addressed in preceding sections of this Reply.

On page 9 of his Brief, Hunter Wilson asserts that the construction spending theory is consistent with GAAP and that the evidence can be found on page 159 of the May 9, 2008 Trial Transcript and page 55 of the September 11, 2008 Trial Transcript. This assertion is an attempted fraud on this Court. Page 159 of the May 9, 2008 Transcript is attached hereto as Exhibit A. No mention is made of the construction spending theory. Page 55 of the September 11, 2008 Trial Transcript is attached hereto as Exhibit B. The September 11, 2008 Transcript confirms that internal accounting documents, such as presented to the Family Court, were not consistent with GAAP, although National Land Partners' annual audit is consistent with GAAP. No annual report consistent with GAAP was offered into evidence by Hunter Wilson.

Even though Hunter Wilson offered evidence that should be construed as admissions against interest regarding GAAP, the Circuit Court concluded that the construction spending

theory was consistent with GAAP. On review of the Circuit Court's Order, we find this unsupported conclusion in Footnote 2, without any evidence from the record as to what evidence supports this conclusion.

Simply stated, the Circuit Court, sitting as an appellate court, could not have properly drawn the conclusion that the construction spending theory was consistent with GAAP because **no such evidence was presented at trial by any witness.**

3. The Circuit Court, Sitting as an Appellate Court, Erroneously Concluded that Valuation Methodology Employed by Kenneth Apple was Improper When No Expert Testimony or Case Law Supported that Conclusion

As noted above, what is and what is not consistent with GAAP is and what is not an appropriate valuation methodology are matters for expert witnesses.

It is clear from *May* "there are a number of acceptable methods of computing the goodwill value of a professional practice, and no single method is to be preferred as a matter of law." *May* at 547-48 and 405-06. The essence of goodwill for valuation purposes is the future profits that a corporation might expect to enjoy, beyond the mere value of the corporation's assets. It was undisputed at trial that the value of the desks and computers owned by the Hunter Company was relatively modest, specifically approximately \$54,000. At trial, Hunter Wilson confirmed the Hunter Company's value:

- Q. *What do you think Hunter Company of West Virginia is worth?*
A. *It's worth whatever we make off the net proceeds of our projects are sir.*
- Q. *It's worth the net profits?*
A. *It's worth whatever we may off of our projects, yes, sir.*
- Q. *So you think the value of the The Hunter Company is the value of its net profits?*
A. *It's the only asset the company has.*

Q. The only assets the company has is the Exhibit #1, is that correct?

A. Yes, sir.

Q. And the predecessor to Exhibit #1⁸ regarding other projects?

A. Yes, sir.

See May 8, 2008 Trial Transcript at page 112, lines 19-25 and page 113, lines 1-9.

Kenneth Apple testified that he utilized the accounting documents provided to him in discovery by the Hunter Company to calculate net profits based on GAAP. It is important to note that the date of separation was May 31, 2005 and the date of Mr. Apple's testimony to the Court was May 9, 2008. Three (3) years transpired from the date of separation until the date of Mr. Apple's testimony. Mr. Apple testified that the Hunter Company provided him both with actual data regarding profits, which was updated monthly, as well as future prospective profits. The future prospective profits were modified by the "*recosting documents*" that are addressed throughout the record. Mr. Apple specifically noted that his opinion of value increased based upon updated information provided by the Hunter Company and National Land Partners. See May 9, 2008 Trial Transcript at page 112, lines 9-25; page 113; page 114; and page 115, lines 1-15.

Hunter Wilson asserts that the valuation methodology of reducing expected future profits pursuant to GAAP, to present value is flawed. What evidence supports this conclusion, which the Circuit Court improperly accepted? The simple answer is that no such evidence was presented because no countering expert witness was offered to criticize the methodology employed by Mr. Apple.

Kenneth Apple is a well-respected certified public accountant, whose credentials were so certain, that Hunter Wilson stipulated as to his authority to serve as a valuation expert. Mr. Apple's opinions were consistent with GAAP as required by the Management Agreement. The

⁸ Exhibit 1 was the Management Agreement.

Family Court properly gave his evidence greater weight than the construction spending theory that was inconsistent with GAAP. The Circuit Court, sitting as an appellate court, had no appropriate or legitimate basis to reject Mr. Apple's well-reasoned conclusions.

Simply stated, Kenneth Apple's opinions were the kind of "competent evidence" mandated by *Helper I and II*.

C. Advertising and Seven Separate Business Locations were Evidence of an Enterprise

From the evidence presented at trial, it was clear that the Hunter Company's extraordinary success is a result, in part, of well-developed advertising campaigns. The business plan was to get people close to or inside Washington, D.C.'s beltway to buy real property in West Virginia. These programs were described during Hunter Wilson's testimony about the marketing programs that he and his wife established in the early years of the Hunter Company.

Q. And isn't it true that you and she developed sales programs to market your products?

A. She helped me write ads, yes, sir.

Q. Pardon me?

A. She helped me write ads, yes, sir.

Q. And you devised a certain approach to selling your real estate, is that true?

A. Yes, sir.

Q. And in fact you marketed primarily in the Washington Metropolitan area?

A. Yes, sir.

Q. For large acreage lots located in West Virginia?

A. Yes, sir.

Q. And you would market on the radio?

A. Some.

Q. And you would also market in newspaper ads?

A. That was the primary.

See May 8, 2008 Trial Transcript at page 80, lines 1-18.

Q. Okay, but the two of you implemented these programs for your own businesses?

A. Yes, sir.

See May 8, 2008 Trial Transcript at page 81, lines 8-10.

The Hunter Company spent an extraordinary amount of money on advertising. Although evidence was not presented at trial regarding the advertising expenditures for all six (6) projects at issue in this marital estate, the sum expended for Ashton Woods, The Bluffs, The Springs and The Point totaled more than \$4.5 million. This kind of advertising budget is clearly indicative of an enterprise selling a product.

In his Brief, Hunter Wilson notes that advertising was paid as a project cost. This does not diminish the extent to which multi-million dollar advertising campaigns are evidence of an enterprise.

**D. The Failure to Exclude Inadmissible Evidence
By the Family Court and the Circuit Court is
Properly Before this Court**

Donna Wilson raised Error No. 3 in her Rule 59(e) Motion. Hunter Wilson argues it was not properly raised and Donna Wilson is prevented from asking this Court to exclude clearly inadmissible non-expert evidence on the construction spending valuation theory. Hunter Wilson in his Rule 59(e) argument suggests that contrary to *Helper II*, non experts can testify about valuation methods even though what is being valued is the marital share of the Hunter Company. He also attempts to downplay the requirement in the Management Agreement that requires the use of GAAP. Hunter Wilson asserts that GAAP is only applicable to the valuation of the net profits which underlay the valuation of the marital assets. However, the Management Agreement, in Schedule D, Section C (Husband's Exhibits 1-4), also clearly requires the use of

GAAP regarding the sale of lots. Clearly, GAAP is required for the calculation of sales and the compensation of the manager, all of which are relevant numbers utilized by Mr. Apple, determining the value of the Hunter Company stock. The error raised in Item No. 3 of the Rule 59(e) Motion has clearly been preserved. If the error had not been committed, the construction spending theory, unsupported by expert testimony, would not have been entered into evidence.

E. Compensation to the Hunter Company was Earned as Received and Not Subject to Subsequent Adjustment (Ashton Woods)

1. The Management Agreement Provides for Compensation per Schedule D

Schedule D was an attachment to the Management Agreement applicable to each specific project that is also binding upon the parties. Four separate versions of Schedule D were admitted into evidence as part of Husband's Exhibits 1 through 4. Each Schedule D is important to the extent that it indicates that the Hunter Company and National Land Partners agreed that they would meet from time-to-time and determine the sum of net profits to be paid to the Hunter Company.

At trial, the Hunter Company and National Land Partners claimed that the net profits were overpaid in relation to Ashton Woods at the time of separation. However, there is no evidence before the Court that net profits were overpaid over the lifetime of any project, including Ashton Woods. Further, there was no evidence before the Family Court that National Land Partners ever demanded the return of any sums paid to the Hunter Company; that the Hunter Company ever voluntarily repaid any sums allegedly overpaid; or that the Hunter Company and Hunter Wilson ever amended tax returns to address the alleged overpayment.

2. The Hunter Company Received and Paid Tax on the Earned Income

In relation to the alleged overpayments of profits as of the date of separation, it is important to recall that Wife's Exhibits 2, 3, 4, 5 and 6 were the tax returns filed by Hunter and Donna Wilson from 2004, 2005 and 2006, respectively. The evidence indicates that the Hunter Company was a Subchapter S corporation, meaning that the profits and taxable income from the Hunter Company were shown on the Wilson's personal joint tax returns. Notwithstanding the assertion of an overpayment before the Family Court, it is significant that no amended tax return was offered into evidence by Hunter Wilson. Given the Wilson's tax bracket, an overpayment of nearly \$2.7 million would also result in an overpayment of income taxes in excess of \$800,000. No such evidence was presented or is in the record for very obvious reasons. Given the mandate of Schedule D, net profits were not overpaid as alleged. Further, even in his Brief to which this Reply pertains, Hunter Wilson admits that the overpayment with regard to Ashton Woods amounted to only \$276,000 — not nearly \$2.7 million.

Where a reasonable approximation of the value of goodwill is required, the modest alleged overpayment at Ashton Woods is more than offset by the downward adjustment by Mr. Apple, who assumed for purposes of his approximation that Hunter Wilson was incapacitated or dead.

3. Ashton Woods' Distribution of Profits to the Hunter Company Did Not Create a Claim Against the Marital Estate

While rejecting the expert testimony regarding the existence and value of enterprise goodwill, the Circuit Court completely adopted the argument that the sums due to Donna Wilson should be reduced by the amount of profit distributions received in relation to Ashton Woods

prior to separation. The essence of the Circuit Court's calculation is contained on page 6 of the Circuit Court Opinion as follows:

<i>Overlook</i>	\$	212,537	<i>(manager fees earned but not received)</i>
<i>The Springs</i>	\$	<u>156,181</u>	<i>(manager fees earned but not received)</i>
<i>Total</i>	\$	368,718	
<i>Crossings</i>	\$	(692)	<i>(manager fees received but not earned)</i>
<i>Ashton Woods</i>	\$	<u>(2,681,364)</u>	<i>(manager fees received but not earned)</i>
<i>Gross Total</i>	\$	(2,312,646)	<i>(net manger fees)</i>

The Circuit Court, while concluding that the Hunter Company possessed no enterprise goodwill, remarkably decided that the \$2,681,364 allegedly paid to the Hunter Company before it was due, became a claim against Donna Wilson. What this means is that the Hunter Company received \$2,681,364 prior to May 31, 2005. National Land Partners has not demanded the sum back. Further, Hunter Wilson asserts that with respect to Ashton Woods, profits in the sum of \$11,892,096.32 were paid, while allegedly only \$11,615,290 was earned — an alleged overpayment of \$276,806.32.

Taking Hunter Wilson's evidence in a light most favorable to him, the overpayment at the end of the project was \$276,806.32. Yet, he convinced the Circuit Court to characterize the entire \$2,681,364 as a sum that could be "recovered" from Donna Wilson. This is not accounting. This is not equitable distribution.

The Circuit Court's duty was to evaluate whether or not the Family Court properly valued the Hunter Company stock. The Circuit Court's acceptance of the construction spending theory, and manufacturing a claim against Donna Wilson based on the alleged overpayment of Ashton Woods, is egregious.

IV. CONCLUSION

A Circuit Court sitting as an appellate court in an appeal from the Family Court has a very limited role. The Circuit Court of Berkeley County went far beyond the authority granted by the legislature in reversing the Family Court. The singular issue to be decided by the Family Court after four (4) days of trial was the value of the Hunter Company stock, as Hunter and Donna Wilson agreed that Hunter Wilson would receive all of the Hunter Company stock, and that Donna Wilson would recover the value of her fifty percent of the stock in that corporation. The only issues to be decided at trial were the existence and value of enterprise goodwill.

The Berkeley County Circuit's Opinion and Order of March 25, 2009 is remarkable in that the Court entered *verbatim* the twenty-two page proposed Order forwarded by counsel for Hunter Wilson. In such a complicated undertaking, it is surprising that a Circuit Court Judge would enter such an Order without any modification. Perhaps this explains why, in part, the Order contains such remarkable, in fact, glaring errors.

When an appellate court determines that a trier of fact was clearly erroneous, ordinarily one would expect a recitation of conclusions, drawn by the trier of fact, that could not be derived from the record. By analogy, if evidence was presented that a motorist ran a red light, while opposing evidence was offered indicating that the light was green, the decision would be left in the hands of the trier of fact, on that contested record. However, in a case where no evidence was presented regarding the color of the light, the trier of fact would be clearly erroneous if he or she concluded that the light was either red or green.

The Family Court's conclusion that Kenneth Apple's opinion was an appropriate valuation methodology was based on "competent evidence" as required by *Helper I* and *Helper II* and was consistent with the remaining evidence, including the financial statement prepared by

Hunter Wilson (Wife's Exhibit 19). This conclusion was not clearly erroneous because it was supported by competent evidence. The Family Court's conclusion that the Hunter Company had twenty to twenty-five highly skilled and compensated employees was not clearly erroneous because of the testimony of Hunter Wilson, Donna Wilson and the clear requirement of the Management Agreement that the Hunter Company have employees and that National Land Partners serve as "*paymaster*." The Family Court's conclusion that the Hunter Company possessed enterprise goodwill because it would continue to benefit from future profit at the Westvaco and The Point projects, even following Hunter Wilson's death, was not clearly erroneous because of evidence of the Hunter Company's "*highly skilled workforce*" and because of the replacement manager provisions contained in Section 3.2.2 of the Management Agreement.

The Honorable William T. Wertman, Jr., sitting in his capacity as a Judge of the Family Court of Berkeley County, heard four full days of evidence, three of which were devoted exclusively to the issue of enterprise goodwill and the value thereof. His Findings of Fact and Conclusions of Law stand as an example as to how a trial court should determine the issues to assure that an appellate court has a precise understanding of the proceedings below. Judge Wertman's Order serves as a guide as to the correct way to apply *May*, *Helper I* and *Helper II* on the issues of the existence and valuation of enterprise goodwill.

While it is clear that the Family Court's conclusions were supported by appropriate, if not overwhelming, evidence, the reversals by the Circuit Court on these issues was simply inconsistent with the law and the facts, and must be reversed.

V. RELIEF SOUGHT AND REQUEST FOR ORAL ARGUMENT

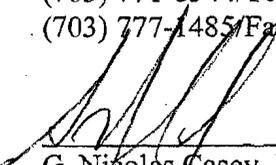
Donna Wilson respectfully requests that this Honorable Court reverse the Circuit Court's Order of March 25, 2009 and reinstate the Family Court's Order of November 21, 2008.

Donna F. Wilson respectfully requests to be heard orally by this Honorable Court on the issues raised in her Opening Brief and this Reply Brief.

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By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that service of a true copy of the foregoing has been made as follows:

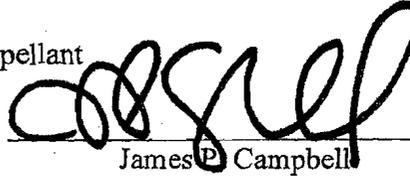
Type of Service: Federal Express

Date of Service: April 27, 2010

Persons served and address: Cinda L. Scales, Esquire
112 East King Street
Martinsburg, West Virginia 25401

Charles F. Printz, Jr., Esquire
Bowles Rice McDavid Graff & Love LLP
101 South Queen Street
Martinsburg, West Virginia 25401

Item Served: Reply Brief of Appellant



James P. Campbell

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1 determine the progress of a project?

2 A. The best way we have found is through the
3 measurement of construction, because construction tends
4 to start before we can get into sales and normally ends
5 after we finish selling the lots. So, we do a...we do
6 a budget for construction, and we monitor, again,
7 monthly.

8 Q. So, in terms of the activities of Hunter
9 Company of West Virginia on any particular project, the
10 work performed by Hunter Company of West Virginia is
11 best described or measured by construction spending?

12 A. In our opinion, yes.

13 Q. Is there any other way to better measure the
14 work performed than by construction spending?

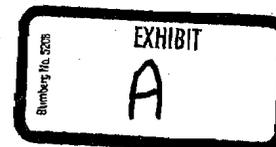
15 A. There are probably other ways. I'm not aware
16 of a better way to measure.

17 Q. Now, with respect to the projects that we
18 have been talking about today, are you ab...with the
19 financial tools at your disposal with National Land
20 Partners, are...are you able to determine the
21 percentage of work performed on any of these projects
22 as of a date certain?

23 A. I'm able to develop a very close estimate of
24 the percentage of work completed, yes.

25 Q. And in this exhibit book, under tabs 12

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1 A. They don't change that, they don't change the
2 May of 2005 number because the total budget or the
3 total actual spending hasn't changed for any of the six
4 projects, and I actually on this one the only
5 difference is that I added a column to the right of the
6 total spending to show whether these were final
7 spending amounts or whether they were budget so that
8 where it says final we haven't spent any more money
9 because we don't have to, the project's final.

10 I n the case of Westvaco and The Point we may
11 spend more money, so I just put budget. If we do have
12 to spend more money, if we have to increase the budget
13 on both of those, the percentage spent as of May 2005
14 will slightly decrease because the amount spent through
15 that date will not change but that's the numerator, the
16 denominator will get bigger so therefore the percentage
17 will get smaller.

18 Q. Is using percentage construction spending to
19 measure the profits earned by National Land Partners
20 consistent with GAAP?

21 A. We are required for purposes of our annual
22 audit to report according to GAAP and we do a
23 percentage completion calculation and adjust our
24 financial statements but we do not do that for our
25 internal interim reporting.