

RENDERED: AUGUST 14, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000042-MR
&
NO. 2008-CA-000167-MR

SHAWNEE TELECOM RESOURCES,
INC., Successor by Merger to SHAWNEE
TECHNOLOGY, INC.

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 03-CI-05040

KATHY BROWN

APPELLEE/CROSS-APPELLANT

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: NICKELL, STUMBO, AND WINE, JUDGES.

STUMBO, JUDGE: This appeal and cross-appeal stems from a shareholder's appraisal action pursuant to Kentucky Revised Statute (KRS) 271B.13-300. In it, the parties appeal the lower court's valuation of stock shares, the award of attorney's fees, and the recusal of the trial judge. We find that the Master

Commissioner and trial court used an improper method of valuing the stock shares, the trial court needs to make findings of fact regarding the award of attorney's fees, and that the trial court judge did not need to recuse himself. We, therefore, reverse and remand this case back to the lower court.

This case primarily revolves around a shareholder's right to dissent from a merger of a corporation and receive payment of the fair value of her shares. KRS 271B.13-020. Kathy Brown was a shareholder in Shawnee Technology, Inc., a closely held corporation, when the company sought to merge into a new company, Shawnee Telecom Resources, Inc. Ms. Brown invoked her dissenter's rights to receive the fair value of her shares in Shawnee Technology. In her notice of demand for the fair value of her shares, Ms. Brown alleged that her shares were worth \$525,600.

Shawnee Technology had the company valued by an independent accounting firm. The firm valued Ms. Brown's shares at \$168,840. This number was based on the valuation of the company as of December 31, 2002. The merger did not occur until December 31, 2003, so an additional valuation was required. This valuation valued Ms. Brown's shares at \$232,740. Shawnee did not pay Ms. Brown the difference. Instead, based on Ms. Brown's demanded amount of \$525,600, Shawnee filed the underlying suit to have the court determine the value of Ms. Brown's shares.

Judge Payne of the Fayette Circuit Court appointed a Master Commissioner to appraise Shawnee and determine the fair value of Ms. Brown's

shares. After several days of hearings, the Master Commissioner issued a fifteen-page Report of Appraisal which used two methods of valuing Ms. Brown's stock. First, under the capitalization of earnings method, the Master Commissioner determined Ms. Brown's stock was worth \$414,751. Next, under the net asset approach, the Master Commissioner valued the stock at \$322,526. The Master Commissioner then combined the two approaches, gave twice the weight to the net asset approach, and ultimately appraised the fair value of Ms. Brown's stock to be \$353,633. The circuit court affirmed the Report of Appraisal in full.

Later, Ms. Brown filed a motion for attorney's fees pursuant to KRS 271B.13-310. The relevant portion of that statute states:

The court may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable: . . .

(b) Against either the corporation or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this subtitle.

The lower court awarded Ms. Brown attorney's fees stating that the Shawnee acted vexatiously, arbitrarily, and in bad faith.

Shawnee then moved for the court to amend the judgment adopting the Commissioner's valuation and to either reverse the award of attorney's fees or reduce them. Shawnee also moved to recuse Judge Payne based on statements he made that might seem to put the court's impartiality in question. Shawnee also filed a motion for findings of fact and conclusions of law as to why the lower court

awarded attorney's fees. Shawnee pointed out that there were no findings of fact or conclusions of law regarding the award of attorney's fees in the court's order.

The final act of Judge Payne, prior to this appeal, was to recuse himself from further action in the case and to deny all of Shawnee's post-trial motions.

On appeal, both parties argue that the Commissioner and trial court erred in the valuation of Ms. Brown's stock. Shawnee claims that the Master Commissioner should have given no weight to the capitalization of earnings method and Ms. Brown asserts that the Master Commissioner should have given no weight to the net asset approach.

We find Ms. Brown's argument most persuasive. The Report of Appraisal admits that the net asset approach deals with concepts of open-markets and fair market value and is based partly on the decision of *Ford v. Courier-Journal Job Printing Co.*, 639 S.W.2d 553 (Ky. App. 1982). Any valuation dealing with fair market values and issues of open-market would be appropriate for companies whose stock is available on the open-market, i.e. companies whose stock is bought and sold on the open-market. However, as stated above, this case revolves around a closely held corporation, one whose stocks are not openly bought and sold.

Ms. Brown brings to our attention the case of *In re Valuation of Common Stock of McLoon Oil Co.*, 565 A.2d 997 (Me. 1989). This case from Maine deals with a dissenter's rights action in a closely held corporation. We find

the case persuasive. “The basic concept of value under the appraisal statute is that the stockholder is entitled to what has been taken from him, viz., *his proportionate interest in a going concern.*” *McLoon* at 1003 (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983)) (emphasis added).

In the statutory appraisal proceeding, the involuntary change of ownership caused by a merger requires as a matter of fairness that a dissenting shareholder be compensated for the loss of his proportionate interest in the business as an entity. The valuation focus under the appraisal statute is not the stock as a commodity, but rather the stock only as it represents a proportionate part of the enterprise as a whole. The question for the court becomes simple and direct: What is the best price a single buyer could reasonably be expected to pay for the firm as an entirety? The court then prorates that value for the whole firm equally among all shares of its common stock. The result is that all of those shares have the same fair value.

McLoon at 1004.

Especially in fixing the appraisal remedy in a close corporation, the relevant inquiry is what is the highest price a single buyer would reasonably pay for the whole enterprise, not what a willing buyer and a willing seller would bargain out as the sales price of a dissenting shareholder’s shares in a hypothetical market transaction. Any rule of law that gave the shareholders less than their proportionate share of the whole firm’s fair value would produce a transfer of wealth from the minority shareholders to the shareholders in control. Such a rule would inevitably encourage corporate squeeze-outs. . . . As the Delaware Supreme Court stated recently in *Cavalier Oil Corp. v. Harnett*, “to fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control, and unfairly enriches the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder, a clearly undesirable result.”

Cavalier Oil Corp. v. Harnett, 564 A.2d at 1141. We agree.

McLoon at 1005.

Further, in the case at bar, the Master Commissioner discounted Ms. Brown's stock 25% for lack of marketability. *McLoon* also takes this into consideration.

Should the dissenting shareholder's proportionate part of that whole firm value as so determined be discounted because of the minority status and lack of marketability of his stock? The Delaware Supreme Court, the same court that decided *Weinberger*, has recently said no: Delaware emphatically rejects the application of those discounts in determining the fair value of a dissenting shareholder's stock. See *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1141 (Del. 1989) ("application of a discount to a minority shareholder is contrary to the requirement that the company be viewed as a going concern").

McLoon at 1004.

We adopt the reasoning of *McLoon* as it pertains to *closely held corporations*, such as Shawnee. Closely held corporations should not be held to open-market standards. We therefore reverse and remand this case to the circuit court in order for it to determine the value of Ms. Brown's stock, giving no weight to the fair market considerations of the net asset approach or the 25% marketability discount.

The other primary issue before us regards the award of attorney's fees. Shawnee filed a Civil Rule (CR) 52.02 motion requesting findings of fact and conclusions of law in regard to the award of attorney's fees. This was denied. CR

52.01 requires that in all actions tried without a jury, the court “shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment. . . .” Shawnee is correct in that the lower court made no findings of fact or conclusions of law as to why it was awarding attorney’s fees. The lower court merely stated “Plaintiff acted vexatiously, arbitrarily, and in bad faith, as set forth in defendant’s Motion for Attorney Fees and Costs.”

We find this is insufficient and remand to the lower court for findings of fact and conclusions of law. We also note that the attorney’s fees awarded should be based on the fees incurred in litigating the KRS 271B.13-020 dissenter’s rights action only and not include fees incurred litigating the other separate issues outside the dissenter’s rights action.

Shawnee also argues that the dissenter’s rights issue should not have been made final and appealable as there were other claims yet to be decided by the court.¹

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay.

CR 54.02.

Before the processes of CR 54.02 may be invoked for the purpose of making an otherwise interlocutory judgment final and appealable, there must be a final adjudication upon one or more of the claims in litigation. The

¹ Ms. Brown brought another claim against Shawnee and its shareholders for breach of fiduciary duty and Shawnee and shareholder Jim Clark filed claims against Ms. Brown.

judgment must conclusively determine the rights of the parties in regard to that particular phase of the proceeding.

Hale v. Deaton, 528 S.W.2d 719, 722 (Ky. 1975). We find that the dissenter's rights action was separate from the other claims and that there was no error in making it final and appealable. The dissenter's rights action is a method of valuing the stock while the other pending claims deal with actions and transactions between shareholders. The valuing of the stock can be conclusively determined without ruling on the other cross-claims and counterclaims.

Finally, Shawnee made a motion for Judge Payne to recuse himself from further involvement in the case. This was based on comments made by Judge Payne during the hearing for attorney's fees. When Judge Payne indicated he would be awarding attorney's fees he stated that "I am sure I will be accused of being prejudiced." In the same order denying Shawnee's post-trial motions, Judge Payne also recused himself. Shawnee argues that by recusing himself, Judge Payne could not rule on the post-trial motions and the case should be sent back for a new judge to rule on those motions. We do not agree.

While it is true that normally a judge who has recused himself or herself cannot further participate in the case proceedings, there was no need for Judge Payne to recuse himself in this instance. Shawnee's motion for recusal was unnecessary and put forth no evidence that even hinted Judge Payne was being biased. There is no evidence in the record that Judge Payne was being prejudiced

and his statement was nothing more than a passing comment. As such, Judge Payne properly ruled on the pending motions.

For these reasons, we reverse and remand the case to the circuit court to determine the value of Ms. Brown's stock in accordance with this opinion and to make findings of fact and conclusions of law regarding the award of attorney's fees.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT/
CROSS-APPELLEE:

D. Duane Cook
Georgetown, Kentucky

BRIEFS FOR APPELLEE/
CROSS-APPELLANT:

Clark Case
Jessica Case
Lexington, Kentucky

ORAL ARGUMENT FOR
APPELLEE/CROSS-APPELLANT:

Clark Case
Lexington, Kentucky